

5. Intention

- Intention = **purpose or aim** — NOT desire or motive (*Willmot No. 2; Zaburoni*)
- Proof of intention is a **subjective** exercise — what did the accused actually mean to do?
- Foresight alone is not intention, but foresight of a consequence as probable may be *evidence* from which intention is *inferred*

Key Cases

Willmot No. 2 (Qld)

- Intent means having a "purpose or design" — not the same as motive or desire
- "In ordinary cases it is unnecessary to explain an ordinary word"

R v Zaburoni [2016] (HCA)

- Accused transmitted HIV through repeated unprotected sex — charged with unlawfully transmitting a serious disease with intent
- "Knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent"
- "Foresight as a virtual certainty is of evidential significance — trier of fact must still be satisfied accused meant to produce the result"

Recklessness vs Negligence vs Intention

- **Intention:** purpose or aim to produce result (most serious)
- **Recklessness:** subjective — person recognises a risk but chooses to run it (CC uses "knowingly", "wilfully")
- **Negligence:** objective — risk was reasonably foreseeable; whether defendant fell below a reasonable standard
- WA does not have reckless indifference as a basis for murder (unlike NSW, Vic, SA, Tas, ACT, Qld — *Crabbe (1985)*)

Contemporaneity of Conduct and Intent

R v Thabo Meli [1954] (Privy Council)

- Appellants struck victim, believed him dead, threw him over a cliff — he died of exposure
- Held: treated as a "continuing assault" — intent was present at the outset and the chain of causation was not broken

6. Non-Fatal, Non-Sexual Offences Against the Person

6.1 Simple / Common Assault (ss 222, 313)

s 313: Imprisonment up to 18 months (\$18,000 fine); up to 3 years (\$36,000) in circumstances of aggravation

Definition of Assault — s 222

Two forms of assault under s 222:

1. **Application of force** without consent (or consent obtained by fraud), directly or indirectly
2. **Attempt or threat to apply force** by bodily act or gesture, without consent, where accused has actual or apparent present ability to carry out the threat
 - Force includes: heat, light, electrical force, gas, odour — no need to prove injury; need only result in "personal discomfort"
 - An assault is **unlawful** unless authorised, justified or excused by law — s 223

Mental Element

- **Type 1 (application of force)**: no need for intention — *Hayman v Cartwright* [2018]: "on a proper construction of s 222, there is no requirement to prove intention for an assault by actual application of force"
- **Type 2 (threat)**: intention to cause apprehension of force is required — *Brady v Schatzel* [1911]
- **Type 2 (attempt)**: intention to apply force is required — *Hall v Fonceca* (1983)
- Hostility is NOT an element of assault — *Boughey v The Queen* [1986] (HCA)

Key Cases

***Brady v Schatzel* [1911]**

- Pretended to load rifle and pointed it at police officer
- For threat: need to prove V apprehended force (not fear); accused had apparent present ability to carry it out
- Words alone are insufficient — must be accompanied by a bodily act or gesture

***Secretary v NT* (1996)**

- Woman killed sleeping abusive husband; TJ refused self-defence on basis that assault must be active
- Majority: some assaults may be "continuing" — jury should decide whether assault had been completed when accused fell asleep

***Hayman v Cartwright* [2018] WASCA**

- Cyclist struck hand against car, making contact with passenger's hand
- No requirement to prove intention for an assault by actual application of force; no specific intent to assault the complainant needed

6.2 Assault Causing Bodily Harm (s 317)

s 317: Unlawfully assaults another and thereby does that person bodily harm

- "Bodily harm" = bodily injury that interferes with health or comfort (s 1)
- "Bodily injury" requirement limits scope — pain alone insufficient (*Scatchard* (1987)); lasting pain or numbness may suffice (*Robinson v Smith* [2005])
- Black eye or blood nose is enough — *Lergesner v Carroll*
- PTSD / psychological injury without underlying bodily injury is NOT covered — *Robinson*
- s 317A: more serious offence where assault is accompanied by underlying intent (e.g. to do GBH, or resist arrest)

6.3 Serious Assault (s 318)

s 318 creates a separate offence of assault on particular persons — requires simple assault PLUS victim's occupation/function covered by the section.

- Police officers and other public officers performing public functions
- Persons aiding public officers; train/bus/taxi/ferry drivers; ambulance officers; emergency service workers

6.4 Offences Endangering Life

GBH (s 297)

"Bodily injury which endangers life, or is likely to endanger life, or which causes or is likely to cause permanent injury to health" (s 1)

- "Likely" = real and not remote chance — *Hind & Harwood; Boughey* [1986]
- GBH assessed at the time of injury, not after medical treatment — *Lovell* [2015]; *Lewis v WA* [2008]
- "Serious disease" = disease likely to endanger life or cause permanent injury to health — *R v Houghton* [2004] (HIV infection constituted GBH)
- "Permanent injury to health" does not include cosmetic disabilities with no consequence upon bodily function — *Tranby* [1991]

Wounding (s 301)

- Wounding = cutting injuries that bleed with penetration to the outer layer of skin — *Devine* [1982] (Tas)
- Intent to wound is NOT an element of s 301; it IS required for the more serious offence under s 294

6.5 Consent and Offences Against the Person

When can a person consent to the application of force?

- Lack of consent is an element in ss 222, 317 (assault-based offences) — but NOT in wounding or GBH
- In AOBH: tribunal of fact must decide whether the degree of violence exceeded that to which consent was given — *Carroll* (Qld) adopting Derrington J's approach in *Raabe*
- Sporting context: reasonable incidents of force within a sporting event may be impliedly consented to — *Cooper J* in *Carroll*

7. Chapter XXVII Duties

The CC holds a person criminally responsible for killing by omission ONLY where that person has a duty to act but has failed to do so. There is NO general duty to "rescue" others.

Five Duties Under Chapter 27

s 262 — Duty to provide necessaries of life

- Having charge of another who is unable by reason of age, sickness, mental impairment, detention, or other cause to provide themselves — *R v MacDonald & MacDonald* [1904]; *Rossiter*

s 263 — Duty as head of family

s 265 — Duty of persons doing dangerous acts (surgical/medical treatment)

s 266 — Duty of persons in charge of dangerous things

- *Jackson & Hodgetts* (1989): meat preservative in Coke left for victim = dangerous thing
- *Pacino v WA* (1998): four dogs that escaped and killed victim = dangerous things (animals included)

s 267 — Duty to do certain acts

Function of Duty Sections

- Breach of duties in ss 262–267 establishes a causal link between the accused's omission and the harm caused
- Three-stage analysis (*Heaton v WA* [2013]): (1) owe the duty; (2) breached the duty; (3) breached with gross criminal negligence
- Basis of fault is objectively assessed — *Young v Qld* (1969)
- Duty sections are incompatible with defences in ss 23A(1) and 23B — the duty renders these defences inoperative

Standard of Care

- Criminal negligence (gross negligence) is required — higher than civil negligence — *Jackson & Hodgetts*; *Callaghan* (1952) HCA

8. Sexual Offences

Social Context

- Sexual violence is gendered — empirically, most perpetrators are men; most victims are women and girls
- Aboriginal and Torres Strait Islander women estimated to be sexually assaulted at least three times the rate of non-Indigenous women
- Challenges: under-reporting, decision-maker misconceptions, definitions of offences

Key Historical Changes in WA

- 1985: All forms of penetration become basis for most serious sexual offence; immunity for marital rape abolished
- 2002: Offence of male homosexual sex abolished
- 2019: Distribution of intimate images without consent criminalised

Structure of Ch 31 Offences

- s 323 Indecent Assault — up to 5 years; s 324 Aggravated Indecent Assault
- s 325 Sexual penetration without consent; s 326 Aggravated sexual penetration without consent
- Offences also structured by: age (ss 320, 321, 321A, 322); relationship (s 329); mental impairment (s 330)

Sexual Penetration — s 319

Penetrate the vagina, anus, or urethra of any person with any part of the body of another or an object manipulated by another. Also includes manipulating any part of the body of another to cause penetration.

Consent — s 319(2)

"Consent freely and voluntarily given." Consent is NOT freely given if obtained by force, threat, intimidation, deceit, or fraudulent means. Failure to offer physical resistance does not constitute consent. A child under 13 years is incapable of consenting.

What is Indecency? — Drago

- Objective test: "unbecoming or offensive to the common propriety"
- Subjective state of mind of accused may be relevant in determining whether objectively offensive
- Indecent character may arise from circumstances and words — *Leeson*; *Johnson v Ramsden*

Key Cases on Consent

Michael v WA (2008)

- Police officer used title to "force" sex workers to have sex for free or reduced rate

- Consent by threat: subjective test — does not need to be a threat of serious BH; need not be immediate; may be directed at third party
- Fraud must concern: essential nature/character/purpose of the act; OR identity of accused; OR legal status as spouse of V

HES v WA [2022]

- HES represented himself as Aboriginal Elder with cultural practices to obtain sexual consent
- Mitchell JA: State must prove — (1) accused made representation; (2) accused intended to do so; (3) representation was false; (4) accused knew it was false; (5) complainant believed representation; (6) complainant was induced to consent when they otherwise would not have