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Lord Lane states "*it is an essential element of an assault that the act is done contrary to the will and without the consent of the victim.*" Dr Jepson argues that "*consent should never be a valid defence when it comes to intent to commit serious offences against the person.*" Critically analyse these views.

Introduction

A successful use of the defence of consent not only results in a full acquittal, it means no crime has been committed at all. However, while this is the general rule from crimes, it does not apply in murder cases or in situations where serious crime has been caused. The comment made by Lord Lane refers only to assault, which could be said to be the least serious non-fatal offence, which would explain the stark difference in opinion between his views and those of Dr Jepson, who refers to serious offences against the person, where consent should not be used as a defence. Lane's comments, from the Attorney-General's Reference (No. 6 of 1980) 1981 case and Dr Jepson's comments will be critically analysed in relation to each of the non-fatal offences against the person.

Assault and battery

Assault and battery are common law offences but the defendants are charged under **s39 of the Criminal Justice Act 1988**, which gives that "*common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both.*" The two crimes are often referred together; however they clearly are not exactly the same.

For an assault to have occurred there must be 'an act which causes the victim to apprehend the infliction of immediate, unlawful, force'. This definition was confirmed in **Ireland 1998**¹, where the defendant made a large number of telephone calls to women and remaining silent when they answered. Lord Steyn stated that "*an assault can consist of any act causing the victim to apprehend an immediate application of force upon her.*" It was held that "*a thing said is also a thing done*", and there is no reason why something said should be incapable of causing an apprehension of immediate personal violence. A telephone caller who says in a menacing way "I will be at your door in a minute or two" can certainly be guilty of an assault if he causes the victim to apprehend immediate personal violence, and there is no reason why a caller who creates the same apprehension by remaining silent should not also be convicted. In **Constanza 1997**², where the defendant wrote 800 letters to the victim, it was held that written words can also amount to an assault if they cause the victim to fear violence. It was decided in **Lamb 1967**³ that someone who has a gun pointed at their face, if they know it is not loaded, will not be the victim of an assault. This is because that person would not fear

¹ **R v. Ireland [1998] AC 147**

² **R. v. Constanza [1997] 2 Cr App Rep 492**

³ **R v Lamb [1967] 2 QB 981**

immediate force, but if that person did not know if it was loaded, then they would be scared, and therefore would be the victim in that instance.

Also confirmed by **Ireland 1997** are the elements necessary for a battery to have occurred, *“the offence is committed when the defendant intentionally or recklessly applies unlawful physical force to another person”*. The force necessary for a battery may only have to constitute a slight touching, which was shown in the case of **Collins v Wilcock 1984**⁴. Two police officers saw two women apparently soliciting for the purposes of prostitution. They asked the appellant to get into the police car for questioning, but she refused and walked away. As she was not known to the police, one of the officers followed her to try and ascertain her identity. She refused to speak to the officer and walked away again. The officer then took hold of her arm to prevent her from leaving. She became abusive and scratched the officer’s arm. She was convicted of assaulting a police officer in the execution of his duty, but appealed against this on the basis that the officer was not acting in the execution of his duty, but was instead unlawfully holding her arm due to the fact that he was not attempting to arrest her. On appeal, the court held that the officer had committed a battery and the defendant was entitled to free herself. From a logical perspective, this decision may be seen as flawed. The police force may now fear the use of even minimal force in situations which may benefit from it. The decision also creates a very high degree of liability, as the court also pointed out that touching a person to get his attention was acceptable, provided that no greater degree of physical contact was used than was necessary. In **Martin 1881**⁵ and **DPP v K 1990**⁶ it was held that a battery can also be committed through an indirect act, such as in K where the next used of a machine suffered Actual Bodily Harm due to K’s actions.

As seen from the aforementioned cases, the victim needs to have apprehended the infliction of immediate and unlawful force for an assault to have taken place. If the victim has consented to the assault, they will not apprehend this force, so the assault will not have taken place. This is the basis of Lord Lane’s comment, that an essential element of an assault that the act is done contrary to the will and without the consent of the victim. For a battery, as Dr Jepson points out *“Robert Goff LJ said in Collins v Wilcock implied consent is given to touching in the ordinary course of everyday life”*⁷. This was confirmed in **Wilson v Pringle 1987**⁸, where the court held that the ordinary ‘jostlings’ of everyday life were not a battery, for example in an underground station, a busy street or a crowded shop.

In relation to s39 offences, then, Lord Lane’s comment that the lack consent is an essential element of an assault is good sense, which Dr Jepson confirms *“should in most circumstances be followed”*⁹.

Assault occasioning actual bodily harm

Assaults occasioning actual bodily harm, the lowest level of injury, are dealt with under **s47 of the Offences against the Person Act 1861**. S47 states *“whoever shall be convicted of any assault*

⁴ **Collins v Wilcock** [1984] 3 All ER 374

⁵ **R v Martin (1881)** 8 QBD 54

⁶ **DPP v K (a minor)**[1990] 1 WLR 1067

⁷ Dr Jepson’s article

⁸ **Wilson v Pringle** [1987] QB 237

⁹ Dr Jepson’s article

occasioning actual bodily harm shall be liable... to imprisonment for five years". The lack of a statutory definition of the offence in this section means that the elements needed for an assault occasioning actual bodily harm have been established through case law. In the case of **Chan-Fook 1994**¹⁰ the Court of Appeal stated that the words 'actual bodily harm' are *"three words of the English language which require no elaboration and in the ordinary course should not receive any. The word 'harm' is a synonym for 'injury'. The word 'actual' indicates that the injury (although it need not be permanent) should not be so trivial as to be wholly insignificant... the body of the victim includes all parts of his body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties"*. This shows that while s47 could be used in reference to physical harm, psychiatric injury and other identifiable clinical conditions, it will not cover emotions like fear, distress or panic. That would come under s39 of the Criminal Justice Act for assault.

The actus reus of actual bodily harm is an assault or battery which resulted in actual bodily harm. This harm was expanded upon in **Miller 1954**¹¹ where it was said that actual bodily harm is *'any hurt or injury calculated to interfere with the health or comfort of the victim'*. In **T v DPP 2003**¹² it was held that a loss of consciousness, even momentarily can amount to actual bodily harm. The defendant and a group of other youths chased the victim, who fell to the ground and saw the defendant coming towards him. The victim covered his head with his arms and was kicked. He momentarily lost consciousness and remembered nothing until being woken by a police officer. The defendant was convicted of assault occasioning actual bodily harm. In **Chan-Fook**, mentioned above, the defendant subjected the victim to questioning about the theft of his fiancée's wedding ring, then dragged him upstairs and locked him in a room. The victim feared the defendant's return, so tried to lower himself out of a window but fell and was injured. The Court of Appeal accepted that psychiatric harm did amount to actual bodily harm, but pointed out that emotions did not. This was then confirmed in **R v Burstow 1997**¹³ where the defendant could not accept that the victim has ended their relationship. He began to regularly telephone her and write menacing letters to her and she suffered severe clinical depression as a result, which amounted to actual bodily harm. It was held in **Smith (Michael) 2006**¹⁴ that cutting off a person's hair amounted to actual bodily harm. The fact that hair is a 'dead tissue' is not relevant.

The lack of reference to mens rea in the Act meant that there has been a great deal of confusion in the law about what is was, until the current position was first outlined in **Roberts 1971**¹⁵, then returned to in the combined appeals of **Savage and Parmenter 1991**¹⁶. The courts have held that the mens rea for a common assault is sufficient for the mens rea of a s47 assault. So, this means that the defendant must intend or be subjectively reckless as to whether the victim fears or is subjected to unlawful force, which is the same mens rea as that of an assault or battery. There is no need for the defendant to intend, or be reckless as to whether actual bodily harm is caused. This was confirmed and demonstrated in the case of **Roberts 1971**. The defendant, driving a car, made

¹⁰ R v **Chan Fook [1994]** 1 WLR 689

¹¹ R v **Miller [1954]** 2 All ER 529

¹² (T) v DPP [2003] Crim LR 622

¹³ **R v Burstow [1997]** 4 All ER 225

¹⁴ DPP v **Smith (Michael Ross) [2006]**

¹⁵ **R v Roberts [1971]** EWCA Crim 4

¹⁶ R v **Savage**, DPP v **Parmenter 1991**

advances to the girl in the passenger seat, and tried to take off her coat. She feared that he was going to commit a more serious assault and jumped from the car while it was travelling at around 30 miles per hour. She was slightly injured as a result. The defendant was found guilty of assault occasioning actual bodily harm even though he had not intended any injury or realised there was a risk of injury. However, the fact that he intended to apply unlawful force when he touched her as he tried to take her coat off. This satisfied the mens rea for a common assault, and he could then be found guilty of a s47 offence. This was then echoed by the House of Lords in **Savage and Parmenter 1991**, where the House of Lords confirmed that the mens rea for actual bodily harm is the same as that of a common assault or battery. If actual bodily harm results as a consequence of either putting the person in fear of a battery intentionally, or recklessly touching the victim unlawfully, then the greater crime under s47 has been committed, and there is no need to prove that the defendant intended to cause actual bodily harm itself, or be reckless as to whether this would happen.

As Dr Jepson notes, a slap across the face, resulting in a bruise, would establish the necessary actus reus for ABH and a s47 offence. He goes on to say how a slap across the face may affect two separate victims differently, which would therefore create some problem in the law in regards to Lord Lane's comments about consent. The crux of Dr Jepson's argument against Lord Lane's in regard to assault resulting in actual bodily harm is that Lane would have to distinguish assaults, and try and say some are acceptable and others are not. After Lord Lane's comments in AG's Reference (No 6 of 1980) resulting in the above statement, that it is 'an essential element of an assault that the act is done contrary to the will and without the consent of the victim'¹⁷, he also went on to say that 'it is not in the public interest that people should try to cause or should cause each other actual bodily harm'¹⁸. This would suggest that Lord Lane, similarly to Dr Jepson, is not willing to say that consent is a valid defence when it comes to intention to commit serious crimes against the person, which is a valid and sensible standpoint due to the possible harm which the victim could have suffered.

Malicious wounding or inflicting grievous bodily harm

This is governed by **s20 Offences against the Person Act 1861**. **S20** states that '*Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence*'. The maximum sentence available to a judge convicting a defendant of this crime is 5 years, the same as the previous and lesser crime. This could be highlighted as an area for reform of the law, as it hardly seems fair that two defendants who commit these crimes which differ so much in their seriousness should be sentenced to the same length of time in prison. For the offence to be proved it must be shown that the defendant wounded or inflicted grievous bodily harm, and that he did this intending some injury (but not serious injury) be caused, or being reckless as to whether any injury was inflicted.

A 'wound', for the purposes of this offence can mean a cut or a break in the continuity of the whole skin. A cut of internal skin, such as in the cheek, is sufficient, but internal bleeding where there is no cut of the skin is not sufficient. This was seen in **JJC (a minor) v Eisenhower 1984**¹⁹.

¹⁷ Lord Lane's comments in AG's Reference (No 6 of 1980)

¹⁸ Lord Lane's comments in AG's Reference (No 6 of 1980)

¹⁹ **JJC v Eisenhower** (1983) QBD

Pellets from the defendant's airgun had injured the victim's eye. There was bruising around the eye and rupturing of the internal blood vessels surrounding it, but, crucially, there was no breaking of the skin. As there was no cut, it was held that this was not a wound, and that the cut must be of the whole skin, so that a scratch is not considered a wound. A broken bone is not even considered a wound, unless the skin is also broken. In the case of **Wood 1830**²⁰ the victim's collar bone was broken, but as the skin was intact it was held that there was no wound.

In **DPP v Smith 1961**²¹ it was held that grievous bodily harm meant 'really serious harm'. This does not have to be life threatening, and in **Saunders 1985**²² it was held that it was acceptable to direct a jury that there needs to be 'serious harm', without the use of the word 'really'. In **Bollom 2004**²³ judges noted that the severity of the injuries should be assessed according to the victim's health and age, and agreed that bruising would be less serious on an adult of full health than on a very small child or baby.

It seems absurd to suggest that, with Lord Lane's comments about not wanting people to 'try to cause or should cause each other actual bodily harm', in relation to any crime further than a common assault, that he would try to suggest that consent should be an available defence for s20 offences. This would therefore suggest that Dr Jepson's viewpoint would be much more logical in regard to s20.

He notes that his view is supported by the sadomasochistic case of **Brown and others 1993**²⁴. Homosexual, violent, sadomasochistic activities were found to have been taking place. Even though each member said they had consented to the activities, Lord Templeman said that '*the question whether the defence of consent should be extended to the consequences of sadomasochistic encounters can only be decided by consideration of policy and public interest... Society is entitled and bound to protect itself against a cult of violence*'. As Dr Jepson explains, '*when Brown and others appealed to the House of Lords, and subsequently the European Court of Human Rights, both courts took the view that consent should not be a defence in circumstances of serious bodily harm*²⁵. This therefore confirms the illegitimacy of Lord Lane's comments in relation to a s20 offence.

However, as with most other areas of the law, issues surrounding consent and sadomasochism are not without confusion. In **Wilson 1996**²⁶, the Court of Appeal held that where a defendant branded his initials on his wife's buttocks with a hot knife, at her request, this was not an unlawful act, even though she had to seek medical attention for the burns which were caused. It held it was not in the public interest that such consensual behaviour should be criminalised, and that this was a situation of 'personal adornment' like having a tattoo. While the Judges thought this was a satisfactory and logical decision, the public did not and saw it to be a homophobic outcome when compared with the case of Brown. Dr Jepson also voices his opinion in regards to Wilson; '*for my part, I consider the decision in Wilson to be irrational and out of step with common sense. It is just a*

²⁰ R. v. Wood [1830] 1 Mood. 278.

²¹ **DPP v Smith [1961]** AC 290

²² **R v Saunders 1985**

²³ R v **Bollom (2004)** 2 Cr App R 6

²⁴ R v **Brown [1993]** 2 All ER 75

²⁵ Dr Jepson's article

²⁶ R v **Wilson (1996)** 2 Cr App Rep 241

shame that the case was not appealed by the CPS to the House of Lords in order to clarify what now seems to be a confused area of law²⁷.

Due to the case of **Wilson** and the earlier case of **Slingsby 1995**²⁸, where the defendant successfully used consent as a defence to involuntary manslaughter, as the consent meant there had been no unlawful act, it seems that the law does allow for consent in regards to these more serious offences, which is neither in line with Lord Lane's comments, or Dr Jepson's.

Wounding or causing grievous bodily harm with intent

This is given under **s18 Offences against the Person Act 1861**, and amended by **Criminal Law Act 1967**, which says *'Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life'* It is often referred to as simply 'wounding with intent', however it covers a much wider range than this implies. As Dr Jepson notes, *'the maximum sentence for such an offence is life imprisonment, which signifies the seriousness with which we should consider this type of offence'*²⁹.

The actus reus of s18 can be committed in two ways, by wounding or by causing grievous bodily harm. The meanings of these words are the same as those given for s20 offences, as mentioned above. The word 'cause' with its obvious wide ranging meanings mean that it is only necessary to prove that the defendant's act was a substantial cause of the wound or grievous bodily harm.

As could be guessed from the specific nature of the definition of the necessary mens rea in the statute, s18 offences are specific intent crimes. It must be proven that the defendant intended to do some grievous bodily harm or resist or prevent the unlawful apprehension or detainer of any person. Although the word maliciously appears in s18, it has been decided that this adds nothing to the mens rea of this section where grievous bodily harm is intended. As the crime is one of specific intent, recklessness is not enough to constitute its mens rea. However, where the defendant is trying to resist or prevent arrest or detention then the level of intention regarding injury is lower. The prosecution must prove that he had specific intention to resist or prevent arrest but so far as the injury is concerned they need only prove that he was reckless as to whether his actions would cause a wound or injury. This was established in the case of **Morrison 1989**³⁰. A police officer seized hold of the defendant and told him that she was arresting him. He dived through a window, dragging her with him as far as the window so that her face was badly cut by the glass. The Court of Appeal held that as the word 'maliciously' is used in respect of this part of the section it must have the same meaning as in **Cunningham 1957**³¹ which means that the prosecution must prove that the defendant either intended injury or realised there was a risk of injury and took that risk.

²⁷ Dr Jepson's article

²⁸ R v **Slingsby 1995** Crim LR 570

²⁹ Dr Jepson's article

³⁰ **R v Morrison** (1988) 89 Cr App R 17

³¹ R v **Cunningham [1957]** 2 All ER 412

Dr Jepson gives an example of a s18 offence: *“the difference between assault occasioning GBH and intent to commit GBH can be envisaged a simple assault. If I slap V, and accidentally cut her face with my signet ring, I have caused serious harm (a wound) and possess the necessary mens rea for a s20 offence. If however, I pick up a razor blade and intentionally cut or wound her face, not only have I caused serious harm (a wound) I clearly intended to and in these circumstances I have the necessary intent for a s18 offence.”*³²

It is logical and sensible that Lord Lane’s argument about the defence of consent is not valid here. This is a much more serious crime than a common assault which is for what he intended his comments. However his later comments about not wanting to allow consent for injury just for the sake of injury are relevant here. Therefore Dr Jepson’s comments that consent should not be allowed as a defence for serious crimes is valid. There are no examples of cases where consent has been used as a defence, successfully, to s18 offences, which proves the unlikelihood of the courts to allow it.

Exceptions

Lord Lane, in the AG reference case, went on to say that consent may be available in limited circumstances, such as for *‘properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc’*³³. Consent to practical jokes and consent to minor harm in sexual activities has also been tolerated.

Properly conducted games and sports

As Lord Lane gave, injuries gained from properly conducted games and sports can be consented to, which Dr Jepson agrees with *‘correctly asserted that sport is an area where implied consent exists, because due to its nature injuries often occur with people consenting to the risk of such injury when they participate’*³⁴. In sports such as boxing, where the participants intend to do harm to one another, the House of Lords have confirmed them as lawful activities, such as in **Brown 1994**³⁵. In sports such as football, rugby and hockey, the victim is said to consent to harm that occurs within the rules of the game, provided that the defendant did not intend to cause serious injury. If he did have such intention then it would be immaterial that he was playing within the rules, which was confirmed by **Bradshaw 1878**³⁶ when the victim died during a football match, and again in **Barnes 2004**³⁷ where the defendant made a late tackle on the victim.

Lawful chastisement

Parents have traditionally been able to use reasonable force to chastise their children, and since the case of **Watkins 2001**³⁸ it appears that teachers also share this ability in regards to their unruly students. However, it was given that punishment could not be inflicted *‘for the gratification of passion or rage or if it be immoderate or excessive in its nature or degree’*.

³² Dr Jepson’s article

³³ Lord Lane’s comments in AG’s Reference (No 6 of 1980)

³⁴ Dr Jepson’s article

³⁵ R v **Brown** [1993] 2 All ER 75

³⁶ **R v Bradshaw (1878)** 14 Cox CC 83

³⁷ **R v Barnes**. [2004] EWCA Crim 3246

Reasonable surgical interference

A person can agree to the infliction of pain for medical reasons, even where the risk is substantial, such as an operation with only a small chance of success. However, surgical interference in cases where there is little medical advantage to be gained is less clear cut. Generally, it is held that the act is acceptable if it has some therapeutic value to the person requesting it. The defence of consent can be used by those performing cosmetic surgery, ear piercing, and tattooing of adults. In **Richardson 1999**³⁹ it was held that patients had consented to their dental treatment, even though they did not know the dentist had been struck off by the General Dental Council. In **Tabassum 2000**⁴⁰ however, the accused who pretended to be a doctor and intimately examined several women failed to get his conviction quashed. The women involved had not given a valid consent.

Dangerous exhibitions

In the field of entertainment, consent can be used as a defence in cases where there is a possibility of some harm, such as where a person allows knives to be thrown at him. However it is uncertain how far this allowance would extend.

Horseplay

It has been held in many cases that horseplay is a valid exception, and consent is a defence here. In **Jones 1986**⁴¹ two young boys were injured after they were tossed in the air by the defendants. The Court of Appeal quashed the convictions for GBH because the boys consent to such 'rough and undisciplined play' had provided a defence.

Harm inflicted through sexual activity

As Dr Jepson notes, *'it can be argued that sexual activity – because of its contact nature - always involves some form of assault or battery. Therefore, each time two people experience sexual acts they implicitly consent to an assault/battery. Indeed, the courts have accepted this and it is only if sexual activity occurs without consent that the law becomes involved (apart from in cases of underage sex)'*⁴².

For many years it was held that consent to sex included consent to any injury stemming from it, including disease. This was, until the case of **Dica 2004**⁴³. In this case, D knew that he had HIV and failed to notify two female sexual partners that he had the disease. As a consequence the women became infected and Dica was charged with a s20 OAPA 1861 offence. The judge at the first instance trial refused to allow the issue of consent to be placed before the jury, but on appeal it was held that the awareness of the women to the 'risk' of contracting HIV should have been considered at the first trial - so a re-trial was ordered.

In relation to those who actively seek pain during sex, sado-masochists, the law is equally firm. As mentioned above, the case of **Brown and other 1994** the convictions of a group of

⁴⁰ R v **Tabassum [2000]** 2 Cr. App. R. 328

⁴¹ R. v. **Jones, [1986]** 2 S.C.R. 284

⁴² Dr Jepson's article

⁴³ **R v Dica [2004]** 3 ALL ER 593

homosexual sado-masochists were upheld in the House of Lords, even though they had all consented to the activities.

Conclusion

Lord Lane's comments in relation to common assault are valid and sensible, in relation to the offences under s39. They should not be taken in relation to any more serious offences than these. Instead, Dr Jepson's comments that consent should not be allowed in these situations seems much more logical and valid in relation to the more serious offences against the person.

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