

CHAPTER 6

ASSAULTS, INJURIES AND HARM

The structure of non-fatal offences against the person

6.1 The major non-fatal offences against the person fall into two broad groups.

- One group comprises assault and its compound offences, such as assault causing bodily harm. Assault and its compound offences take as the initial focus the intentional use or threat of force by one person against another. Although injury might be caused, there can be cases in which force was intentionally used by the accused but no injury was inflicted or where the force was merely threatened.
- In the other group of offences, such as unlawfully wounding or causing grievous harm, the focus is on the causation of injury or harm, whether or not due to an intentional attack. The injury or harm might be caused by an intentional attack constituting an assault. However, there can also be cases in which injury or harm is caused through criminal negligence rather than through an intentional attack.

Within each group, there are hierarchies of offences, with penalties increasing as the circumstances or consequences of the violence become more serious. The offences often overlap in their application, with offences from both groups being potentially applicable to particular cases.

6.2 Maximum terms of imprisonment under the Penal Codes for some of the most common offences involving assault are as follows:

- Common assault: punishable in Solomon Islands by up to 1 year imprisonment under SI s 244; in Kiribati and Tuvalu by up to 6 months imprisonment under Ki/Tu s 237
- Assault occasioning actual bodily harm: punishable by up to 5 years imprisonment under SI s 245; Ki/Tu s 238;
- Serious assaults (including assault with intent to commit an offence and assault on a police officer in the execution of his or her duty): punishable by up to 2 years imprisonment under SI s 247; Ki/Tu s 240;
- Indecent assault on females: punishable by up to 5 years imprisonment under Ki/Tu s 133. In Solomon Islands, this offence has now been subsumed within a broader offence of indecent act without consent, which is punishable by up to 5 years where the victim is an adult and to longer terms where the victim is a child.

6.3 In the second group of offences, where the focus is on injury or harm caused by one person to another, the principal offences include:

- Unlawfully doing grievous harm: punishable in Solomon Islands by up to 14 years imprisonment under SI s 226; in Kiribati and Tuvalu by up to 7 years imprisonment under Ki/Tu s 220;
- Unlawfully wounding: punishable by up to 5 years imprisonment under SI s 229; Ki/Tu s 223.

6.4 Even if injury or harm does not result, it is an offence to do certain things in a manner 'so rash or negligent' as to endanger human life or be likely to cause harm to any person: SI s 237; Ki/Tu s 230. These provisions create a range of offences similar to the offence of 'dangerous driving' which is found in many jurisdictions. The listed activities in SI s 237; Ki/Tu s 230 include driving a vehicle, engaging in medical or surgical treatment, and omitting to take precautions against probable danger associated with fires, animals, machinery or explosives. There is a similar offence respecting poisons under SI s 239; Ki/Tu s 232.

Forms of harm

6.5 The Penal Codes refer to several forms of harm, some but not all of which are given statutory definitions.

6.6 'Harm' is defined in SI/Ki/Tu s 4, in broad terms. The provision reads:

"harm" means any bodily hurt, disease or disorder whether permanent or temporary

Under this definition, a physical injury is not required for actual bodily harm: physical pain or infection will suffice.

6.7 'Wound' is defined in the SI/Ki/Tu s 4 to mean 'any incision or puncture which divides or pierces any exterior membrane of the body'. Section 4 further provides that 'any membrane is "exterior" for the purpose of this definition which can be touched without dividing or piercing any other membrane'. These definitions reflect the common law, where wounding has traditionally been understood to involve breaking or penetration of the skin. Bruising is not sufficient; nor is a surface scratch. It must be a break of the whole skin including the underlayer. See *R v Da Costa* [2005] QCA 385 at [3], [33].

6.8 'Grievous harm' is defined in s 4 to mean:

any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense

'Maim' is defined in s 4 to mean 'the destruction or permanent disabling of any

external or internal organ, member or sense'. As a matter of common law, the severity of the injury has traditionally been assessed at the time of its infliction and without reference to any expected results of medical treatment: see *R v Lobston* [1983] 2 Qd R 720.

The elements of assault

6.9 The Codes SI s 244; K/iTu s 237 provide that a person commits an offence if he or she assaults another person. However, assault is not defined in the Codes, so that its definition remains a matter of common law.

6.10 Two forms of assault are recognised in the common law world (see, for example, *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, 444D-E; *R v Ireland* [1998] AC 147 at 161 (HL)):

1. unlawful application of force;
2. an act causing the victim to apprehend an imminent application of force.

The common law historically distinguished between 'assault' as a threat of force and 'battery' as an application of force. Like most criminal statutes, however, the Penal Codes do not use the term 'battery' and the term has also fallen into disuse in the modern common law of crime. Under the Codes, the term 'assault' covers applied force as well as threatened force.

6.11 'Force' carries a broad meaning in this context and covers any non-consensual physical contact. In the Criminal Codes of Queensland and Western Australia, it is statutorily defined as 'strikes, touches, or moves, or otherwise applies force': Criminal Codes s 245(1) (Qld)/s 222 (WA). The position at common law is the same. In *Popoe v R* [2015] SBCA 20 at [50], there was held to be an assault where one person sat upon another. The force used may be as light as a mere touch, as in some sexual assaults. The force may also be direct or indirect, so that it may be applied by way of a third party, agent, device or instrument. See, for example, *DPP v K* [1990] 1 All ER 331 (DC), where acid was poured into a hand drier so that it would spray onto a person using the drier. The Criminal Codes s 245(2) (Qld)/s 222 (WA) indicate that the application of force may even be incorporeal; the application of 'heat, light, electrical fault, gas, odour, or any other substance or thing whatever' is an application of force if the degree is such as to cause 'injury, or personal discomfort'. It is to be expected that the same scope would be given to the term 'force' at common law and hence to offences of assault under the Penal Codes.

6.12 A threat may be by gesture or by words. Moreover, the utterance of threatening words may be what gives a bodily movement the character of a threatening gesture. It has even been held that under some circumstances silence can constitute a threat. For example, someone who repeatedly telephones another person but remains silent when the telephone is picked up may be held to be making a threat: *R v Ireland* [1998] AC 147 at 162 (HL). In *Hall v Fonceca* [1983] WAR 309, it was suggested that a threat

would have to create an actual apprehension of the use of force on the part of the victim. In other words, there could not be an assault by threat without the victim being aware that the threat was made.

6.13 In *R v Secretary* (1996) 5 NTLR 96, it was held that a person who makes a threat of future violence and then falls asleep may continue to commit the assault while asleep. The question of continuing assaults has been important because of its bearing on rights of self-defence in some jurisdictions which (unlike Solomon Islands, Kiribati and Tuvalu) require an assault to be occurring when defensive force is used: see **Chapter 10**. The accused in *Secretary* had shot and killed her husband while he was asleep. Her defence to a charge of murder was that he had threatened to kill her when he awoke and that this assault was continuing when she shot him in self-defence. The court ruled that an assault may continue to be committed by a person who falls asleep after making a threat, if the ability to put the threat into effect upon awakening is evident.

6.14 Much physical contact between people is consensual. It is settled that for an assault the contact must occur without the consent of the victim (or with an expression of consent which the law does not recognise, for example an expression of consent obtained by coercion or fraud): see the discussion in Ormerod, Smith and Hogan: *Criminal Law* (12 ed 2008) pp 589-596. However, there has been some disagreement over whether lack of consent is an element of the unlawfulness of an assault or whether consent is an exculpatory defence: see the divergence of opinion in this matter in *R v Brown* [1994] AC 212. If consent is merely an exculpatory defence, the accused may carry an evidential burden to put the matter of consent in issue.

6.15 Problems about the meaning of consent and fraud have mainly arisen in relation to offences of sexual violence: see **Chapter 7**. In that specific context, the Solomon Islands Code s 136A now expressly provides that consent means 'free and voluntary agreement' and excludes an expression of consent obtained by such means as threat or fear. It is to be expected that courts would adopt a similar interpretation of coerced expressions of consent for assault generally. There is some uncertainty as to whether any fraud will invalidate an expression of consent or only certain specific forms of fraud. See **Chapter 7** for discussion of this issue in the context of sexual assault.

6.16 Consent can be implied as well as expressed: see *Collins v Wilcock* (1984) 1 WLR 1172; *Horan v Ferguson* [1994] QCA 375. For example, a person who moves into a heavily crowded area can be taken to have consented to the inevitable jostling which will occur. Similarly, a person who plays in a sporting game, the rules of which permit physical contact, may be taken to have consented to the application of some measure of force, even though there has been no express statement to this effect. Of course, even where there is consent to some degree of force, a greater degree of force may actually be used. The assailant is then liable for the force used just as if there had been no consent at all.

6.17 The Penal Codes do not specify a fault element or elements for the offence of assault. The fault elements are complex and in some respects uncertain. This is partly because there are distinct physical elements: the application or the threat of force and lack of consent. It is also partly because of difficulties inherent in the overall scheme of criminal responsibility in the Penal Codes.

6.18 It is well established that, for an assault at common law, there must be an intention to apply force or to create an apprehension of its application, or possibly recklessness (that is, awareness of a risk) respecting these results: see *R v Venna* [1976] QB 421; [1975] 3 All ER 788. An assault cannot be committed inadvertently.

- It appears to be generally accepted that this is also true of an assault by threat under the Penal Codes, because the notion of a threat implies intention: see the dicta on this point in *Hall v Fonceca* [1983] WAR 309 (CA); *Hayman v Cartwright* [2018] WASCA 116. However, the intention might be to make the victim believe that there was ability and willingness to use force rather than intention actually to use it, but some form of intention is required.
- It is, however, uncertain whether intention is required for an assault by application of force under the Penal Codes. There is conflicting authority on the elements of assault under the Western Australia version of the Griffith Code, where the relevant provisions are the same as those of the Penal Codes of Solomon Islands, Kiribati and Tuvalu.

6.19 The Penal Codes SI/Ki/Tu s 9 state that intention is immaterial unless the intention to cause a particular result is expressly declared to be an element of the offence. There is no such express declaration for assault. It might therefore be argued that the application of force could have been inadvertent. A defence of accident under s 9 would be available if the contact was unforeseeable: see **Chapter 4**. However, lack of intention would not provide a defence. This was the conclusion reached by the Western Australia Court of Appeal in *Hayman v Cartwright* [2018] WASCA 116.

6.20 A contrary view was taken in the earlier decision of the Western Australia Court of Appeal in *Hall v Fonceca* [1983] WAR 309. In that case, it was said that there must be an intention to apply force, or possibly recklessness (that is, awareness of a risk) respecting these results. The court relied heavily on the common law as authority for its position. This reliance would be justified if 'assault' is regarded as a technical term that the Codes adopt from the common law.

6.21 The better view, at least for the Penal Codes of Solomon Islands, Kiribati and Tuvalu, is that intention or recklessness is required for an assault by application of force. There are two reasons for this:

- The argument that the terms of the Griffith Code exclude a requirement for intention or recklessness has been based on the orthodox Australian doctrine that the language of the Griffith Code should be interpreted in accordance with ordinary meanings and without any presumption that the previous common law was intended to be maintained. However, that doctrine is inconsistent with Penal Codes SI/Ki/Tu s 3, which provides that the expressions used are generally to be given the meaning attached to them in English criminal law: see **Chapter 1**.
- If an assault could be committed inadvertently, there would be little role for criminal negligence to play in the law of manslaughter and offences relating to non-fatal injuries. The distinction between manslaughter by unlawful act and manslaughter by criminal negligence is well established in all jurisdictions and is expressly recognised in SI s 199; Ki/Tu s 192. The same distinction is made for offences such as unlawfully wounding and unlawfully causing grievous bodily harm. Yet, if an assault could be committed inadvertently, there would be little room left for cases of criminal negligence. Most cases of causing death or injury by criminal negligence involve the inadvertent application of force. The result would be a radical restructuring of the whole field of offences against the person. There was no acknowledgement of this in *Hayman v Cartwright*.

6.22 Although the application or threat of force must have been intentional or reckless, a conviction of assault does not require knowledge that consent was absent or awareness of the risk of absence of consent. A mistaken belief in consent can be a defence, but generally only when the terms of the excusing defence under the Codes SI/Ki/Tu s 10 are met: there must be a positively mistaken belief and the mistake must be an objectively reasonable one: see **4.23-4.28**. However, there is an exception in Solomon Islands for the new offence of indecent act without consent, which has replaced offences of indecent assault. The new offence requires that a person acts ‘knowing about or being reckless as to the lack of consent’: s 138(1)(b).

The aggravated assault offences

6.23 The Penal Codes include several compound assault offences, where aggravating circumstances or consequences create more serious offences with higher penalties. These include assault occasioning actual bodily harm: punishable by up to 5 years imprisonment under SI s 245; Ki/Tu s 238 and a range of other serious assaults like assault with intent to commit an offence and assault on a police officer in the execution of his or her duty which are punishable by up to 2 years imprisonment under SI s 247; Ki/Tu s 240.

6.24 The Codes SI s 245; Ki/Tu s 238 establish an offence which is called ‘assault

causing actual bodily harm' in its title but uses the expression 'assault occasioning actual bodily harm' in the offence provision. In this context, 'occasioning' means the same as 'causing'. In order to obtain a conviction, the prosecution must prove not only an assault but also that bodily harm was caused. On the meaning of 'bodily harm', see above **6.6**. On the principles of causation, see **3.16-3.27**. The general principles are that a person is held to have caused a result if the person made a substantial contribution to its occurrence, unless there is an independent later actor whose contribution is also substantial and who can be held criminally liable for it.

6.25 Although consent is a defence to common assault, it may not always be a defence to assault causing bodily harm. It is provided in SI s 236; Ki/Tu s 229 that a person's consent to not only death but also maiming does not affect the criminal responsibility of the person who causes the result. 'Maim' is defined in s 4 to mean 'the destruction or permanent disabling of any external or internal organ, member or sense'. Whether or not consent provides a defence therefore depends on the nature and severity of the injury. A case of maiming could give rise to a charge of unlawfully causing grievous bodily harm. However, if the lesser offence of assault causing bodily harm was charged, consent would still not be a defence if the injury involved a maim.

6.26 The Penal Codes do not specify a fault element for the causation of bodily harm. Intention or recklessness is required for the underlying assault: see **6.19-6.21**. However, there is no need to prove intention to cause bodily harm or even foresight of the possibility. If not foreseen, however, the harm must have been foreseeable. In other words, the prosecution must disprove accident under the Codes s 9 if that defence is in issue: see **4.16-4.18**.

6.27 The Penal Codes also establish in SI s 247; Ki/Tu s 240 a group of offences simply called 'Assaults punishable with two years imprisonment'. These include assaults with intent to commit felonies, assaults with intent to resist lawful apprehension or detention, assaults upon police officers acting in the execution of their duties, and assaults on certain persons exercising legal powers or performing legal duties such as executing court processes. Assaults on police officers often arise in the context of resistance to arrest. Assaults with intent to resist lawful apprehension or detention are specified in SI s 247(a); Ki/Tu s 240 (a) and assaults on police officers generally are covered by SI s 247(b); Ki/Tu s 240(b).

6.28 Although SI s 247; Ki/Tu s 240 is titled 'Assaults', the provision respecting police officers in paragraph (b) is more broadly drafted. It covers not only assaulting but also resisting or wilfully obstructing a police officer who is acting in the execution of his or her duty. The offence also applies to assaulting, resisting or wilfully obstructing any person acting in aid of a police officer. Obstruction involves some active conduct which makes it more difficult for the police to execute their duties. Mere failure or refusal to co-operate is not an offence: see *Rice v Connolly* [1966] 2 QB 414; 2 All ER 649. 'Wilfully' means 'intentionally' or 'recklessly': *R v Lockwood; Ex parte Attorney-General* [1981]

Qd R 209.

6.29 No fault elements are specified for an apprehension or detention being lawful or a person being a police officer executing duties. The general scheme of criminal responsibility in the Penal Codes does not require intention or recklessness. Nevertheless, a defence of reasonable mistake of fact under s 10 can be available where a positive mistake, such as a person believing that the other person is something other than a police officer. It is not sufficient that the defendant was not aware that the victim was a police officer. The defendant must have positively believed that the victim was something else: see **4.27**. The mistake can then provide a defence to the more serious charge and result in a conviction of common assault only. There may, however, be no defence for a mistake about whether a known police officer is acting lawfully or in the execution of his or her duty. A mistake about the legal powers or duties of a police officer usually involves a mistake of law rather than a mistake of fact. Mistakes of law are generally immaterial to criminal responsibility: see Penal Codes SI/Ki/Tu s 7; see also **4.30-4.35**.

Liability for injury or harm

6.30 There are a number of offences that focus on whether injury or harm is caused rather than on the intentional use of force. The primary point of differentiation between these offences is the severity of the harm. There are separate offences for various degrees of injury, each with escalating penalties: see above. The most severe penalty of liability to imprisonment for life attaches to various intentional offences under the Codes SI s 224; Ki/Tu s 218, such as unlawfully wounding or doing grievous harm with intent to do grievous harm under paragraph (a). Less serious are offences without such specific intention: SI s 226; Ki/Tu s 220 (unlawfully doing grievous harm); SI s 261; Ki/Tu s 223 (unlawfully wounding).

6.31 ‘Doing’ means ‘causing’. These offences generally require proof that an injury or harm was caused by the accused. On the principles of causation, see **3.16-3.27**. Omissions as well as acts can establish the offences if there is a breach of a legal duty of care. The same general conditions of liability for omissions apply to all offences against the person: see **3.2-3.12**.

6.32 Consent may be a defence as long as the injury or harm does not amount to a maim. If maiming is the result, the Codes SI s 236; Ki/Tu s 229 make consent immaterial. ‘Maim’ is defined in s 4 to mean ‘the destruction or permanent disabling of any external or internal organ, member or sense’.

6.33 These offences all require the infliction of injury or harm to be ‘unlawful’. There are two main ways in which causing bodily harm can be unlawful: either by involving intentional violence (an assault) or by involving criminal negligence: see **5.24** on the distinction between the two forms of involuntary manslaughter. The same principles

apply to non-fatal offences against the person.

- Where liability is based on intentional violence (an assault), the application of force must have been intentional or reckless and the resulting injury or harm must have been foreseeable, as with the offence of assault causing bodily harm: see above, **6.26**.
- Where liability is based on criminal negligence, the general conditions for criminal liability based on negligence must be met. There must be a legal duty of care, a breach of that duty, and a criminal degree of negligence. See **3.2–3.12**; **5.28–5.34**. In cases of criminal negligence, the infliction of the injury or harm may be inadvertent.

6.34 The aggravated offence under the Codes SI s 224; Ki/Tu s 218 is a complex one. The section provides for the offence to be committed by the matching of any one of a number of intents with any one of a number of sets of physical elements. The specified intents are:

to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person

The specified sets of physical elements are:

(a) unlawfully wounds or does any grievous harm to any person by any means; or

(b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife, or other dangerous or offensive weapon; or

(c) unlawfully causes any explosive substance to explode; or

(d) sends or delivers any explosive substance or other dangerous or noxious thing to any person; or

(e) causes any such substance or thing to be taken or received by any person; or

(f) puts any corrosive fluid or any destructive or explosive substance in any place; or

(g) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person.

Where the offence takes a form such as doing grievous bodily harm with intent to do grievous bodily harm, the fault element matches the conduct element. The intent which has to be proved is the intent to do that which has been done. However, where the offence takes a form such as wounding with intent to do grievous bodily harm, or doing grievous bodily harm with intent to resist arrest, the fault element is separate from the conduct element. The intent to be proved is an intention to achieve a result

lying beyond the required conduct, and which need not have actually occurred. Offences involving such further intentions are sometimes called offences of 'ulterior intent'.

6.35 The transmission of disease is an important issue because of the potentially fatal impact of AIDS. Disease is specifically mentioned as a form of 'harm' in the Penal Codes s 4. Negligent transmission of a disease which is life threatening could constitute an offence of unlawfully doing grievous harm under SI s 226; Ki/Tu s 220, assuming that a person has a duty of care with respect their body or bodily fluids as dangerous things: see the discussion of the competing authorities in **5.32**. The negligence will need to be of a sufficient degree to amount to criminal negligence. There could also be liability for the more serious offence under SI s 224; Ki/Tu s 218 if the transmission of a disease is intentional or reckless.