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Criminal Law Special Study

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G154 CRIMINAL LAW

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extracts from the Offences Against the Person Act 1861.

Section 18 Shooting or attempting to shoot, or wounding, with intent to do grievous bodily harm, or to resist apprehension

Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause 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.

Section 20 Inflicting bodily injury, with or without weapon

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 a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude [for not more than five years].

Section 47 Assault occasioning bodily harm

Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable … to be kept in penal servitude [for not more than five years].

Extract from the Criminal Justice Act 1988

Section 39 Common Assault

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.

SOURCE 2

Extract adapted from the judgment of Lord Justice Robert Goff in *Collins v Wilcock* [1984] 1 WLR 1172.

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SOURCE 3

Extract adapted from the judgment of Lord Steyn in *R v Ireland; R v Burstow* [1997] 4 All ER 225 House of Lords.

LORD STEYN:

Harassment of women by repeated silent telephone calls, accompanied on occasions by heavy breathing, is apparently a significant social problem. That the criminal law should be able to deal with this problem, and so far as is practicable, afford effective protection to victims is self-evident.

It is to the provisions of the Offences against the Person Act 1861 that one must turn to examine whether our law provides effective criminal sanctions for this type of case.

An ingredient of each of the offences is "bodily harm" to a person. In respect of each section the threshold question is therefore whether a psychiatric illness, as testified to by a psychiatrist, can amount to "bodily harm". If … the answer to the question is yes, it will be necessary to consider whether the persistent silent caller, who terrifies his victim and causes her to suffer a psychiatric illness, can be criminally liable ….

The correct approach is simply to consider whether the words of the 1861 Act considered in the light of contemporary knowledge cover a recognisable psychiatric injury ….

The proposition that the Victorian legislator when enacting sections 18, 20 and 47 of the 1861 Act, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy. But the subjective intention of the draftsman is immaterial. The only relevant inquiry is as to the sense of the words in the context in which they are used.

[Accordingly] "bodily harm" must be interpreted so as to include recognisable psychiatric illness.

[In] *Burstow* … counsel laid stress on the difference between "causing" grievous bodily harm in section 18 and "inflicting" grievous bodily harm in section 20 [and] submitted that it is inherent in the word "inflict" that there must be a direct or indirect application of force to the body ….

[T]he question is whether as a matter of current usage the contextual interpretation of "inflict" can embrace the idea of one person inflicting psychiatric injury on another. One can without straining the language in any way answer … in the affirmative ….

[I]t is now necessary to consider whether the making of silent telephone calls causing psychiatric injury is capable of constituting an assault under section 47 ….

It is necessary to consider the two forms which an assault may take. The first is battery, which involves the unlawful application of force… The second form of assault is an act causing the victim to apprehend an immediate application of force upon her….

The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible … There is no reason why something said should be incapable of causing an apprehension of immediate personal violence … I would, therefore, reject the proposition that an assault can never be committed by words.

That brings me to the critical question whether a silent caller may be guilty of an assault. The answer to this question seems to me to be "yes, depending on the facts". It depends on questions of fact within the province of the jury. After all, there is no reason why a telephone caller who says to a woman in a menacing way "I will be at your door in a minute or two" may not be guilty of an assault if he causes his victim to apprehend immediate personal violence. Take now the case of the silent caller. He intends by his silence to cause fear and so he is understood. The victim … may fear the *possibility* of immediate personal violence. As a matter of law the caller may be guilty of an assault, whether he is or not will depend on the circumstance and in particular on the impact of the caller's potentially menacing call or calls on the victim. Such a prosecution case under section 47 may be fit to leave to the jury. I conclude that an assault may be committed in the particular factual circumstances which I have envisaged. For this reason I reject the submission that as a matter of law a silent telephone caller cannot ever be guilty of an offence under section 47.

SOURCE 4

Extract adapted from the judgment of Lord Justice Robert Goff in *JCC (a minor) v Eisenhower* [1983] 3 All ER 230 QBD.

ROBERT GOFF LJ:
In my judgment, that conclusion (of the magistrates) was not in accordance with the law. It is not enough that there has been a rupturing of blood vessels internally for there to be a wound under the statute because it is impossible for a court to conclude from that evidence alone whether or not there has been any break in the continuity of the whole skin. There may have simply been internal bleeding of some kind or another, the cause of which is not established. Furthermore, even if there had been a break in some internal skin, there may not have been a break in the whole skin.

In these circumstances, the evidence is not enough, in my judgment, to establish a wound within the statute. In my judgment, the magistrates erred in their conclusion on the evidence before them.

SOURCE 5

Extracts adapted from *Criminal Law.* Michael Jefferson. 8th Edition. 2007. Pearson Publishing. Pp 552-3 and 556.

For many years there has been debate as to the width of the word 'inflict' under section 20 [Offences Against the Person Act 1861]. These issues were raised in *Ireland; Burstow* [[1997] 4 All ER 225] … The first issue was whether or not section 20 required an assault (in the sense of a battery). The authorities were divided. Lord Steyn stated that section 20 does not require an assault on the basis that, if it did, words would have to be read into section 20 ('inflict *by assault* any grievous bodily harm') whereas section 20 'works perfectly satisfactorily without any such implication'.

There is a problem arising from *[R v] Wilson (Clarence)* [1984] AC 242 HL]. Lord Roskill apparently believed that 'inflict' required the direct application of force to the victim or the doing of an act which directly resulted in force being applied to the victim's body. What is said is *dictum.* On this approach, to take an old example, if one dug a pit for the victim to fall into, one would be guilty under section 20 because, although one has not directly applied force to the victim, one has done an act which directly resulted in force being applied. One will have caused GBH within section 18 because 'cause' does not require the direct application of force. On the facts of *Martin* [[1881] 8 QBD 54] … the accused would be guilty of the more serious offence, section 18, and guilty of the less serious offence, section 20, for the same reason, but one is not guilty in the poisoning example because no force is used. The result is absurd. It could have been avoided by having the same verb in sections 18 and 20 or by the House of Lords in *Wilson* deciding that 'cause' and 'inflict' covered the same ground. The House of Lords took the point further: not just did 'inflict' require direct application force, but so did assault occasioning actual bodily harm and common assault. Therefore, a person could be guilty of the most serious non-fatal assault but not of the lesser assaults! It is about time that the meaning of 'inflict' was settled ….

Another issue was whether section 20 required the direct or indirect application of force. The Lords [in *Ireland; Burstow*] held that no direct physical violence was necessary. Lord Steyn said:

> The problem is one of construction. The question is whether as a matter of current usage the contextual interpretation of 'inflict' can embrace the idea of one person inflicting psychiatric injury on another. One can without straining the language in any way answer that question in the affirmative. I am not saying that the words cause and inflict are exactly synonymous. They are not. What I am saying is that in the context of the Act of 1861 one can nowadays quite naturally speak of inflicting psychiatraic injury.

[L]ord Steyn thought that it would be 'absurd' if 'cause' and 'inflict' were of different width. This interpretation was consistent with the hierarchy of non-fatal offences ....

In both sections 18 and 20 the mental element is stated to be 'maliciously'. Section 18 requires proof of a further state of mind: 'with intent to do some grievous bodily harm'. Coleridge CJ said in *Martin* that 'maliciously' did not mean spitefully. It normally means in a statute 'intentionally or recklessly'. Negligence is insufficient. Yet one can be guilty of a more serious offence, manslaughter by gross negligence ….

Because section 18 is expressed in terms of 'cause GBH with intent to do GBH', the Court of Appeal in *Mowatt* [[1968] 1 QB 421] opined that the term 'maliciously' was superfluous. The thinking is that if one intends GBH, one must foresee GBH as a probable or possible outcome. If, however, the indictment is based upon GBH with intent to resist arrest, 'maliciously' is not superfluous ….

Criminal law should work in practice. Clarkson and Keating in 'Codification: Offences against the person under the draft Criminal Code' (1986) 50 JCL 405 at 415, wrote:

> Each of the non-fatal offences against the person is, to varying degrees, confused and uncertain … in relation to each other, they are incoherent and fail to represent a hierarchy of seriousness.

[I]t is possible to substitute all the terms in the sections and thereby produce an authoritative modern version of the crimes which gets rid of all the difficult and case-encrusted phraseology. The definition of concepts such as 'wound', 'cause', 'inflict', 'actual bodily harm' and 'grievous bodily harm' have to be gathered from the cases. The OAPA was a consolidation statute with no attempt made to grade the offences or fit them together … it is easy to see why modern judges find difficulty fitting modern methods into the 1861 statute.

SOURCE 6

Extract adapted from 'Consent: public policy or legal moralism?'. Susan Nash. New Law Journal. March 15 1996.

In *R v Wilson* [[1996] 2 Cr. App. R. 241] the Court of Appeal held that consensual activity between a husband and wife in the privacy of the matrimonial home was not a proper matter for a criminal prosecution. The defendant had been charged with assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861. The "activity" involved the defendant burning his initials onto his wife's right buttock with a hot knife because "she had wanted his name on her body". This decision rekindles the debate regarding the extent to which the criminal law should be concerned with the consensual activities of adults in private. In *R v Brown* [[1994] 1 AC 2112] the House of Lords upheld convictions under sections 20 and 47 of the Offences Against the Person Act notwithstanding that the victims had given their consent. This decision has been described as "unprincipled and incoherent".

The trial judge in *Wilson* had ruled that consent was no defence to an assault occasioning actual bodily harm. In arriving at this conclusion he stated that he felt bound by … *R v Brown*. The Court of Appeal considered it misdirection for the judge to say these cases constrained him to rule that consent was no defence.

The majority of the House of Lords in *Brown* held that it was not in the public interest that a person should wound or cause actual bodily harm to another for no good reason. Thus, in the absence of a good reason the victim's consent would not amount to a defence to a charge under section 47 or section 20 of the 1861 Act.

The defendants had taken part in consensual acts of violence for the purpose of sexual gratification which had resulted in varying degrees of injury. The court was of the opinion that the satisfying of sado-masochistic desires could not be classed as a good reason and dismissed the appeals. Lord Templeman considered that in some circumstances the accused would be entitled to an acquittal although the activity resulted in the infliction of some injury.

"Surgery involves intentional violence resulting in actual or sometimes serious bodily harm but surgery is a lawful activity. Other activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities." This reference to tattooing has now assumed significance. Lords Templeman and Jauncy referred to it as being an activity which, if carried out with the consent of an adult, did not involve an offence under section 47. Wilson had been engaged in an activity which in principle was no more dangerous than professional tattooing. Thus, the Court of Appeal was of the opinion that it was not in the public interest that his activities should amount to criminal behaviour.

The Court of Appeal has now declared that *Brown* is not authority for the proposition that consent is no defence to a charge under section 47 of the 1861 Act *in all circumstances* where actual bodily harm is deliberately inflicted upon a person. Public policy and public interest considerations will become increasingly important in deciding whether it is appropriate to criminalise consensual activity, giving rise to even greater uncertainty in the area.