



UNSW
SYDNEY

Law & Justice

Criminal Laws

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T2 2022 – Class 2

Aggravated assaults

Consent to harm

Aggravated assaults

- Each aggravated assault offence is typically characterised by:
 - further specific intent (i.e., cause a specific result) – to cause GBH (s 33(1)), resist arrest (s 33(2)), commit a serious indictable offence against certain persons (ss 57, 58)
 - level of harm inflicted – assault occasioning or where the defendant intends (i) actual bodily harm, (ii) wounding or (iii) grievous bodily harm (ss 35, 59) (NB: assault involves unlawful touching but not any actual bodily harm (s 61))
 - setting – in company (ss 35(1), (3)), during “public disorder” (s 59A), in schools (s 60E)
 - victim – police & emergency services workers (div 8A)



Aggravated assaults (cont'd)

Aggravated assault	Section
Wounding or GBH with intent	<i>Crimes Act 1900 (NSW) s 33(1)</i>
Wounding or GBH with intent to resist arrest	<i>Crimes Act 1900 (NSW) s 33(2)</i>
Discharging firearm with intent to cause GBH	<i>Crimes Act 1900 (NSW) s 33A(1)</i>
Reckless GBH or wounding	<i>Crimes Act 1900 (NSW) ss 35(2), (4)</i>
Reckless GBH or wounding in company	<i>Crimes Act 1900 (NSW) ss 35(1), (3)</i>
Causing a dog to inflict GBH or ABH	<i>Crimes Act 1900 (NSW) ss 35A(1), (2)</i>
Choking, suffocating or strangulating with intent	<i>Crimes Act 1900 (NSW) s 37(1A)</i>
Reckless choking, suffocating or strangulating	<i>Crimes Act 1900 (NSW) s 37(1)</i>
Choking, suffocating or strangulating with intent to commit/assist another to commit an indictable offence	<i>Crimes Act 1900 (NSW) s 37(2)</i>
Causes GBH by unlawful or negligent act or omission	<i>Crimes Act 1900 (NSW) s 54</i>



Aggravated assaults (cont'd)

Aggravated assault	Section
Assault with intent to commit serious indictable offence	<i>Crimes Act 1900 (NSW) s 58</i>
Assault officer in execution of duty (if assault of police officer, use s 60)	<i>Crimes Act 1900 (NSW) s 58</i>
Assault with intent to resist or prevent lawful arrest of any person	<i>Crimes Act 1900 (NSW) s 58</i>
Assault occasioning ABH	<i>Crimes Act 1900 (NSW) ss 59(1)</i>
Assault during public disorder (either common or occasioning ABH) (if assault of police officer, use s 60)	<i>Crimes Act 1900 (NSW) ss 59A(1), (2)</i>
Assaults police officer in execution of duty (various, including occasioning ABH, GBH or wounds)	<i>Crimes Act 1900 (NSW) ss 60(1), (1A), (2), (2A), (3), (3A)</i>



Case study: Reckless causing of grievous bodily harm in company (*Crimes Act 1900* (NSW) s 35(1))

(1) A person who, in the company of another person or persons—

(a) causes grievous bodily harm to any person, and

(b) is reckless as to causing actual bodily harm to that or any other person,

is guilty of an offence.

	Conduct	Consequence / result of conduct	Circumstance
Physical element / <i>actus reus</i>	act	grievous bodily harm to any person	in the company of another person or persons
Fault element / <i>mens rea</i>	intention	recklessness (causing ABH to that or any other person)	strict liability



Case study: Reckless GBH (*Crimes Act 1900* (NSW) s 35) (cont'd)

- Recklessness for offences other than murder require *foresight of possibility of the result* (i.e., ABH) rather than *probability* of the result:
 - *Aubrey v The Queen* (2017) 260 CLR 305:
 - man infected sexual partner with HIV virus knowing he was HIV positive;
 - proceedings stayed on the question of whether “inflict” in now-amended s 35(1)(b) means immediate GBH (or a later infection) – prosecution appealed;
 - HCA also asked whether recklessness in s 35 (and elsewhere in aggravated assault charges), the prosecution must prove foresight of probability of the consequence or only possibility;
 - HCA decided recklessness only requires establishing foresight of possibility of the consequence (differs from murder: *Crabbe* (foresight of probability of death or grievous bodily harm))
 - See bizarre decision of the HCA last year on the Victorian equivalent: *DPP Reference No. 1 of 2019* [2021] HCA 26 (4-3 found Victorian courts are applying the wrong test but it is for Parliament to “fix” the legislation)



Assaults: types of harm

- **Common assault** (even on indictment): contact that does not result in actual bodily harm (though you can still charge or accept pleas to this charge where ABH results...)

Whether there is ABH, wounding or GBH (or none of these) is a question of fact

- We are concerned with the injury itself and its direct physical effects, not the personal and social economic consequences of that injury (*Swan v R* [2016] NSWCCA 79)
- **Actual bodily harm**: “any hurt or injury calculated to interfere with the health or comfort of the victim”: *R v Overall* (1993) 71 A Crim R 170; can include psychiatric injury – which is really a diagnosable condition (highlights the difficulty of permanency v. “routine” consequences of being a victim of a crime – how do we measure susceptibility?)
- **Wounding**: breaking of the skin (*R v Lardner*, NSWCCA unrep.); penetration of the internal layer of the skin (*McCullough v R* [2009] NSWCCA 94 [36])
- **Grievous bodily harm**: non-exhaustive examples in *Crimes Act 1900* (NSW) s 4(1); harm that is really serious (?), but need not be permanent, long-lasting or life-threatening (*Haoui* [2008] NSWCCA 209)



Assaults: types of harm (cont'd)

... Seeing this, the offender pulled out a knife from his pocket. He approached the victim from behind and struck him in the mid-section with the knife. Ms Irvine then interceded, pushing the offender away towards the other side of the lobby and a struggle ensued between her and the offender...

Police were called by a neighbour and arrived at about 1:46am. Paramedics also arrived. They observed that the victim was intoxicated. A puncture wound was observed on his upper right abdomen. The victim did not inform police or the paramedics about the stabbing. Although paramedics encouraged the victim to attend hospital, he initially refused. A few hours later, though, he attended Camden hospital, and was thereafter transferred to Liverpool Hospital. He was treated for a **wound measuring 2 cm in his chest, with surrounding bruising. A small, displaced fracture of the 9th costal cartilage (at the front of the rib cage) was identified during surgery.** The **victim was discharged two days later.**

R v Assi-Leplaw [2022] NSWDC 108

ABH, wounding or GBH (or none of these)?

- **Relevant considerations include:**
 - length of time in hospital, providing it was as a result of the wounding/injuries sustained
 - injuries of the one act can be taken together, i.e., wounding may be part of more serious injuries sustained (rising to GBH)
 - courts must be careful in sentencing when determining what injuries a defendant can be sentenced for

Assaults: types of harm (cont'd)

He assaulted his infant daughter, who was not yet 12 weeks old, at some time prior to the detection of the child's injuries in August 2019. The family were known to the Department of Family and Children Services (FACS) before the victim's birth and were subject to monitoring due to concerns about drug use in the household. On 22 August 2019, the applicant attended a departmental office to discuss housing and FACS employees noticed bruising on the victim's face. Police were notified and the child was removed for a full medical examination. The examination revealed multiple rib fractures in various stages of healing... The injuries were treated conservatively and the child, I am told, is expected to make a full recovery...

CW v R [2022] NSWCCA 50

ABH, wounding or GBH (or none of these)?

- **Relevant considerations include:**
 - detection of the injuries at a much later time from infliction no bar to concluding type of harm
 - full recovery will not exclude GBH
 - indeterminate cause of injuries no bar to finding of ABH, wounding or GBH

Assaults: types of harm (cont'd)

[The defendant] excised the labia minora of AA with her consent. There was no dispute as to the actions of Russell, the only issue was whether the procedure was in breach of s 45 (prohibition of female genital mutilation)...

[The defendant] caused grievous bodily harm (s 33(1)(b)) when he performed a 'tummy tuck' on BB **cutting into the skin of the abdomen and removing fatty tissue**. Following the procedure BB was in **extreme pain with ongoing bleeding**. She needed **corrective surgery to repair the damage**, leaving her with a **low scar from hip to hip**... original procedure was a really serious cutting of the complainant's skin and flesh in a 20 centimetre by 6 centimetre elliptical form. The procedure included cutting of the complainant's abdominal fascia

R v Russell [2021] NSWDC 782

ABH, wounding or GBH (or none of these)?

- **Relevant considerations include:**

- subsequent medical intervention was “relatively significant”; original wound resulted in significant scar; scar from subsequent (corrective) surgery casually connected (and capable of being taken into account as the injury suffered)
- indeterminate cause of injuries no bar to finding of ABH, wounding or GBH



Assaults: death of a foetus (*Crimes Act 1900* (NSW) s 54A)

- Essentially, the prosecution prove a GBH offence (ss 33, 35, 35A (although not likely), 39 & 54) with an additional consequence causes the loss of a foetus of a pregnant woman (s 54A(1)(b))
- Prosecution does not have to prove the defendant knew or ought to reasonably have known the woman was pregnant (unless knowledge is the element of the GBH provision relied on)
- In other words, for intent to cause GBH (s 33), the prosecution must prove the defendant intended to cause GBH – for a s 54A charge, the GBH is the death of the foetus; if the defendant intended to cause that specific type of harm, the prosecution must prove the defendant knew the woman was pregnant
- Injuries to the pregnant woman can found separate charges, unless the only “injury” is the death of the foetus (not without doubt)
- No case law yet – car accident victim “was about 32 weeks pregnant, had to be extricated from the front passenger seat... She had suffered a ruptured uterus, a right ulna fracture and a bilateral acetabular fracture. She underwent an emergency laparotomy, extraction of the foetus, a sub-total hysterectomy, temporary closure with review in 24 hours and then full closure. The baby was intubated immediately upon its removal but there were no signs of life, no heart rate and no response to ventilation...” (*Silvestri v R* [2016] NSWCCA 245 – dangerous driving occ GBH)



Assaults: choking, suffocation & strangulation (*Crimes Act 1900 (NSW) s 37*)

- Three different offences in s 37:
 - Intentionally chokes, suffocates or strangles another (conduct) without consent (circumstance): s 37(1A)
 - Intentionally chokes, suffocates or strangles another (conduct) rendering that person unconscious, insensible or incapable of resistance (consequence), and being reckless as to so doing (reckless – fault element for consequence): s 37(1)
 - Intentionally chokes, suffocates or strangles another (conduct) rendering that person unconscious, insensible or incapable of resistance (consequence), done with the intention of enabling themselves to commit (or assist another to commit) an indictable offence (ulterior intention – fault element attaching to the consequence): s 37(2)
- NSWCCA declared “intentionally chokes” means to apply pressure to the neck so as to be capable of affecting the breath or the flow of blood to or from the head: *GS v R; Director of Public Prosecutions (NSW) v GS* [2022] NSWCCA 65
- Suffocates/strangles have different meanings? Can you consent to a choking in s 37(1)?

Consenting to harm: *Brown* [1994] 1 AC 212

- Facts:
 - group of young men engaging in sadomasochistic activities (for 10+ years)
 - not some form of rough sex, rather grave acts of violence that occasioned injuries meeting the definition of GBH (i.e., testicle clamps, piercing urethras, bloodletting, branding)
- Lord Templeman:
 - difference between violence incidental to an activity and an activity whose end is violence – sadomasochism is not only concerned with sexual gratification
 - significant that the defendants were not also the victims; but we criminalise other activities that risk serious self-harm
 - Defendants' acts were “*unpredictably dangerous*” and “*breed and glorify cruelty*”
 - “*Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised*”



Consenting to harm: *Brown* [1994] 1 AC 212 (cont'd)

- Lord Mustill (in dissent):
 - “*matter of public policy*” that certain acts are essentially too violent
 - invited Parliament to consider whether infliction of violence comprising something less than GBH should be criminal where consensual and done for some end meaningful to the recipient
 - struggled to distinguish boxing and sadomasochism (*cf BM* [2018] EWCA Crim 560 – act “*produces some discernible social benefit*”, such as entertainment)
- Resolution:
 - 3-2, appeals against convictions dismissed

Consenting to harm: *Brown* [1994] 1 AC 212 (cont'd)

- In Australia:
 - *R v Stein* [2007] VSCA 300: nature of the sexual violence rendered the deceased unable to withdraw consent or articulate distress, cf *Neal* (2011) 32 VR 454: consent to actual BH not GBH
 - *R v McIntosh* [1999] VSC 358: erotic asphyxiation (wife strangled husband as part of sex act), but the execution was off and he was killed; guilty of dangerous act manslaughter, but sentencing judge made clear the sentence was “*not based on any moralistic response to the sexual predilections of those involved in bondage*”
- And subsequent cases in the UK have sought to distinguish *Brown*, likening some practices akin to tattooing, rather than sadomasochistic activity: *Wilson* [1997] QB 47



Consenting to harm: *Brown* [1994] 1 AC 212 (cont'd)

- Consider the facts in a recent decision of the Irish Supreme Court – *DPP v Brown* [2018] IESC 67:
 - offender claims he struck a fellow prisoner with a mug in a sock as part of a plot between the two for the victim to be transferred to another prison (which may have followed from the assault)
 - the Supreme Court’s decision ultimately turned on whether “without consent” was an element of the relevant offence in Irish law – which it found that it wasn’t – and whether that question should be put to the jury
- How would you distinguish the two *Browns*? Would the end not justify the means in this case?



Consenting to harm: *Brown* [1994] 1 AC 212 (cont'd)

“Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised”

In breakout groups:

- How does Lord Templeman’s observation sit with boxing activities or other violent sports?
- Is *Brown* inherently homophobic? Would similar decisions likely be made today?
- No-one reported the activities – police happened upon it. Is this something that warrants attention (i.e., no complaint)? Compare *Stein* and *McIntosh* where there is a dead body.
- *“The criminal trial process is inapt to enable a wide-ranging inquiry into the underlying policy issues, which are much better explored in the political environment”* (BM [2018] EWCA Crim 560). Should it be left to courts to decide the categories that are exceptions? Or should Parliament provide clear parameters re consent?



Readings for next class: Domestic violence & Sexual Assault

- Brown et al: pp 663-77; 682-721; 737-46

