

Law Homework: LA2-5

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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

Consent is strictly speaking not a defence as where the victim consents there is no offence; however, the defence of consent can be used for all offences against the person excluding murder or situations where serious injury is caused. Lord Lane's statement refers to the non-fatal offence of assault under s39 Criminal Justice Act 1988. The actus reus of assault is the apprehension of immediate fear of violence, therefore there is no requirement for the victim to have been harmed, they merely need to fear it. The level of apprehension is determined through the eyes of the victim, thus if the victim were to consent to the assault this would negate any apprehension. Dr Jepson's response refers to 'serious' non-fatal offences against the person suggesting that an intent to commit a serious offence against a person would counteract any consent on behalf of the victim. To evaluate the views of both Lord Lane and Dr Jepson I will apply the law on consent to all non-fatal offences against the person; assault/battery, assault occasioning actual bodily harm, assault occasioning (or inflicting) grievous bodily harm and assault occasioning (or inflicting) grievous bodily harm with intent to do so.

Assault and Battery

The common assault offences of assault and battery are both common-law offences under s39 Criminal Justice Act 1988 with a slight difference. An assault requires the victim to apprehend immediate fear of violence through either the words or actions of the defendant (an omission is insufficient). The words used on the behalf of the defendant for the purposes of an assault can be verbal (Light (1857)) or non-verbal (Constanza (1997)). It has even been held that making silent phone calls is a sufficient act to cause the victim to apprehend the immediate fear of violence or unlawful force, as per the case of Ireland (1997). However, it will depend on the circumstances as to whether the victim's fear is reasonable, for example if the defendant has a gun and the victim is aware that the gun is not loaded then there is no reason for them to fear any immediate force.

The offence of battery requires the application of unlawful force to the victim or recklessness as to whether unlawful force is applied. The level of force used by the defendant needn't be much; the case of Thomas (1985) held that the touching of the victim's clothing was sufficient 'force' for the purposes of a committing a battery as it was considered to be 'equivalent to touching' the victim. The defendant needn't intend to apply any force; a battery can be committed through an indirect act as demonstrated in the case of DPP v K (1990) where the defendant was reckless in his actions which caused unlawful force to be applied. Furthermore, a battery can be committed through a continuing act as illustrated in the case of Fagan v Metropolitan Police Commander (1968) in which the defendant unintentionally parked his car on a police officer's foot, yet when he was asked to remove the car he refused to do so for several minutes. Unlike an assault, the defendant can be criminally liable through an omission if they are under a duty to act. This was seen in the case of DPP v Santana-Bermudez (2003) in which a police officer asked the defendant if he had any sharp objects on his person before she searched his person. He answered no but on searching him she was injured by a needle.

Intention and recklessness are both sufficient for the mens rea of assault and battery; the mens rea for an assault is either intention to cause another to fear immediate unlawful violence, or recklessness as to whether such fear is caused. The mens rea for a battery is either an intention to apply unlawful force or recklessness as to whether unlawful force is applied.

In response to Lord Lane's statement, I believe that his statement is applicable to the offences of assault and battery under s29 Criminal Justice Act 1988 as if the defendant had consented then there would not be an apprehension of force by the victim. Therefore, it would be true to say that it is essential for these offences

that they are done contrary to the will of the victim and thus, to continue with criminal prosecution would be a waste of both court time and money.

Assault occasioning Actual Bodily Harm

Assault occasioning actual bodily harm is listed under s47 Offences Against the Person Act 1861. For this area of law there is no statutory definition for either 'assault' or 'actual bodily harm', it is therefore based on case law. For the actus reus of a s47 offence it is necessary to prove that there was an assault and that this caused actual bodily harm. In the case of Miller (1954) 'actual bodily harm' was described to be 'any hurt or injury calculated to interfere with the health or comfort of the victim', however in the case of Chan Fook (1994), the Court of Appeal held that actual bodily harm does not include 'mere emotions such as fear, distress or panic or states of mind that are not themselves evidence of some identifiable clinical condition'. In T v DPP (2003) a temporary loss of consciousness was held to be actual bodily harm and in DPP v Smith (2006), cutting someone's hair was also held to be actual bodily harm.

The mens rea of a s47 offence is, again, either intention or recklessness as to whether the victim fears or is subjected to unlawful force is applied to the victim. This is the same as the mens rea for the s39 offence of common assault as previously discussed. The defendant need not intend or be reckless as to whether the actual bodily harm is caused, but must be for the purposes of the assault. This ruling was demonstrated in the case of Roberts (1971) where the defendant made sexual passes at the victim whilst he was driving. As a result, the victim jumped from the car and was injured. The defendant was found guilty of a s47 offence even though he did not intend or, in fact, realise that there was a risk of injury. He had, however, intended to apply unlawful force when he touched her which is sufficient for both the actus reus and mens rea of assault occasioning actual bodily harm.

In response to Lord Lane's above statement, it does not, in my opinion, seem rational or logical in regard to a s47 offence. This is because the same amount of force applied to two different people may lead to two different outcomes; one may remain unharmed whilst the other may be caused a bruise. Although the same act has been committed, the difference in outcome means that the defendant could be guilty of a worse offence if bruising occurs. Therefore, it would seem that Dr Jepson's statement stands to reason that consent should not be a defence to 'serious' offences. Although, a further point to consider is that Lord Lane later said in the Attorney General's Reference case that 'it is not in the public interest that people should try to cause or should cause each other actual bodily harm'. This suggests that Lord Lane does not believe that consent should be used in regard to causing actual bodily harm as it is not in the public interest, and this seems a rational and logical decision.

Assault occasioning (inflicting) Malicious Wounding / Grievous Bodily Harm

The offences of malicious wounding and grievous bodily harm are listed under s20 Offences Against the Person Act 1861. The word 'wound' was held to mean 'a cut or break in the continuity of the whole skin' in the case of JCC v Eisenhower (1983). Thus, the actual wound need not be severe as long as it breaks the skin. Any internal bleeding would not be considered a wound, nor would a broken bone unless this has broken the skin as well as per the case of Wood (1830).

Grievous bodily harm was held to mean 'really serious harm' in the case of DPP v Smith (1961). It needn't be life-threatening harm and in the case of Bollom (2004) it was approved that the jury

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could be directed to find 'serious harm', omitting the word 'really'.

The actus reus of a s20 offence is either the wounding or infliction of grievous bodily harm on the victim. The mens rea of a s20 offence is either intending to cause some injury or recklessness as to whether any injury was inflicted.

As previously mentioned, Lord Lane stated that it was 'not in public policy' for people to try to cause ABH on one another, thus it seems logical that he would also believe that it is not in the public policy to consent to an offence of higher severity such as that of a s20 offence.

The case of Brown (1993) supports Dr Jepson's viewpoint that consent should never be allowed as a defence to the infliction of serious harm. In this case a number of homosexual men were partaking in sadomasochistic activities and tried to plead the defence of consent to the injuries caused. The court rejected this defence due to the violent nature of the acts and, on appeal to the House of Lords and European Court of Human Rights, the defence was again rejected the view that consent was a valid defence for cases involving serious harm against the person. The case of Wilson (1997), however, rejects Dr Jepson's viewpoint and allows for the defence of consent where serious harm has been caused. In this case the defendant branded his initials on his wife's buttocks, which was distinguished from the case of Brown as the branding was considered to be 'personal adornment' and therefore the defence of consent was accepted.

Therefore, it is clear that the law on consent as a defence is constantly changing and there is no clear ruling with different cases taking conflicting views. My personal view agrees with that of Dr Jepson's statement that consent should never be a defence.

Wounding or Causing Grievous Bodily Harm with intent:

This offence is listed under s18 Offences Against the Person Act 1861 and is a more serious offence than the previously discussed s20 offence. The actus reus of s18 is an act which causes wounding or grievous bodily harm, the same as that for s20. The mens rea must be done with an intention to cause grievous bodily harm or to resist or prevent the lawful apprehension or detention. Although there are many similarities between the s20 and s18 offence, the main difference is that for the s18 offence, it cannot be committed recklessly; there must be an intention to cause GBH.

In regard to both Lord Lane's and Dr Jepson's statements, it is my opinion that the defence of consent must not be allowed for an offence of this severity. To continue to allow the defence of consent would lead to severe injustices and it would inevitably lead to the argument whether consent should be allowed for murder.

Exceptions:

There have, however, been some exceptions where the defence of consent has been allowed by the courts. The first, as previously discussed, is during sexual activity. In addition to sadomasochistic activities, there is also the point of biological GBH to consider. In the case of Clarence (1888) the defendant had sex with his wife without informing her that he had venereal disease, which he was aware of. It was argued that she would not have consented to having sexual intercourse with him had she known of the disease. This point was considered again in the later case of Dica (2004) in which the defendant had sex with two women and omitted to inform them that he had HIV. The issue to be considered by the jury was whether the defendants had consented to the risk of transmitting a sexual

infection, not whether they were aware of the defendant's condition. This reasoning seems illogical; surely the defendant should have to make others aware if he or she is carrying an infection.

A further example of where the defence of consent is commonly accepted is where the defendant is partaking in 'properly conducted games or sports'. If there was no defence of consent in contact sports such as football and rugby then the sport would not be able to be played. However, it is important to note that the sports must be 'properly conducted' and a distinction must be drawn between behaviour that is within the rules and that which breaches the rules. The case of Barnes (2004) set guidelines to be considered when deciding whether the offence was within the conduct of the sport. This area of law supports Lord Lane's statement that the assault must be done contrary to the will of the victim; where the players have consented to playing the game there can be no assault unless the offence has breached the proper conduct of the game.

Conclusion

To conclude, it is my opinion that Lord Lane's statement is logical in relation to the offences of assault and battery. However for more serious offences such as s18 and s20, I am in agreement with Dr Jepson that consent should never be a defence where there is intent to commit a serious offence against the person. Although, there are exceptions to both views as discussed above, thus it is preferable that the law be reformed to account for these. Overall, I do believe that the availability of the defence of consent should be limited.

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