

ASSAULT

There are two kinds of assault: **Common** assault and **Aggravated** assault

COMMON ASSAULT (THE THREAT OF FORCE)

IS X LIABLE FOR COMMON ASSAULT AGAINST Y?

The relevant act occurred in NSW thus it will be prosecuted under **the CA**. Common assault is outlined in **s61** as assault to “any person, although not occasioning actual bodily harm” and a guilty party “shall be liable to imprisonment for two years”. As assault is not defined in statute, *Fagan* outlines the prosecution has the onus to prove beyond reasonable doubt X’s actions intentionally or recklessly cause “another person to apprehend immediate and unlawful personal violence”. The relevant conduct is ____.

A Actus Reus

For X to be found guilty of common assault, the prosecution must prove beyond reasonable doubt that their voluntary act caused Y’s (the victims) apprehension of immediate and unlawful violence (*Fagan*).

NB: an omission to act cannot be considered an assault (*Fagan*)

NB: automatism can be dealt with in voluntariness

1 Was X’s conduct voluntary?

X’s conduct would be voluntary if it was performed pursuant to their will (*Ryan v The Queen*). In the absence of contrary evidence, it is presumed an apparently “willed and conscious act” is voluntary (*Falconer*).

NB: For an action to be willed it does not matter if the consequences were not intended

NB.2: the presumption is rebutted if there is evidence the actions were not “subject to control and direction of their will” (*Radford*)

- *Jimenez v The Queen* is a key analogy: not voluntary if it is “unwilled reflexes or spasms in response to being attacked by a swarm of bees or an epileptic fit”

As it appears uncontentious on the facts that X’s act was performed pursuant to their will (*Ryan*), the courts are likely to find their conduct voluntary.

Analogue to *Fagan* if needed” initial battery was involuntary (driving over the foot), he “knowingly, provocatively and unnecessarily” left the wheel on his foot thus the continuing act of actus reus was voluntary.

2 Did X's threat of force create apprehension in Y's mind?

An apprehension of immediate bodily harm in the mind of the threatened victim must arise for an act to constitute an assault at the common law (*R v McNamara*). This is a **subjective** test (*Pemble*) whereby the victim must be taken as you find them (*R v Blaue*) and the jury must apply their common sense to the facts to test for causation (*Royall*).

Add in line from **unlawful** violence Q.(b) if uncontentious

NB: The actual capacity of the accused to carry out the threat made is not relevant – it only matters that the victim is **subjectively** perceived they had the ability to carry it out (*R v Everingham*)

- *R v Everingham* - Pointing a toy gun at someone still constitutes assault if the victim believed it to be real
- *R v St George* – even if the gun is not loaded, it constitutes assault if the victim believes it could be

NB: conditional threats constitute assault when, if the conduct threatened were carried out, would be unlawful (*Rozsa v Samuels*)

If the victim is brave/ is not afraid

NB: It can be assault even when the victim is not put in fear (but they must suspect they will do it)

- *Brady v Schatzel*: he pointed gun at him which was still assault even though police officer was not afraid
- “Whilst a person must be placed in a reasonable apprehension of imminent unlawful contact it is not necessary that they anticipate fear” (*Brown v Spectacular Views*)

If the victim is particularly timid

The eggshell skull rule applies (*MacPherson v Beath*)– take the victim as you find them (*R v Blaue*)

- The rule is “known to him to be so”

If the victim is not aware of the assault

NB: the victim must be aware of the threat (*Pemble*)

- Threatening a sleeping person does not count as assault

On the facts, it appears the accused's actions formed an apprehension in the victim's mind.

(a) Was Y's apprehension of immediate violence?

The victim must apprehend immediate bodily harm, not immedicably apprehend bodily harm (*Knight*) to satisfy apprehension.

A **continuing threat** can constitute an apprehension of immediate violence if the victim is in continuing fear, even if the victim is uncertain as to when the violence will actually occur (*Zanker*).

NB: it is an apprehension of immediate violence, not an immediate apprehension of violence

- Meaning if the threat could be executed at any time, it is not apprehension of immediacy (*Knight*)

NB: a threat over the phone can be a threat of immediate violence (dependant on the circumstances) and thus is an assault (*Barton v Armstrong; Knight*)

- **Silent calls** can constitute assault in certain circumstances (*R v Ireland; R v Burstow*).

How far does imminence extend? If a fear of "relatively immediate imminent violence" is instilled in the victims' mind and the fear is kept alive in the continuing present, with them as a prisoner it can constitute assault (*Zanker v Vartzokas*)

- It is likely they must be at the mercy of the defendant

NB: a FUTURE threat, even of the most menacing violence, CANNOT constitute assault (*Knight*)

- Consider: are they from an appreciable distance thus no immediate danger?

Instances potentially constituting **immediate assault**:

- Where the accused was in another room (*R v Lewis*)
- Where the accused on other side of a locked door, apparently about to break it down (*Beech*)
- Where the accused opened a drawer and showed the victim a gun declaring that he would hold her hostage (*Logdon*)
- Where the accused peered in through a bedroom window at the victim who was wearing her night clothes (*Smith v Chief Superintendent Woking Police Station*)

(b) **Was Y's apprehension of unlawful violence?** (Often uncontentionous so can write in the introduction)

If consent is given/ or is contentious

To constitute assault, the personal violence threatened must be unlawful, thus if the victim has consented, a common assault has not occurred (*R v Donovan*). However, ___ implies Y did not consent as ___.

Consent can be **expressed** or **implied** (*Beer v McCann*).

- You can't really give consent to say something someone threatens verbally

B Mens Rea

To be found guilty of common assault, X's conduct must be proven, beyond reasonable doubt, to be intentional or reckless by the prosecution. Beyond this, the mens rea and actus reus must also coincide to form a conviction (*Meyers v R*).

1 Did X intend to assault Y?

The prosecution must prove BRD that X intended to assault Y. Intention is defined in common law as "a decision to bring about an act of a particular kind or result" (*He Kaw Teh*). Assault is a crime of "basic intent" (*DPP v Morgan*); thus the intention is the creation of apprehension of unlawful and immediate violence.

As intention is inferred by "all evidence admitted at trial" (*Peters v The Queen*) we can consider ___.

NB: self-induced intoxication cannot be considered (*s428D(b)*)

2 Did X recklessly assault Y?

For the prosecution to prove recklessness, they must show that X had actual subjective foresight that their actions would potentially cause Y to apprehend immediate and unlawful violence (*Coleman*) but took the risk, regardless (*Crabbe*).

Conclusion

Write conclusion on the facts – potentially discuss a defence

COMMON ASSAULT (USE OF FORCE)

I IS X LIABLE FOR COMMON ASSAULT?

The relevant act occurred in NSW thus it will be prosecuted under the CA. Common assault is outlined in s61 as assault to “any person, although not occasioning actual bodily harm” and a guilty party “shall be liable to imprisonment for two years”. As assault is not defined in statute, *Fagan* outlines the prosecution has the onus to prove beyond reasonable doubt X’s actions intentionally or recklessly cause “another person to apprehend immediate and unlawful personal violence”. The relevant conduct is ___.

A Actus Reus

For X to be convicted of common assault with use of force, they must have voluntarily but unconsensually come into contact with Y.

1 Was X’s conduct voluntary?

X’s conduct would be voluntary if it was performed pursuant to their will (*Ryan v The Queen*). In the absence of contrary evidence, it is presumed an apparently “willed and conscious act” is voluntary (*Falconer*).

It must be willed but the consequences do not have to be intended (*Falconer*).

NB: automatism can be dealt with in voluntariness

NB.2: the presumption is rebutted if there is evidence the actions were not “subject to control and direction of their will” (*Radford*)

- *Jimenez v The Queen* is a key analogy: not voluntary if it is “unwilled reflexes or spasms in response to being attacked by a swarm of bees or an epileptic fit”
- Potential defence of ‘sane automatism’ and unconsciousness

As it appears uncontentional that X’s act was performed pursuant to their will (*Ryan*), the courts are likely to find their conduct voluntary.

Analogue to *Fagan* if needed: initial battery was involuntary (driving over the foot), he “knowingly, provocatively and unnecessarily” left the wheel on his foot thus the continuing act of actus reus was voluntary.

2 Did X make contact with Y? (Not likely to be contentious – can probably mention earlier)

X’s act of ___ to Y (the victim) likely amounts to making contact with them.

The use of a weapon or instrument to apply force can still constitute an assault, provided the implement was controlled by the action of the accused (*Fagan*). The application of force must be direct in that it is aimed at the victim, or an object on which the victim is supported (*R v Salisbury*).

- Spitting counts as assault (*Neal v The Queen*)
- Touching clothes still counts as they are “intimately connected to the person that it touches” (*R v Thomas; Beal v Kelley*)
- You do not have to be touched by the accused, you can be touched by their weapon, or a vehicle (*Fagan*) – kicking a ladder they are standing on also counts
- The touch does not need to be violent in any way to amount to assault (*Collins v Wilcock*) “mere touch is sufficient”

3 Did Y consent to the use of force? (Is often more contentious here)

To constitute assault, the violence threatened must be unlawful, thus if the victim has consented, a common assault has not occurred (*R v Donovan*). The burden is on the prosecution to prove consent was not provided (*Woolmington*).

Consent can be **expressed** or **implied** (*Beer v McCann*).

Consent in daily life: “Consent is a defence to battery and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to all who move in society and so expose themselves to the risk of bodily contact” – *Collins v Wilcock*

- “The test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct” (*Collins v Wilcock*)
- Hostile intent may convert what would otherwise be unobjectionable as an ordinary incident of social intercourse into battery at common law (*Boughey v The Queen*)

Consent in sport: whilst there is a level of implied consent to rough contact inherent in sport, this is “not a license for thuggery and where inflicted injury is clearly intentional and reckless to the extent it is beyond the rules and norms of the game in question, the criminal law’s threshold of toleration will be breached” (*R v Carr*)

Reasonable chastisement (abuse) to children (*s61AA the CA*)

Reasonable for used during an arrest (*Collins v Wilcock; R v Turner*)

Reasonable force used in self-defence (*Collins v Wilcock; R v Kaszynski*)

Consent for tattoos and piercings (*R v Wilson*) – you often sign a consent form etc.

NB: there are certain types of **conduct that cannot legally be consented to**

“The tribunal of fact in deciding whether the prosecution has proved beyond reasonable doubt that the assault was unlawful must decide whether the degree of violence to the person assaulted exceeded that to which consent was given” (*Lergesner v Carroll*)