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MOCK TRIALS

Legal Guidance R v Kim 2021

R v Kim

LEGAL GUIDANCE



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A Brief Overview

Assault is when a person applies force to somebody, directly or indirectly, without their consent. Within this definition, there are a number of legal factors to consider in order to determine whether the accused is guilty of the charge.

Elements of an offence is a term used in law to describe what the Crown must prove in order to convict somebody of a certain offence. In any case, the Crown must prove the elements of the date, time, identity of the accused, and jurisdiction. For the purposes of this mock trial, none of these elements are contested.

However, there are also elements specific to the charges of Assault Causing Bodily Harm and Unlawfully Causing Bodily Harm, which we will cover in this document. The underlying offence for both these charges is that of Assault. Simply put, the test for finding somebody guilty of Assault Causing Bodily Harm is whether they committed Assault, and whether that Assault led to the 'bodily harm' of the complainant. Similarly, the test for finding somebody guilty of Unlawfully Causing Bodily Harm is whether they committed an unlawful act, and whether that act led to the 'bodily harm' of the complainant. The difference between these charges and what it takes to prove them will be covered below.

Assault Causing Bodily Harm

In order to find somebody guilty of Assault Causing Bodily Harm, first the Crown must prove beyond a reasonable doubt (more on that below) that an Assault took place. According to the Criminal Code of Canada,

- '265 (1)** A person commits an assault when
- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
 - (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
 - (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

That's what it takes to prove Assault. In addition to that:

- 267.** Every one who, in committing an assault,
- (a) carries, uses or threatens to use a weapon or an imitation thereof, or
 - (b) causes bodily harm to the complainant,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.’

Let’s go through the steps of this charge, starting from the beginning.

Step 1 – Did Mackenzie Kim apply force to Avery Parker?

Force includes any physical contact with another person, even if it isn’t aggressive or violent in itself. It could be a simple touch. Direct contact means touching a person with a hand or other part of the body, while indirect contact is touching a person with another object.

If the Crown can’t prove beyond a reasonable doubt that Kim applied force to Parker, Kim must be found not guilty. The judge’s deliberations would be over and Kim would be acquitted.

If the Crown can prove that, you move on to the next question.

Step 2 – Did Mackenzie Kim intentionally apply the force?

The physical contact that the Crown has proved has to be intentional. This means that it didn’t happen accidentally. In order to prove intention, we have to look at all the evidence, including all the circumstances surrounding the incident. Leave no stone unturned!

If the Crown can’t prove beyond a reasonable doubt that the force Kim applied to Parker was intentional, Kim must be found not guilty. The judge’s deliberations would be over and Kim would be acquitted on this charge.

If the Crown can prove that, you move on to the next question.

Step 3 – Did Avery Parker consent to the force that Mackenzie Kim applied?

In order to determine this, we have to consider Kim’s state of mind during the incident. Once again, we look to all the circumstances surrounding the physical contact, but this time we’re doing this in order to decide whether Parker consented to the contact. We’re looking for things like words, gestures, and movements by either person. It’s also worth noting that even in situations where the complainant doesn’t resist, that doesn’t necessarily mean that they consented. Consent means that there is a voluntary agreement between the parties, without the influence of force, the presence of threats, fear, fraud, or abuse of authority.

Step 4 - Did Mackenzie Kim know that Avery Parker did not consent to the force in question?

The Crown must prove beyond a reasonable doubt that Kim was aware that Parker did not consent to the physical contact. In order to prove this, the Crown must prove **any one** of the following:

1. that Kim actually knew that Parker did not consent;
2. that Kim knew there was a risk that Parker did not consent and that Kim proceeded in the face of that risk;
3. that Kim was aware of indications that Parker did not consent, but deliberately chose to ignore them because Kim did not want to know the truth.

Any one of these would be enough to establish a lack of consent.

If the Crown can establish that, you move on to the next and final question concerning Assault Causing Bodily Harm.

Step 5 – Did Mackenzie Kim cause bodily harm to Avery Parker?

The definition of ‘bodily harm’ is any hurt or injury that interferes with a person’s health, comfort or psychological well-being and that is more than merely transient or trifling in nature. This means that the harm must be something that is more than brief, fleeting or minor in nature. It must result from or be due to the physical contact that Kim made with Parker.

If Parker did suffer bodily harm, the question is whether Kim’s conduct contributed significantly to that bodily harm. Note that the Crown doesn’t need to prove that Kim meant to cause bodily harm **with the force they applied**.

If the Crown cannot prove that Kim caused bodily harm to Parker, Kim must be found not guilty of Assault Causing Bodily Harm, even if they are found guilty of Assault. If the Crown can prove beyond a reasonable doubt that Kim caused bodily harm to Parker, Kim must be found guilty of Assault Causing Bodily Harm.

Unlawfully Causing Bodily Harm

The Criminal Code of Canada states that:

‘269 Every one who unlawfully causes bodily harm to any person is guilty of
(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
(b) an offence punishable on summary conviction.’

This is a charge that, in order for Kim to be found guilty, they need to also have been found guilty of an 'unlawful act'. An unlawful act is any offence under either federal or provincial law. In this case, that alleged unlawful act is the charge of Assault Causing Bodily Harm.

We already know that from the previous section that “bodily harm” means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature. So let’s go through the steps for proving the charge of Unlawfully Causing Bodily Harm.

1st Step – Did Mackenzie Kim commit an unlawful act?

This is pretty straightforward. It means that if Kim is found not guilty of the Assault Causing Bodily Harm Charge, and any other unlawful act, they cannot be found guilty of Unlawfully Causing Bodily Harm. The judge’s deliberations would be over and Kim would be acquitted on this charge. If Kim is found guilty of the unlawful act of Assault Causing Bodily Harm, you move on to the next question.

Step 2 – Was the unlawful act dangerous?

Not only does the Crown have to prove beyond a reasonable doubt that Kim committed an unlawful act, they also have to prove that the unlawful act was dangerous.

To decide whether Kim’s unlawful act was dangerous, the question is whether a reasonable person in the same circumstances would have realized that they were exposing someone else to a risk of bodily harm.

In deciding what a reasonable person would have realized, it’s important to remember that a person’s individual characteristics and experiences are not to be considered. There is more on the reasonable person in a section below.

If the Crown cannot prove beyond a reasonable doubt that the unlawful act was dangerous, Kim must be found not guilty. The judge’s deliberations would be over and Kim would receive an acquittal on the charge of Unlawfully Causing Bodily Harm.

If the Crown can prove that the unlawful act was dangerous, you must go on to the next question.

Step 3 – Did Mackenzie Kim’s unlawful act cause Blake Caputo bodily harm?

Once again, “bodily harm” is any hurt or injury (including psychological harm) that interferes with a person’s health or comfort and is more than brief or fleeting, or minor in nature.

The Crown must prove beyond a reasonable doubt that Kim's conduct contributed significantly to the bodily harm of Blake Caputo. The Crown does not have to prove that Kim meant to cause bodily harm to Caputo **at the time that they committed the unlawful act.**

If the Crown cannot prove beyond a reasonable doubt that Kim's unlawful act caused bodily harm to Caputo, Kim must be found not guilty of Unlawfully Causing Bodily Harm and receive an acquittal on that charge.

If the Crown can prove beyond a reasonable doubt that Kim's unlawful act caused bodily harm to Caputo, Kim must be found guilty of Unlawfully Causing Bodily Harm.

Be Reasonable! Reasonable Doubt and the Reasonable Person

While you might think of reasonability as something that varies from person to person, in law this is not the case. Both the terms 'reasonable doubt' and 'the reasonable person' invoke a standard that is objective, not subjective.

The Reasonable Person

Because the standard of reasonableness is objective, this means that it does not consider personal characteristics or traits. Instead, the accused is compared to a fictional 'reasonable person'. Such a person is really an ideal, focusing on how a typical person, with ordinary prudence, would act in certain circumstances. Instead of considering the individuality of the accused, the reasonable person standard considers the accused's conduct in light of what they actually know, have experienced, or have perceived. For example, what did Kim actually know, experience, and perceive about their duties as a landlord and the state of the house? Given these factors, did Kim act reasonably?

Reasonable Doubt

This is a phrase you will come across in the law quite a bit. Reasonable doubt is the standard of proof required of the Crown to obtain a criminal conviction. As with the reasonable person, this is an objective standard. This means that the judge or jury must be satisfied beyond a reasonable doubt that the defendant is guilty in order to convict. It is the Crown's job to prove this. It is not up to the defence to prove the accused's innocence.

However, this doesn't mean that the Defence can throw out vague or unrealistic notions just to introduce the element of doubt. Likewise, the Crown does not need to prove guilt beyond any doubt whatsoever - thus the term reasonable. For example, a

doubt will not be considered 'reasonable' if it is based on either prejudice or sympathy - it must be logically connected to the evidence or lack of evidence. Reasonable doubt cannot be imaginary or frivolous doubt. In other words, reasonable doubt is something less than absolute certainty, but more than probable guilt. This is why the notion of reasonable doubt is inseparable from the notion of the presumption of innocence. In our criminal justice system, every defendant is presumed innocent until proven guilty, not probably guilty.

The Mind and the Act: Mens Rea and Actus Reus

In criminal law, to find someone guilty, they must have had both a guilty mind, or mens rea, and they must have committed a guilty act, or actus reus. To establish both the actus reus and the mens rea of criminal negligence, the Crown must prove that the accused's actions amounted to a marked and substantial departure from the standard of care that a reasonable person would observe in the circumstances.

Actus Reus refers to the physical component, or the actual act of a crime. Most laws tell us what not to do. However, some laws tell us what we must do. These laws create a "duty" – a legal obligation to take certain actions in particular circumstances. The existence of a duty is an exception to the norm; there is, for example, no legal duty to call 911 or intervene if you witness a house fire or a victim who is drowning (though you may feel a strong moral duty to do so). An exception to this general rule is found in sections 219 and 220 of the Criminal Code (Criminal Negligence and Criminal Negligence Causing Death).

Mens Rea refers to somebody's mental state at the time of the alleged offence. It helps us to determine whether the accused intended to commit a crime, or had knowledge that their action or inaction would cause a crime to be committed.

The accused is not innocent just because they were "not thinking" about their conduct. However, a conviction cannot occur if there is "a reasonable doubt whether a reasonable person in [the accused's] position would have been aware of the risks arising from the conduct" (R. v. Beatty, 2008 SCC 5, at para. 8). The Crown must prove that a reasonable person in all the circumstances would have foreseen a risk of bodily harm that is neither trivial nor transitory.

Applying the Law

With your teacher and lawyer coaches, you will need to work on applying the law to the facts of the case. Remember that different witnesses may have conflicting "facts" – what one witness thinks is fact does not make it the undisputed truth.

Your opening statement and your closing arguments should argue how the law applies to the evidence. Your opening statement should outline the law and how the evidence that you anticipate the witnesses will give either establishes guilt if you are the Crown, or raises a reasonable doubt if you are defence. Then, your closing arguments should refer back to the evidence the court heard, and again put it in the context of the law. Remember that the mock trial is really about making good arguments: whether they actually succeed in achieving a “verdict” of guilty or not guilty makes no difference to the scores.

You will likely find it helpful to do some further reading to refine your understanding of the law and how it applies to this case. Key cases are noted below. Keep a few things in mind:

- Case summaries, or “briefs”, which you can find online (even on Wikipedia), can be very helpful in explaining the key points of a legal judgment. The cases themselves can all be found on the website of the Canadian Legal Information Institute: canlii.org.
- Legal judgments can make for dense reading, even for lawyers. Start by reading the summary at the beginning (called the “headnote”) so you know what the judgment is about and what points are relevant to this case, then read parts of the judgment itself if you think you need more detail. Judges do not always agree with each other. The majority opinion – the judgment written by the judge who most judges agreed with, is the best statement of the law. However, dissents (the view of a minority of judges) may help you understand the majority opinion by comparison.
- There is no need, and the rules do not allow, for you to reference cases by name. Simply state what you believe the law requires in the case at hand.

Additional resources

Key reading: R. v. Macciacchera, 2018 ONCJ 743

Bodily Harm: R. v. Moquin, 2010 MBCA 22

Consent: R v Jobidon [1991] 2 SCR 714

Mens Rea: R v Beatty, 2008 SCC 5; R. v. M.R., 2011 ONCA 190

Reasonable Doubt: “What Is “Beyond A Reasonable Doubt” In Canadian Criminal Law?” by Jonathan Pyzer, July 2019. Posted on the Toronto Defence Lawyers Blog: <https://www.torontodefencelawyers.com/blog/general-category/beyond-reasonable-doubt-canadian-criminal-law/>