# Consent and non-fatal offences against the person.

Written by Dr Peter Jepson (March 2007).

Lord Lane, in the Attorney General Reference (No 6 of 1980) 1981, 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." The logic of this statement is self-evident when one recognises that an assault is the apprehension of immediate force or violence.[i] The apprehension of force is established subjectively through the eyes of the victim and logically - if they invite or consent to the assault - the level of apprehension is undermined and therefore there should be no assault.

In order to consider Lord Lane's statement further, I intend to place Non-Fatal Offences Against the Person into four different categories and then consider if his statement is applicable for each of these categories.

**Category One** – Assault/Battery contrary to s39 Criminal Justice Act 1988 - maximum sentence of 6 months imprisonment.

**Category Two** – Assault occasioning (or inflicting) actual bodily harm contrary to s.47 of the Offences Against the Person Act 1861 - maximum sentence of five years imprisonment.

**Category Three** – Assault occasioning (or inflicting) grievous bodily harm contrary to s 20 OAPA 1861 (this includes wounding) - maximum sentence of five years imprisonment.

**Category Four** – Causing grievous bodily harm with intent to do so contrary to s18 OAPA 1861 (this includes wounding with intent) - maximum sentence of Life imprisonment

Having set out the four categories of offences against the person, the first thing to note about Lord Lane's statement is that his view does not establish a binding precedent. Indeed, his statement is obiter because it derives from an Attorney General Case in which the two defendants were unable to use consent as a defence in relation to a fistfight. In fact, a more binding quote from the case are the words of Lord Lane can be found in his words: "it is not in the public interest that people should try to cause or should cause each other actual bodily harm." What this suggests is that Lord Lane does not accept the view that consent is generally considered as a defence in relation to all assaults. This view is backed up by the fact that Lord Lane himself rejected consent in the circumstances of a fistfight resulting in actual bodily harm.

For my part, I would prefer a little more clarity in the law. One possible way of establishing clarity is to relate the issue of consent to the four categories above and try and determine if the liberal, and obiter, statement of Lord Lane could be applicable to any of the categories.

## Category One

Given that Category One involves assaults and batteries, contrary to s39 CJA 1988, this suggests limited/minimal harm to the victim. Indeed, an assault can be committed through silent telephone calls[ii] and/or where there is no physical touching and just an apprehension of force.[iii] Likewise a battery occurs through 'any touching of another person, however slight.[iv] However, as Robert Goff LJ said in Collins v Wilcox [1984], implied consent is given to touching in the ordinary course of everyday life. Thus, the courts have taken a view that "a battery is a touching in anger", with assault and battery separate crimes[v] that are often referred to under common references as someone committing "assault and battery".

Logically, therefore, Category One is an area of criminal law to which we could apply Lord Lane's obiter statement. Certainly, if D has consented to an assault/battery and there is no physical or mental harm, to establish either actual bodily harm or serious harm, there seems little point in prosecuting. Indeed, in this situation, given the consent of the victim there should be no need to prosecute because (1) there is no harm and (2) there is no genuine apprehension of force by the victim because they invited or consented to the assault.

In relation to Category One, therefore, I conclude that Lord Lane's obiter comments do make good sense and should in most circumstances be followed.

## Category Two

Within Category Two we have assaults that have occasioned or resulted in actual bodily harm as per s47 of the OAPA 1861. ABH was defined in Donavan [1934], by the Court of Appeal, who said that 'actual bodily harm' in s,47 bore its ordinary meaning with it including 'any hurt or injury' that interfered with the 'health or comfort' of V. Such hurt or injury need not be permanent but it has to be 'more than merely transient or trifling'. In practice, the courts have taken a wide approach to this and included minor bruises and abrasions – with the case of Chan-Fook confirming that the injury 'should not be so trivial as to be wholly insignificant.' On this logic: a slap across the face, resulting in a bruise, would establish the necessary actus reus for ABH and a s47 offence.

This, to my mind, creates a problem for Lord Lane's obiter statement. If he is prepared to accept consent to an assault, is he also prepared to accept consent to an assault that results in a bruise? Indeed, if I slap A she may just smile. However, the same force of slap on B could result in bruising because of the sensitive nature of her skin. Is Lord Lane really prepared to accept that some assaults are acceptable and others are not? The answer to that is clearly yes, because his further comment: "it is not in the public interest that people should try to cause or should cause each other actual bodily harm" signifies that he is not prepared to accept actual bodily harm injuries can be consented to.

Therefore, it seems that even Lord Lane is not prepared to accept that consent to an assault is always a defence when it comes to non-fatal offences that fall within Category Two.

## Category Three

This third category relates to an assault that occasions or results in grievous bodily harm within s.20 of the OAPA 1861. This begs the question, what is grievous bodily harm and in what ways may an assault result in such harm?

In DPP v Smith [1961] it was held that "bodily harm" needs no explanation and "grievous" means no more and no less than "really serious". Further, in the subsequent case of Saunders [1985], the Court of Appeal held that there is no real need to use the word "really". Hence, the term "grievous bodily harm" can be equated to "serious harm". Given that bruising can amount to 'actual bodily harm', it is reasonable to argue that "serious harm" must be more than bruising, with a wound amounting to a break in the skin and falling within the remit of s.20.[vi] Thus, in practice, "serious harm" can take various forms from a cut in the skin to broken bones.

An example of an assault occasioning GBH is that of me slapping V in her face resulting in my signet ring accidentally cutting her face - with blood all over the carpet (and/or breaking her cheekbone). In this imaginary situation, I intend assault (the necessary mens rea), but I fulfil the actus reus of an assault that results in a wound or "serious harm" (and/or even a broken cheekbone). Thus, I should be found guilty of s.20 offence. The real question is should I be found guilty if the V said, "go on please hit me I like being slapped"? On the basis of Lord Lane's obiter statement, there is an argument that V has consented to an assault, with it just being an accident that she obtained a cut on her face (and/or a broken cheekbone). Given that there is consent, and you cannot be liable for an accident, I must be considered as innocent. However, if we also look again at Lord Lane's second statement – which is part of the ratio of the case – he says: "it is not in the public interest that people should try to cause or should cause each other actual bodily harm." While his statement refers to ABH, it can be logically argued that a cut with a loss of blood (and/or a broken cheekbone) is more serious than a bruise. Thus, if public policy does not permit an assault that results in a bruise, it cannot permit an assault that results in a cut and loss of blood (or a broken cheekbone).

This view is supported by the sadomasochistic case of Brown and others [1993]. In this case a number of homosexual men were exploring sadomasochistic activities. Various different criminal acts were involved and the court rejected the argument of consenting adults because of the violent nature of the acts that varied from rubbing nettles on genitals[vii] and nailing a scrotum to a desk.[viii] 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.

Thus, in terms of legal logic, it can be argued that, consent is not an excuse when it comes to Category Three and s.20 OAPA 1861. Indeed, on the basis of the principles of the doctrine of judicial precedent, the House of Lords is the supreme and highest court in the land and we should all follow its binding precedent. Despite such logic, the case of R v Wilson [1997] burns a hole not just in the buttocks of the defendant's wife, but also in the argument that consent is not an excuse to s.20 offences against the person. In Wilson, the Court of Appeal distinguished the [1993] case of Brown by arguing that Alan Wilson's action of branding his initials on the buttocks of his wife

with a hot blade was 'a desirable personal adornment' similar to tattooing. Accordingly, the consent of the wife was accepted as a defence to a s.20 offence.

For my part, I consider the decision in Wilson to be irrational and out of step with common sense. It is just a 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 law. That being said, Wilson can be argued to be consistent with the earlier case of Slingsby [1995][ix] where rough and unsavoury sexual activity resulted in a woman dying from an infection from a cut in her vagina/rectum deriving from a signet ring belonging to the defendant. In this case constructive manslaughter case, the woman had fully consented to the battery and sexual activity – with the totally unforeseeable outcome clearly a justifying factor in the defendant's acquittal.

It follows therefore, that the courts will accept circumstances in which consent is a valid defence to a Category Three and other criminal offences.

## Category Four

As stated earlier, Category Four involves offences where D has caused grievous bodily harm with intent to do so contrary to s18 OAPA 1861 (this includes wounding with intent). The maximum sentence for such an offence is life imprisonment, which signifies the seriousness with which we should consider this type of offence. An example of 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 s.20 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 s.18 offence.[x]

It is my clear and unequivocal argument that consent should never be a defence when it comes to this level of serious harm and criminal activity.[xi] Indeed, there is not a single case where the courts have permitted consent in circumstances where there is intent to commit serious harm. When examining all the standard case law - Brown, Slingsby, Wilson etc – all of these cases have involved either s.47 or .20 OAPA 1861 offences.

What is more, if the law were to allow consent to intent to commit serious harm it would open the door to the unacceptable thought of consent to murder – since the law accepts that intent to cause serious harm resulting in death provides the necessary intent for murder.[xii] While some may argue that I am ruling out the prospect of a law that permits euthanasia, it is my view that such a legal development has many moral and legal consequences and it should only derive from a carefully constructed Act of Parliament – it should not derive from the shirttails of a common law case.

Consequently, with regards to Category Four, I assert that consent should never be a valid defence when it comes to intent to commit serious harm offences against the person.

**Exceptions that the law should/may permit.**

Lord Lane, in the Attorney General Reference Case, correctly asserted that the law does generally – on public policy grounds - allow situations in which the courts permit consent to assault, actual, and even serious harm. He cites: two key areas of medical operations/activity and sports activities. It can even be argued that consent to sexual activity is a form of assault/battery that the law implicitly and openly recognises. Thus, I will now consider each of these exceptions.

**Medical and similar exceptions.**
Lord Lane logically argued that one area where consent to an assault is recognised by the courts is with regards to medical operations/activities. There is no doubt this is true and his statement is sound, but I do not believe that Lord Lane and his fellow judges are giving open "get out of jail" cards. For example, the case of Tabasco 2000 establishes that consent does not extend in the circumstances of a person who pretends to be a Doctor and conducts intimate examinations. That aside, Doctors and other medical people, who have appropriate qualifications, do not commit criminal offences when they conduct necessary and appropriate medical operations and activities. Thus, if they are carrying our their bona fide duties, they should not fall within any of the four criminal categories I have discussed.[xiii]

This could also be argued with certified Tattooists, who are required by law to register with a local authority before they conduct business. Indeed, there are very strict guidelines which tattooists must follow in order to protect their customers from harm. Accordingly, they too should be considered as licensed to undertake minor cosmetic operations where valid consent is given.[xiv]

**Properly conducted sports exception.**
Lord Lane also correctly asserted that sport is an area where implied consent exists, because due to its nature injures often occur with people consenting to the risk of such injury when they participate. If we take rugby as an example, there is clear evidence of many assaults and batteries occurring during every match.[xv] Thus, the sport readily fits into Category One in relation to all of the tackles - and, on the basis of the logic behind that category; there should be no prospect of a prosecution. This should also apply if somebody suffers some actual bodily harm, or serious harm, as a result of a tackle or activity within the general rules of the game (which takes us into **Categories** Two and Three) since the resulting injury is not intended and could result from an accident. However, should a player deliberately set out to cause serious harm to another player (e.g. he sets out to break, and breaks, his neck) then consent should be no defence to such a serious criminal activity. It follows that those everyday injuries that occur within sport - and within the ambit of the rules of the sport - should be exempt from a prosecution where consent or an accident occurs. However, such liberty should not be extended to assaults that operate outside the rules of the game[xvi] and should never be extended to intent to cause serious harm[xvii] since 'no rules or practice of any game can make lawful that that is unlawful by the law of the land'.[xviii]

Even with regards to boxing we can recognise the potential for applying the principles of consent in relation to the four different categories. Both boxers, in recognised contest operating under the Queensbury Rules, consent to being assaulted and battered. While they do not necessarily welcome any resulting injuries that flow from those assaults/batteries, they do recognise that they may get injured. The courts also recognise this[xix] and so there have been no prosecutions flowing in the UK from

recognised and controlled boxing. That being said, if one of the boxers were to place a horseshoe in his glove - with the intent of causing 'serious harm' on his opponent - then he should have no defence of consent should injury occur because it amounts to a s18 offence which falls with a Category Four offence.

**Sexual activity.**
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.[xx]

For many years, it has been the law that consent to sexual activity impliedly resulted in consent to any diseased outcomes that may follow.[xxi] However, the case of Dica [1998] has established what has become to be known as 'biological GBH'. 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 s.20 OAPA 1861 offence.[xxii] 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. The worrying feature about this case is not so much the fact that consent is a potential issue, but more that there seems to be an expectation that the women should be cross-examined about the risk that they took in having un-protected sex. Quite why the victim of a crime should face such questions seems irrational – given that we do not ask victims of other crimes: "Why did you walk down that street in the dark – did you not recognise the risk of attack" etc.

Even allowing for the issue of consent to be relevant, they were consenting to sexual activity (and the risks that involves[xxiii]) they were not consenting, and almost certainly would not consent, to a killer disease like HIV. Thus, consent is meaningless unless it is informed.[xxiv] For my part, I fail to understand (other than it is easier to establish guilt) why people who have HIV - and set out to pass on the disease to others – are not prosecuted under s.18 OAPA 1861. In such circumstances, the Crown would need to prove that D intended to cause serous harm and therefore there should be no need to consider the issue of consent.

**In conclusion,**

Lord Lane's obiter statement: 'It is an essential element of an assault that the act is done contrary and without the consent of the victim' - is a sensible and practical statement. His statement - because it is based upon sound common and legal sense – establishes strong persuasive authority with regards to Category One (assault/battery) offences. However, in light of a number of important contradictory cases, his statement is at best weak persuasive authority when it comes to **Category** Two, Three, and Four offences.

Likewise, I have also produced a persuasive argument that 'consent should never be a valid defence when it comes to ***intent*** to commit serious offences against the person'.

That too has only persuasive value, but it does seem to be consistent with the laws in relation to non-fatal offences against the person.

**Bibliography**: Cases as shown and Criminal Law (3rd edition) Storey & Lidbury – Willan Publishing [2004].

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[i] Fagan v Metropolitan Police Commissioner [1968].
[ii] Ireland [1997], the House of Lords confirmed that silent telephone calls that caused a woman to apprehend immediate force or violence can occasion pschiatric injury which can amount to actual bodily harm.
[iii] Smith v Supt of Woking Police Station [1983].
[iv] Collins v Wilcox [1984]
[v] DPP v Little [1992]
[vi] See C (a minor) v Eisenhower [1984].
[vii] Logically, this could amount to a S.47 OAPA 1861 offence of ABH.
[viii] This seems to have been classed as a s.20 OAPA 1861 offence of assault occasioning GBH. For my part, I fail to understand how nailing a person to a desk is anything other than intent to cause serious harm. Having said that, it is clear that the CPS often establish a s.20 charge (rather than a s.18 charge) because it is easier to establish guilt (under s.20 there is only need to establish intent to assault).
[ix] Such an argument is valid by way of persuasive precedent, since Slingsby involves constructive manslaughter.
[x] The intent is reflected in a resulting sentence. For a s.20 offence the maximum sentence is 5 years imprisonment. For a s.18 offence it is 'life' imprisonment.
[xi] For an example of a case where consent has been denied in relation to 'serious harm' see R v Leach [1969] - where consent was not allowed in the circumstances of somebody being nailed to the cross in a crucifixion.
[xii] R v Woollin [1998].
[xiii] It is my view that this applies even without consent – for example in situations requiring an urgent medical operation in order to save life.
[xiv] So far as I am aware, ear piercing is not regulated in the same way – though given the potential danger of disease maybe it should be.
[xv] A simple tackle is a form of assault or battery.
[xvi] An example of this is Lee Bowyer being fined by the courts for assaulting a fellow Newcastle United play on the pitch with a live TV audience. Taken liberally, it seems the rules may provide for altercations between opposing players – they do not provide for assaults between players from the same team.
[xvii] Bradshaw [1878]
[xviii] Moore [1898]
[xix] As asserted by the House of Lords in Brown and others [1993]
[xx] An exception to this is under age sex – where it is clear that due to their age the victim cannot give bona fide consent.
[xxi] This derived from the case of Clarence [1888] where a woman unsuccessfully claimed that her husband had assaulted her by giving her VD. She argued that she had consented to sexual activity not VD.
[xxii] For the purposes of this article this is a Category Three offence.
[xxiii] A woman - who has unprotected sex - risks pregnancy and contracting a disease. By comparison, a man risks child maintenance payments, responsibilities, and disease.

[xxiv] If it is informed consent logically it should fall with a s.20 and Category Three offence.