

# Assault Charges

Section 61 of the Crimes Act (NSW) 1900

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Assault matters are the bread and butter of a criminal law practice. Yet, I regularly see lawyers appear in court who are unaware of the elements of the offence, the available defences, the applicable legislation and the legal precedents. This article is designed to assist practitioners appearing in the Local Court of NSW.

## Fear of Immediate & Unlawful Violence

An assault is any act, and not a mere omission to act, by which a person intentionally (or recklessly) causes another to apprehend immediate and unlawful violence.<sup>1</sup> Thus, it is the fear which is the gist of assault.

Physical force that does not injure the complainant is known as common assault. Whereas, any mark or bruise will upgrade the charge to Assault Occasioning Actual Bodily Harm.

## Elements of the Offence

There are four elements which the police must prove beyond reasonable doubt. They are:

1. An act by the accused which intentionally, or recklessly, causes another person (the complainant) to apprehend immediate and unlawful violence,
2. That such conduct of the accused was without the consent of the complainant,
3. That such conduct was intentional or reckless in the sense that the accused realised that the complainant might fear that the complainant would then and there be subject to immediate and unlawful violence and none the less went on and took that risk,
4. That such conduct be without lawful excuse.

## Immediacy

In *Barton v Armstrong*<sup>2</sup> it was held that if the threat produces an immediate fear or apprehension of physical violence, there may be an assault, even though the complainant does not know when the physical violence may occur.

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<sup>1</sup> R v Burstow; R v Ireland [1998] 1 AC 147

<sup>2</sup> [1969] 2 NSW 451 at 455

There need be no intention or power to use actual violence or power. Indeed, if it later appears that no violence was intended, it is sufficient if the complainant or a reasonable person thinks that it is intended. For example, pointing a gun at someone is an assault even if it is not loaded.

## **Consent**

Consent is always a defence to common assault. Playing contact sports invariably leads to the application of physical force. However, the participants are presumed to have consented to the use of force and the risk that they may be injured within the context of the game.

## **Intentional or Reckless?**

There is no requirement that the action be accompanied by hostile intent. Such intent may however, convert what might otherwise be unobjectionable as reasonably necessary for the common intercourse of life into assault by precluding an excuse or justification of assistance or rescue<sup>3</sup>.

If the police fail to prove intention, then they will fall back on recklessness. It is necessary to prove that the accused realised that the complainant might be subjected to unlawful force, however slight, as a result of what the accused was about to do, but yet took the risk that that might happen.<sup>4</sup>

This is further complicated if the accused was under the effect of alcohol or drugs at the time. It may be that they were too intoxicated to realise the danger and likely consequences of their actions. A court must take this into account when deciding whether the accused's actions were intentional or reckless.

## **Defences**

If the police can prove intention or recklessness beyond reasonable doubt, then the Accused can lead evidence of additional facts that raise the issues of self defence, necessity, duress or lawful chastisement. For more on Self Defence click [here](#).

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3 Boughy v The Queen (1986) 161 CLR 10 at 27

4 R v Savage; DPP v Parmenter [1992] 1 AC 699