

Assault (1) Common Assault

Patterns of Victimisation

R Hogg and D Brown, Rethinking Law and Order (1998) 43-78

Understanding Interpersonal Violence

The most useful way to understand interpersonal violence is to conceptualize it as a process, a form of personal interaction.

Violence Among Men

Excessive alcohol consumption is a significant cultural and situational factor in patterns of violence among men. While death is a rare and often unintended consequence of these violent interactions, serious non-fatal injuries are not uncommon.

Violence Among Family Members

Violence within families tends to involve more pronounced inequalities of power and strength. It is often ongoing and intertwined with the emotional and material dependencies that define intimate relationships, leading to lasting and destructive emotional and psychological effects on victims. This highlights the importance of social policy areas such as income maintenance, housing, women's health, and childcare in any comprehensive family violence prevention strategy.

Marginalisation and Violence in Aboriginal Communities

Previous research indicates that incidents of violence commonly arise from altercations or minor provocations during drinking sessions, where all participants—offender, victim, and observers—are intoxicated.

Reporting violence depends on a range of things including whether or not assault "victims" regard the violence as a crime. There is evidence that young male victims may be less likely to perceive assault victimisation as a crime and women are less likely to see an event as a crime if the perpetrator is known to them: see J Clare and F Morgan, "Factors affecting perceived criminality: evidence from victims of assault", AIC Trends & Issues In Crime And Criminal Justice (No 3 76, 2009).

Social Context and Prevalence (of Violence)

In the area of assault, context is everything. A very minor contact, causing no physical injury, may constitute an assault if the actor possesses a certain state of mind (intentionally or recklessly making the victim apprehend imminent violence). On the other hand, injury (even serious injury) may be caused without the actor being criminally liable.

Offences against the person are not treated as seriously as property offences: the basic assault offence (s 61) carries a maximum penalty of imprisonment for two years, compared with five years for both intentionally or recklessly destroying or damaging property (s 195) and the basic larceny offence (s 117) (although it is noted that the offence can now be dispensed with by a penalty notice of \$300 if the property stolen is less than \$300).

Alcohol and Violence

Alcohol can contribute to crime in two ways. The first is by loosening inhibitions and reasoning, which leads to decreased impulse control and potential offending. The second, and possibly less explored, is by providing an economic incentive to steal to feed an alcohol abuse problem (The Australian Institute of Criminology)

Criminal Offence Categories

Acts of non-fatal violence are commonly classified into "common assaults" and "aggravated assaults" (for aggravated assault, see Assault (2)). Section 61 of the Crimes Act 1900 establishes that the maximum penalty for common assault is two years imprisonment, but does not define the offence.

Although s 61 recognises common assault as an indictable offence, it is routinely dealt with summarily by a Local Court (as a Table 2 offence under the Criminal Procedure Act 1986). Common assault is not a serious indictable offence: "Serious indictable offence" means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more (s 4).

Common assault is the second most common offence prosecuted in the Local Court. The majority of assaults (including aggravated assaults) are tried summarily despite being indictable offences.

Common Assault

The common law originally contained separate — torts — offences of "assault" and "battery":

- "Assault" was the crime of putting another person in fear or apprehension of an unlawful contact- that is, threatening someone with unwanted physical contact (sometimes known as a "psychic assault").
- "Battery" was the actual application of force without consent, lawful excuse or justification.

Section 61 combines these two offences as "assault" ("... assaults any person, even if it does not result in actual bodily harm").

Thus, for the purposes of "common assault" in s 61 of the Crimes Act "assault" here means both the old form of assault and battery.

Common Assault Prosecuted by Indictment [8-s 61]

Section 61:

Whosoever assaults any person, even if it does not result in actual bodily harm, shall be liable to imprisonment for up to two years.

[Assault is not defined in s 61; refer *Darby v DPP (NSW) (2004)*]

Amended by Act 50 of 1974, s 5.

Editor's note: For more proof material on s 61, refer to [27-16,475] in Vol 4, behind the "27 – Informations and Indictments" guide card.

Summary Disposal [8-s 61.1]

An offence under this section is classified as a Table 2 offence under the Criminal Procedure Act. It is generally dealt with in a Local Court unless a trial by indictment is elected, as per [2-s 260] and [2-Sch 1] Pt 1 cl 1.

Maximum penalty: 24 months imprisonment or a fine of 50 penalty units, or both, as stated in [2-s 268] of the Criminal Procedure Act.

Note: The offence of common assault can be prosecuted by indictment. Even though the maximum penalty is two years imprisonment, it does not automatically make the offence summary in nature (*R v Fisher* (2002) 54 NSWLR 467; [2002] NSWCCA 188; BC200202699; (2002) 9 Crim LN 39 [1430]). Definitions [8-s 61.5]

For the definition of “assault,” refer to [8-s 58.5].

Sentence [8-s 61.7]

When sentencing for an assault offence under this section, the infliction of injuries amounting to actual bodily harm must not be considered (*R v Abboud* [2005] NSWCCA 251; BC200505225; *McIntyre v R* [2009] NSWCCA 305; BC200911594; (2010) 17 Crim LN 28 [2684]).

Compellability of Spouse [8-s 61.10]

Where the offence is committed against a child under the age of 18, the spouse of the accused is required to give evidence at the hearing. See [2-s 279].

Personal Violence Offence/Domestic Violence Offence [8-s 61.15]

This offence (or an attempt to commit this offence) qualifies as a “personal violence offence” as per s 4 of the Crimes (Domestic and Personal Violence) Act 2007 (see [8-5015]). If committed by someone in a domestic relationship with the victim, it is considered a “domestic violence offence” as defined in s 11 of the same Act (see [8-5240]).

[8-s 61.30] Element of offence The element of the offence is —

(1) The accused assaulted [8-s 58.5] the victim.

Definition of Assault

In *Darby v DPP* (NSW) (2004), Giles JA clarified the distinction between assault and battery:

- Assault: An assault occurs when a person intentionally, or perhaps recklessly, causes another person to apprehend the immediate infliction of unlawful force upon them.
- Battery: Battery involves the actual infliction of unlawful force.
- Notably, an assault can occur without a battery, and vice versa.

Elements of Assault Without Physical Contact

In *Edwards v Police* (1998) 71 SASR 493, DeBelle J outlined the elements of assault in situations where there is no physical contact:

1. Actus Reus: The actus reus of such an assault involves the defendant causing the victim to fear immediate violence, specifically the fear of any unlawful physical contact.
2. Mens Rea: The mens rea is the defendant's intention to create that expectation of immediate violence in the victim's mind.

3. Reckless Assault: An alternative form of assault arises when the defendant does not intend to cause fear but realizes that their conduct may do so and continues regardless. (at 495)

Assault Involving Physical Contact

Using DeBelle J's summary as a basis, when an assault involves physical contact, the actus reus is the application of force without consent. Spitting on another person, for example, may constitute such an application of force depending on the circumstances (DPP v JWH [unreported, NSWSC, 17 October 1997]; Stenecker v Police [2014] SASC 68 at [17]).

Elements of Assault Involving Physical Contact

Actus Reus

For an act to constitute assault, whether through the application of force or causing apprehension of immediate violence, the following elements must be present:

1. Positive Act, Not Omission: The assault must be committed by a positive act, not by an omission or failure to act.
2. Absence of Consent: The act must be performed without the consent of the victim.
3. Apprehension of Immediate Violence: In cases where the assault involves causing the victim to fear immediate violence, the victim must genuinely be put in fear of imminent unlawful force.

Positive Act, Not Omission

Short form citation	Fagan v Commissioner of Metropolitan Police [1969] 1 QB 439 at 439 (Queen's Bench Div Ct)
Keywords	
Material facts	<p>The appellant was reversing a motor car when Police Constable Morris directed him to drive the car forward to the kerbside. Morris, standing in front of the car, pointed out a suitable place to park. The appellant then drove forward and stopped the car, with the offside wheel resting on Morris's left foot.</p> <p>"Get off, you are on my foot," said the officer. "Fuck you, you can wait," replied the appellant. The car's engine had stopped running by this time. Morris repeatedly said, "Get off my foot." After some time, the appellant reluctantly reversed the vehicle off of the officer's foot.</p> <p>It was unclear whether the appellant had turned off the ignition to stop the engine or whether it had stopped running before he turned it off.</p> <p>The appellant argued there was no act on his behalf which should constitute an actus reus but only the omission or failure to remove the wheel as soon as he was asked.</p>
Issue	Whether the initial mounting of the wheel could not be an assault and that the act of the wheel mounting the foot came to an end without there being any mens rea
Held	James J: