

## **CRIMINAL LAW AND PROCEDURE**

**Structure**

**Larceny**

**Fraud**

**Common Assault**

**Battery**

**Psychic**

**Aggravated Assault**

**S 59**

**S 35**

**S 33**

**Sexual Assault**

**Complicity**

**AL (P2 & ABF)**

**JCE**

**EJCE**

**Automatism**

**Intoxication**

**Insanity/Mental Illness**

**Self-defence**

**Duress**

**Bail**

## Problem Question Structure

- Introduction of the overall problem
- State the relevant charges
- Relevant legislation/common law/ burden of proof
- Defences
- Legal and evidentiary burden of proof
- \_\_\_\_\_ could be charged with \_\_\_\_\_ (insert crime) under s \_\_\_\_\_ (*Crimes Act 1900*). The prosecution bears the onus of proving all the elements of this charge BRD (*Woolmington*). The prosecution is entitled to presume voluntariness (*Falconer*). There are no facts which suggest that \_\_\_\_\_ conduct was not 'willed and conscious'. *Falconer* D may seek to rely on the defence \_\_\_\_\_ (insert defence). D bears the evidentiary burden to raise the 'reasonable possibility' of his defence.
- Mini conclusion per element and mini conclusion for AR/MR
  - This element is made out/satisfied BRD
  - P will have difficulty proving this element BRD
  - AR is satisfied
- Overall conclusion
  - The prosecution will successfully convict \_\_\_\_\_ (insert name) of \_\_\_\_\_ (insert crime) pursuant to s \_\_\_\_\_ (insert legislation), as the AR, MR and TC can be established BRD. \_\_\_\_\_ (insert name) will be acquitted of the s \_\_\_\_\_ (insert legislation) charge of \_\_\_\_\_ (insert crime) as \_\_\_\_\_ (insert name) will be able to successfully raise \_\_\_\_\_ (insert defence), which the prosecution will not be able to disprove BRD.
- PART A: plan 10 minutes, write 50 minutes
- PART B: plan 5 minutes, write 20 minutes
- 10 MINS TO EDIT AT END

## Sample answer structure

### Offender 1

#### Introduction

- Address charges, burdens and standards of proof.
- **Capacity** (only if raised on facts)

#### Crime 1

- **Actus reus**/conduct (remember voluntariness!)
- **Mens rea**/fault
- Temporal coincidence (**Actus reus/mens rea at the same time**) – don't forget this!
- Mini conclusion

#### Crime 2

- **Actus reus**/conduct (remember voluntariness!)
- **Mens rea**/fault
- Temporal coincidence (**Actus reus/mens rea at the same time**) – don't forget this!

- Mini conclusion

#### Defence 1

- Note burdens and standards of proof (if not already addressed in intro)
- Address each element in turn
- Mini conclusion

#### Defence 2

- Note burdens and standards of proof (if not already addressed in intro)
- Address each element in turn
- Mini conclusion

#### Offender 2 etc.

- [Repeat above]

#### Overall Conclusion

- Which offence(s) will the defendant(s) be convicted for, or will they be acquitted, and why?

## COMMON ASSAULT

- s 61 – Common assault prosecuted by indictment: Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.
- Defined at common law *Illich*
- Choose the correct charge but pick another on either side to consider if available or not
- Charged with common assault under s 61 by way of: Battery or Psychic
- Positive act → *Fagan*
- Context is everything!!
- An assault is an act by which a person intentionally or perhaps recklessly causes another person to apprehend the immediate infliction of unlawful force upon him; a battery is the actual infliction of unlawful force (*Darby v DPP*).
- Examples = push, tackle, slap, spitting, mere touching, scratch (no traces left after)
- BASIC INTENT (Battery + Psychic) → no intoxication defence
- D could be charged with **assault** under s 61 of the **Crimes Act 1900 (NSW)**. The burden of proof lies upon the prosecution to prove all the elements of the crime beyond a reasonable doubt (*Woolmington*). In this case, it is evident from the facts that:
  - I. If **psychic assault**: D may be charged with psychic assault, which requires the intentional or reckless creation of the apprehension of imminent unlawful contact (*MacPherson v Brown*), as he/she \_\_\_\_\_ (relate back to the facts).
  - II. If **battery**: D may be charged with battery, which requires intentional or reckless unlawful contact (*Fagan v Metropolitan Police Commissioner*), as he/she \_\_\_\_\_ (relate back to the facts).
- D may raise the defence of \_\_\_\_\_ (insert defence) OR D has no grounds to raise a defence.

## BATTERY

1. Voluntary application of unlawful contact – positive act <i>Fagan</i>	1. Intentionally or recklessly applies unlawful contact against V's person <i>Venna</i> [1976]
2. Without consent of victim (no express or illicit consent)	Whether it was intentional or reckless → subjective standard/adverted to the recklessness <i>MacPherson v Brown</i>
3. Causation – A's act caused the unlawful contact <i>Royall</i>	Recklessness as to the possibility rather than probability of some injury/harm <i>Coleman</i>
TC – AR & MR coinciding <i>Fagan</i>	

### AR:

1. Voluntary application of unlawful contact
  - Actions go beyond normative, generally accepted contact, mere touching can amount to an assault *Collins v Wilcock*
  - Must be positive act not omission *Fagan*
  - Causes something less than a bruise – push, slap
2. Without consent
  - P must prove that V did not expressly or illicitly consent *Collins v Wilcock* [1984]; *Clarence* (1888)
  - Daily social life is assumed to be filled with implied consent *Boughey*
  - “An assault with consent is not an assault at all” *Brown* [1994]
  - V's consent may be vitiated (ie. Not valid) in:
    - Consent which is obtained by force or threats of force is not relevant, as the use of force or threats would constitute consent
    - Sometimes fraud *Richardson* [1998]
    - V cannot consent to ABH or more unless D's actions were within lawfully recognised exceptions e.g. contact sport (boxing), lawful correction, surgery *Brown* [1994]
  - Contact sport (e.g. boxing):

## RECKLESS GBH OR WOUNDING

- s 35
- Examples = stabbing, shooting
- GBH = ‘really serious bodily harm’ *Perks; Pemble* (1986)
- Wounding = ‘the breaking or cutting of the interior layer of the skin (dermis)’; the breaking of the external layer of the skin is not enough: *R v Smith* (1837); *Vallance* (1961)
- BASIC INTENT
- Alternate verdict of s 59

AR	MR
1. Voluntarily application of force/unlawful contact OR cause victim to fear imminent unlawful contact (psychic) (no consent)	1. Reckless as to possibility of causing ABH <i>Blackwell, Coleman; s 35(2)(b)</i>
2. Assault amounts to GBH/wounding	
3. Assault occasioned/causation GBH/wounding	
TC – AR and MR coinciding	

### AR

1. Voluntarily application of force/unlawful contact OR cause victim to fear imminent unlawful contact (psychic) (no consent)
  - Same as common assault
2. Assault amounts to GBH or wounding
  - It is a question of fact for the jury to determine whether the injury amounts to GBH or wounding. *Griffiths* [1999]
  - GBH as per s 4(1): ‘any permanent or serious disfiguring of the person...any grievous bodily disease.’
  - GBH does not require permanence, or that consequences are long lasting or life threatening; it just requires a really serious injury: *Haoui*
  - Wound = injury which breaks through the whole skin, that is both the inner&outer skin: *Vallance*
  - Evidence of free bleeding will suffice to prove a wound was inflicted: *R v Devine*
3. Assault occasioned/caused GBH/wounding (as above)
  - S 35(2)(a): D’s act must be the substantial and operating cause of D’s injury – no requirement of direct application of force, provided D’s casual responsibility can be established.
  - GBH is defined as ‘really serious bodily harm’: *R v Perks*

### MR

1. Reckless as to possibility of causing ABH *Blackwell; s 35(2)(b)*
  - S 35(2): need only to prove that D was reckless as to causing GBH, no intent required
  - s 4A: Recklessness may be established by proof of intention or knowledge → what does the person know about the circumstances?
  - Requires D to realise there is a real possibility his act will cause V very serious injury or wounding, not merely the real possibility that V will suffer contact: *Blackwell*
  - D recognised the possibility of harm/ABH, not necessarily GBH or wounding; not probability: *Coleman; Donovan*

**Ask:** Do they recognize the possibility of unlawful contact? And do they recognize possibility of injury?

### TC

Same as common assault.

For example: the prosecution will successfully convict \_\_\_\_\_ (insert name) of **common assault** with an **aggravating offence** pursuant to **s 59/33/35** of the Crimes Act, as the AR, the MR and temporal coincidence can be established BRD. \_\_\_\_\_ (Insert name) will be acquitted of the s \_\_\_\_\_ (insert legislation) charge of \_\_\_\_\_ (insert crime) as \_\_\_\_\_ (insert name) will be able to successfully raise \_\_\_\_\_ (insert defence), which the prosecution will not be able to disprove BRD.

### Intoxication

BASIC INTENT – no intoxication defence

## DURESS

- Defence has evidentiary burden – reasonable possibility
- P has legal burden to negate the defence BRD
- Use *Hurley* [1967] and *Lawrence* [1980]
- Absolute Acquittal – complete defence
- Not available for following:
  - Murder *Brown* (1986)
  - Gang related offences *Palazoff, Sharp*
  - Terrorist group *Fitzpatrick*
- “do this or else”
- Go through 3 tests then look at *Hurley* for other considerations

1. Threat of serious, imminent harm (GBH or murder)
2. Person of ‘ordinary firmness of mind’ would have yielded to threat (reasonable person: objective test)
3. Threat induced crime, and A had no means to avoid the threat

1. Threat of serious, imminent harm
  - Threat must be GBH or murder – if not then fails.
  - Threat does not have to be real, can be imaginary but must be based on reasonable grounds *Graham* [1982]
  - The threat must have been such as to overbear D’s will, so that D was incapable of acting independently *Palazoff* (1986);
  - Threat which have been recognised includes:
    - Death and GBH: *Hurley and Murray* [1967]
    - Imprisonment: *Lawrence* [1980]
    - Torture causing pain, but without residual injury *Osborne v Goddard* (1978)
    - Harm to a third party *Abusafiah* (1991)
2. Person of ‘ordinary firmness of mind’ would have yielded to threat (reasonable person: objective test)
  - Objective test is of probability → would have yielded *Abusafiah*
  - Person of same sex, age
3. Threat induced crime, and A had no means to avoid the threat
  - If had opportunity to go to police/seek help then defence not available *Taiapa* (2009)
  - Assumed that a person who has been threatened will report such threat to the authorities and the courts have only reluctantly accepted exceptional circumstances where a failure to do so will not render the defence of duress unavailable (*Brown*)

*R v Hurley and Murray*: Identified 8 factors for consideration of duress:

1. Threat of death or GBH to D (or a relative) if the accused failed to follow out instructions
2. Circumstances are such that a person of ‘ordinary firmness of mind’ would have yielded to the threat (objective test)
3. Threat was present, continuing and imminent
4. D reasonably believed the threat would be carried out
  - Can be directed at the accused or another person (*Hurley*; de facto wife - *Brown*; wife, children or parents)
5. D was induced to commit the crime because of the threat (causal nexus)
6. D did not voluntarily expose themselves to the threat
7. D had no means of preventing the execution of the threat
8. Not applicable to murder or attempted murder

### Gang related

- *Palazoff*: Voluntary involved with a criminal enterprise – a person who “voluntarily” joins a criminal enterprise may not later rely on duress. Zelling ACJ: “If the accused becomes associated with a man or group of men with criminal objectives who possess coercive methods of ensuring that their criminal enterprises are carried out whereby the accused voluntarily exposes himself to legal compulsion, he cannot rely upon the defence of duress”
- *Sharp* - The appellant joined a gang who carried out armed robberies. He then wished to leave but was threatened with serious violence if he did so. He took part in a robbery on a post office in which the post master was killed. He was convicted of murder and his appeal was dismissed. Lord Lane CJ: “Where a