

## PART V – LAWS OF ASSAULT

### I *Sociological Background*

#### A *Contextualisation*

The law of assault is structured into two groups of offences:

- 1 Assault
- 2 Sexual assault

These crimes fall into the broader group of crimes against the person.

#### B *Objectives*

The law of assault seeks to address the social problem of public order.

#### C *Development*

The development of new offences has led to an expansion of the limits of the law of assault. This expansion has seen it deal with new social problems (eg, the transmission of HIV) in two ways:

##### 1 *Using an existing offence*

Eg, reckless endangerment, which normally applies in relation to driving in a public place in such a way as to place pedestrians in danger (thus, criminal liability is still attached to the act resulting in the prohibited consequence – risk – regardless of whether a pedestrian is injured or HIV is actually transmitted)

##### 2 *Creating a new offence*

Eg, s 19A, which makes it a crime to transmit a dangerous disease; this offence deals with cases in which the disease is actually transmitted

Stalking is another example of a new social problem dealt with by the law of assault. Traditional forms of assault are problematic when applied to the kinds of factual scenarios which arise in the context of stalking. Acts which are in themselves innocuous (eg, giving flowers, sending a letter) may, through repetition (eg, sending them every hour), pattern (on an anniversary), or some other circumstance it could nevertheless produce the prohibited apprehension of imminent violence.

To solve these difficulties, the legislature created a new offence which incorporates as its central element the repetition of seemingly innocent conduct.

The structure of modern criminal law is such as to enable it to deal with new issues and changing factual patterns. It changes by altering the structure directly, through legislation, or using the structure to generate new offences by a particular mode of application. It is arguable, however, that changing the structures of criminal law can only accommodate new offences to a certain

extent, and that new techniques of appraising wrongful conduct are necessary in some cases (eg, rape, stalking; ‘circumstances’-based crimes).

## D *Statistics*

Some salient statistics about the location at which assaults occur:

- 40% occur in private dwellings
  - The modern law of assault has increasing importance in private residences
- 24% in public streets/footpaths
  - Public spaces are the traditional focus of assault

Age and gender of victims:

- 0-14: more male victims
- 15-24: bracket most likely to be assaulted; more female victims

Gender and location of assaults:

- 68% of female victims are assaulted in the home
- 28% of males are assaulted in the home

From these, some broad propositions about the current applications of the law of assault can be made:

- 1 *As a matter of public order, the problem is one of masculinity*
- 2 *In the context of domesticity, the victim is typically female*
- 3 *Young persons are at the highest risk*

## II **General Structure**

### A *(Fairly) Recent Reforms*

In Victoria, 1985 saw a series of reforms to the law of assault. Under these reforms, much of the terminology used to formulate offences changed (eg, wounding, actual bodily harm, and grievous bodily harm became injury and serious injury). There was a consolidation of the major legal developments since the 1850s.

Homicide and assault share a common approach to evaluating liability. Both show no interest in the modus operandi of a prohibited consequence. Instead, only the consequence is important. Thus, the focus in assault is on the outcome. Examples:

- Basic indictable offences: the consequence is injury or serious injury
- Stalking: the consequence is apprehension in the mind of the victim
  - Note, however, recent reforms (R Hulls, 2004) which have had the effect of shifting the focus of the crime of stalking to the acts of the accused (inconsistent)

In general, however, crimes are comprised of a prohibited mentality attached to the causation of prohibited consequences by the accused. This approach is used to generate the basic structure for non-fatal offences.

## B Overview

General definitions of crimes are now abstract and broad. These most commonly occur in the context of legislation, such as the *Crimes Act 1958* (Vic) or the *Summary Offences Act 1958* (Vic).

The basic structure of legislative definitions of assault is as follows:

### 1 *Common assault*

- Low level; at the threshold of **harm**
  - Application of mere force
  - Low level harm
- At the border of innocence (the very bottom rung of criminal responsibility)
- The gist of the offence is the **apprehension of physical harm**
- Battery is the actual application of force to the victim
- Dealt with in the *Summary Offences Act* and at common law

### 2 *Basic indictable offences*

- Deals with injuries; examine the harm:
  - Injury
  - Serious injury
  - These are defined in s 15 of the *Crimes Act*
- ss 16-18, 24 define the basic indictable offences

### 3 *Supporting indictable offences*

- These further offences support the division between basic indictable offences and common assault
- They serve two primary purposes:
  - Gap-filling (owing to the generality of the basic indictable offences)
    - Threats to cause serious injury are not covered by common assault
    - Status offences (eg, assaulting a police officer) are identity-based; the punishment differs from assaulting another identity
  - Extending liability from causing *actual* to causing *potential* consequences
    - Reckless endangerment and stalking address risk and danger
    - Similar to *Wilson*: a culpability-dangerousness approach
      - Culpability: basic indictable offences and common assault
      - Dangerousness: stalking, endangerment
    - Here, there doesn't need to be any effect on a victim, just *potential* risk (rather than actual consequences)

All assaults relevant to our purposes fall within this basic structure.

### III Common Assault

#### A Physical Elements

If the prosecution can prove beyond reasonable doubt that the accused caused the victim to apprehend immediate and unlawful force, the accused will be guilty of an assault (*Zanker*, *Barton*).

- 1 *Did the victim apprehend or fear immediate and unlawful violence or force?*
  - V must know she is being threatened (*Pemble*)
    - Eg, if V knows the gun is loaded (*McNamara*)
  - Mere words
    - Insufficient; need some additional conduct (*Knight*)
    - *MacPherson*: yelling *and* obstruction causes fear or apprehension of physical assault
  - Omission
    - Assault normally requires positive act
    - *Fagan*: doing 'precisely nothing' can be an act for the purposes of assault
  - Future threats
    - Prima facie, future threats are not immediate (*Knight*)
    - However, if there is a present and continuing apprehension of imminent force, will be sufficient (*Zanker*)
    - *Zanker*: threat of future rape ('he will really fix you up') can induce a continuing fear of violence
      - V powerless to prevent A carrying out his threat
      - Helpless and imprisoned in moving vehicle
    - *Barton*: future threats over telephone can be immediate if they place V in continuing fear of harm and relationship such as to make fear reasonable
    - *Beech*: breaking open V's door induced fear of imminent sexual assault
    - *Knight*: threats made to police not assault because they don't threaten immediate violence
  - Conditional threats
    - *Rosa*: taxi driver to V: 'if you don't move I'll stab you with this knife' can create apprehension of harm

Alternatively, if the accused can be proved to have actually applied force to the victim, the accused may be guilty of a battery (*Collins*).

- 2 *Did the accused actually apply physical force to the victim?*
  - Low threshold; force need not be violent or cause injury (*Collins v Wilcock*: touching sufficient)
  - A's force must be directed at V
  - A's force must be unlawful
    - Consider: consent, SD, lawful arrest

**B Fear of Imminent Harm*****MacPherson v Brown:***Facts:

- During student protests, the administration building was occupied at Flinders University
- The victim, Dr Gibbs, helps security to remove the students from the building
- The next day, one student has a verbal exchange with Gibbs
- Later, as he is walking to his office, Dr Gibbs is surrounded by 30 students, led by MacPherson
- There is a verbal interchange; no threats are made, but the group blocks the lecturer's passage
- He attempts to move them out of the way, in response to which they yell 'assault!', which they subsequently chant
- In evidence, Gibbs said he was in fear of physical harm from the accused at this time
- After a period of some 15 minutes have passed, the students let him continue

Issue:

- Did MacPherson engage in conduct which he knew or ought to have known might give cause for belief of imminent harm in the mind of Dr Gibbs?

Reasoning:

- Because no physical contact is involved, this case immediately falls into the category of the apprehension type of assault
- The professor was falsely imprisoned by the students, for he was unable to escape them
- Bray CJ and Jacobs J:
  - Factual uncertainty prevents guilty verdict
- Zelling J:
  - A fear was induced in Dr Gibbs that if he tried to get away, his progress would be impeded and if necessary restrained until this confrontation had taken place
  - The circumstances of the false imprisonment constitute the assault

Decision:

- Blocking Gibbs' passage by surrounding him recklessly put him in fear of danger
- However, factual uncertainty means the defendant must be acquitted

***Zanker v Vartzokas:***Facts:

- The accused gives a lift to the victim
- He offers her money to perform sexual favours; she refuses
- He responds by accelerating; she tries to open the door, but he accelerates further
- He says he will take her to his mate's house, where 'he will really fix you up'
- She jumps from the car, now travelling at 60km/h

Issue:

- Is her fear of sexual assault 'sometime in the future' sufficient to constitute the prohibited apprehension of *immediate* harm?

Reasoning:

- Her fear is of later harm instead of immediate harm about to be directed at her by the driver
- The immediacy requirement is satisfied when the victim is held in place and cannot prevent the harm or escape
- However, the requirement should not be read literally:
  - It is one of imminence, not contemporaneousness
  - The victim's fear in this case is present and continuing
  - Just because she doesn't know where the 'mate's' house is, that doesn't excuse fear of harm
  - The accused has falsely imprisoned her – this imprisonment continues, along with her fear, since she is at his mercy
- Two analogies are drawn:
  - Cat and mouse
  - Hiker and stalker
  - In both cases, the exact moment of injury is known only to the aggressor
  - The victim is only aware of the vague threat of injury in the future
  - However, it is still an assault where the victim is powerless to prevent the aggressor from carrying out his threat, as where they are helpless or imprisoned

Decision:

- The imprisonment and threat constituted an assault and the accused was responsible for the victim's injuries; the accused is convicted for assault occasioning actual bodily harm

### C      *Mental Elements*

To be guilty of an assault or battery, the accused must have intended or been reckless as to inducing the victim's apprehension of force (*Beech; Venna*).

- 1      *Did the accused intend to cause or recklessly caused apprehension of force?*
  
- 2      *Did the accused intend to apply or recklessly applied force?*
  - Recklessness is foreseeing the apprehension as a 'possible' consequence of the accused's conduct (*Venna*)
  
- 3      *Did the mens rea temporally coincide with the actus reus?*
  - The prosecution may construct the events as a single continuum (as in *Fagan*)
  - Mens rea must occur sometime within the course of the crime
  - Need not occur contemporaneously; mens rea can arise during the course committing the actus reus
  - However, mens rea cannot arise after the actus reus is complete (*Fagan*)

## IV **Basic Indictable Offences**

### A *Causing Injury*

If the prosecution can prove beyond reasonable doubt that the accused caused injury (or serious injury) to the victim, the accused will be guilty of an offence under one of the following sections of the *Crimes Act 1958* (Vic):

- Section 16
- Section 17
- Section 18
- Section 19A
- Section 24 – negligently causing serious injury

1 *Was the victim injured?*

- Injury includes unconsciousness, hysteria, pain, mental harm, disease, and any substantial impairment of bodily function
- Need not be permanent but must be more than merely transient or trifling (*Donovan*)

Alternatively, the victim may have been seriously injured, in which case a different class of offences applies.

2 *Was the victim seriously injured?*

- Serious injury is a high standard: something short of death (*Kane*)
- A very serious disease (ie, HIV) is serious injury: s 19A

### B *Mens Rea*

1 *Did the accused intend to cause the injury?*

- A must have willed or desired the consequence (injury/serious injury)
- The consequence is what is relevant (*Westway*)
- Section 16 (serious injury)
- Section 18 (injury)
- Section 19A (intentionally transmitting very serious disease)

2 *Was the accused reckless as to causing the injury?*

- Conflicting authorities: foresight of a 'possibility' (*Coleman*) of foresight of a 'probability' (*Campbell; Nuri*)
- P must establish A foresaw at least the possibility (or probability) of injury/serious injury and was indifferent to the consequences
- Section 17 (serious injury)

- Section 18 (injury)
- 3 *Did the accused negligently cause the serious injury?*
- Apply *Nydam* – see [2.4.5]
  - Section 24 (serious injury only)

## C Defences

- 1 *Did the accused have a lawful excuse for causing the injury?*
- The accused must establish the excuse beyond reasonable doubt
- 2 *Was the accused's conduct done with an 'intention of goodwill'? (Phillips)*
- *Phillips*: no battery where A drags V across sand to determine whether she is alright
  - Cf *Boughey*: (murder) touching carotid arteries for gratification irrelevant
- 3 *Did the victim consent to the injury (but not serious injury)?*
- If V expressly or impliedly consented to the injury, A will not be liable (*Collins*)
  - Situations in which consent will preclude liability:
    - Contact sports (within the rules of the game: *Brown*) and prize fighting
    - Dangerous Pastimes (bravado, mortification)
    - Rough horseplay
    - Prostitution
    - Consensual fighting
    - Medical treatment and surgery (but not gross conduct)
    - 'Common intercourse of life' (implied consent: *Brown*)
  - Consent may be vitiated:
    - Public policy (*Brown*: consensual sexual acts)
    - Fraud
    - Youth
    - Mental disability
  - Serious injuries *cannot* be consented to by V
    - *Brown*: sadomasochistic sexual injuries cannot be consented to even though no permanent injury
    - *Wilson*: heterosexual branding can be consented to
    - *Brown* protects both individual and society – upholds norms
  - Transmission of HIV is a serious injury
    - *Mohammed Dica*: V knew of A's HIV, but cannot consent to the transmission because it is a serious injury

Note that self-defence also applies. See below Part VI.



## 4 Was the accused acting in self-defence?

**V Supporting Indictable Offences****A 'Gap-Filling' Offences**

Various offences are defined in the *Crimes Act 1958* (Vic). These will primarily be relevant where the accused cannot be convicted for common law murder, manslaughter, or assault (eg, where the accused is negligent in a peculiar circumstance, such as driving or attempting lawful arrest).

Offence	Section ( <i>Crimes Act 1958</i> (Vic))
Intentionally transmitting a 'very serious disease' (HIV)	s 19A
Threats to kill (intentionally or recklessly causing V fear)	s 20
Threats to cause serious injury (same MR) <ul style="list-style-type: none"> <li>• Wider than common law assault: need not be immediate</li> <li>• Broader in scope than common law threats</li> </ul>	s 21
Recklessly engaging in conduct that places or may place another person at risk of death	s 22
Recklessly engaging in conduct that places or may place another person at risk of serious injury	s 23
Setting a trap with intent/recklessness to kill another person	s 25
Setting a trap to cause serious injury (same MR)	s 26
Extortion with threat to kill (obtaining by violence)	s 27
Extortion with threat to destroy property	s 28
Using firearm to resist lawful arrest	s 29
Threatening injury to resist arrest or investigation	s 30
Assault with intent to commit indictable offence (eg, rape)	s 31(1)(a)
Assault of police officer/assault with intent to resist arrest	s 31(1)(b)
Use of firearms in the commission of indictable offence	s 31A

## B Stalking

If it can be proven that the accused engaged in a course of conduct for the purposes of causing physical or mental harm in the victim or arousing apprehension of fear, the accused will be guilty of stalking the victim under the *Crimes Act 1958* (Vic) s 21A.

- 1 *Has the accused engaged in a course of conduct that could amount to stalking under s 21A(2)?*
  - (a) Following V or anyone else
  - (b) Contacting V or by any means whatsoever
  - (ba) Publishing by electronic communication to any person material
    - (i) concerning or (ii) purporting to concern V or any other person
  - (bb) Causing an unauthorised computer function in a computer owned by V or anyone else
  - (bc) Tracing V's use of electronic communications
  - (c) Entering or loitering outside or near V's or any other's residence or business or any other place frequented by V
  - (d) Interfering with property in V's or any other person's possession
  - (e) Giving/leaving offensive material to/for V or any other person
  - (f) Keeping V or any other person under surveillance
    - *Gunes v Pearson* per McDonald D
    - *Berlyn v Brouskos* per Nettle J
  - (g) Acting in any other way that could reasonably be expected to arouse apprehension or fear in V for their safety
  
- 2 *What is the course of conduct?*
  - The locus of the offence of stalking is a protracted course or pattern of conduct
  - Has A's romance with V gone wrong?
  - Is there a neighbourhood or political disputes between A and V?
  - Is A excessively trying to seduce V?
  - Is A an excessive fan of V?
  - Relevant factors:
    - Timeframe in which conduct occurred (*Connolly*: protracted)
    - Number and frequency of acts
    - Intent with which acts were done (*Connolly*: A trying to win ex-girlfriend back)
  
- 3 *Did A intend to cause physical or mental harm to V or arouse apprehension or fear in V for their safety? (s 21A(2))*
  - Intention includes where A knows (subjectively) or ought to have known (objectively) that his course of conduct would be likely to cause such harm or arouse such apprehension or fear (s 21A(3)(a), s 21A(3)(b))
  - A need not have *actually* caused the apprehension
  - It does not matter whether V was outside of Victoria if A was in Victoria (s 21A(7))

- It does not matter whether A was outside of Victoria if V was in Victoria (s 21A(6))

### C *Endangerment Offences*

The accused may be guilty of reckless endangerment if the prosecution can establish that the accused's conduct placed or may have placed the victim in danger of death (s 22) or of serious injury (s 23).

- 1 *Would a reasonable person engaging in X foresee that its 'probable' consequences place V at an appreciable risk of death/serious injury?*
  - Objectively, the risk must be a 'probable consequence' of X
  - V need not actually suffer serious injury or death; concerned with potential consequences of A's conduct
  - P must adduce evidence that the risk of death or serious injury is at least 'appreciable' (dangerous)
    - Dangerous if an 'appreciable risk' of death/serious injury
    - Eg, evidence of actual risk of infection from unprotected HIV sex, and actual risk of death or serious injury if infected
  
- 2 *Did A intend to engage in the relevant conduct while being reckless as to the danger of death (s 22) or of serious injury (s 23) in which the victim is or may be placed and went ahead regardless of the foreseen 'probability' of death or serious injury?*
  - A must foresee death or serious injury as 'probable' consequences of doing X (*Mutemeri*)
  - *Mutemeri*: A has HIV, has unprotected sex with V, knowing of risks; A needs to intend to engage in the conduct; he must foresee an appreciable risk of death or serious injury; such a low probability of catching the disease (between 1/667 and 1/2000) that the risk of death was 'not appreciable'
  - *Filmer v Barclay*: As make and set off bombs in a park; 2 do not explode; later, they explode when children are in the playground; no-one is hurt; As must have foreseen that bombs would 'probably' result in death or serious injury