

ASSAULT

Introduction:

- Public violence typically involves men as offender and victim.
- Many private incidences are committed by men against female partner.
 - There is a reliance on a two-step criminalisation seeking to prevent violence by foregrounding civil Apprehended Domestic Violence Orders (ADVOs), and reserving criminal prosecution for when the perpetrator doesn't comply.

Patterns of victimisation:

- R Hogg and D Brown. *Rethinking Law and Order* (1998):
 - Two broad types of violent interaction which account for most of violent crimes in society: confrontational violence between males, typically young and of marginal socioeconomic status; and between family members/intimates.
 - Violence among men:
 - Nonfatal violence between men conforms with the pattern found in male-to-male homicides in social settings, where situational factors such as alcohol play an important part.
 - Underreported. Police are inclined to treat both parties at fault.
 - Police tended to only take action if the incident could be construed as an offence against public order.
 - National Injury Surveillance and Prevention Project: 30% of intentional injuries involving children ≤ 14 occurred in schools.
 - Males reported incidents of assault 4x the rate of females.
 - Up to 2/3 total surveyed assault incidents were not reported.
 - Violence among family members:
 - Highly underreported.
 - Correlation between socioeconomic marginalisation and domestic violence. 1/3 male and 2/3 female offenders were unemployed.
 - Most victims of domestic violence are women who are not in paid employment, have children and are receiving welfare. Most are separated from partner when they initiate court action.
 - Because it is unreported, social policy areas such as housing and childcare should not be left out of comprehensive policies for family violence prevention.
 - Marginalisation and violence in Aboriginal communities:
 - Communities suffering chronic levels of violence experience other problems such as overcrowded housing, low health standards and alcoholism. Elements sustaining these problems such as alienation are the legacy of government policies.
 - Between 1968–86 Aboriginal homicide rate was 7x the general population and 87% of victims were killed by other Aborigines.
 - Incidents of violence officially recorded typically arose out of altercations occurring in the course of drinking sessions.
 - Drinking culture is the focal point of the lives of those living on reserves. Usual solutions of prosecution and incarceration do

not mitigate problems as the community loses more members placing it and families under added stress and eroding already meagre opportunities to maintain stable employment.

- ABS, *Australian Personal Safety Survey* (2012): 18-24 year olds were most likely to experience violence with 10% of young women and 25% of young men having experienced some form of violence.
- Clare and Morgan (2009): male victims <25 are less likely to perceive assault victimisations as crimes and women were less likely to perceive the event as criminal if the perpetrator is known to them.

Social context and prevalence:

- Context may determine what is assault. E.g. someone who causes serious injuries may be not liable if it was an accident.
- Law reflects social ambivalence of the use of violence e.g. parents are permitted to use force for the punishment of their children. Basic assault offences carries a lower maximum penalty (s 61) than larceny offence (s 117).
- Social perceptions to some forms of violence change. Domestic violence is reported more now after public education, police training and legislative changes to enhance powers of entry and arrest in domestic disputes.
- BOSCAR (2013): 65, 000 recorded assaults in NSW; includes 28, 291 domestic violence assaults and 2639 assaults on police.
- Following the death of Thomas Kelley, there has been special attention paid to alcohol related assaults despite no increase in reporting.
- Weatherburn (2001): correlation between alcohol consumption and violence because high rates of alcohol consumption have high rates of violence and assaults tend to cluster around licensed premises.
- BOSCAR (2013): 25 000 instances of alcohol-related assaults in NSW.
- BOSCAR (2014):
 - Reported the number of non-domestic assaults between 2004–14. Recorded rates of assault dropped from 40, 500 in 2004–5 to 32, 600 in 2013–4.
 - 40% of assaults were alcohol-related. 38% in 2013–4.
 - 2013–4: 15% of assaults occurred on licensed premises (92% alcohol-related) and 31% occurred in public place (38% alcohol-related).
 - In King's Cross Local Area Command, rates have been dropping since tougher laws put in place: 758 assaults in 2004–5; 714 assaults in 2012–3; and 626 in 2013–4.

Criminal offence categories:

- Nonfatal violence categorised into common assaults and aggravated assaults.
- *Crimes Act 1900* (NSW): s 61 (common assault): Whosoever assaults someone, although not occasioning ABH, shall be liable to 2 years.
- Aggravated assault is not in the *Crimes Act*. It describes more serious assaults.

Assault in the courts:

- BOSCAR (2013): 44, 200 charges for assaults were finalised in NSW.
 - Just under half charges were laid for common assault under s 61.
- Common assault is the 2nd most common offence before the Local Court.
 - 2013: 18, 543 charges were finalised (BOSCAR).

- 2013: More than 60% were for domestic violence.
 - 25, 535 ADVOs and 6022 apprehended personal violence orders (APVOs– for non-domestic violence) were issued (BOSCAR).
- For the aggravated offence categories (BOSCAR 2013):
 - S 59(1): 8770 charges for assault occasioning in actual bodily harm (ABH).
 - S 60(1): 708 charges for intimidating a police officer.
 - S 60(1): 670 charges for assault of a police officer.
 - S 59(2): 606 charges for assault occasioning in ABH in company.
 - S 35(2): 379 charges for causing GBH and reckless to causing ABH.
- 15, 023 were found guilty in the LC. 60% given good behaviour bond.

Common Assault:

- *Darby v DPP (NSW)* (2004) 61 NSWLR 558: assault= intentionally or recklessly causing another to apprehend the immediate infliction of unlawful force; battery= actual infliction of the unlawful force. May arise separately or together. Both generally referred to as assault.
- *Edwards v Police* (1998) 71 SASR 493:
 - The actus of an assault where there is no actual physical contact is an act of the D raising in the mind of the victim, the fear of immediate violence to him.
 - The mens rea is the D’s intention to produce that expectation or of recklessness where the D realises that his conduct may cause such a fear but persists with it.

Actus reus:

- Must be committed by an act not omission and without consent.

Acts not omissions:

<i>Fagan v Commissioner of Metropolitan Police</i> [1969] 1 QB 439	
Facts	<ul style="list-style-type: none"> • Convicted of assaulting officer in execution of his duty. • A was reversing vehicle. V directed him to drive car forwards to kerb. Parked it on V’s foot. • Engine stopped running. A got it on and reversed off.
Issues	<ul style="list-style-type: none"> • Whether an omission can amount to assault.
Rules	<ul style="list-style-type: none"> •
Application	<p>James J:</p> <ul style="list-style-type: none"> • A claims that after the car was mounted on V’s foot, there was no act which could constitute the actus. Claims as the mounting was accidental it was not the act. • R claims the mounting was the actus and it continued until the moment in which the wheel was removed. During this the A found necessary mens rea. Alternative: there are situations in which there is a duty to act. • Where assault involved a battery, it doesn’t matter whether it is inflicted directly by the body of the offender or through another medium. There is no difference between stepping

	<p>on a toe and maintaining that position and the action of driving a car on a person's foot and leaving it there.</p> <ul style="list-style-type: none"> • Mere omission cannot constitute an assault.
Conclusion	<ul style="list-style-type: none"> • Appeal dismissed.

Consent:

- *Bonora* (1994) 35 NSWLR 74: assault with consent is no assault. Law requires an intentional application of force which is unlawful. Unlawful= no legal justification and consent is a lawful excuse.
- *Wilson* [1985] 2 Qd R 420: No necessity for the jury to have evidence from the victim as to the absence of consent.

Apprehension of immediate infliction of force:

<i>Knight</i> (1988) 35 A Crim R 314	
Facts	<ul style="list-style-type: none"> • A was convicted of assault under s 61 and making false statements giving rise to apprehension for a person's safety. • Phone calls were traced to A who was some distance away.
Issues	<ul style="list-style-type: none"> • Whether the evidence of the threats could constitute assault.
Rules	<ul style="list-style-type: none"> • <i>Fagan</i> [1969]: assault is an act which intentionally or possibly recklessly causes another to apprehend immediate and unlawful personal violence. • <i>Pemble</i> (1971) 124 CLR 107: An assault is a threat by one to inflict unlawful force upon another; it constitutes a crime when the threatener intentionally caused the other to believe such force is about to be inflicted. • <i>Barton v Armstrong</i> [1969] 2 NSWLR 451: merely because a threat is made does not mean it could not constitute assault. How immediate is the violence offered by the threat to be depends on the circumstances.
Application	<p>Lee J:</p> <ul style="list-style-type: none"> • The threats, although serious, were not threats of immediate violence. They may have been executed at any time. • <i>Barton</i>: Suggests that the element in assault that the violence be immediate was not always necessary– immediate could be stretched to cover events in the future. Just obiter.
Conclusion	<ul style="list-style-type: none"> • Appeal allowed– convictions quashed.

<i>Zanker v Vartzokas</i> (1988) 34 A Crim R 11	
Facts	<ul style="list-style-type: none"> • A accepted lift from R. R accelerated van and offered money for sex. Rejected offer. She demanded he stop and let her out but he continued to drive, accelerating. • A threatened to jump out. Accelerated. Said to A: "I am going to take you to my mate's house. He will really fix you up". She jumped out and suffered injuries. • Magistrate held that the fear was real and was induced by R's words and actions. He intended to do it. But it was not fear of immediate violence.

Issues	<ul style="list-style-type: none"> Does fear of violence some time in the future satisfy the actus reus immediacy element?
Rules	<ul style="list-style-type: none"> <i>MacPherson v Brown</i> (1975) 12 SASR 184: A person guilty of unlawful imprisonment could also be guilty of assault if all its elements accompanied FI. FI in this case encompassed the actus and mens rea of assault.
Application	<p>White J:</p> <ul style="list-style-type: none"> <i>MacPherson</i>: fear had to be present fear of physical harm in due course within the parameters of the FI. Did not have to be immediate. Threat could operate in a continuing way so long as the FI continued. A was in immediate and continuing fear so long as she was imprisoned by R. No indication of whether the mate's house was around the corner. Words did not have effect only at the time they were uttered. "How immediate must the threatened physical violence be after the utterance of the threat which creates the fear?" Must be appreciated that the fear is a continuing fear in the victim's mind, the threat having as must effect in an hour as at the moment of utterance.
Conclusion	<ul style="list-style-type: none"> Appeal allowed.

The victim's apprehension:

- DPP v JWH*: a psychic assault is constituted by an act which intentionally or recklessly causes another to apprehend immediate and unlawful violence.
- Pemble v R* (1971) 124 CLR 107: it cannot occur unless or until the victim is aware of the accused's actions.
- MacPherson v Beath* (1975) 12 SASR 174: Apprehension may or may not be reasonable. If the D knew the person was exceptionally timid, then unreasonable fear may be enough.

Conditional threats:

- It may constitute an assault if it was a condition that the person could not lawfully impose e.g. "your money or your life" (*Police v Greaves* [1964] NSZLR 295).

Spitting:

- DPP v JWH* (unreported, NSWSC, 1997): spitting is assault (battery). Battery is unlawful force on another be it ever so small.