BASIC PRINCIPLES OF ASSAULT LAW IN NEW SOUTH WALES
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INTRODUCTION

Assault offences are the second most common type of offence seen in the Local Court of New South Wales, (being second only to drink/drug driving offences); and the most frequently seen type of offence in the Children's Court of New South Wales (closely followed by property damage offences). (NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2011*, p3; 8). Hence, having a comprehensive understanding of the basic principles of assault law is fundamental for a lawyer practicing in either of these jurisdictions.

At common law, the offence of Assault developed historically alongside the distinct offence of Battery. The distinction between the two was noted in *Darby v DPP* (2004) 61 NSWLR 558 per Giles JA, that;

> "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. There can be an assault without a battery, and there can be a battery without an assault".

However, the two offences have essentially emerged into one offence, and the use of the word 'assault' in the *Crimes Act 1900* (hereafter referred to as "the Act") includes both forms of assault. (Brown D, Farrier, D, Egger, S, McNamara L, Steel, A, Grewcock, M and Spears, D, *Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales*, 5th Edition, 2011 at 646). However, Giles JA noted in *Darby* that as between the two offences, "the distinction remains, and must be recognized". (at 71-72)

The offence of Assault at common law is a ‘catch all’ offence, which can potentially extend to the merest application of any degree of force at all. On the other hand, the various specific provisions created relating to personal violence, other than the offence of Common Assault under section 61, relate to specific categories of offence. (See the *Model Criminal Code Committee; Model Criminal Code, Chapter 5, Fatal Offences Against the Person Report* 1998).

STATUTORY COMMON ASSAULT

The intrinsic provision of assault law in New South Wales is contained in section 61 of the Act, Common Assault. Section 61 reads.

61 Common Assault Prosecuted by Indictment

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

Section 61 is a building block offence, with numerous other assault offences contained in the Act incorporating the element of an assault, combined with certain other elements. To compartmentalize an assault, the offence can be summarized as follows;

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, realizes that his or her conduct may do so, and persists with it.

See *Edwards v Police* (SA) (1998) 71 SASR 493 (Debelle J) at 495.

An assault is thus any act which intentionally or recklessly causes another person to apprehend **immediate and unlawful violence**. *R v Venna* [1976] QB 421.

In *Pemble v R* [1971] HCA 20, Owen J cited the following statement on the law of assault in *Russell on Crime*, 12th ed. (1964), vol. 1, at p. 652 :

> "An assault, as distinct from battery, is a threat by one man to inflict unlawful force (whether light or heavy) upon another; it constitutes a crime at common law when the threatener, by some physical act, has intentionally caused the other to believe that such force is about to be inflicted upon him. The actus reus of assault thus consists in the expectation of physical contact which the offender creates in the mind of the person whom he threatens. The mens rea consists in the realization by the offender that his demeanour will produce that expectation; As the gist of the crime lies in the effect which the threat creates upon the mind of the victim it is plain that on principle it can make no difference if the threatener in fact is quite unable to carry out the threat, provided the victim does not know this, but believes that the threat is about to be implemented."

IMMEDIACY

The threat must be immediate, and it is insufficient that the threat raises an apprehension of unlawful violence at some future time. In *R v Knight* (1988) 35 A Crim R 314, Lee J noted that;

> “The expression is, “apprehend immediate violence”, not “immediately apprehends violence”.

ASSAULT BY WORDS ALONE

In relation to an assault constituted by words alone, in *Zanker v Vartzokas* (1988) 34 A Crim R 11 (SASC), it was held that the relevant test is ‘how immediate must the threatened physical violence be after the utterance of the threat which creates fear” (per White J).

PROXIMITY

In *R v Ireland* [1997] UKHL 34; [1998] AC 147, where psychiatric injury was inflicted through silent telephone calls, Lord Hope concluded:

> "As the Supreme Court of Victoria held in *Reg. v Salisbury* [1976] VicRp 45; [1976] VR 452, it is not a necessary ingredient of the word 'inflict' that whatever causes the harm must be applied directly to the victim. It may be applied indirectly, so long as the result is that the harm is caused by what has been done. In my opinion it is entirely consistent with the ordinary use of the word 'inflict' in the English language to say that the appellant's actions 'inflicted' the psychiatric harm from which the victim has admittedly suffered in this case" (at 164 - 5).

As assault cannot occur unless or until the victim is aware of the accused’s actions. *Pemble v R* (1971) 124 CLR 107 at 123; 134;141.

However, an assault against a person can extend beyond the physical boundary of the person to the person’s clothing, as this is considered to be intimately connected with a person. *R v Day* (1845) 1 Cox 207; *R v Thomas* (1985) 81 Cr App R 331 at 334.

COINCIDENCE OF ACTUS REUS AND MENS REA

The actus reus and the mens rea of an assault must coincide with each other at the same time. However, the mens rea does not need to be present at the

time of the commencement of the actus reus. It can be superimposed onto an existing act. In *Fagen v Commissioner of Metropolitan Police* [1969] 1 QB 439 James J noted at 445;

> "the 'mens rea' is the intention to cause the effect. It is not necessary that mens rea should be present at the inception of the actus reus; it can be superimposed upon an existing act. On the other hand the subsequent inception of mens rea cannot convert an act which has been completed without mens rea into an assault".

INTENT

In the absence of admissions, a person's intent can be established only by inference drawn from the facts. The mental state of an accused may be inferred from their conduct. *Thomas v The Queen* [1960] HCA 2; 102 CLR 584 at 596; *Vallance v The Queen* [1961] HCA 42; (1961) 108 CLR 56 at 82. In *Kural v The Queen* (1987) 162 CLR 502, Mason CJ, Deane and Dawson JJ said;

> "the existence of the requisite intention is a question of fact and that in most cases the outcome will depend on an inference to be drawn from primary facts found by the tribunal of fact. "

RECKLESS ASSAULT

Recklessness in terms of assault is established where the accused foresees the likelihood of inflicting injury or fear, and ignores the risk. *Vallance v R* (1961) 108 CLR 56.

In *Pemble v R* [1971] HCA 20, Barwick CJ noted at [23] that;

> "it is of paramount significance to observe that recklessness to be relevant involves foresight of or, as it is sometimes said, advertence to, the consequences of the contemplated act and a willingness to run the risk of the likelihood, or even perhaps the possibility, of those

> consequences maturing into actuality. This aspect of recklessness entails an indifference to a result of which at least the likelihood is foreseen. An awareness of the consequences of the contemplated act is thus essential".

The accused must foresee that his or her conduct might induce fear, and mere inadvertence to the risk is not sufficient. *Macpherson v Brown* (1975) 12 SASR 184. The notion that recklessness can be established objectively, or by what a reasonable person would foresee (rather than by what the accused actually foresaw) was rejected by the High Court in *Parker* (1963) 111 CLR 610 per Dixon CJ at 632-633 (in rejecting the hitherto held maxim that "a man is presumed to intend the reasonable consequences of his act").

Recklessness is undefined in the Act, other than to elaborate on the common law definition.

4A Recklessness

> *For the purposes of this Act, if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge.*

'LAWFUL' ASSAULT

The law of assault, however, has developed historically so that certain forms of human behaviour that may constitute an assault, are tolerated. Frequently, an act which would otherwise be considered an 'assault' is tolerated as it forms part of the exigencies of everyday life; on the basis that the contact invokes implied consent, or constitutes physical contact which is tolerated as part of the conduct of daily life. *Collins v Wilcock* (1984) 1 WLR 1172.

In *DPP v JWH* (unreported, NSWSC, 17 October 1997), Hulme J noted;

> "force is not unlawful if it falls within what may be regarded as an incident of ordinary social intercourse such as patting another on the shoulder to attract attention or pushing between others to alight from a crowded bus".

The issue of 'hostile intent' has little relevance in assault law, other than in the case of force inflicted in this category. In *Broughey* (1986) 161 CLR 10, Mason, Wilson and Deane JJ noted that:

> "It has never…been the common law that actual hostility or hostile intent towards the person against whom force is intentionally applied is a necessary general ingredient of an unlawful battery. Where the existence of hostility or hostile intent may be of decisive importance is in a case [in] which….that hostility or hostile intent may convert what would otherwise be unobjectionable as an ordinary incident of social intercourse into battery at common law or an assault".

In *Brown* [1994] 1 AC 212, Lord Mustill (in the minority) isolated several distinct varieties of human conduct involving violence which formed exceptions to unlawful assault (for example, prize fighting, sparring and boxing; contact sports; surgery; lawful correction; dangerous pastimes, bravado, religious mortification; rough horseplay; prostitution).

As to lawful violence in sport, in *R v Stanley* (unreported, NSWCCA, 7 April 1995), Levine J said;

> " in an organized game of rugby league the players consent to acts of violence and acts of substantial violence, and the risks of injury, from the minor to the serious, flowing therefrom, provided that those acts occurred during the course of play in accordance with the rules and usages of the game. Players are not to be taken as consenting to the malicious use of violence intended or recklessly to cause grievous bodily injury. The policy of the law will not permit the mere occasion of a rugby league match to render innocent or otherwise excuse conduct

which can discretely be found, beyond reasonable doubt, to constitute a criminal offence."

Perhaps of greatest significance on the issue of lawful assault, is the issue of self defence, which is discussed below.

OMISSIONS

At common law, an assault cannot be committed by an omission to act. *Fagen v Commissioner of Metropolitan Police* [1969] 1 QB 439 at 444.

ACTUAL BODILY HARM

At common law, actual bodily harm "has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient or trifling". *R v Donovan* [1934] 2 KB 498.
Actual bodily harm can include psychiatric injury, excluding mere emotions such as fear or panic, or states of mind that were not themselves evidence of some identifiable clinical condition*. R v Chan Fook* [1994] 2 All ER 552; [1994] 1 WLR 691 at 696 (applied in *Lardner* (unrep) NSWCCA 10 September 1998).

Section 59 of the Act contains the offence of Assault Occasioning Actual Bodily Harm.

59 Assault occasioning actual bodily harm

(1) Whosoever assaults any person, and thereby occasions actual bodily harm, shall be liable to imprisonment for five years.

(2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in the company of another person or persons. A person convicted of an offence under this subsection is liable to imprisonment for 7 years.

The offence thus requires that there to be an assault, which is the principal element of the offence. Where as a consequence of an assault, actual bodily harm is occasioned, the offence is complete. In *R v Williams* (1990) 50 A Crim R 213 at 221, the following statement from the South Australian case of *Percali* (1986) 42 SASR 46 was extracted (it having been approved by the High Court in *Coulte*r (1988) 164 CLR 350 per Mason CJ, Wilson and Brennan JJ);

> "the mental element of this crime consists in the intention to apply unlawful force, that is to say, commit an assault, but that it is not necessary for the prosecution to establish that the offender intends to occasion actual bodily harm. The test as to whether bodily harm has been occasioned by the assault is, in my view, on the established principles, entirely objective."

WOUNDING

Wounding is defined as the cutting of the interior layer of the skin, the dermis. A cut to the epidermis is insufficient. *R v Smith* (1837) 8 C & P 173. An internal hemorrhage will not suffice. A wound may be inflicted by a fist and a split lip is sufficient (although only in the most technical sense) *R v Shepherd* [2003] NSWCCA 351.

In cases which involve an element of wounding, section 35(3) or (4) of the Act are frequently invoked. These sections read as follows;

35 Reckless grievous bodily harm or wounding

> *(3) Reckless wounding-in company - A person who, in the company of another person or persons:*
>
> *(a) wounds any person, and*
>
> *(b) is reckless as to causing actual bodily harm to that or any other person,*

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(4) Reckless wounding - A person who:

(a) wounds any person, and

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

is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

GRIEVOUS BODILY HARM

The concept of grievous bodily harm is defined at common law, and under section 4 of the Act. At common law, grievous bodily harm requires that the relevant injury be a 'really serious one'; but does not require that the injury be permanent or the consequences of the injury are long lasting or life threatening. *Haoui v R* [2008] NSWCCA 209. Grievous Bodily Harm is defined under section 4 of the Act to include;

(a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm (also see R v King (2003) 59 NSWLR 472; 139 A Crim R 132; [2003] NSWCCA 399), and;

(b) any permanent or serious disfiguring of the person, and;

(c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).

Offences involving grievous bodily harm or wounding are brought under section 35(1) or (2), and section 33 of the Act.

35 Reckless grievous bodily harm or wounding

(1) Reckless grievous bodily harm-in company 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.

Maximum penalty: Imprisonment for 14 years.

(2) Reckless grievous bodily harm A person who:

(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.

Maximum penalty: Imprisonment for 10 years.

33 Wounding or grievous bodily harm with intent

(1) Intent to cause grievous bodily harm A person who:

(a) wounds any person, or

(b) causes grievous bodily harm to any person,

with intent to cause grievous bodily harm to that or any other person is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

(2) Intent to resist arrest A person who:

(a) wounds any person, or

(b) causes grievous bodily harm to any person,

with intent to resist or prevent his or her (or another person's) lawful arrest or detention is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

(3) Alternative verdict If on the trial of a person charged with an offence against this section the jury is not satisfied that the offence is proven but is satisfied that the person has committed an offence against section 35, the jury may acquit the person of the offence charged and

find the person guilty of an offence against section 35. The person is liable to punishment accordingly.

The offences against sections 33 and 35 consist of the various elements discussed above. However, the offence against section 33 involves the further issue of specific intent (an intention to cause the respective outcome).

ASSAULTS AGAINST POLICE OFFICERS

Sections 58 and section 60 of the Act create two common offences of assaulting officers in the execution of duty. Both offences are common in New South Wales, in part because each provision creates numerous distinct offences. Broken down to their constituent elements, the offences read;

58 Assault with intent to commit a serious indictable offence on certain officers

Whosoever:

assaults any person with intent to commit a serious indictable offence,

or

assaults, resists, or wilfully obstructs any officer

while in the execution of his or her duty,

such officer being a constable, or other peace officer, custom-house officer, prison officer, sheriff's officer, or bailiff, or any person acting in aid of such officer,

or

assaults any person, with intent to resist or prevent the lawful apprehension or detainer of any person for any offence,

shall be liable to imprisonment for 5 years.

60 Assault and other actions against police officers

(1) A person who assaults, throws a missile at, stalks, harasses or intimidates a police officer while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years.

(1A) A person who, during a public disorder, assaults, throws a missile at, stalks, harasses or intimidates a police officer while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 7 years.

(2) A person who assaults a police officer while in the execution of the officer's duty, and by the assault occasions actual bodily harm, is liable to imprisonment for 7 years.

(2A) A person who, during a public disorder, assaults a police officer while in the execution of the officer's duty, and by the assault occasions actual bodily harm, is liable to imprisonment for 9 years.

(3) A person who by any means:

(a) wounds or causes grievous bodily harm to a police officer while in the execution of the officer's duty, and

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

is liable to imprisonment for 12 years.

(3A) A person who by any means during a public disorder:

(a) wounds or causes grievous bodily harm to a police officer while in the execution of the officer's duty, and
(b) is reckless as to causing actual bodily harm to that officer or any other person,
is liable to imprisonment for 14 years.

(4) For the purposes of this section, an action is taken to be carried out in relation to a police officer while in the execution of the officer's duty, even though the police officer is not on duty at the time, if it is carried out:
(a) as a consequence of, or in retaliation for, actions undertaken by that police officer in the execution of the officer's duty, or
(b) because the officer is a police officer.

Resistance implies the use of force to oppose some course of action which the person being resisted is attempting to pursue; *R v Galvin* (No 2) [1961] VR 740 at 749. If the act being resisted is not lawful, then any resistance will not constitute an offence unless it exceeds what is necessary for the purpose of justifiable resistance. *R v Ryan* (1890) 11 LR (NSW) 171.

Willful obstruction implies an act which may fall short of an assault, but which interferes with the lawful execution of the duties of an officer. *Davis v Lisle* [1936] 2 KB 434.

To amount to an offence, the officer concerned must be acting in the execution of duty. This does not require knowledge of that fact on the part of the accused be established. *R v Reynhoudt* (1962) 107 CLR 381. It has been held that a police officer acts in the execution of his or her duty from the moment they embark upon a lawful task connected with their functions as a police officer and continues to act in the execution of that duty as long as he is engaged in the task provided he does not do anything outside the ambit of that duty so as to cease to be acting therein. *R v K* (1993) 118 ALR 596.

THREAT OF UNLAWFUL VIOLENCE – AFFRAY

The offence of Affray is contained in section 93C of the Act as follows;

93C Affray

> *(1) A person who uses or threatens unlawful violence towards another and whose conduct is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety is guilty of affray and liable to imprisonment for 10 years.*
> *(2) If 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).*
> *(3) For the purposes of this section, a threat cannot be made by the use of words alone.*
> *(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.*
> *(5) Affray may be committed in private as well as in public places.*

Violence is relevantly defined as follows;

93A Definition

> *"violence" means any violent conduct, so that:*
>
> *(a) except for the purposes of section 93C, it includes violent conduct towards property as well as violent conduct towards persons, and*
> *(b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).*

The mental element for the offence of Affray is similarly defined;

93D Mental element under sections 93B and 93C

(1) A person is guilty of riot only if the person intends to use violence or is aware that his or her conduct may be violent.
(2) A person is guilty of affray only if the person intends to use or threaten violence or is aware that his or her conduct may be violent or threaten violence.

The offence of Affray, although involving the threat or use of unlawful violence, is not an offence of personal violence, but is rather an offence against public order. In *Khanwaiz, Shajeel v R; Khanvez, Noman v R; Khanwaiz, Zeeshan v R* [2012] NSWCCA 168 (16 August 2012), Beech-Jones J (with Basten JA and Harrison J agreeing) noted (at 50);

> " Further the significance of the distinct element of the affray charge, namely the effect of the attack upon persons at the scene, cannot be understated. Offences such as s 93C have a wider focus that just the impact on the direct victim of the unlawful violence. Section 93C is located within Part 3A of the *Crimes Act* which deals with public order. Attacks of the kind participated in by Noman can undermine the public's confidence in the security of their streets and homes".

In *Colosimo and Ors v Director of Public Prosecutions* (NSW) [2005] NSWSC 854, Johnson J extracted the following general principles in relation to Affray, derived from the development of the offence in New South Wales and the United Kingdom.

- If two or more persons use or threaten unlawful violence, the conduct of those persons may be taken together and considered for the purpose of determining whether an offence of affray has been committed. (at 19)
- Self defence is available to a charge of affray. (at 20).
- Common purpose is not essential to constitute an affray. (at 29;50)
- Citing *R v Smith* [2007] EWHC 1836; [1997] 1 Cr App R 14, the offence;

"typically…involves a continuous course of conduct, the criminal character of which depends on the general nature and effect of the conduct as a whole and not on particular incidents and events which may take place in the course of it." (at 51)

• Even though the identification of individual acts may not be possible where a large number of people are involved, this does not preclude a conviction for affray. The elements of the offence may be satisfied where a finding is open that the accused has engaged in unlawful violence, even where the specific acts cannot be identified. (at 89)

In considering how to defend an affray charge, the concept of unlawful violence raises a range of issues that are also relevant in assault matters, for example, consent, self defence, and given the dynamics of many affray matters (the number of people involved and the circumstances) identification.

SELF DEFENCE

At common law, violence inflicted in self defence is not unlawful violence. *Zecevic v Director of Public Prosecutions* (Vic) [1987] HCA 26. Section 418 of the Act codifies the law of self defence;

418 Self-defence-when available

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
(a) to defend himself or herself or another person, or
(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
(c) to protect property from unlawful taking, destruction, damage or interference, or
(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

419 – Self Defence – Onus of Proof

In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

In *R v Katarzynski* [2002] NSWSC 613 (9 July 2002) Howie J summarized the test in self defence matters as follows (at 22-23);

> "Where there is evidence raising self defence…The questions to be asked by the jury under s 418 are: (i) is there is a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and, (2) if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.
>
> The first issue is determined from a completely subjective point of view considering all the personal characteristics of the accused at the time he or she carried out the conduct. The second issue is determined by an entirely objective assessment of the proportionality of the accused's response to the situation the accused subjectively believed he or she faced. The Crown will negative self-defence if it proves beyond reasonable doubt either (i) that the accused did not genuinely believe that it was necessary to act as he or she did in his or her own defence or (ii) that what the accused did was not a reasonable response to the danger, as he or she perceived it to be".

In a case where self defence is the issue, the first question is whether self defence is raised on the prosecution case. If it is, the prosecution have an

obligation to negative it, beyond reasonable doubt. As to whether self defence has been raised on the evidence, although involving an analysis of the evidence, this is a question of law, and not of fact. *R v Burgess and Saunders* [2005] NSWCCA 52 per Adams J (Hislop J and Newman AJ agreeing).

CONSENT

The issue of consent is frequently considered in assault matters. For an act to be an assault there must be a want of consent, and an assault with consent is no assault at all. *R v Bonora* (1994) 35 NSWLR 74 (NSWCCA) at 78 per Abadee J. Want of consent is not a factor, however, that the prosecution must negative. The prosecution have no obligation to call evidence in order to negative consent. *R v Wilson* [1985] 2 QD R 420 at 421. The prosecution have an obligation, in order to establish a prima facie case, to call evidence of unlawful violence, that is, violence which is not consensual.

Those who enter into a consensual fight with intent to inflict actual bodily harm, however, are guilty of an assault. *R v Coney* (1982) 8 QBD 534. The policy basis for this distinction is that some types of harm involve public, and not just private interests; *Department of Health and Community Services (NT) v JWB (Marion's Case)* (1992) 175 CLR 218 at 233.

However, it has been held that the question of whether consent can be relevant in the case of the infliction of actual bodily harm depends on the particular circumstances of the case and whether the act of the accused should be considered in the public interest as being criminal. In *R v Wilson* [1996] 3 WLR 125; (1996) 3 Crim LN 61 [609], where the subject behaviour was the branding by a husband of his initials on his wife's buttocks (which was held to be lawful) Russell LJ said;

> "does public policy or the public interest demand that the appellant's activity should be visited by the sanctions of the criminal law? The majority in *Reg v Brown* clearly took the view that such considerations were relevant. If that is so, then we are firmly of the opinion that it is not

> in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution". .

In *Brown* [1994] 1 AC 212, however, the engagement of a group of people in extreme, consensual, sadomasochistic activities was deemed unlawful by a 3:2 majority in the House of Lords, with Lord Templeman in the majority stating;

> "society is entitled to and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized".

The House of Lords decision was upheld by the European Court of Human Rights in *Laskey, Jaggard and Brown v United Kingdom* (19 February 1997), which held that the level of harm to be tolerated where the victim consents is a matter for the state, and rejected the contention that the behaviour formed part of a private morality, which is not the state's business to regulate. (see Brown D, Farrier, D, Egger, S, McNamara L, Steel, A, Grewcock, M and Spears, D, *Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales*, 5th Edition, 2011 at 663).

MENTAL ILLNESS

The provisions of the *Mental Health (Forensic Provisions Act) 1990* (in particular Part 3 in relation to summary proceedings) should be well known to defence lawyers. Broadly, the Part creates diversionary regimes for persons suffering from mental disorders. However, the common law defence of mental illness remains applicable in defended summary proceedings. Under section 38 of the *Mental Health (Forensic Provisions) Act 1990,* where a person is found to be suffering from a mental illness a jury can return a special verdict

of not guilty on the basis of that mental illness. The provision applies to a trial by jury.

However, the section does not override or replace the existing common law defence of mental illness. It is an ordinary rule of statutory construction that a statute is not read to affect the common law to a greater extent than its expressions clearly indicate, as there is no presumption that a statute is intended to override the common law. *Bishop v Chung Brothers* [1907] HCA 23 per Griffith CJ. The common law defence of mental illness thus remains applicable to summary proceedings.

The term mental illness is not defined in the *Mental Health (Forensic Provisions) Act 1990*. To be 'mentally ill' is to suffer from a defect of reason, from a disease of the mind, so that a person does not know the quality and nature of the physical act he or she commits, or alternatively, if he or she does know, that he or she did not know that what he or she is doing, was wrong. *Regina v M'Naghten* (1843) 8 ER 718.

In order to establish the defence of mental illness, three matters must be proven. Firstly that at the time of committing the act the accused was labouring under a defect of reason, from disease of the mind; secondly, that as a result, the accused did not know the nature and quality of the act that he was doing, thirdly, if the accused did know of the nature and quality of the act, he did not know that what he or she was doing was wrong. *R v McNaghten (1843) 8 ER 718*.

In establishing whether or not a person is suffering from mental illness, the onus of proof lies on the accused person, to be proven on the balance of probabilities *Mizzi v The Queen* (1960) 105 CLR 659.

It does not matter whether the disease of the mind which brings about the defence of mental illness is curable or incurable, temporary or permanent (*R v Porter* (1933) 55 CLR 812 at 187-188; *R v Kemp* [1957] 1 QB 399 at 407; *R v Quick* [1973] QB 910 at 918.

The defence of mental illness is still available even thought the psychotic episode was brought about by the accused use of drugs. Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. The law takes no account of the cause of insanity. If actual insanity, permanent, or temporary, in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. *R v Stones* (1955) 56 SR (NSW) 25 at 29 per Street CJ, Roper CJ in Eq and Herron J.

LAWFUL CORRECTION

Under the common law, parents were entitled to use reasonable and moderate force to chastise their children. The use of force in schools has been rescinded, with section 35(2A) of the *Education Act 1990* banning corporal punishment in government schools, and 47(h) in respect of non-government schools. However, the specific defence of lawful correction in respect of parents remains.

61AA Defence of lawful correction

> (1) In criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the punishment of the child, but only if:
>
> > (a) the physical force was applied by the parent of the child or by a person acting for a parent of the child, and
> > (b) the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances.

(2) The application of physical force, unless that force could reasonably be considered trivial or negligible in all the circumstances, is not reasonable if the force is applied:

(a) to any part of the head or neck of the child, or
(b) to any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period.

(3) Subsection (2) does not limit the circumstances in which the application of physical force is not reasonable.

(4) This section does not derogate from or affect any defence at common law (other than to modify the defence of lawful correction).

CONCLUSION

The idea that personal harm should be prohibited in human society has existed since at least the pronouncement of the 5th Commandment ('Thou Shalt Not Kill'), and probably before depending on the historical context. It can be seen that the current law of assault is derived from centuries of jurisprudence, confirmed over time and crystallized as the current law.

Accordingly, this paper has in no way sought to 'reinvent the wheel' on assault law, but has sought to simply provide an overview for the busy Local Court list lawyers of New South Wales, so as to better grasp the fundamental concepts of assault, and the principles relevant to assault cases frequently encountered.

The writer would therefore value any further input on issues, novel or otherwise, that have been encountered in assault cases. By sharing these experiences, other lawyers doing Local Court assault work can better develop a subconscious 'heads up' when similar issues confront them, possibly on a

day of having to do multiple hearings with minimal preparation time and even more minimal instructions, somewhere in Western New South Wales.

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