

106. Assault: s 335

106.1 Legislation

[Last reviewed: October 2024]

Criminal Code

[Section 335](#) – Common assault

[Section 245](#) – Definition of assault

[Section 246](#) – Assaults unlawful

106.2 Commentary

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The offence in s 335 makes it an offence to unlawfully assault another person. The definition of ‘assault’ in s 245 states that an assault can involve either (1) an actual physical application of force or (2) a threatened or attempted application of force. An assault is unlawful unless it is authorised, justified or excused by law.

Alternative one: physical application of force

The defendant must have:

- (1) Struck, touched, moved, or applied force of any kind to the person of another;
- (2) Either directly or indirectly;
- (3) Without the other person’s consent or with consent, if the consent is obtained by fraud.

The first two elements are generally straightforward, though where force is applied indirectly some further explanation to the jury may be required.

Consent may be tacit or implied: *Horan v Ferguson* [1995] 2 Qd R 490. In particular, a certain amount of physical contact is inevitable and generally acceptable in the ordinary conduct of everyday life. See also *R v Gee* [2016] 2 Qd R 602, dealing with an assault on an infant.

The Queensland Court of Appeal has yet to clarify whether proof of intent is required for assault by the physical application of force. In *Isitt v Commissioner of Police* [2016] QDC 308, Smith DCJA held that proof of intention was required. Note, however, the more recent 2018 decision of the Western Australian Court of Appeal in *Hayman v Cartwright* [2018] WASCA 116; 53 WAR 137, where it was held that proof of intent is not required for the analogous assault provision in s 222 of the *Criminal Code* (WA). This decision overruled that of Corboy J in *Murphy v Spencer* [2013] WASC 256; 232 A Crim R 74 (which had been followed in *Isitt*).

Alternative two: threats or attempts to apply force

The defendant must have:

- (1) By any bodily act or gesture;
- (2) Attempted or threatened to apply force of any kind to the person of another;
- (3) Without the person's consent;
- (4) In circumstances where the defendant has, actually or apparently, a present ability to effect that purpose.

Note that a threat to apply force can be conditional. In *Rozsa v Samuels* [1969] SASR 205, Hogarth J held that the defendant must have had no right to impose the condition.

Note also that where there is an attempt to apply force, proof of intent is required. See *R v Chong* [2012] QCA 265, [22] (Holmes JA), where the jury was not told of the intent requisite to any attempted assault.

Words alone cannot amount to an assault. There must be some bodily act or gesture associated with words indicating an intention of assaulting. See *R v Agius* [2015] QCA 277 for a discussion as to whether there is a relevant bodily act or gesture.

An assault may occur where the defendant's ability to effect their purpose is only apparent, such as where they use an unloaded or replica firearm. There is no need for fear on the part of the complainant: *Brady v Schatzel* [1911] St R Qd 206.

Multiple charges

It may be proper to lay one charge, notwithstanding that a series of assaults is relied upon by the prosecution: see *R v Morrow* [1991] 2 Qd R 309 and *R v Chen* [1997] QCA 355 where the court said, at 4-6:

There are no doubt cases in which, notwithstanding that offences could be charged separately, it is nevertheless permissible and even appropriate to prefer only one charge. One obvious class of such cases is that where the offence may be constituted by continuing conduct. But also where one act constitutes a number of offences (stealing a number of articles at one time) or where there are a number of similar acts, each constituting a separate offence, but in a short space of time — a flurry of blows, whether with or without a weapon, or a succession of shots — there is, in most cases, little practical advantage in separating them and no loss of fairness to an accused in failing to do so ... Courts have never managed to produce a technical verbal formula of precise application which constitutes an easy guide in cases such as this and the question will always be one of fact and degree for decision in each case.

See also *R v Aplin* [2012] QCA 258 for an illustration of a case where the indictment was held to be duplicitous because a series of incidents should have been separately charged.

106.3 Suggested Direction

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(It will often be sufficient to pose the following questions set out below, depending on the issues in the case. Relevant evidence and/or admissions should be identified for each question posed for the jury. It will often be convenient to provide a short summary of the arguments of the parties in relation to each question).

(In a case where it is alleged the defendant applied force directly to the complainant, the following questions might be put to the jury, depending on the issues in the case):

1. **Did the defendant punch** [or specify the act alleged by the prosecution, being an act within the definition found in s 245(1)] **the complainant?**
2. **Was that act done without the complainant's consent?**
3. **Was that act unlawful? Unlawful means not authorised, justified or excused by law.** (See s 246)

(In a case where it is alleged the defendant applied force indirectly to the complainant, the following questions might be put to the jury, depending on the issues in the case):

1. **Did the defendant ...** [specify the act alleged by the prosecution]?
2. **Did the defendant thereby apply force indirectly to the complainant?**
3. **Was that done without the complainant's consent?**
4. **Was that unlawful? Unlawful means not authorised, justified or excused by law.** (See s 246)

(In a case where it is alleged the defendant assaulted the complainant by threatening to apply force, the following questions might be put to the jury, depending on the issues in the case):

1. **Did the defendant ...** [specify the act alleged by the prosecution]?
2. **Did the defendant thereby threaten to ...** [describe the threatened means of applying force to the complainant]?
3. **Did the defendant at that time have, or apparently have, the ability to...** [again, describe the threatened means of applying force to the complainant]?

4. Was that done without the complainant's consent?

Was that unlawful? Unlawful means not authorised, justified or excused by law (See s 246).