CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

ANDREW HEMMING

ASSESSMENT PREPARATION

CHAPTER 4

ACTIVE LEARNING QUESTIONS

1. What are the three alternative ways in which an assault can occur?

Assault is defined in s 245 (Qld) and s 222 (WA) in identical terms.

> 245 Definition of assault
>
> (1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an assault.
>
> (2) In this section—
>
> applies force includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.

The above definition of assault encompasses three alternative ways in which assault can occur: (1) the application of force; (2) the attempt or threat to apply force with an actual present ability to do so; and (3) the attempt or threat to apply force with an apparent present ability to do so.

2. Distinguish between common assault, assault causing bodily harm, and grievous bodily harm.

Common assault, where the fault element is intent but not a specific intent, is a baseline offence under s 335 of the *Criminal Code* (Qld) and s 313 *Criminal Code* (WA). However, assault is also an element for more serious offences relating to the severity of the injury sustained by the victim. Thus, for example, an assault that causes bodily harm constitutes a separate and more serious offence of assault occasioning bodily harm with a more severe penalty: s 339 (Qld) and s 317 (WA).

'Bodily harm' is defined in both Codes in s 1 as any bodily injury which interferes with health and comfort. This means that (a) there must be a bodily injury, and (b) the injury interferes with health and comfort. In *Scatchard v The Queen* (1987) 27 A Crim R 136 it was held that pain satisfies the second limb of the definition but not the first.

In Western Australia, the term 'bodily harm' is extended under s 1(4) to include intending to cause a person to have a disease which interferes with health or comfort.

> Section 317 (WA) Assault causing bodily harm
>
> (1) Any person who unlawfully assaults another and thereby does that other person bodily harm is guilty of a crime, and is liable —
>
> (a) if the offence is committed in circumstances of aggravation or in circumstances of racial aggravation, to imprisonment for 7 years; or (b) in any other case, to imprisonment for 5 years.
>
> Alternative offence: s. 313.
>
> S 1(1) The term *bodily harm* means any bodily injury which interferes with health or comfort.
>
> S 1(4) In this Code, unless the context otherwise indicates —
>
> > (a) a reference to causing or doing bodily harm to a person includes a reference to causing a person to have a disease which interferes with health or comfort; and
> >
> > (b) a reference to intending to cause or intending to do bodily harm to a person includes a reference to intending to cause a person to have a disease which interferes with health or comfort.

The offence of doing grievous bodily harm to another is found in s 320 (Qld), and s 297 (WA).

'Grievous bodily harm' is defined in s 1 (Qld) as:

> (a) the loss of a distinct part or organ of the body; or (b) serious disfigurement; or (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to

> endanger life, or cause or be likely to cause permanent injury to health, whether or not treatment is or could have been available.

'Grievous bodily harm' is defined in s 1 (WA) as:

> Any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health.

In WA, under sub-section 1(4)(c) and (d) the definition of grievous bodily harm is extended to causing a serious disease.

> (c) a reference to causing or doing grievous bodily harm to a person includes a reference to causing a person to have a serious disease; and
>
> (d) a reference to intending to cause or intending to do grievous bodily harm to a person includes a reference to intending to cause a person to have a serious disease.

In Queensland, grievous bodily harm is extended to the intention to transmit a serious disease to any person under s 317(b).

> 317 Acts intended to cause grievous bodily harm and other malicious acts
>
> Any person who, with intent—
>
> (b) to do some grievous bodily harm or transmit a serious disease to any person, is guilty of a crime, and is liable to imprisonment for life.

3. What is the difference between a circumstance of aggravation and a serious assault?

Circumstances of aggravation usually refer to the circumstances that surround the assault rather than the injury sustained, as exampled in s 313 (WA) below and the meaning of the relevant terms used for circumstances of aggravation and racial aggravation in s 221 and s 80I.

> Section 313 Common assault
>
> (1) Any person who unlawfully assaults another is guilty of a simple offence and is liable —
>
> (a) if the offence is committed in circumstances of aggravation or in circumstances of racial aggravation, to imprisonment for 3 years and a fine of $36 000; or (b) in any other case, to imprisonment for 18 months and a fine of $18 000.
>
> Section 221 Terms used: circumstances of aggravation
>
> (1) In this Part [Part V Offences against the person]—

circumstances of aggravation means circumstances in which —

(a) the offender is in a family and domestic relationship with the victim of the offence; or (b) a child was present when the offence was committed; or (c) the conduct of the offender in committing the offence constituted a breach of an order made or registered under the *Restraining Orders Act 1997* or to which that Act applies; or (d) the victim is of or over the age of 60 years.

Section 80I Terms used: circumstances of racial aggravation

In sections 313, 317, 317A, 338B and 444 —

circumstances of racial aggravation means circumstances in which —

(a) immediately before or during or immediately after the commission of the offence, the offender demonstrates hostility towards the victim based, in whole or part, on the victim being a member of a racial group; or (b) the offence is motivated, in whole or part, by hostility towards persons as members of a racial group.

It can be seen that the maximum penalty for an assault doubles if it is committed under circumstances of aggravation or racial aggravation. However, circumstances of aggravation are not confined to baseline offences like common assault. Hence, in s 339 (Qld) an assault occasioning bodily harm is aggravated if the offender is armed with an offensive weapon or is in company.

Serious assaults can be divided into two categories: (1) offences that require proof of a specific intent; and (2) offences made more serious because of the class of person assaulted. The distinction is based on whether the elements of common assault are sufficient for the fault element, or whether an additional element is required to be proved.

Serious assaults are governed by s 340 (Qld) and s 318 (WA). In Queensland, sub-section 340(1)(a) provides that 'any person who assaults another with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or of any other person, is guilty of a crime punishable by 7 years imprisonment'. This sub-section is an example of the first category of offence where an additional intent to common assault is required. The remaining sub-sections, namely, ss 340(1)(b)–(g) fall into the second category of serious assaults and are based on the class of person assaulted, ranging from a police officer to persons reliant on a remedial device such as a guide dog or wheelchair. The Crown is not required to prove that the defendant knew the person assaulted came within the class of persons covered in s 340, although mistake of fact under s 24 is a valid defence. If the s 24 defence is successful, then the defendant would be convicted of common assault in the alternative.

In Western Australia, serious assaults based on the class of person assaulted are covered in s 318, while assault with intent is dealt with under s 317A.

S 317A Assault with intent

> Any person who —
>
> (a) assaults another with intent to commit or facilitate the commission of a crime; or (b) assaults another with intent to do grievous bodily harm to any person; or (c) assaults another with intent to resist or prevent the lawful arrest or detention of any person, is guilty of a crime, and is liable —
>
> (d) if the offence is committed in circumstances of aggravation or in circumstances of racial aggravation, to imprisonment for 7 years; or (e) in any other case, to imprisonment for 5 years.
>
> Alternative offence: s. 313 [Common assault] or 317 [Assault causing bodily harm].

Note the alternative offence provisions if the Crown is unable to prove the necessary intent under s 317A.

4. Explain why no specific intent is required for grievous bodily harm, and why under some circumstances negligence will suffice as the fault element for both grievous bodily harm and assault causing bodily harm.

For the offence of causing grievous bodily harm, no fault element is specified. Thus, it is unnecessary for the Crown to prove a specific intention to cause grievous bodily harm. Contrast s 320 with s 317 Acts intended to cause grievous bodily harm and other malicious acts in the *Criminal Code* (Qld), where intent is specified. This means that under s 320 a person can be charged with negligently causing grievous bodily harm through the duty provisions, in the same manner as for bodily harm in *R v BBD* [2006] QCA 441. An example of negligently causing grievous bodily harm can be found in *R v Clark* [2007] QCA 168.

5. Under what circumstances will consent act as a defence to an assault?

Criminal responsibility will not arise unless the assault is unlawful, meaning it was not authorised, justified or excused by law: s 246(1) (Qld) and s 223 (first paragraph) (WA). The Crown has the burden of proving lack of consent. Examples of authorised or justified conduct would include effecting an arrest or self-defence. The definition of assault in the definition section above includes the words 'without the other person's consent'. Every time a person participates in a contact sport, there is an implied consent to the application of force provided the contact is within the rules: *R v Brown* [1993] 2 All R 75, 78. Examples of contact outside of the rules can be found in *R v Billinghurst* (1978) Crim LR 553 where a rugby player who punched an opponent and caused a fractured jaw was convicted of inflicting grievous bodily harm. A similar outcome occurred in *R v Johnson* (1986) 8 Cr App R (S) 343 for biting an ear after a tackle in a rugby match.

However, even though consent has been given, the application of force may still be unlawful: s 246(2) (Qld) and s 223 (second paragraph) (WA).

> 246 Assaults unlawful (Qld)
>
> (2) The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

PROBLEM QUESTION 1

ASSUME THE FOLLOWING FACTS

Matt and George were friendly rivals in surf life-saving competitions. One day they decided to have a private race between themselves. Matt won but George accused him of cheating. After a heated argument, George challenged Matt to 'settle it like a man' and came towards Matt with his fists raised. At first Matt backed away, but believing he had no choice other than to fight said 'OK, hit me with your best shot'. The fight developed into a wrestling match during which George bit off part of Matt's ear.

Discuss George's possible criminal responsibility assuming (a) the injury to Matt's ear fell within the definition of bodily harm; and (b) the injury fell within the definition of grievous bodily harm.

THE ISSUES

This question raises three main issues: (1) consent; (2) whether a person can consent to any level of harm; and (3) the defence of mistake of fact.

THE RELEVANT LAW

Criminal responsibility will not arise unless the assault is unlawful, meaning it was not authorised, justified or excused by law: s 246(1) (Qld) and s 223 (first paragraph) (WA). The Crown has the burden of proving lack of consent. Examples of authorised or justified conduct would include effecting an arrest or self-defence. The definition of assault in the definition section includes the words 'without the other person's consent'. Every time a person participates in a contact sport, there is an implied consent to the application of force provided the contact is within the rules: *R v Brown* [1993] 2 All R 75, 78. Examples of contact outside of the rules can be found in *R v Billinghurst* (1978) Crim LR 553 where a rugby player who punched an opponent and caused a fractured jaw was convicted of inflicting grievous bodily harm. A similar outcome occurred in *R v Johnson* (1986) 8 Cr App R (S) 343 for biting an ear after a tackle in a rugby match.

However, even though consent has been given, the application of force may still be unlawful: s 246(2) (Qld) and s 223 (second paragraph) (WA).

246 Assaults unlawful (Qld)

> (2) The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

Consent was the central issue in *Lergesner v Carroll* (1990) 49 A Crim R 51 below, where the Queensland Court of Appeal held that mistake of fact under s 24 of the Code was open in circumstances where the defendant is mistaken as to whether the victim consented.

Carroll was convicted of unlawfully assaulting Lergesner, contrary to the *Criminal Code* (Qld), s 339 Assaults occasioning bodily harm. Carroll appealed against his conviction, contending that Lergesner had consented. Carroll had claimed at trial that Lergesner had made a provocative remark to him, and that he had punched Lergesner only after an exchange between them at the end of which Lergesner had said 'let's settle it right here and now'.

The Court of Appeal held that in some cases of assault occasioning bodily harm the prosecution will, on the evidence, have to negative consent beyond reasonable doubt. Each case must be looked at in light of its own facts. The tribunal of fact must decide whether the degree of violence to the person assaulted exceeded that to which consent was given. The presence or absence of consent to the force applied is a matter for the tribunal of fact to determine on a charge under s 339. In each case it is a question of fact for the jury to determine whether consent existed and if it did exist, the precise limits of the consent. However, the presence or absence of consent, as a matter of law, is irrelevant where the force applied does grievous bodily harm or wounds. Here, consent cannot be relied upon.

> Cooper J (at 63-64)
>
> By including assault as an element in certain offences the legislature, as a policy matter, has determined that some conduct which involves the application of force to the person can be consented to. That is clear from the definition of assault in s 245 …
>
> Again for policy reasons, the legislature may determine that classes of persons are considered incapable of protecting themselves by withholding consent to conduct which in the absence of consent would be assault, eg children under a certain age, in respect of which consent is made entirely immaterial (see for example ss 210 and 215 of the *Criminal Code*).
>
> It is also clear … that the legislature has set limits in the area where a person can consent to conduct. Beyond this limit it becomes irrelevant whether the conduct involved an assault, as an incident of it, or whether it involved conduct that was consented to. Relevant examples include grievous bodily harm (s 320) and wounding (s 323).

Section 24 of the Codes provides for circumstances in which a person is not criminally responsible for an act or omission done under an honest and reasonable, but mistaken, belief in a state of things, to any greater extent than if that state of things had actually existed. It is important to understand the significance of the words 'than if that state of things had actually existed' in s 24(1). A successful

defence of mistake of fact does not necessarily lead to an acquittal, as the person is still liable for any offence encompassed by the state of things he or she believed actually existed. The excuse of mistake of fact is available to all criminal offences, unless there are other express or implied provisions which exclude it as a defence: s 24(2).

A determination as to whether the defendant held an honest (subjective) and reasonable (objective) mistaken belief requires both a subjective and objective assessment. If the defendant did not honestly hold a mistaken belief in the state of things, or had not considered whether or not the state of things existed, then the defence is not available. Similarly, the defendant is required to have reasonable grounds for the mistaken belief as to the state of things, 'even though another ordinary, reasonable person would not have made that mistake': *R v Wilson* [2009] 1 Qd R 476 at [20] per McMurdo P.

PUTTING THE FACTS INTO THE LAW

On the facts, there is no doubt that an assault has taken place: see the definition of assault under s 245 (Qld) and s 222 (WA). There has been a fight and Matt has lost part of his ear. George's main defence will be that Matt agreed to fight him, and that therefore Matt consented to the assault. However, this is not a boxing contest or a wrestling match with rules and a referee. We are not told whether any weapons were used or the circumstances of the fight that led to Matt losing part of his ear. In the absence of more detail, the question has to be answered from first principles. One issue that George has to face is that a person cannot consent to certain types of assault for public policy reasons: see s 246(2) (Qld) and s 223 (second paragraph) (WA). This is the significance of the distinction between bodily harm and grievous bodily harm in the question: see *Lergesner v Carroll* (1990) 49 A Crim R 51.

Remember to take the facts as given as this is a hypothetical and assume that losing part of an ear can constitute grievous bodily harm. There is normally a purpose behind an examiner altering the factual scenario, and here it is to establish an awareness that a person cannot consent to certain types of assault.

Where the injury came under the definition of bodily harm, George may also have a defence under s 24 Mistake of fact. Consent was the central issue in *Lergesner v Carroll* (1990) 49 A Crim R 51, where the Queensland Court of Appeal held that mistake of fact under s 24 of the Code was open in circumstances where the defendant is mistaken as to whether the victim consented.

Here, the obvious question arises as to the nature of the force applied by George and whether it was disproportionate to Matt's expectations. Matt may himself have been mistaken as to the George's intentions, instead believing it was to be light hearted or 'play fighting' given they were friendly rivals.

George was the instigator of the fight, and Matt who initially backed away only agreed to fight because he felt he had no choice. Matt's statement 'OK, hit me with your best shot' would seem to

indicate that Matt was expecting a boxing fight, possibly partly because George had raised his fists, but the fight developed into a wrestle.

The evidence of the two protagonists and any witnesses would be determinative as to what occurred during the fight, whether either party tried to end the fight, or whether Matt was actually winning when George bit his ear in desperation. Nevertheless, it seems clear that on the facts we do have, that the Crown will have to negative beyond reasonable doubt that George was mistaken in believing that Matt was consenting to fight him. Of course, whether Matt was consenting to a 'no holds barred' wrestle that included biting off part of his ear is a different question. If this was an official wrestling match then George would have exceeded the implied consent rules: *R v Billinghurst* (1978) Crim LR 553; *R v Johnson* (1986) 8 Cr App R (S) 343.

CONCLUSION

George has no defence (leaving aside self-defence which is scarcely raised on the facts) if the injury to Matt's ear constituted grievous bodily harm. This is because of (1) public policy and (2) s 24 deals with mistake of fact not mistake of law.

George may have a defence if the injury to Matt's ear constituted only bodily harm. George could argue that (1) Matt consented to fight him and (2) in the alternative that he was mistaken that Matt consented to fight him. The difficulty George faces is the nature of Matt's injury. While Matt may have consented to fight him, it is unlikely Matt was consenting to biting. Further, the mistaken belief has to be both honest and reasonable. George would have difficulty convincing the trier of fact that it was reasonable to believe Matt was consenting to a fight that resulted in the loss of part of his ear.

PROBLEM QUESTION 2

ASSUME THE FOLLOWING FACTS

Neil ran an adventure tour company, specialising in remote outback tours. On one of his tours, his group was camped for the evening near a river gorge in which it had previously been safe to swim. However, the Department of Parks and Wildlife had recently sent all tour operators a notice warning of observed crocodile activity in the river gorge and to exercise great caution. It was a very hot night and two members of the tour group announced their intention to go swimming. Neil mentioned the warning but did not press it. One of the swimmers lost an arm to a crocodile attack. Neil has been charged under s 320 of the *Criminal Code* (Qld) of unlawfully doing grievous bodily harm to another.

Advise Neil.

THE ISSUES

The issue here is whether Neil has breached one of the duty provisions (s 290 Qld and s 267 WA Duty to do certain acts) to the criminal standard of negligence.

THE RELEVANT LAW

> Criminal Code (Qld)
>
> 290 Duty to do certain acts
>
> When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is the person's duty to do that act: and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

Under s 320 no fault element is specified. Thus, it is unnecessary for the Crown to prove a specific intention to cause grievous bodily harm. Contrast s 320 with s 317 Acts intended to cause grievous bodily harm and other malicious acts, where intent is specified. This means that under s 320 a person can be charged with negligently causing grievous bodily harm through the duty provisions. A case example of negligently causing grievous bodily harm is *R v Clark* [2007] QCA 168, which is on point with the question above.

> Keane JA
>
> [12] The Crown's case against the appellant was that, in contravention of s 289 of the *Criminal Code* [Duty of persons in charge of dangerous things], he failed to use reasonable care and take reasonable precautions in the management of the flying fox to avoid danger to the complainant's life, safety or health in that he failed to securely attach the complainant's harness to enable her to descend in safety. It was this failure that made the doing of grievous bodily harm to the complainant unlawful, and thus a contravention of s 320 of the *Criminal Code* …
>
> [39] The seriousness of the lack of care required to warrant a finding of criminal negligence was explained to the jury by the learned trial judge …
>
> 'A very high degree of negligence is required before a defendant may be found guilty of criminal negligence. To convict you must be satisfied beyond reasonable doubt that his conduct in failing to attach the running slings to [the complainant's] harness so far departed from the standard of care incumbent upon him to use reasonable care to avoid a danger to life, health and safety as to amount to recklessness involving grave moral guilt deserving of punishment. You must bear that caution and that warning in mind.'
>
> [40] This direction was, in my respectful opinion, sufficient to bring home to the jury the gravity of the misconduct which is required for a finding of criminal negligence. Importantly, it brought home to the jury the point that they were concerned with whether the appellant's breach of duty was so serious as to involve grave moral guilt deserving of punishment as a

> criminal offence. There was no suggestion from the jury that they required further assistance or direction from the learned trial judge in the application of the language of s 289 of the *Criminal Code* to the facts of the case. Accordingly, I am of the opinion that there is no substance in these grounds of appeal.

Section 290 is expressed in terms of gross breach of duty unconnected to criminal liability *per se*. In order for the trier of fact to arrive at a grievous bodily harm conviction under s 320 of the *Criminal Code 1899* (Qld), a four step process has to occur. First, the defendant, Neil, has to have caused the grievous bodily harm to the victim. The deeming provision in s 290 (held to have caused any consequences) satisfies causation, where the relevant question is whether the grievous bodily harm is a consequence resulting from the breach of duty. Secondly, the defendant must have had a duty to the victim. Thirdly, the defendant must have breached that duty. Fourthly, the defendant must have been grossly negligent to the criminal standard in performing that duty.

Common law criminal negligence applies to the duty provisions of the Griffith Codes (*Callaghan v The Queen* (1952) 87 CLR 115). Common law gross criminal negligence was explained by Lord Hewitt CJ in a well-known passage from *R v Bateman* (1925) 19 Cr App R 8, 11.

> In order to establish criminal liability the facts must be such that in the opinion of the jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

PUTTING THE FACTS INTO THE LAW

The key question is whether Neil has been criminally negligent in not pressing home to the two members of his tour group the dangers of swimming in the gorge. This is a very high standard of negligence: *R v Bateman* (1925) 19 Cr App R 8, 11. It is not the civil standard. Under s 290 of the *Criminal Code* (Qld), Neil will be held to have caused any consequences (the loss of an arm) from any breach of his duty under s 290.

Neil will seek to distinguish his situation from that of *R v Clark* [2007] QCA 168, where the failure of the defendant to securely attach the complainant's harness to enable her to descend in safety was a more blatant breach of duty than preventing swimming on the basis of one notice. However, the notice did specify great caution. The evidence of the conversation between Neil and the two swimmers will be crucial, as would the responses of other tour operators to the notice. If other tour operators gave evidence that they had or would have either sought to prevent a tour member from swimming or strongly remonstrated if their advice was being ignored, then Neil's case would be weakened. Another factor would be Neil's standing within the tour industry. If Neil was known to be slack and cavalier in his approach to safety, especially if there had been previous incidents, complaints or warnings concerning his tour company, then again Neil's case would be weakened.

Conversely, if other operators were acting in a similar manner to Neil and he had a good safety reputation in the tour industry, his case would be strengthened.

CONCLUSION

Neil's criminal liability will depend on the evidence. On the one hand crocodiles are very dangerous creatures and the notice stressed that great caution should be exercised. The members of his tour would likely have taken his advice very seriously as Neil was an experienced operator who specialised in outback tours. If Neil had observed crocodile traps set by the Department of Parks and Wildlife in the gorge, then this knowledge would be extremely damaging to Neil's case. On the other hand, there had been no previous crocodile activity in the gorge, and if the notice had come out without any follow up activity by the Department of Parks and Wildlife to indicate it was other than routine, then Neil may be able to argue he did enough to fulfil his duty by bringing the warning to the attention of the swimmers and leaving the decision to them. Neil may be able to argue it was general knowledge that crocodiles are dangerous and that it was a voluntary decision to swim which he could not physically prevent.

The law would be similar if the events had taken place in Western Australia: s 267 Duty to do certain acts of the *Criminal Code* (WA).