

Criminal Laws
LAWS1022

Assault

Week 1

Class 1- Assault 1

Reading: Criminal Laws Textbook

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

Interpersonal Violence - entails relationships between people in the wider sense of patterns of social relations which provide the opportunities and contexts within which violent events occur.

There are two broad types of violent interaction which account for the majority of violent crimes in Australian society.

1. Violence among men
Confrontational violence which escalates into physical conflict.
Usually from marginal socioeconomic backgrounds.
2. Violence among family members
Most frequently involves inequalities of power and strength, it is often ongoing and bound up with the emotional and material dependencies that characterise intimate relationships, and it can have lasting and destructive effects on victims.

Marginalisation and violence in Aboriginal communities:

Aboriginal communities which suffer chronic levels of violence also experience many other problems on a massive scale: under-employment, chronically bad and overcrowded housing, horrific health standards, and limited educational opportunities for the young.

- Violence continues to be experienced by Aboriginal and Torres Strait Islander peoples at disproportionately high rates.

Social Context and Prevalence

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).

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 is two years' imprisonment, but does not define the offence.

Assault in the Courts

Although s61 recognises common assault as an indictable offence, it is routinely dealt with summarily by a Local Court.

Common assault is the second most common offence prosecuted in the Local Court, after possession of a prohibited drug.

In 2018, 38,858 charges for non-fatal violent crimes were finalised in NSW (BOCSAR).

COMMON ASSAULT

For the purposes of 'common assault' in s61 of the *Crimes Act*, 'assault' means both the old form of assault and battery.

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years - *Crimes Act s61*.

Darby v DPP (NSW) (2004) - Giles JA:

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.

Edwards v Police (1998) - DeBelle J summarised the elements of assault where there is no actual physical contact as:

1. The actus reus of an assault where there is no actual physical contact is an act of the defendant raising in the mind of the victim, the fear of immediate violence to him or her, that is to say, the fear of any unlawful physical contact.
2. The mens rea of such an assault is the defendant's intention to produce that expectation in the victim's mind.
3. 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.

Assault involving physical contact:

1. Actus reus is an application of force without consent.
2. Mens rea is either an 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 of 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 actually be put in fear of imminent unlawful force.

Acts not omissions

Case:	<i>Fagan v Commissioner of Metropolitan Police [1969]</i>
Facts:	- The appellant was reversing a motor car when police constable Morris directed him to drive the car forwards to the kerbside and standing in front of the car pointed to a suitable place in which to park. - The appellant drove forwards towards him and stopped it with the offside wheel on Morris's left foot. "Get off, you are on my foot," said the officer. "Fuck you, you can wait," said the appellant. The engine of the car stopped running. Morris repeated several times "Get off my foot". The appellant reluctantly said "Okay man, okay" and then slowly turned on the ignition of the vehicle and reversed it off the officer's foot.
Issue/s:	Whether the facts proved by the prosecution amounted in law to assault.
Arguments:	The appellant "knowingly, provocatively and unnecessarily allowed the wheel to remain on the foot after the officer said 'Get off, you are on my foot'." They found on those facts an assault was proved. It was argued by the respondent that during the continuing act, the appellant formed the necessary intention to constitute the element of mens rea and once that element was added to the continuing act, an assault took place.
Judgement:	Appeal dismissed - it was assault.
Key takeaways:	To constitute the offence of an assault, some intentional act must have been performed: a mere omission to act cannot amount to an assault. Causing harm/injury is not an element of the offence.

Consent

The absence of consent is an element of common assault.

However, Kelly J found in *Wilson [1985]* that there is no necessity for the jury to have had before it evidence from the person alleged to have been ultimately assaulted as to the absence of consent on his part to the application of force to him.

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 lawful justification or excuse. (*Bonora (1994)*)

Apprehension of immediate infliction of force

Where the assault involves an act causing the victim to apprehend the immediate infliction of unlawful force, questions sometimes arise as to whether the threat of harm is sufficiently imminent to satisfy the actus reus requirement.

Case:	<i>Knight (1988)</i>
Facts:	- The appellant was convicted of assault under s61 following threatening and abusive telephone calls to a police officer, a magistrate and a judge.
Issue/s:	Whether the evidence of threats, which were made from a phone at a considerable distance from the targets, was sufficient to constitute assault.
Arguments:	The evidence in the present case went no further than to merely show that threats had been made to the various callers and serious threats they were. But as to there being any evidence that those threats were threats of immediate violence it is clear that they were not. They were mere threats which may have been executed at any time, if at all.
Judgement:	Convictions quashed.
Key takeaways:	A threat violence made over the phone could be a threat of immediate violence in given circumstances, and thus an assault. There must be "apprehended immediate violence".

Case:	<i>Zanker v Vartzokas (1988)</i>
Facts:	- A woman accepted a lift from the defendant who then offered her money for sex. - She said no but he persisted; she asked to be let out of the car but he kept driving. - She attempted to jump, he accelerated and said, "I am going to take you to my mate's house. He will really fix you up ." She then jumped out of the car and was injured. - At first instance, the magistrate dismissed the charge on the basis that the defendant's conduct did not create the fear of immediate violence but a fear of sexual violence at some time in the future.
Issue/s:	Whether there was apprehension of immediate infliction of violence.
Arguments:	The young woman was in immediate and continuing fear so long as she was imprisoned by the defendant. A present fear of relatively immediate imminent violence was instilled in her mind from the moment the words were uttered and that fear was kept alive in her mind, in the

	continuing present, by continuing progress, with her as prisoner, towards the house where the feared sexual violence was to occur.
Judgement:	In the context of unlawful imprisonment the threat operated in a continuing way.
Key takeaways:	The apprehension of immediate violence depends on the particular circumstances and what is in the mind of the individual at the time.

Case:	<i>Mostyn (2004)</i>
Facts:	- The appellant was convicted of maliciously inflicting grievous bodily harm with intent to do grievous bodily harm and assault upon his wife following trial. He received a sentence of six years' imprisonment with a non-parole period of five years. - The appellant appealed against his conviction on a number of grounds, including that the trial judge had misdirected the jury as to the meaning of assault where that assault involved a threat of inflicting violence.
Judgement:	The conviction appeal was dismissed.
Key takeaways:	It has long been held that threats which put a reasonable person in fear or apprehension of physical violence may constitute an assault even though the victim did not know when that physical violence may be effected: <i>Barton v Armstrong</i>. The decision of this case clarifies that the appropriate question is whether the act caused the person to fear immediate violence, regardless of whether the offending person was actually able to inflict such harm.

The victim's apprehension

For a psychic assault, the victim must be put in fear of imminent unlawful contact - *Barton v Armstrong* [1969].

A psychic assault "is constituted by an act which intentionally or recklessly causes another to apprehend immediate and unlawful violence ... It cannot occur unless or until the victim is aware of the accused's actions" - *DPP v JWH*

Bray CJ in MacPherson v Beath (1975):

The reasonableness of the apprehension may or may not be necessary.... If the defendant intentionally puts in fear of immediate violence an exceptionally timid person known to him to be so then the unreasonableness of the fear may not prevent conviction.

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 the other person.

- It has been held, however, that recklessness will suffice.

The mens rea of such an assault is the defendant's intention to produce that expectation in the victim's mind ... There remains the alternative possibility of a reckless assault where the defendant, while not desiring to cause such fear, realises that his conduct may do so and persists with it.

The test for recklessness in *Coleman (1990)* - 'a realisation of the possibility' of putting the victim in fear 'but nevertheless proceeding to act'.

Where recklessness is relied on, therefore, the prosecution must prove foresight of the possibility of inflicting physical contact or the apprehension of imminent unlawful contact.

Case:	<i>MacPherson v Brown (1975)</i>
Facts:	- A student was convicted of having assaulted a lecturer at Flinders University. - A number of students, including the defendant, had taken over the administration building in protest. The lecturer in question, who was involved in the re-occupation of the building by university officials, was surrounded by a number of students who for a time prevented him from passing through the group and caused him to fear for his personal safety. - No actual physical contact was made and he was allowed to pass after about 10-15 minutes. - 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. - The defendant appealed.
Issue/s:	Whether there was foresight of the possibility of inflicting physical contact.
Judgement:	Appeal allowed and charges dismissed.
Key takeaways:	Negligence as a form of mens rea is insufficient.

Coincidence between actus reus and mens rea

It has been held that for an assault involving a 'continuing act', the mens rea does not need to be present at the time of the commencement of the actus reus but can in effect be superimposed onto an existing (and continuing) act.

Elements of assault where there is no actual physical contact

	Conduct	Circumstance	Consequence
Actus Reus	Act creating apprehension of immediate/imminent unlawful physical contact/application of force		Victim put in fear of imminent unlawful contact
Mens Rea	Intention or recklessness		Intention or recklessness

Elements of assault where there is physical contact

	Conduct	Circumstance	Consequence
Actus Reus	Unlawful physical contact/application of force (not an omission) without consent		
Mens Rea	Intention or recklessness		