

## **Criminal Law Guidebook Second Edition – Chapter 5: Assault and Aggravated Assault**

**The following is a suggested solution to the problem question on page 124. It represents an answer of an above average standard.**

**Please note:** Page XIII indicated that this problem solution would be presented in a grid format. However, due to the nature of this content, it was decided that a traditional narrative form would be more effective.

- 1) The first issue is whether the conduct of Mitch at the villa amounts to an assault upon Rachael.

If this incident occurred in New South Wales or Victoria where the common law applies, an assault is any act committed intentionally or recklessly which causes another person to apprehend immediate and unlawful violence<sup>1</sup>. The words used by Mitch, 'You'll regret this. I'll make sure you pay for humiliating me', coupled with the gesture of running his right index finger slowly across his neck, are threatening and Rachael may have a fear of future physical harm from Mitch. It is strongly arguable, however, that this is not sufficient to satisfy the requirement that Mitch induced a fear of immediate violence in his victim. Mitch actually moved out of the villa and although he regularly sat parked in his car outside the villa and followed Rachael about over the ensuing weeks, there is no evidence that Rachael was subject to the physical control of Mitch such that there was a continuing threat from this initial action with Mitch in a position of dominance<sup>2</sup>. It is unlikely that the police would charge Mitch with assault as a result of this initial incident in those jurisdictions where the common law applies.

If this incident occurred in the South Australia, s 20(1)(c) *Criminal Law Consolidation Act 1935* would apply and Mitch may be charged with the assault of Rachael based on a threat to apply force, that is, the words accompanied by the 'throat cutting' gesture, which gave Rachael reasonable grounds to believe that there was, at least, a real possibility that Mitch would carry out the threat. This belief is given substance by the actions of Mitch after he moves out of the villa and there is a heightening in Rachael's fears for her safety over time. Accordingly, in South Australia, the police would be more likely to charge Mitch with assault arising from this initial incident. Mitch would be liable to a higher penalty because the assault is aggravated by the fact that he committed it knowing that Rachael was his spouse or domestic partner<sup>3</sup>.

The next incident raising an issue of assault is where Mitch spits at Rachael following her confronting him outside the restaurant. Returning to the common law, contacting another by spitting on them has been held to constitute an unlawful application of force or a battery<sup>4</sup>. In this instance there is evidence of unlawful contact (or a battery) as Rachael wiped the spittle

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<sup>1</sup> *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *Zanker v Vartzokas* (1988) 34 A Crim R 11; *R v Williams* (1990) 50 A Crim R 213.

<sup>2</sup> *Zanker v Vartzokas* (1988) 34 A Crim R 11, 11-18.

<sup>3</sup> *Criminal Law Consolidation Act 1935* (SA) s 5AA(g)(i) or (ii).

<sup>4</sup> *R v Cotesworth* (1704) 87 ER 928; *DPP v JWH* (Unreported, SC(NSW), 17 October 1997), Hulme J; *Stenecker v Police* (2014) 120 SASR 18.

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from her face. It is strongly arguable that this unlawful contact is accompanied by an intention to make unlawful contact, as Mitch spat towards Rachael after she had berated him for following her. Alternatively, Mitch is, at least, reckless, in spitting in the general direction of Rachael, as he must realise the possibility of causing physical contact with her, an act to which she clearly does not consent.

In South Australia, where force is applied directly to the victim it must be intentional<sup>5</sup>, so Mitch would be charged with assault in this jurisdiction as long as intention to contact Rachael with his spittle can be established beyond reasonable doubt. It is certainly arguable that intention can be established from known facts. Alternatively, if the prosecution seeks to rely on recklessness as the mental element, then it is only open to charge Mitch with recklessly causing harm to Rachael<sup>6</sup>. In relation to this charge, however, harm must be proved and there is no evidence of physical or mental harm caused to Rachael within the meanings contained in *Criminal Law Consolidation Act 1935 (SA)* s 21. Overall, it is likely that in each jurisdiction Mitch will be charged with assault resulting from this incident.

Finally, there is the question of a charge in relation to the actions of Mitch in following Rachael after the breakdown in their relationship. These actions, watching Rachael at her home and following her to work and to the gym, continue on a regular basis over a period of weeks, and actually intensify after Rachael confronts Mitch outside the restaurant to 'leave (her) alone' and stop following her everywhere. These actions of Mitch fit clearly within the definition of stalking in each jurisdiction<sup>7</sup>.

The actions Mitch took in stalking Rachael must be accompanied by an intention to cause Rachael to fear physical or mental harm. Intent includes Mitch knowing that his conduct is likely to cause fear in Rachael<sup>8</sup>. It is strongly arguable that in constantly following Rachael to work, to leisure activities, and keeping her under surveillance at home for a number of weeks after the breakdown of their relationship, coupled with his initial threat when he left the villa and then the possible carrying around of a knife blade, illustrates that Mitch intended to cause Rachael to fear physical harm or he, at least, knew that this was likely to happen. When Rachael confronts Mitch after some weeks of his 'annoying' behaviour, she does not necessarily demonstrate fear. However, the frustration of his constant surveillance is apparent, and can be used to infer Rachael is fearful for her safety as a result of the unrelenting nature of Mitch's conduct when taken in the context of his initial threat that she would 'pay' for humiliating him. The sighting of Mitch with what Rachael thought was a silver blade in his hand, was the final catalyst for action, and her fears were heightened by this sighting. Certainly

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<sup>5</sup> *Criminal Law Consolidation Act 1935 (SA)* s 20(1)(a); *Stenecker v Police* (2014) 120 SASR 18.

<sup>6</sup> *Criminal Law Consolidation Act 1935 (SA)* s 24(2).

<sup>7</sup> *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* s 8(1); *Crimes Act 1958 (Vic)* s 21A(2)(a), (c), (f) and (g); *Criminal Law Consolidation Act 1935 (SA)* s 19AA(1)(a)(i), (ii), (v) and (vi).

<sup>8</sup> *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* s 13(1) and (3); *Crimes Act 1958 (Vic)* s 21A(3); *Criminal Law Consolidation Act 1935 (SA)* s 19AA(1)(b).

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by this stage, Mitch's intention to cause Rachael to fear physical harm is explicit and finally prompts Rachael to go to the police. Overall, it is likely that the police will charge Mitch with stalking Rachael.

In New South Wales, an alternative charge of 'intimidation' under the *Crimes (Domestic and Personal Violence) Act 2007* s 13 might be considered on the basis that the cumulative conduct of Mitch amounts to harassment of Rachael<sup>9</sup> or causes Rachael to have a reasonable apprehension of injury to herself<sup>10</sup>.

- 2) If this incident occurred in New South Wales and Mitch is charged with assault, this is a domestic violence offence<sup>11</sup>. Accordingly, an interim apprehended domestic violence order must be made by the court if the offence appears to be a 'serious offence'<sup>12</sup>. Apart from the domestic violence assault, this includes offences under s 13 as serious offences so that a charge of 'stalking' against Mitch would also be relevant to the court in determining whether it is required to make an interim order. Alternatively, Rachael can apply under Part 10 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) for a final apprehended domestic violence order against Mitch through the application notice procedure in s 52. The application notice must be served on Mitch by a police officer<sup>13</sup> and proceedings are commenced upon the filing of the application notice with the court<sup>14</sup>. The court may make an apprehended domestic violence order against Mitch under s 16 if satisfied on the balance of probabilities that Rachael has reasonable grounds to fear, and in fact fears either the commission by Mitch of a personal violence offence against her, or the engagement of Mitch in conduct which intimidates or amounts to the stalking of Rachael. The court must consider the matters set out in s 17, and in the context of Mitch's stalking and intimidatory behaviour towards Rachael to this point, it is likely that an order would be made against Mitch for a period of least 12 months<sup>15</sup> and contain terms that prohibit Mitch approaching Rachael and prohibit him from accessing her home, place of work and other specified premises, including the gymnasium<sup>16</sup>. Also, the order is taken to specify that Mitch is prohibited from assaulting, stalking and engaging in conduct that intimidates Rachael<sup>17</sup>.

In other jurisdictions, there are similar procedures for obtaining intervention or restraining orders against Mitch. In Victoria, due to the actions of Mitch against Rachael amounting to 'family violence',<sup>18</sup> it is likely that a family violence final intervention order would be made under the *Family Violence*

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<sup>9</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7(1)(a).

<sup>10</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7(1)(c).

<sup>11</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11.

<sup>12</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40(5).

<sup>13</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 55.

<sup>14</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 56.

<sup>15</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 79(3).

<sup>16</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2).

<sup>17</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.

<sup>18</sup> *Family Violence Protection Act 2008* (Vic) s 5.

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*Protection Act 2008* s 74. This intervention order would have similar prohibitions against Mitch as specified above in relation to the New South Wales order<sup>19</sup>. This order can result from the lodging of an application by Rachael as ‘an affected family member’<sup>20</sup> or a police officer<sup>21</sup>. An interim family violence intervention order can be made even if Mitch has not been served with a copy of the application if the court is satisfied that such an order is necessary to ensure Rachael’s safety pending a final decision about the application<sup>22</sup>.

In South Australia, Rachael or a police officer could make an application to the Court for an intervention order against Mitch<sup>23</sup>. Upon application, the Magistrates Court may make an intervention order if satisfied that it is reasonable to suspect that Mitch will, without intervention, commit an act of abuse against Rachael, and that the issuing of an order is appropriate in the circumstances<sup>24</sup>. Mitch has committed an act of domestic abuse against Rachael<sup>25</sup> by following her, keeping her under surveillance and loitering outside her residence and other places she frequents.<sup>26</sup> Questions of fact are determined on the balance of probabilities<sup>27</sup>. The terms of the order will be set in accordance with s 12 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) and are likely to include prohibitions in a similar vein to those specified above<sup>28</sup> when considering the procedure in other jurisdictions.

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<sup>19</sup> See above at n 16. Also, see *Family Violence Protection Act 2008* (Vic) ss 79 – 95.

<sup>20</sup> As the former domestic partner of Mitch, Rachael is a ‘family member’ – see *Family Violence Protection Act 2008* ss 8 and 9.

<sup>21</sup> *Family Violence Protection Act 2008* (Vic) ss 43 and 45.

<sup>22</sup> *Family Violence Protection Act 2008* (Vic) ss 53, 54.

<sup>23</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20(1).

<sup>24</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 6.

<sup>25</sup> A former ‘domestic partner’ of the defendant – see *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 3.

<sup>26</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(1) – (4).

<sup>27</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 28.

<sup>28</sup> See above notes 16 and 19. Also, see *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 13 – 15 in relation to additional terms that may be included in a final intervention order.