R v Brown [1993] 2 All ER 75

HOUSE OF LORDS
LORD TEMPLEMAN, LORD JAUNCEY OF TULLICHETTLE, LORD LOWRY, LORD MUSTILL AND LORD SLYNN OF HADLEY
1, 2, 3, 7 DECEMBER 1992, 11 MARCH 1993

The appellants belonged to a group of sado-masochistic homosexuals who over a 10-year period from 1978 willingly participated in the commission of acts of violence against each other, including genital torture, for the sexual pleasure which it engendered in the giving and receiving of pain. The passive partner or victim in each case consented to the acts being committed and suffered no permanent injury. The activities took place in private at a number of different locations, including rooms equipped as torture chambers at the homes of three of the appellants. Video cameras were used to record the activities and the resulting tapes were then copied and distributed amongst members of the group. The tapes were not sold or used other than for the delectation of members of the group. The appellants were tried on charges of assault occasioning actual bodily harm, contrary to s 47 of the Offences against the Person Act 1861, and unlawful wounding, contrary to s 20 of that Act. The Crown's case was based very largely on the contents of the video tapes. Following a ruling by the trial judge that the consent of the victim afforded no defence to the charges, the appellants pleaded guilty and were sentenced to terms of imprisonment. The appellants appealed against their convictions, contending that a person could not guilty be of assault occasioning actual bodily harm or unlawful wounding in respect of acts carried out in private with the consent of the victim. The Court of Appeal dismissed their appeals. The appellants appealed to the House of Lords.

Held (Lord Mustill and Lord Slynn dissenting) – Consensual sado-masochistic homosexual encounters which occasioned actual bodily harm to the victim were assaults occasioning actual bodily harm, contrary to s 47 of the 1861 Act, and unlawful wounding, contrary to s 20 of that Act, notwithstanding the victim's consent to the acts inflicted on him, because public policy required that society be protected by criminal sanctions against a cult of violence which contained the danger of the proselytisation and corruption of young men and the potential for the infliction of serious injury. Accordingly, a person could be convicted of unlawful wounding and assault occasioning actual bodily harm, contrary to ss 20 and 47 of the 1861 Act, for committing sado-masochistic acts which inflicted injuries which were neither transient nor trifling, notwithstanding that the acts were committed in private, the person on whom the injuries were inflicted consented to the acts and no permanent injury was

sustained by the victim. It followed that the appellants had been properly convicted and that their appeals would be dismissed (see p 83 *h j*, p 84 *g*, p 90 *h j*, p 91 *b c g* to *j*, p 92 *a* to *c*, p 93 *b c*, p 94 *d e*, p 100 *b* to *h* and p 101 *c*, post).

Dictum of Cave J in *R v Coney* (1882) 8 QBD 534 at 539, *R v Donovan* [1934] All ER Rep 207 and *A-G's Reference* (*No 6 of 1980*) [1981] 2 All ER 1057 applied.

Decision of the Court of Appeal [1992] 2 All ER 552 affirmed.

Conjoined appeals

Anthony Joseph Brown, Colin Laskey, Roland Leonard Jaggard, Saxon Lucas and Christopher Robert Carter appealed with the leave of the Court of Appeal, Criminal Division against the decision of that court (Lord Lane CJ, Rose and Potts JJ) ([1992] 2 All ER 552, [1992] QB 491, 94 Cr App R 302) on 7 November 1990 dismissing their appeals against their convictions and sentences on 19 December 1990 in the Central Criminal Court before Judge Rant QC on counts of unlawful wounding, assault occasioning actual bodily harm and aiding and abetting the same contrary to ss 20 and 47 of the Offences against the Person Act 1861, the appellants having pleaded guilty to the charges following rearraignment as a result of a ruling by the judge on 2 November 1990. The Court of Appeal certified, under s 33(2) of the Criminal Appeal Act 1968, that a point of law of general public importance (set out at letter *h*, below) was involved in the decision to dismiss the appeals. The appeals were conjoined by order of the House of Lords dated 9 November 1992. The facts are set out in the opinion of Lord Templeman.

Lawrence Kershen QC, *Eleanor Sharpston* and *Pauline Hendy* (instructed by *Geffens*, Walsall) for the appellant Brown. *Baroness Mallalieu QC*, *Adrian Fulford* and *Eleanor Sharpston* (instructed by *J P Malnick & Co*) for the appellants Lucas and Jaggard. *Anna Worrall QC*, *Gibson Grenfell* and *Eleanor Sharpston* (instructed by *J P Malnick & Co*) for the appellant Laskey. *Ronald Thwaites QC*, *Jonathan Lurie* and *Eleanor Sharpston* (instructed by *Shakespeares*, Birmingham) for the appellant Carter. *Nicholas Purnell QC* and *David Spens* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration.

11 March 1993. The following opinions were delivered.

LORD TEMPLEMAN. My Lords, the appellants were convicted of assaults occasioning actual bodily harm contrary to s 47 of the Offences against the Person Act 1861. Three of the appellants were also convicted of wounding contrary to s 20 of the 1861 Act. The incidents which led to each conviction

occurred in the course of consensual sado-masochistic homosexual encounters. The Court of Appeal upheld the convictions and certified the following point of law of general public importance:

'Where A wounds or assaults B occasioning him actual bodily harm in the course of a sadomasochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 and section 47 of the 1861, Offences Against the Person Act?'

The definition of assault set forth in the 14th Report of the Criminal Law Revision Committee on *Offences against the Person* (Cmnd 7844 (1980)) para 158 and adopted by the Law aCommission in their Consultation Paper No 122, *Legislating the Criminal Code: Offences against the Person and General Principles* (1992) para 9.1 is as follows:

'At common law, an assault is an act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful personal violence and a battery is an act by which a person intentionally or recklessly inflicts personal violence upon another. However, the term "assault" is now, in both ordinary legal usage and in statutes, regularly used to cover both assault and battery.'

There are now three types of assault in ascending order of gravity: first, common assault, secondly, assault which occasions actual bodily harm and, thirdly, assault which inflicts grievous bodily harm. By s 39 of the Criminal Justice Act 1988:

'Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine … to imprisonment for a term not exceeding six months, or to both.'

By s 47 of the 1861 Act, as amended:

'Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable [to a maximum penalty of five years' imprisonment].'

In *R v Donovan* [1934] 2 KB 498 at 509, [1934] All ER Rep 207 at 212 Swift J, delivering the judgment of the Court of Criminal Appeal, said:

'… "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.'

In the present case each appellant pleaded guilty to an offence under this section when the trial judge ruled that consent of the victim was no defence.

By s 20 of the 1861 Act, as amended:

'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] … and shall be liable [to a maximum penalty of five years' imprisonment].'

To constitute a wound for the purposes of the section the whole skin must be broken and not merely the outer layer called the epidermis or the cuticle: see *J J C* (*a minor*) *v Eisenhower* [1983] 3 All ER 230.

'Grievous bodily harm' means simply bodily harm that is really serious and it has been said that it is undesirable to attempt a further definition: see *DPP v Smith* [1960] 3 All ER 161, [1961] AC 290.

In s 20 the words 'unlawfully' means that the accused had no lawful excuse such as self-defence. The word 'maliciously' means no more than intentionally for present purposes: see *R v Mowatt* [1967] 3 All ER 47, [1968] 1 QB 421.

Three of the appellants pleaded guilty to charges under s 20 when the trial judge ruled that the consent of the victim afforded no defence.

In the present case each of the appellants intentionally inflicted violence upon another (to whom I shall refer as 'the victim') with the consent of the victim and thereby occasioned actual bodily harm or in some cases wounding or grievous bodily harm. Each appellant was therefore guilty of an offence under s 47 or s 20 of the 1861 Act unless the consent of the victim was effective to prevent the commission of the offence or effective to constitute a defence to the charge.

In some circumstances violence is not punishable under the criminal law. When no actual bodily harm is caused, the consent of the person affected precludes him from complaining. There can be no conviction for the summary offence of common assault if the victim has consented to the assault. Even when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating. 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 bodily harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities.

In earlier days some other forms of violence were lawful and when they ceased to be lawful they were tolerated until well into the nineteenth century. Duelling and fighting were at first lawful and then tolerated provided the protagonists were voluntary participants. But, where the results of these activities was the maiming of one of the participants, the defence of consent never availed the aggressor: see 1 *Hawkins' Pleas of the Crown* (8th edn, 1824) ch 15. A maim was bodily harm whereby a man was deprived of the use of any member of his body which he needed to use in order to fight but a bodily injury was not a maim merely because it was a disfigurement. The act of maim was

unlawful because the King was deprived of the services of an able-bodied citizen for the defence of the realm. Violence which maimed was unlawful despite consent to the activity which produced the maiming. In these days there is no difference between maiming on the one hand and wounding or causing grievous bodily harm on the other hand except with regard to sentence.

When duelling became unlawful, juries remained unwilling to convict but the judges insisted that persons guilty of causing death or bodily injury should be convicted despite the consent of the victim.

Similarly, in the old days, fighting was lawful provided the protagonists consented because it was thought that fighting inculcated bravery and skill and physical fitness. The brutality of knuckle fighting however caused the courts to declare that such fights were unlawful even if the protagonists consented. Rightly or wrongly the courts accepted that boxing is a lawful activity.

In *R v Coney* (1882) 8 QBD 534 the court held that a prize-fight in public was unlawful. Cave J said (at 539):

'The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial.'

Stephen J said (at 549):

'When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults … In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.'

Hawkins J said (at 553):

'… whatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution. In other words, though a man may by consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interest of the public for the maintenance of good order … He may compromise his own civil rights, but he cannot compromise the public interests.'

Lord Coleridge CJ said (at 567):

'… I conceive it to be established, beyond the power of any argument however ingenious to raise a doubt, that as the combatants in a duel cannot give consent to one another to take away life, so neither can the combatants in a prize-fight give consent to one another to commit that which the law has repeatedly held to be a breach of the peace. An individual cannot by such consent destroy the right of the Crown to protect the public and keep the peace.'

The conclusion is that, a prize-fight being unlawful, actual bodily harm or serious bodily harm inflicted in the course of a prize-fight is unlawful notwithstanding the consent of the protagonists.

In *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207 the appellant in private beat a girl of 17 for purposes of sexual gratification, it was said with her consent. Swift J said ([1934] 2 KB 498 at 507, [1934] All ER Rep 207 at 210):

'… it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.'

In *A-G's Reference*(*No 6 of 1980*) [1981] 2 All ER 1057 at 1059, [1981] QB 715 at 719 where two men quarrelled and fought with bare fists Lord Lane CJ, delivering the judgment of the Court of Appeal, said:

'… it is not in the public interest that people should try to cause or should cause each other bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.'

Duelling and fighting are both unlawful and the consent of the protagonists affords no defence to charges of causing actual bodily harm, wounding or grievous bodily harm in the course of an unlawful activity.

The appellants and their victims in the present case were engaged in consensual homosexual activities. The attitude of the public towards homosexual practices changed in the second half of this century. Change in public attitudes led to a change in the law.

The *Report of the Committee on Homosexual Offences and Prostitution* (the Wolfenden Report) (Cmnd 247 (1957)) ch 2 para 13, declared that the function of the criminal law in relation to homosexual behaviour—

'is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who

are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special, physical, official or economic dependence.'

In response to the Wolfenden Report and consistently with its recommendations, Parliament enacted s 1 of the Sexual Offences Act 1967, which provided, inter alia, as follows:

'(1) Notwithstanding any statutory or common law provision … a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years. (2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done—(*a*) when more than two persons take part or are present … (6) It is hereby declared that where in any proceedings it is charged that a homosexual act is an offence the prosecutor shall have the burden of proving that the act was done otherwise than in private or otherwise than with the consent of the parties or that any of the parties had not attained the age of twenty-one years. (7) For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is a party to the commission by a man of such an act.'

The offence of gross indecency was created by s 13 of the Sexual Offences Act 1956 in the following terms:

'It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man.'

By the 1967 Act Parliament recognised and accepted the practice of homosexuality. Subject to exceptions not here relevant, sexual activities conducted in private between not more than two consenting adults of the same sex or different sexes are now lawful. Homosexual activities performed in circumstances which do not fall within s 1(1) of the 1967 Act remain unlawful. Subject to the respect for private life embodied in the 1967 Act, Parliament has retained criminal sanctions against the practice, dissemination and encouragement of homosexual activities.

My Lords, the authorities dealing with the intentional infliction of bodily harm do not establish that consent is a defence to a charge under the 1861 Act. They establish that the courts have accepted that consent is a defence to the infliction of bodily harm in the course of some lawful activities. The question is whether the defence should be extended to the infliction of bodily harm in the course of sadomasochistic encounters. The Wolfenden Committee did not make any recommendations about sado-masochism and Parliament did not deal with violence in 1967. The 1967 Act is of no assistance for present purposes because the present problem was not under consideration.

The question whether the defence of consent should be extended to the consequences of sado-masochistic encounters can only be decided by consideration of policy and public interest. Parliament can call on the advice of

doctors, psychiatrists, criminologists, sociologists and other experts and can also sound and take into account public opinion. But the question must at this stage be decided by this House in its judicial capacity in order to determine whether the convictions of the appellants should be upheld or quashed.

Counsel for some of the appellants argued that the defence of consent should be extended to the offence of occasioning actual bodily harm under s 47 of the 1861 Act but should not be available to charges of serious wounding and the infliction of serious bodily harm under s 20. I do not consider that this solution is practicable. Sado-masochistic participants have no way of foretelling the degree of bodily harm which will result from their encounters. The differences between actual bodily harm and serious bodily harm cannot be satisfactorily applied by a jury in order to determine acquittal or conviction.

Counsel for the appellants argued that consent should provide a defence to charges under both ss 20 and 47 because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted bodily harm on willing victims. Suicide is no longer an offence but a person who assists another to commit suicide is guilty of murder or manslaughter.

The assertion was made on behalf of the appellants that the sexual appetites of sadists and masochists can only be satisfied by the infliction of bodily harm and that the law should not punish the consensual achievement of sexual satisfaction. There was no evidence to support the assertion that sado-masochist activities are essential to the happiness of the appellants or any other participants but the argument would be acceptable if sado-masochism were only concerned with sex as the appellants contend. In my opinion sado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.

A sadist draws pleasure from inflicting or watching cruelty. A masochist derives pleasure from his own pain or humiliation. The appellants are middle-aged men. The victims were youths some of whom were introduced to sadomasochism before they attained the age of 21. In his judgment in the Court

of Appeal, Lord Lane CJ said that two members of the group of which the appellants formed part, namely one Cadman and the appellant Laskey—

'were responsible in part for the corruption of a youth "K" … It is some comfort at least to be told, as we were, that "K" has now it seems settled into a normal heterosexual relationship. Cadman had befriended "K" when the boy was 15 years old. He met him in a cafeteria and, so he says, found out that the boy was interested in homosexual activities. He introduced and encouraged "K" in "bondage" affairs. He was interested in viewing and recording on video tape "K" and other teenage boys in homosexual scenes … One cannot overlook the danger that the gravity of the assaults and injuries in this type of case may escalate to even more unacceptable heights.' (See 94 Cr App R 302 at 310.)

The evidence disclosed that drink and drugs were employed to obtain consent and increase enthusiasm. The victim was usually manacled so that the sadist could enjoy the thrill of power and the victim could enjoy the thrill of helplessness. The victim had no control over the harm which the sadist, also stimulated by drink and drugs, might inflict. In one case a victim was branded twice on the thigh and there was some doubt as to whether he consented to or protested against the second branding. The dangers involved in administering violence must have been appreciated by the appellants because, so it was said by their counsel, each victim was given a code word which he could pronounce when excessive harm or pain was caused. The efficiency of this precaution, when taken, depends on the circumstances and on the personalities involved. No one can feel the pain of another. The charges against the appellants were based on genital torture and violence to the buttocks, anus, penis, testicles and nipples. The victims were degraded and humiliated, sometimes beaten, sometimes wounded with instruments and sometimes branded. Bloodletting and the smearing of human blood produced excitement. There were obvious dangers of serious personal injury and blood infection. Prosecuting counsel informed the trial judge against the protests of defence counsel that, although the appellants had not contracted AIDS, two members of the group had died from AIDS and one other had contracted an HIV infection although not necessarily from the practices of the group. Some activities involved excrement. The assertion that the instruments employed by the sadists were clean and sterilised could not have removed the danger of infection, and the assertion that care was taken demonstrates the possibility of infection. Cruelty to human beings was on occasions supplemented by cruelty to animals in the form of bestiality. It is fortunate that there were no permanent injuries to a victim though no one knows the extent of harm inflicted in other cases. It is not surprising that a victim does not complain to the police when the complaint would involve him in giving details of acts in which he participated. Doctors of course are subject to a code of confidentiality.

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and

unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty and result in offences under ss 47 and 20 of the 1861 Act.

The appellants' counsel complained that some of the group's activities involved the appellants in offences of gross indecency which, happily for the appellants, became time-barred before the police obtained video films made by members of the group of some of their activities. Counsel submitted that, since gross indecency charges were time-barred, the police acted unfairly when they charged the appellants with offences under the 1861 Act. But there was no reason for the police to refrain from pursuing the charges under the 1861 Act merely because other charges could not be pursued. Indecency charges are connected with sex. Charges under the 1861 Act are concerned with violence. The violence of sadists and the degradation of their victims have sexual motivations but sex is no excuse for violence.

The appellants' counsel relied, somewhat faintly, on art 7 of the European Convention on Human Rights (see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)). That article, so far as material, provides:

'1. No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed …'

At the relevant time it was a criminal offence under English law to inflict actual bodily harm or worse. Counsel submitted that the appellants reasonably believed that consent was a defence. This was an ingenious argument for which there was no foundation in fact or principle and which in any event does not seem to me to provide a defence under art 7.

The appellants' counsel relied on art 8 of the convention, which is in these terms.

'1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of natural security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

It is not clear to me that the activities of the appellants were exercises of rights in respect of private and family life. But assuming that the appellants are claiming to exercise those rights I do not consider that art 8 invalidates a law which forbids violence which is intentionally harmful to body and mind.

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is

uncivilised. I would answer the certified question in the negative and dismiss the appeals of the appellants against conviction.

LORD JAUNCEY OF TULLICHETTLE. My Lords, all five appellants and a number of other persons were charged with offences against s 47 of the Offences against the Person Act 1861, and the appellants Laskey, Jaggard and Lucas were also charged with contraventions of s 20 of that Act. The events giving rise to all the charges were sado-masochistic homosexual activities carried out consensually by the appellants with each other and with other persons. Following upon a ruling of the trial judge that consent of the other participant (the receiver) was no defence to the charges the appellants pleaded guilty and were duly sentenced. Their appeals against the judge's ruling were dismissed by the Court of Appeal, which certified the following point of law as being of general public importance:

'Where A wounds or assaults B occasioning him actual bodily harm in the course of a sadomasochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the 1861, Offences Against the Person Act.'

Although the issue of consent was fundamental and indeed common to all five appeals the appellants did not lack for representation since no less than four Queen's Counsel and one junior counsel addressed your Lordships on their behalf on different aspects of this matter.

The facts giving rise to the charges came to light as a result of police investigation into other matters. It was common ground that the receivers had neither complained to the police nor suffered any permanent injury as a result of the activities of the appellants. Although the incidents giving rise to each charge were the subject of a video-recording, these recordings were made not for sale at a profit but for the benefit of those members of the 'ring', if one may so describe it, who had not had the opportunity of witnessing the events in person. Your Lordships were further informed that the activities of the appellants, who are middle-aged men, were conducted in secret and in a highly controlled manner, that code words were used by the receiver when he could no longer bear the pain inflicted upon him and that when fish-hooks were inserted through the penis they were sterilised first. None of the appellants however had any medical qualifications and there was, of course, no referee present such as there would be in a boxing or football match.

The basic argument propounded by all the appellants was that the receivers having in every case consented to what was inflicted upon them no offence had been committed against s 20 or s 47 of the 1861 Act. All the appellants recognised however that so broad a proposition could not stand up and that there must be some limitation upon the harm which an individual could consent to receive at the hand of another. The line between injuries to the infliction of

which an individual could consent and injuries to whose infliction he could not consent must be drawn it was argued where the public interest required. Thus except in the case of regulated sports the public interest required that injuries should not be inflicted in public where they might give rise to a breach of the peace. Baroness Mallalieu QC, for Jaggard argued that injuries to which consent would be irrelevant were those which resulted in actual expense to the public by reason, for example, of the expenses of hospital or other medical treatment, or payment of some benefit. Such injuries would be likely to be serious and to be appropriate to a s 20 charge, whereas the consensual infliction of less serious injuries would not constitute an offence. Furthermore the presence of hostility was an essential element in the offence of assault, which element was necessarily lacking where a valid consent was present. Miss Worrall QC for Laskey maintained that everyone had a right to consent to the infliction on himself of bodily harm not amounting to serious harm or maiming, at which point public interest intervened. She further argued that having regard to the common law offence of keeping a disorderly house and to the various offences created by the Sexual Offences Acts 1956 to 1976 it was inappropriate to use the 1861 Act for the prosecution of sexual offences because the public interest was adequately looked after by the common law offence and the later Acts. Mr Kershen QC for Brown also argued that the 1861 Act was an inappropriate weapon to use in these cases. He submitted that, while deliberate infliction of injury resulting in serious bodily harm might be an offence whether or not consent was given, deliberate consensual wounding would not be an offence if it did not cause serious bodily harm. This latter proposition would appear to draw the line somewhere down the middle of s 20. Mr Kershen further argued that if his primary submissions were wrong this House should, having regard to the current public interest in freedom of sexual expression, lay down new rules for sado-masochistic activities. Mr Thwaites QC for Carter traced the history of the offence of maiming, which deprived the King of possible service, invited your Lordships to hold that *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207 and *A-G's Reference*(*No 6 of 1980*) [1981] 2 All ER 1057, [1981] QB 715, to which I shall refer later, were wrongly decided and submitted that as a matter of principle a man could lawfully consent to the infliction of any injury upon himself which fell short of maiming.

In concluding that the consent of the receivers was immaterial to the offences charged the Court of Appeal relied on three cases, namely *R v Coney* (1882) 8 QBD 534, *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207 and *A-G's Reference*(*No 6 of 1980*) [1981] 2 All ER 1057, [1981] QB 715. Before examining these cases it is interesting to look at the definitions of 'maim' and 'assault' in *Hawkins' Pleas of the Crown* (1 Hawk PC (8th edn, 1824) ch 15). Maiming is defined as '… such a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary …' (see p 107, s 1). Examples are then given. Assault is

defined as '… an attempt to offer, with force and violence, to do a corporal hurt to another' (see p 110, s 1) and battery as '… any injury whatsoever be it never so small, being actually done to the person of a man in an angry, revengeful, rude, or insolent manner …' (see p 110, s 2). It is to be noted that lack of consent of the victim is stated to be a necessary ingredient neither of assault nor of battery. In *R v Coney* (1882) 8 QBD 534 the 11 judges who heard the case held that a prize-fight was unlawful, that all persons aiding and abetting therein were guilty of assault and that consent of the persons actually engaged in fighting to the interchange of blows did not afford any answer to the criminal charge of common assault. The appellants were spectators at an organised fight between two men near a public road. Cave J said (at 539):

'The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Reg*. v. *Orton* ((1878) 39 LT 293).'

Stephen J said (at 549):

'The principle as to consent seems to me to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually received does not prevent those blows from being assaults.'

In this passage Stephen J clearly considered that prize-fights were likely to cause breaches of the peace and that no consent could render fights with such a result lawful. In a later passage he said:

'In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football, and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.'

In this passage he appears to be considering organised sports where danger to life and limb is merely incidental to the main purpose of the activity. Hawkins J said (at 553):

'As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all … it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution.'

Hawkins J concluded that every fight in which the object and intent of each of the combatants was to subdue the other by violent blows tending to a breach of the peace was illegal and he distinguished friendly encounters in the follow passage (at 554):

'The cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury to or to rouse angry passions in either, do not in the least militate against the view I have expressed; for such encounters are neither breaches of the peace nor are they calculated to be productive thereof …'

It is obvious that in concluding that prize-fights were unlawful he was influenced mainly, if not entirely, by the fact that they were likely to be productive of breaches of the peace. Furthermore, it would in my view be wrong to treat the first cited dictum of Hawkins J as referring to all assaults irrespective of the gravity thereof. The court was considering a charge of common assault and I do not think that the learned judge was intending to lay down a general principle which was applicable also to assaults charged under s 47 of the 1861 Act or to offences under s 20 thereof. Lord Coleridge CJ similarly concluded that the combatants in a prize-fight could not consent to commit a breach of the peace (at 567).

Although there was unanimity among the judges in *R v Coney* as to consent in the particular circumstances affording no answer to a charge of assault, there were differing reasons advanced for reaching that conclusion. However, Cave, Stephen and Hawkins JJ and Lord Coleridge CJ all considered that effectual consent could not be given to blows producing or likely to produce a breach of the peace. Stephen J specifically referred to prize-fights being injurious to the public as disorderly exhibitions and it may be assumed that the other three judges also had in mind the public interest in preventing breaches of the peace. Given the fact that the fight took place before a crowd of more than 100 persons the likelihood of a breach of the peace would by itself have been sufficient to negative consent without considering the nature and effect of the blows struck. Nevertheless, Stephen J also considered that it was against the public interest that blows should endanger the health of the combatants. Whether he had in mind only blows which produced a maim is not stated although in the editions of his *Digest of the Criminal Law* published before and after *R v Coney* he stated (3rd edn (1883) pp 141–142, art 206): 'Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim.' I do not find great assistance in *R v Coney* towards the immediate resolution of the questions raised in these appeals where the offences charged were statutory and where no question of breach of the peace arose. I would therefore sum up my analysis of *R v Coney* (1882) 8 QBD 534 by concluding that it is authority for the proposition that the public interest limits the extent to which an individual may consent to infliction upon himself by another of bodily harm and that such public interest does not intervene in

the case of sports where any infliction of injury is merely incidental to the purpose of the main activity.

In *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207 the appellant was charged with indecent and common assault upon a girl whom he had beaten with her consent for his own sexual gratification. In delivering the judgment of the Court of Criminal Appeal Swift J, after citing the passage in the judgment of Cave J in *R v Coney* 8 QBD 534 at 539, to which I have already referred, said ([1934] 2 KB 498 at 507, [1934] All ER Rep 207 at 210):

'If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is, in one case, an innocent act of familiarity or affection, may, in another, be an assault, for no other reason than that, in the one case there is consent, and in the other consent is absent. As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.'

Swift J also observed that the passage from *Stephen's Digest of the Criminal Law* which I have quoted above needed considerable qualification in 1934. He went on to consider exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. Such exceptions included friendly contests with cudgels, foils or wrestling which were capable of causing bodily harm, rough and undisciplined sports or play where there was no anger and no intention to cause bodily harm and reasonable chastisement by a parent or a person in loco parentis. He might also have added necessary surgery. After referring to the fact that if the appellant acted so as to cause bodily harm he could not plead the gratification of his perverted desires as an excuse, Swift J said ([1934] 2 KB 498 at 509, [1934] All ER Rep 207 at 211–212):

'Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the exceptions to the general rule. In our view, on the evidence given at the trial, the jury should have been directed that, if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied, that it became necessary to consider the further question whether the prosecution had negatived consent. For this purpose we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.'

It is clear from the report that the girl did in fact suffer actual bodily harm.

In *A-G's Reference*(*No 6 of 1980*) [1981] 2 All ER 1057, [1981] QB 715 the respondent and the victim had a fist-fight in a public street which resulted

in actual bodily harm to the victim. The respondent was charged with assault causing actual bodily harm and was acquitted. The question referred to the Court of Appeal was ([1981] 2 All ER 1057 at 1058, [1981] QB 715 at 717):

'Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?'

The court answered the question in the negative. Lord Lane CJ said ([1981] 2 All ER 1057 at 1059, [1981] QB 715 at 718–719):

'Bearing in mind the various cases and the views of the textbook writers cited to us, and starting with the proposition that ordinarily an act consented to will not constitute an assault, the question is: at what point does the public interest require the court to hold otherwise?'

He later said ([1981] 2 All ER 1057 at 1059, [1981] QB 715 at 719):

'The answer to this question, in our judgment, is that it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.'

Although the reasoning in these two cases differs somewhat, the conclusion from each of them is clear, namely that the infliction of bodily harm without good reason is unlawful and that the consent of the victim is irrelevant. In *R v Boyea* (1992) 156 JP 505 at 512–513, in which the appellant was convicted of indecent assault on a woman, Glidewell LJ, giving the judgment of the Court of Appeal, Criminal Division, said:

'The central proposition in *Donovan* ([1934] 2 KB 498, [1934] All ER Rep 207) is in our view consistent with the decision of the court in the *Attorney-General's Reference* [*A-G's Reference* (*No 6 of 1980*) [1981] 2 All ER 1057, [1981] QB 715]. That proposition can be expressed as follows: an assault intended or which is likely to cause bodily harm, accompanied by indecency, is an offence irrespective of consent, provided that the injury is not "transient or trifling".'

Glidewell LJ went on to point out that having regard to the change in social attitude towards sexual relations 'transient and trivial' must be understood in the light of conditions prevailing in 1992 rather than in 1934.

Before considering whether the above four cases were correctly decided and if so what relevance they have to these appeals, I must say a word about hostility. It was urged upon your Lordships that hostility on the part of the inflicter was an essential ingredient of assault and that this ingredient was necessarily lacking when injury was inflicted with the consent of the receiver. It followed that none of the activities in question constituted assault. The

answer to this submission is to be found in the judgment of the Court of Appeal in Wilson v Pringle [1986] 2 All ER 440 at 447, [1987] QB 237 at 253, where it was said, that hostility could not be equated with ill-will or malevolence. The judgment went on to state ([1986] 2 All ER 440 at 448, [1987] QB 237 at 253):

'Take the example of the police officer in *Collins v Wilcock* [1984] 3 All ER 374, [1984] 1 WLR 1172. She touched the woman deliberately, but without an intention to do more than restrain her temporarily. Nevertheless, she was acting unlawfully and in that way was acting with hostility.'

If the appellants' activities in relation to the receivers were unlawful they were also hostile and a necessary ingredient of assault was present.

It was accepted by all the appellants that a line had to be drawn somewhere between those injuries to which a person could consent to infliction upon himself and those which were so serious that consent was immaterial. They all agreed that assaults occasioning actual bodily harm should be below the line but there was disagreement as to whether all offences against s 20 of the 1861 Act should be above the line or only those resulting in grievous bodily harm. The four English cases to which I have referred were not concerned with the distinction between the various types of assault and did not therefore have to address the problem raised in these appeals. However it does appear that in *R v Donovan, A-G's Reference*(*No 6 of 1980*) and *R v Boyea* the infliction of actual bodily harm was considered to be sufficient to negative any consent. Indeed in *R v Donovan* and *R v Boyea* such injuries as were sustained by the two women could not have been described as in any way serious. Cave J in *R v Coney* appeared to take the same view. On the other hand, Stephen J in *R v Coney* appeared to consider that it required serious danger to life and limb to negative consent, a view which broadly accords with the passage in his digest to which I have already referred. A similar view was expressed by McInerney J in the Supreme Court of Victoria in *Pallante v Stadiums Pty Ltd* (*No 1*) [1976] VR 331.

I prefer the reasoning of Cave J in *R v Coney* and of the Court of Appeal in the later three English cases which I consider to have been correctly decided. In my view the line properly falls to be drawn between assault at common law and the offence of assault occasioning actual bodily harm created by s 47 of the 1861 Act, with the result that consent of the victim is no answer to anyone charged with the latter offence or with a contravention of s 20 unless the circumstances fall within one of the well-known exceptions such as organised sporting contests and games, parental chastisement or reasonable surgery. There is nothing in ss 20 and 47 of the 1861 Act to suggest that consent is either an essential ingredient of the offences or a defence thereto. If consent is to be an answer to a charge under s 47 but not to one under s 20, considerable practical problems would arise. It was held in *R v Savage, R v Parmenter* [1991] 4 All ER 698 at 711, [1992] 1 AC 699 at 740 that a verdict

of guilty of assault occasioning actual bodily harm is a permissible alternative verdict on a count alleging unlawful wounding contrary to s 20 (per Lord Ackner). A judge charging a jury in a s 20 case would therefore not only have to direct them as to the alternative verdict available under s 47, but also as to the consequences of consent in relation to that alternative only. Such direction would be more complex if consent was an answer to wounding under s 20 but not to the infliction of grievous bodily harm under the same section. These problems would not arise if consent is an answer only to common assault. I would therefore dispose of these appeals on the basis that the infliction of actual or more serious bodily harm is an unlawful activity to which consent is no answer. In reaching this conclusion I have not found it necessary to rely on the fact that the activities of the appellants were in any event unlawful inasmuch as they amounted to acts of gross indecency which, not having been committed in private, did not fall within s 1(1) of the Sexual Offences Act 1967. Notwithstanding the views which I have come to, I think it right to say something about the submissions that consent to the activity of the appellants would not be injurious to the public interest.

Considerable emphasis was placed by the appellants on the well-ordered and secret manner in which their activities were conducted and upon the fact that these activities had resulted in no injuries which required medical attention. There was, it was said, no question of proselytising by the appellants. This latter submission sits ill with the following passage in the judgment of Lord Lane CJ (94 Cr App R 302 at 310):

'They [Laskey and Cadman] recruited new participants: they jointly organised proceedings at the house where much of this activity took place; where much of the pain inflicting equipment was stored. Cadman was a voyeur rather than a sado-masochist, but both he and Laskey through their operations at the Horwich premises were responsible in part for the corruption of a youth "K" to whom the judge, rightly in our view, paid particular attention. It is some comfort at least to be told, as we were, that "K" is now it seems settled into a normal heterosexual relationship.'

Be that as it may, in considering the public interest it would be wrong to look only at the activities of the appellants alone, there being no suggestion that they and their associates are the only practitioners of homosexual sado-masochism in England and Wales. This House must therefore consider the possibility that these activities are practised by others and by others who are not so controlled or responsible as the appellants are claimed to be. Without going into details of all the rather curious activities in which the appellants engaged, it would appear to be good luck rather than good judgment which has prevented serious injury from occurring. Wounds can easily become septic if not properly treated, the free flow of blood from a person who is HIV positive or who has AIDS can infect another and an inflicter who is carried away by sexual excitement or by drink or drugs could very easily inflict pain and injury beyond the level to which the receiver had consented. Your Lordships have no information as to whether such situations have occurred in relation to other sado-masochistic

practitioners. It was no doubt these dangers which caused Baroness Mallalieu to restrict her propositions in relation to the public interest to the actual rather than the potential result of the activity. In my view such a restriction is quite unjustified. When considering the public interest potential for harm is just as relevant as actual harm. As Mathew J said in *R v Coney* (1882) 8 QBD 534 at 547:

'There is, however, abundant authority for saying that no consent can render that innocent which is in fact dangerous.'

Furthermore, the possibility of proselytisation and corruption of young men is a real danger even in the case of these appellants and the taking of video-recordings of such activities suggests that secrecy may not be as strict as the appellants claimed to your Lordships. If the only purpose of the activity is the sexual gratification of one or both of the participants what then is the need of a video-recording?

My Lords I have no doubt that it would not be in the public interest that deliberate infliction of actual bodily harm during the course of homosexual sado-masochistic activities should be held to be lawful. In reaching this conclusion I have regard to the information available in these appeals and of such inferences as may be drawn therefrom. I appreciate that there may be a great deal of information relevant to these activities which is not available to your Lordships. When Parliament passed the Sexual Offences Act 1967 which made buggery and acts of gross indecency between consenting males lawful it had available the *Report of the Committee on Homosexual Offences and Prostitution* (the Wolfenden Report) (Cmnd 247 (1957)), which was the product of an exhaustive research into the problem. If it is to be decided that such activities as the nailing by A of B's foreskin or scrotum to a board or the insertion of hot wax into C's urethra followed by the burning of his penis with a candle or the incising of D's scrotum with a scalpel to the effusion of blood are injurious neither to B, C and D nor to the public interest then it is for Parliament with its accumulated wisdom and sources of information to declare them to be lawful.

Two further matters only require to be mentioned. There was argument as to whether consent, where available, was a necessary ingredient of the offence of assault or merely a defence. There are conflicting dicta as to its effect. In *R v Coney* (1882) 8 QBD 534 at 549 Stephen J referred to consent as being 'no defence', whereas in *A-G's Reference* (No 6 of 1980) [1981] 2 All ER 1057 at 1058, [1981] QB 715 at 718 Lord Lane CJ referred to the onus being on the prosecution to negative consent. In *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177 Robert Goff LJ referred to consent being a defence to a battery. If it were necessary, which it is not, in this appeal to decide

which argument was correct I would hold that consent was a defence to but not a necessary ingredient in assault.

The second matter is the argument that the appellants should have been charged under the Sexual Offences Act 1956 and not under the 1861 Act. The appellants could within the time limit have been charged under the 1956 Act with committing acts of gross indecency. However that Act contained no provision limiting the effect of ss 20 and 47 of the 1861 Act to offences unconnected with sex. The Wolfenden Report in considering gross indecency between males took the view that it usually took one of three forms, of which none involved the deliberate infliction of injury. Your Lordships were referred to no material which suggested that Parliament, when enacting the 1967 Act, had in contemplation the type of activities engaged in by the appellants. These activities necessarily comprehended acts of gross indecency as referred to in s 13 of the 1956 Act and s 1(7) of the 1967 Act. However, the Wolfenden Report para 105 states that from police reports seen by the committee and other evidence acts of gross indecency usually take one of the three forms in which none involves violence or injury. The activities of the appellants thus went far beyond the sort of conduct contemplated by the legislature in the foregoing statutory provisions and I consider that they were unlawful even when carried out in private. In these circumstances there exists no reason why the appellants should not have been charged under the 1861 Act.

I cannot usefully add anything to what my noble and learned friend Lord Templeman has said in relation to the appellants' argument on arts 7 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedom (Rome, 4 November 1950; TS 71 (1953); Cmd 8969).

My Lords, I would answer the certified question in the negative and dismiss the appeals.

LORD LOWRY. My Lords, I have had the advantage of reading in draft the speeches of your Lordships. I agree with the reasoning and conclusions of my noble and learned friends Lord Templeman and Lord Jauncey of Tullichettle and I, too, would answer the certified question in the negative and dismiss the appeals.

In stating my own further reasons for this view I shall address myself exclusively to the cases in which, as has been informally agreed, one person has acted upon another in private, occasioning him actual bodily harm but nothing worse.

The appellants' main point is that, contrary to the view of the trial judge and the Court of Appeal, the consent of the victim, as I shall call the willing recipient of the sado-masochistic treatment, constitutes a defence to the charges

of assault occasioning actual bodily harm contrary to s 47 of the Offences against the Person Act 1861 and of wounding contrary to s 20 of the 1861 Act (no more than actual bodily harm being occasioned) or, to put it another way, that, when the victim consents, no such offence of assault or wounding as I have described takes place.

Under the law which formerly held sway (and which has been thoroughly described and analysed by my noble and learned friend Lord Mustill) consent was a defence to a charge of common assault but not to a charge of mayhem or maiming. Everyone agrees that consent remains a complete defence to a charge of common assault and nearly everyone agrees that consent of the victim is not a defence to a charge of inflicting really serious personal injury (or 'grievous bodily harm'). The disagreement concerns offences which occasion actual bodily harm: the appellants contend that the consent of the victim is a defence to one charged with such an offence, while the respondent submits that consent is not a defence. I agree with the respondent's contention for reasons which I now explain.

The 1861 Act was one of several laudable but untidy Victorian attempts to codify different areas of the law. From the accusation of untidiness I must exempt such measures as the Bills of Exchange Act 1882 and the Sale of Goods Act 1893, but in regard to the 1861 Act I would adopt the words of para 7.4 of the Law Commission's Consultation Paper No 122, *Legislating the Criminal Code*: *Offences against the Person and General Principles* (1992):

'Sections 18, 20 and 47 of the 1861 Act are not part of a comprehensive legislative code, were not drafted with a view to setting out the various offences with which they deal in a logical or graded manner; in some cases do not create offences, but merely state the punishment for what is regarded as an existing common law offence; and, above all, in so doing employ terminology that was difficult to understand even in 1861. The sections are virtually the only significant part of the extensive series of criminal law statutes passed in 1861 that still remains on the statute book. Those Acts as a whole attracted early criticism, not least from Sir [James] Fitzjames Stephen [in a letter to Sir John Holker, 20 January 1877 cited by Sir Rupert Cross in Glazebrook (ed) *Reshaping the Criminal Law* (1978) p 10]: "Their arrangement is so obscure, their language so lengthy and cumbrous, and they are based upon and assume the existence of so many singular common law principles that no-one who was not already well acquainted with the law would derive any information from reading them." More recent critics have agreed with these strictures describing the 1861 Act as "piece-meal legislation", which is a "rag-bag of offences brought together from a wide variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce consistency as to substance or as to form" [see Professor J C Smith in his commentary on *R v Parmenter* [1991] 2 All ER 225, [1992] 1 AC 699, CA ([1991] Crim LR 43) cited in *R v Savage, R v Parmenter* [1991] 4 All ER 698 at 721, [1992] 1 AC 699 at 752, HL].'

The 1861 Act has not the form or substance of a true consolidation but, with acknowledgments to the work of C S Greaves QC (*Criminal Law Consolidation and Amendment Acts* (2nd edn, 1862) pp xxvi, 52–53, 76), Law Commission Consultation Paper No 122 traces s 18 of the 1861 Act to s 4 of the Act 7 Will 4 & 1 Vict c 85 (offences against the person (1837)), s 20 to s

29 of the Act 10 Geo 4, c 34 (offences against the person (Ireland) (1829)) and s 47 to s 29 of the Criminal Procedure Act 1851). I do not think, however, that it would be helpful to your Lordships for me to go further back than the 1861 Act itself.

It follows that the indications to be gathered from the 1861 Act are not precise. Nevertheless, I consider that it contains fairly clear signs that, with regard to the relevance of the victim's consent as a defence, assault occasioning actual bodily harm and wounding which results in actual bodily harm are not offences 'below the line', to be ranked with common assault as offences in connection with which the victim's consent provides a defence, but offences 'above the line', to be ranked with inflicting grievous bodily harm and the other more serious offences in connection with which the victim's consent does not provide a defence. The sections in question, in their original form, read as follows:

' **18.** Whosoever shall unlawfully and maliciously by any Means whatsoever wound or cause any grievous bodily Harm to any Person, or shoot at any Person, or, by drawing a Trigger or in any other Manner, attempt to discharge any Kind of loaded Arms at any Person, with Intent, in any of the Cases aforesaid, to maim, disfigure, or disable any Person, or to do some other 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, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years,—or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement … **20.** 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, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour … **47.** Whosoever shall be convicted upon an Indictment of any Assault occasioning actual bodily Harm shall be liable, at the discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, [with] or without Hard Labour; and whosoever shall be convicted upon an Indictment for a common Assault shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding One Year, with or without Hard Labour.'

I suggest that the following points should be noted. (1) Offences against s 18 were felonies, but offences against ss 20 and 47 were misdemeanours. Therefore s 20 was not associated with s 18 and separated from s 47 by categorisation. (2) Although s 47 appears to describe a less serious offence than s 20, the maximum penalty was the same. Equality was maintained at five years' imprisonment after the distinction between felony and misdemeanour was abolished. (3) Wounding is associated in ss 18 and 20 with the infliction of grievous bodily harm and is naturally thought of as a serious offence, but it may involve anything from a minor breaking or puncture of the skin to a near fatal injury. Thus wounding may simply occasion actual bodily harm or it may inflict grievous bodily harm. If the victim's consent is a defence to occasioning actual bodily harm, then, so far as concerns the proof of guilt, the line is drawn, as my noble and learned friend Lord Jauncey of Tullichettle puts it, 'somewhere

down the middle of s 20', which I would regard as a most unlikely solution. (4) According to the appellants' case, if an accused person charged with wounding relies on consent as a defence, the jury will have to find whether anything more than actual bodily harm was occasioned, something which is not contemplated by s 20. (5) The distinction between common assault and all other attacks on the person is that common assault does not necessarily involve significant bodily injury. It is much easier to draw the line between significant injury and some injury than to differentiate between degrees of injury. It is also more logical, because for one person to inflict any injury on another without good reason is an evil in itself (malum in se) and contrary to public policy. (6) That consent is a defence to a charge of common assault is a common law doctrine which the 1861 Act has done nothing to change.

The proposition that the line of 'victim's consent' is regarded as drawn just above common assault gains support from the wording of cl 8(1) of the Bill attached to Law Commission Consultation Paper No 122 (see para 9.10):

'A person is guilty of assault if—(/a/) he intentionally or recklessly applies force to or causes an impact on the body of another, (i) without the consent of the other; or (ii) where the act is likely or intended to cause injury, with or without the consent of the other; or (/b/) he intentionally or recklessly, without the consent of the other, causes the other to believe that any such force or impact is imminent.'

My Lords, on looking at the cases, I get little help from *R v Coney* (1882) 8 QBD 534, which was much canvassed at the hearing of the appeal and on which your Lordships, necessarily, have commented. The case contains a number of inconclusive and sometimes conflicting statements, but it was generally agreed (the charge being one of common assault) that consent was no defence to that which amounted to, or had a direct tendency to create, a breach of the peace. The only support for the present appellants is found in the judgment of Stephen J (at 549):

'In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used …'

The learned judge developed this view in his *Digest of the Criminal Law*, where he stated that consent was a defence to a charge of assault occasioning actual bodily harm. *Archbold Criminal Pleading Evidence and Practice* adopted that statement, for which there is no other judicial authority, until it was disapproved in *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207 and the editor of later editions of *Stephen's Digest of the Criminal Law* has abandoned the distinguished author's proposition.

In *R v Donovan* the appellant had been convicted on two counts, indecent assault and common assault. The only issue of fact was whether the victim consented. The chairman of quarter sessions rightly told the jury that the case depended on the issue of consent. The jury must have rejected the appellant's

evidence, but the Court of Criminal Appeal held that the chairman had misdirected the jury as to the burden of proof on the consent issue and quashed the conviction. It was obvious what had to be done once the court found misdirection on the vital issue, but it is instructive to note what happened. Lord Hewart CJ is reported as saying at the conclusion of argument (25 Cr App R 1 at 4):

'We have come to the conclusion that this trial, dealing as it did with a revolting matter, was in various ways unsatisfactory. The Court is compelled, however reluctantly, to take the view that in the circumstances this conviction cannot safely be upheld and that this appeal must be allowed. The matter involves, however, more than one question of importance and we propose therefore to give our reasons for our decision upon a later day.'

Five weeks later Swift J delivered the judgment of the court, disposing first of the consent issue and another point (see [1934] 2 KB 498, [1934] All ER Rep 207). He then dealt with the question which has some relevance to the present appeals and which he introduced as follows ([1934] 2 KB 498 at 506, [1934] All ER Rep 207 at 210):

'This conclusion would have been enough to dispose of the case were it not for the fact that the learned counsel for the Crown relied in this Court upon the submission which he had unsuccessfully made at the trial, and argued that, this being a case in which it was unnecessary for the Crown to prove absence of consent, this Court ought not to quash the conviction.'

A doctor who gave evidence for the Crown had said that marks on the girl's body two days after the incident indicated 'a fairly severe beating'; therefore clearly actual bodily harm had been caused. The judgment continued: 'We have given careful consideration to the question of law which this submission raises.' Then, having noted observations of Cave J in *R v Coney* (1882) 8 QBD 334 at 539, the judge said ([1934] 2 KB 498 at 507, [1934] All ER Rep 207 at 210–211):

'We have considered the authorities upon which this view of the learned judge was founded, and we think it of importance that we should state our opinion as to the law applicable in this case. If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where *the act charged* is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer … As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial. We are aware that the existence of this rule has not always been clearly recognised. In his Digest of the Criminal Law (6th edn, 1904), Art. 227, Sir James FitzJames Stephen enunciates the proposition that "every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim." This may have been true in early times when the law of this country showed remarkable leniency towards crimes of personal violence, but it is a statement which now needs considerable qualification.' (My emphasis.)

Having referred to *East's Pleas of the Crown* and *Foster's Crown Law* (3rd edn, 1809) p 259, Swift J stated ([1934] 2 KB 498 at 508, [1934] All ER Rep 207 at 211):

'If an act is malum in se in the sense in which Sir Michael Foster used the words, that is to say, is, in itself, unlawful, we take it to be plain that consent cannot convert it into an innocent act.'

Having then mentioned the 'well established exceptions' to the general rule that an act likely or intended to cause bodily harm is an unlawful act, he continued ([1934] 2 KB 498 at 509, [1934] All ER Rep 207 at 211–212):

'In the present case it was not in dispute that the motive of the appellant was to gratify his own perverted desires. If, in the course of so doing, he acted so as to cause bodily harm, he cannot plead his corrupt motive as an excuse, and it may truly be said of him in Sir Michael Foster's words that "he certainly beat him with an intention of doing him some bodily harm, he had no other intent," and that what he did was malum in se. Nothing could be more absurd or more repellent to the ordinary intelligence than to regard his conduct as comparable with that of a participant in one of those "manly diversions" of which Sir Michael Foster wrote. Nor is his act to be compared with the rough but innocent horse-play in *Reg*. v. *Bruce* ((1847) 2 Cox CC 262). Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the exceptions to the general rule. In our view, on the evidence given at the trial, the jury should have been directed that, if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied, that it became necessary to consider the further question whether the prosecution had negatived consent.'

This passage is followed by an explanation why, the question not having been put to the jury, the court did not feel that, consistently with its practice, it could uphold the conviction on the ground argued by Crown counsel.

I find this part of the court's judgment hard to follow, when I recall the protest made at his trial by Sir Walter Raleigh to Sir Edward Coke ((1603) 2 State Tr 1 at 26): 'Mr Attorney, you should speak secundum allegata et probata.' The rule that the Crown cannot otherwise recover is a universal proposition, not confined to trials of the high and mighty for treason. The prosecution must both *allege* and *prove*. There were two counts in the indictment, to which consent of the victim was a complete defence. If the jury, properly directed, had found that consent was not disproved, they must have acquitted the appellant of the only charges brought against him. How, then, could they have convicted the appellant of either of those charges or of the offence of assault, occasioning actual bodily harm, with which he was *not* charged? It will not be overlooked that the judgment ran, 'where *the act charged* is in itself unlawful' (see [1934] 2 KB 498 at 507, 1934] All ER Rep 207 at 210).

Does the second part of the Court of Criminal Appeal's judgment therefore stand condemned in all respects? My Lords, I suggest not. It clearly indicates

the view of the court that assault, occasioning actual bodily harm, is malum in se, an offence for which, absent one of the recognised exceptions, the accused will be convicted, even though the victim consents.

/A/-/G's Reference /(/No 6 of 1980/) [1981] 2 All ER 1057, [1981] QB 715 was relied on by both sides before your Lordships. The charge was one of assault, occasioning actual bodily harm; the fight, between youths of 18 and 17 years, took place in the street; and the question referred was concerned with fighting *in public*. In giving judgment, however, the court expressly made no distinction between fighting in public and in private. Lord Lane CJ introduced the subject by saying ([1981] 2 All ER 1057 at 1058, [1981] QB 715 at 718):

'We think that it can be taken as a starting point 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; and it is doubtless for this reason that the burden lies on the prosecution to negative consent. Ordinarily, then, if the victim consents, the assailant is not guilty.'

Then he said ([1981] 2 All ER 1057 at 1059, [1981] QB 715 at 718–719):

'Bearing in mind the various cases and the views of the textbook writers cited to us, and starting with the proposition that ordinarily an act consented to will not constitute an assault, the question is: at what point does the public interest require the court to hold otherwise?'

I would concede that the natural way in which to construe these passages is to the effect that (1) there is no assault if the act is consented to by the victim and (2) where the victim has consented, a factor directed to the public interest is needed in order to make the court hold that an offence has been committed. No doubt this is what caused Professor Glanville Williams in *Textbook of Criminal Law* (2nd edn, 1983) pp 582–589 to express the view that, by vitiating the effect of the victim's consent in cases where the occasioning of physical harm seemed to be against the public interest, the courts were extending the law against assault and were legislating judicial paternalism.

Lord Lane CJ then spoke of the need for a 'partly new approach' (compared with that found in *R v Coney* and *R v Donovan*). He continued ([1981] 2 All ER 1057 at 1059, [1981] QB 715 at 719):

'The answer to this question [at what point does the public interest require the court to hold otherwise?], in our judgment, is that it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.

Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a

legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.

Our answer to the point of law is No, but not (as the reference implies) because the fight occurred in a public place, but because, wherever it occurred, the participants would have been guilty of assault (subject to self-defence) if (as we understand was the case) they intended to and or did cause actual bodily harm.'

The appellants submitted that this pronouncement was confined to fighting but, as Professor Glanville Williams pointed out, the contents of the second paragraph cited above appear to contradict this view. Thus we are left with the proposition that it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason and that it is an assault if actual bodily harm is caused (except for good reason).

This principle was adopted in *R v McCoy* 1953 (2) SA 4 [SR] (although it was not required in order to decide the case), where the manager of an airline caned an air hostess, allegedly with her consent, as a punishment for failing to secure her seat belt when landing, and also by the Court of Appeal in *R v Boyea* (1992) 156 JP 505. I think that consideration of the 1861 Act and the indications to be derived from the cases together provide strong support for the Crown's case on the effect of consent on charges involving actual bodily harm. While saying this, I do not forget the danger of applying to a particular situation cases decided by judges who, in reaching their decisions, were not thinking of that situation at all.

Let me now consider the judgment of the Court of Appeal in this case, delivered by Lord Lane CJ (see [1992] 2 All ER 552, [1992] QB 491). First, I agree with the disposal, brief as it was, of the appellants' argument directed to the word 'hostility'. On this point I gladly adopt everything which has been said by my noble and learned friend Lord Jauncey. I also concur in the summary dismissal of the argument that it was inappropriate for the Crown to have proceeded under the 1861 Act. There was a considerable delay and one may speculate that the prosecuting authorities had cast around for a suitable vehicle for their accusations before finally deciding to proceed under the 1861 Act in this unusual case, but the only way of meeting these charges otherwise than on the merits was to contend that they amounted to an abuse of process. This procedure was not resorted to, which is not surprising in the state of the authorities.

Predictably, the appeal and the judgment in the Court of Appeal were mainly occupied with the effect of the victim's consent (see [1992] 2 All ER 552 at 557–560, [1992] QB 491 at 497–500). Having cited *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207 Lord Lane CJ drew attention to *Kenny's Outline of Criminal Law* (19th edn, 1966) p 209 and *Archbold's Pleading Evidence and Practice in Criminal Cases* (43rd edn, 1988) para 20–124 (see

[1992] 2 All ER 552 at 558–599, [1992] QB 491 at 499) and went on to consider *A-G's Reference*(*No 6 of 1980*) [1981] 2 All ER 1057, [1981] QB 715. Commenting on that case ([1981] 2 All ER 1057 at 1059, [1981] QB 715 at 719), he said ([1992] 2 All ER 552 at 559, [1992] QB 491 at 500):

'What may be "good reason" it is not necessary for us to decide. It is sufficient to say, so far as the instant case is concerned, that we agree with the trial judge that the satisfying of sado-masochistic libido does not come within the category of good reason nor can the injuries be described as merely transient or trifling.'

In the immediately following paragraph of his judgment Lord Lane CJ shows that what he said in *A-G's Reference* (*No 6 of 1980*) was intended by him to be of general application:

'It was submitted to us that the facts in that case were so different from those in the instant case that the principle which is expressed in the answer to the Attorney General's question does not apply to the present circumstances. We disagree. In our judgment the principle as expressed in the reference does apply. Consequently for those reasons the question of consent was immaterial. The judge's ruling was accordingly correct.'

If, as I, too, consider, the question of consent is immaterial, there are prima facie offences against ss 20 and 47 and the next question is whether there is good reason to add sado-masochistic acts to the list of exceptions contemplated in *A-G's Reference*. In my opinion, the answer to that question is No.

In adopting this conclusion I follow closely my noble and learned friends Lord Templeman and Lord Jauncey. What the appellants are obliged to propose is that the deliberate and painful infliction of physical injury should be exempted from the operation of statutory provisions the object of which is to prevent or punish that very thing, the reason for the proposed exemption being that both those who will inflict and those who will suffer the injury wish to satisfy a perverted and depraved sexual desire. Sado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society. A relaxation of the prohibitions in ss 20 and 47 can only encourage the practice of homosexual sado-masochism, with the physical cruelty that it must involve, (which can scarcely be regarded as a 'manly diversion') by withdrawing the legal penalty and giving the activity a judicial imprimatur. As well as all this, one cannot overlook the physical danger to those who may indulge in sado-masochism. In this connection, and also generally, it is idle for the appellants to claim that they are educated exponents of 'civilised cruelty'. A proposed general exemption is to be tested by considering the likely general effect. This must include the probability that some sado-masochistic activity, under the powerful influence of the sexual instinct, will get out of hand and result in serious physical damage to the participants and that some activity will involve a danger of infection such as these particular exponents do not contemplate for themselves. When considering the danger of infection, with its inevitable threat of AIDS, I am not

impressed by the argument that this threat can be discounted on the ground that, as long ago as 1967, Parliament, subject to conditions, legalised buggery, now a well-known vehicle for the transmission of AIDS.

So far as I can see, the only counter-argument is that to place a restriction on sado-masochism is an unwarranted interference with the private life and activities of persons who are indulging in a lawful pursuit and are doing no harm to anyone except, possibly, themselves. This approach, which has characterised every submission put forward on behalf of the appellants, is derived from the fallacy that what is involved here is the restraint of a lawful activity as opposed to the refusal to relax existing prohibitions in the 1861 Act. If in the course of buggery, as authorised by the 1967 Act, one participant, either with the other participant's consent or not, deliberately causes actual bodily harm to that other, an offence against s 47 has been committed. The 1967 Act provides no shield. The position is as simple as that, and there is *no legal right to cause actual bodily harm* in the course of sado-masochistic activity.

As your Lordships have observed, the appellants have sought to fortify their argument by reference to the European Convention on Human Rights (see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969)). On the view which I have taken, art 7 has no relevance since the question of retrospective legislation or a retrospective judicial decision does not arise. Article 8(1) of the convention states that everyone has the right to respect for his private and family life, his home and his correspondence. The attempt to rely on this article is another example of the appellants' reversal of the onus of proof of legality, which disregards the effect of ss 20 and 47. I would only say, in the first place, that art 8 is not part of our law. Secondly, there has been no legislation which, being post-convention and ambiguous, falls to be construed so as to conform with the convention rather than to contradict it. And thirdly, if one is looking at art 8(2), no public authority can be said to have interfered with a *right* (to indulge in sado-masochism) by enforcing the provisions of the 1861 Act. If, as appears to be the fact, sado-masochistic acts inevitably involve the occasioning of at least actual bodily harm, there cannot be a *right* under our law to indulge in them.

For all these reasons I would answer No to the certified question and would dismiss the appeals.

LORD MUSTILL. My Lords, this is a case about the criminal law of violence. In my opinion it should be a case about the criminal law of private sexual relations, if about anything at all. Right or wrong, the point is easily made. The speeches already delivered contain summaries of the conduct giving rise to the charges under the Offences against the Person Act 1861 now before the House, together with other charges in respect of which the appellants have been

sentenced, and no longer appeal. Fortunately for the reader my Lords have not gone on to describe other aspects of the appellants' behaviour of a similar but more extreme kind which was not the subject of any charge on the indictment. It is sufficient to say that whatever the outsider might feel about the subject matter of the prosecutions—perhaps horror, amazement or incomprehension, perhaps sadness—very few could read even a summary of the other activities without disgust. The House has been spared the video tapes, which must have been horrible. If the criminality of sexual deviation is the true ground of these proceedings, one would have expected that these above all would have been the subject of attack. Yet the picture is quite different.

The conduct of the appellants and of other co-accused was treated by the prosecuting authorities in three ways. First, there were those acts which fell squarely within the legislation governing sexual offences. These are easily overlooked, because attention has properly been concentrated on the charges which remain in dispute, but for a proper understanding of the case it is essential to keep them in view. Thus, four of the men pleaded guilty either as principals or as aiders and abettors to the charges of keeping a disorderly house. It is worth setting out, with abbreviations, the particulars of a typical charge:

'[GWC] on divers days between the 1st day of January 1979 and the 5th day of November 1987 at … Bolton, kept a disorderly house to which numerous persons resorted in order to take part in, and who did take part in, acts of sadistic and masochistic violence, and in accompanying acts of a lewd, immoral and unnatural kind. [IW, PJG, Colin Laskey and PJK] at the same times and at the same place did aid, abet, counsel and procure [GWC] to commit the said offence.'

Laskey also pleaded guilty to two counts of publishing an obscene article. The articles in question were video tapes of the activities which formed the subject of some of the counts laid under the 1861 Act.

The pleas of guilty to these counts, which might be regarded as dealing quite comprehensively with those aspects of Laskey's sexual conduct which impinged directly on public order, attracted sentences of four years reduced on appeal to 18 months' imprisonment and three months' imprisonment respectively. Other persons, not before the House, were dealt with in a similar way.

The two remaining categories of conduct comprised private acts. Some were prosecuted and are now before the House. Others, which I have mentioned, were not. If repugnance to general public sentiments of morality and propriety were the test, one would have expected proceedings in respect of the most disgusting conduct to be prosecuted with the greater vigour. Yet the opposite is the case. Why is this so? Obviously because the prosecuting authorities could find no statutory prohibition apt to cover this conduct. Whereas the sexual conduct which underlies the present appeals, although less extreme, could at least arguably be brought within ss 20 and 47 of the 1861 Act

because it involved the breaking of skin and the infliction of more than trifling hurt.

I must confess that this distribution of the charges against the appellants at once sounds a note of warning. It suggests that the involvement of the 1861 Act was adventitious. This impression is reinforced when one considers the title of the statute under which the appellants are charged, 'Offences against the Person'. Conduct infringing ss 18, 20 and 47 of the 1861 Act comes before the Crown Court every day. Typically it involves brutality, aggression and violence, of a kind far removed from the appellants' behaviour which, however worthy of censure, involved no animosity, no aggression, no personal rancour on the part of the person inflicting the hurt towards the recipient and no protest by the recipient. In fact, quite the reverse. Of course we must give effect to the statute if its words capture what the appellants have done, but in deciding whether this is really so it is in my opinion legitimate to assume that the choice of the 1861 Act as the basis for the relevant counts in the indictment was made only because no other statute was found which could conceivably be brought to bear upon them.

In these circumstances I find it easy to share the opinion expressed by Wills J in *R v Clarence* (1888) 22 QBD 23 at 33, [1886–90] All ER Rep 133 at 137, a case where the accused had consensual intercourse with his wife, he knowing and she ignorant that he suffered from gonorrhoea, with the result that she was infected. The case is of general importance, since the Court for Crown Cases Reserved held that there was no offence under ss 47 and 20, since both sections required an assault, of which the wound or grievous bodily harm was the result, and that no assault was disclosed on the facts. For present purposes, however, I need only quote from the report (22 QBD 23 at 30, [1886–90] All ER Rep 133 at 137):

'… such considerations lead one to pause on the threshold, and inquire whether the enactment under consideration could really have been intended to apply to circumstances so completely removed from those which are usually understood when an assault is spoken of, or to deal with matters of any kind involving the sexual relation or act.'

I too am led to pause on the threshold. Asking myself the same question, I cannot but give a negative answer. I therefore approach the appeal on the basis that the convictions on charges which seem to me so inapposite cannot be upheld unless the language of the statute or the logic of the decided cases positively so demand. Unfortunately, as the able arguments which we have heard so clearly demonstrate, the language of the statute is opaque, and the cases few and unhelpful. To these I now turn.

I. THE DECIDED CASES

Throughout the argument of the appeal I was attracted by an analysis on the following lines. First, one would construct a continuous spectrum of the infliction of bodily harm, with killing at one end and a trifling touch at the other. Next, with the help of reported cases one would identify the point on this spectrum at which consent ordinarily ceases to be an answer to a prosecution for inflicting harm. This could be called 'the critical level'. It would soon become plain however that this analysis is too simple and that there are certain types of special situation to which the general rule does not apply. Thus, for example, surgical treatment which requires a degree of bodily invasion well on the upper side of the critical level will nevertheless be legitimate if performed in accordance with good medical practice and with the consent of the patient. Conversely, there will be cases in which even a moderate degree of harm cannot be legitimated by consent. Accordingly, the next stage in the analysis will be to identify those situations which have been identified as special by the decided cases, and to examine them to see whether the instant case either falls within one of them or is sufficiently close for an analogy to be valid. If the answer is negative, then the court will have to decide whether simply to apply the general law simply by deciding whether the bodily harm in the case under review is above or below the critical level, or to break new ground by recognising a new special situation to which the general law does not apply.

For all the intellectual neatness of this method I must recognise that it will not do, for it imposes on the reported cases and on the diversities of human life an order which they do not possess. Thus, when one comes to map out the spectrum of ordinary consensual physical harm, to which the special situations form exceptions, it is found that the task is almost impossible, since people do not ordinarily consent to the infliction of harm. In effect, either all or almost all the instances of the consensual infliction of violence are special. They have been in the past, and will continue to be in the future, the subject of special treatment by the law.

There are other objections to a general theory of consent and violence. Thus, for example, it is too simple to speak only of consent, for it comes in various sorts. Of these, four spring immediately to mind. First, there is an express agreement to the infliction of the injury which was in the event inflicted. Next, there is express agreement to the infliction of some harm, but not to that harm which in the event was actually caused. These two categories are matched by two more, in which the recipient expressly consents not to the infliction of harm, but to engagement in an activity which creates a risk of harm; again, either the harm which actually results, or to something less. These examples do not exhaust the categories, for corresponding with each are situations of frequent occurrence in practice where the consent is not express but implied. These numerous categories are not the fruit of academic over-elaboration, but are a reflection of real life. Yet they are scarcely touched on in

the cases, which just do not bear the weight of any general theory of violence and consent.

Furthermore, when one examines the situations which are said to found such a theory it is seen that the idea of consent as the foundation of a defence has in many cases been forced on to the theory, whereas in reality the reason why the perpetrator of the harm is not liable is not because of the recipient's consent, but because the perpetrator has acted in a situation where the consent of the recipient forms one, but only one, of the elements which make the act legitimate. This concept is clearly expressed in the following extract from the judgment of Robert Goff LJ in *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177:

'We are here concerned primarily with battery. The fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. So Holt CJ held in 1704 that "the least touching of another in anger is a battery": see *Cole v Turner* (1704) Holt KB 108, 90 ER 958. The breadth of the principle reflects the fundamental nature of the interest so protected; as Blackstone wrote in his Commentaries, "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner" (see 3 Bl Com (17th edn, 1830) 120). The effect is that everybody is protected not only against physical injury but against any form of physical molestation. But so widely drawn a principle must inevitably be subject to exceptions. For example, children may be subjected to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest; and reasonable force may be used in self-defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life. Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is (within reason) slapped (see *Tuberville v Savage* (1669) 1 Mod Rep 3, 86 ER 684). Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. We observe that, although in the past it has sometimes been stated that a battery is only committed where the action is "angry, or revengeful, or rude, or insolent" (see 1 Hawk PC (8th edn, 1824) ch 15, s 2), we think that nowadays it is more realistic, and indeed more accurate, to state the broad underlying principle, subject to the broad exception.'

In these circumstances I must accept that the existing case law does not sustain a step-by-step analysis of the type proposed above. This being so I have considered whether there is some common feature of those cases in which consent has been held ineffectual whose presence or absence will furnish an immediate solution when the court is faced with a new situation. The only touchstone of this kind suggested in argument was the notion of 'hostility' without which, as Mr Kershen QC maintained, no offence of violence can be made out. This argument, which equates hostility with antagonism, is attractive because antagonism felt by the perpetrator against the recipient, and expressed in terms of violence, is present in the great majority of the offences dealt with

by the courts under the 1861 Act. Nevertheless I cannot accept it as a statement of the existing law which leads automatically to a conclusion on the present appeals. It is true that counsel was able to cite a series of cases on indecent conduct with consenting children, beginning with *Fairclough v Whipp* [1951] 2 All ER 832, in which the absence of hostility formed a ground for holding that indecent assaults were not proved. It is however clear to my mind that whatever precise meaning the word was intended to bear in the judgments there delivered it must have been different from the one for which Mr Kershen now contends. The facts were far removed from the present, for the accused persons did nothing to the children but merely persuaded them to do certain acts. They used no force, nor inflicted any physical harm. It is not surprising that no assault was made out, and the decisions do no more than furnish a useful reminder of the care to be taken before punishing repugnant sexual conduct under laws aimed at violence. Furthermore this theory does not fit the situations at the upper end of the scale. The doctor who hastens the end of a patient to terminate his agony acts with the best intentions, and quite without hostility to him in any ordinary sense of the word, yet there is no doubt that notwithstanding the patient's consent he is guilty of murder. Nor has it been questioned on the argument of the present appeal that someone who inflicts serious harm, because (for example) he is inspired by a belief in the efficacy of a pseudo-medical treatment, or acts in conformity with some extreme religious tenet, is guilty of an offence notwithstanding that he is inspired only by a desire to do the best he can for the recipient. Hostility cannot, as it seems to me, be a crucial factor which in itself determines guilt or innocence, although its presence or absence may be relevant when the court has to decide as a matter of policy how to react to a new situation.

I thus see no alternative but to adopt a much narrower and more empirical approach, by looking at the situations in which the recipient consents or is deemed to consent to the infliction of violence upon him, to see whether the decided cases teach us how to react to this new challenge. I will take them in turn.

1. *Death*

With the exception of a few exotic specimens which have never come before the courts, euthanasia is in practice the only situation where the recipient expressly consents to being killed. As the law stands today, consensual killing is murder. Why is this so? Professor Glanville Williams (*Textbook of Criminal Law* (2nd edn, 1983) pp 579–580, §25.16) suggests that the arguments in support are transcendental, and I agree. Believer or atheist, the observer grants to the maintenance of human life an overriding imperative, so strong as to outweigh any consent to its termination. Some believers and some atheists now dissent from this view, but the controversy as to the position at common law

does not illuminate our present task, which is to interpret a statute which is aimed at non-lethal violence.

Nor is anything gained by a study of duelling, an activity in which the recipient did not consent to being killed (quite the reverse) but did consent to running the risk. The nineteenth century authorities were not too concerned to argue the criminality of the practice as between principals, but to stamp out this social evil by involving in the criminality those others, such as seconds and surgeons, who helped to perpetuate it. A series of nineteenth century cases, such as *R v Rice* (1803) 3 East 581, 102 ER 719, reiterated that the dueller who inflicted the fatal wound was guilty of murder, whether he was the challenger or not, and regardless of the fact that the deceased willingly took the risk, but by then it was already very old law—certainly as old as *R v Taverner* (1619) 3 Bulstr 171, 81 ER 144 where Coke CJ and Croke J expounded the heinousness of the offence with copious reference to the ancients and to Holy Scripture. Killing in cold blood was the sin of Cain, and that was that. There is nothing to help us here.

2. *Maiming*

The act of maiming consisted of 'such a hurt of any part of a man's body, whereby he is rendered less able, in fighting either to defend himself or to annoy his adversary' (see 1 Hawk PC (8th edn, 1824) ch 15, p 107, s 1). Maiming was a felony at common law. Self-maiming was also a crime, and consent was no defence to maiming by another. Maiming was also, in certain circumstances, a statutory offence under a series of Acts, now repealed, beginning with the so-called 'Coventry Act' (22 & 23 Car 2 c 1 (1670) (maiming)), and continuing as part of a more general prohibition of serious offences against the person until an 1803 Act (43 Geo 3 c 58 (malicious shooting or stabbing)). Then it seems to have disappeared. There is no record of anyone being indicted for maim in modern times, and I doubt whether maiming would have been mentioned in the present case but for the high authority of Sir James Fitzjames Stephen, who as late as 1883, in his *Digest of the Criminal Law* (3rd edn) pp 141–142, art 206, stated: 'Everyone has a right to consent to the infliction upon himself of bodily harm not amounting to a maim.' No reported decision or statute was cited in support of this proposition, and the reasoning (according to a footnote) rested upon the assertion that below the level of maiming an injury was no more than an assault, to which consent was a defence.

My Lords, I cannot accept that this antique crime any longer marks a watershed for the interrelation of violence and consent. In the first place the crime is obsolete. The 1861 Act says nothing about it, as it must have done if Parliament had intended to perpetuate maiming as a special category of offence. Furthermore, the rationale of maiming as a distinct offence is now

quite out of date. Apparently the permanent disablement of an adult male was criminal because it cancelled him as a fighting unit in the service of his King. I think it impossible to apply this reasoning to the present case.

Finally, the practical results of holding that maim marks the level at what consent ceases to be relevant seem to me quite unacceptable. The point cannot be better made than in terms of the only illustration given by Stephen J in art 206 of his work: 'It is a maim to strike out a front tooth. It is not a maim to cut off a man's nose.' Evidently consent would be a defence in the latter instance, but not in the former. This is not in my view a sound basis for a modern law of violence.

3. *Prize-fighting, sparring and boxing*

Far removed as it is from the present appeal, I must take a little time over prize-fighting, for it furnishes in *R v Coney* (1882) 8 QBD 534 one of the very few extended judicial analyses of the relationship between violence and consent. By the early part of the nineteenth century it was firmly established that prize-fighting was unlawful notwithstanding the consent of the fighters. It nevertheless continued to flourish. It is therefore not surprising to find that the few and meagrely reported early cases at nisi prius were concerned with the efforts of the courts to stamp out the practice by prosecuting those who were thought to encourage it by acting as seconds or promoters, or just by being present. Although it was at that stage taken for granted that the activity was criminal per se, it is significant that in almost all the cases the accused were charged with riot, affray or unlawful assembly, and that emphasis was given to the tendency of prize-fights to attract large and unruly crowds. We encounter the same theme when at a later stage, in cases such as *R v Coney* (1882) 8 QBD 534, *R v Young* (1866) 31 JP 215 and *R v Orton* (1878) 39 LT 293, the courts were forced to rationalise the distinction between prize-fighting (unlawful) and sparring between amateurs (lawful). Of these cases much the most important was *R v Coney*. Burke and Mitchell fought in a ring of posts and ropes on private land a short distance from a highway. Upwards of 100 people were present. There was no evidence that the fight was for money or reward. Coney, Gilliam and Tully were in the crowd. Originally, Burke, Mitchell and three spectators and others who did not appeal were charged under an indictment which contained counts against all the accused for riot and other offences against public order, but these were dropped and the trial proceeded on two counts alone, one alleging (against all the accused except Burke) a common assault upon Burke, and the other a kindred count relating to Mitchell. The chairman of quarter sessions left to the jury the question whether this was a prize-fight, with a direction that if so it was illegal and an assault. He also directed that all persons who go to a prize-fight to see the combatants strike each other and who are present when they do so are guilty of an assault. The

jury convicted all the accused. The chairman stated for decision by the Court of Crown Cases Reserved the question whether in relation to the three last-named accused his direction was right.

Two issues arose. First, whether the fighting between Burke and Mitchell was an assault. If it was not, none of the accused were guilty of any offence. Second, whether the direction as to the participation of the other three appellants as aiders and abettors was correct. The court was divided on the second issue. But on the first all the judges were agreed that if the proceedings constituted a prize-fight then Burke and Mitchell were guilty of assault irrespective of the fact that they had agreed to fight.

Even at first sight it is clear that this decision involved something out of the ordinary, for the accused were charged, not with any of the serious offences of violence under the 1861 Act but with common assault; and as all concerned in the argument of the present appeal have agreed, in common with the judges in *R v Coney* itself, consent is usually a defence to such a charge. Furthermore it seems that the degree of harm actually inflicted was thought to be immaterial, for no reference was made to it in the case stated by quarter sessions or (except tangentially) in the judgments of the court. What then was the basis for holding that a prize-fight stood outside the ordinary rules of criminal violence? Of the 11 judges only five went further than to say that the law was well-established. Their reasons were as follows. (1) Prize-fighting is a breach of the peace. The parties may consent to the infliction of blows as a civil wrong, but cannot prevent a breach of the peace from being criminal (see 8 QBD 534 at 538, 549, 553, 567 per Cave, Stephen, Hawkins JJ and Lord Coleridge CJ respectively). As Stephen J put it, prize-fights were ‘disorderly exhibitions, mischievous on many obvious grounds’. (2) The participants are at risk of suffering ferocity and severe punishment, dreadful injuries and endangerment of life, and are encouraged to take the risk by the presence of spectators. It is against the public interest that these risks should be run, whether voluntarily or not (see per Cave and Mathew JJ (at 539, 544)). (3) Fists are dangerous weapons like pistols, and prize-fighting should be proscribed for the same reasons as duelling (see per Mathew J (at 547)).

My Lords, there is nothing here to found a general theory of consensual violence. The court simply identifies a number of reasons why as a matter of policy a particular activity of which consent forms an element should found a conviction for an offence where the level of violence falls below what would normally be the critical level. As Stephen J made clear, the question whether considerations of policy are strong enough to take the case outside the ordinary law depends on whether ‘the injury is of such nature or is inflicted under such circumstances that its infliction is injurious to the public’ (at 549). Speaking of

duels, Bramwell LJ was later to say in *R v Bradshaw* (1878) 14 Cox CC 83, at 84–85:

'… no person can by agreement go out to fight with deadly weapons, doing by agreement *what the law says shall not be done*, and thus shelter themselves from the consequences of their acts.' (My emphasis.)

Precisely the same reliance on an empirical or intuitive reference to public policy in substitution for any theory of consent and violence are seen in discussions of amateur sparring with fists and other sports which involve the deliberate infliction of harm. The matter is put very clearly in *East's Pleas of the Crown* (1 East PC (1803) ch v, §§ 41–42, pp 268–270):

'… if death ensue from such [sports] as are innocent and allowable, the case will fall within the rule of excusable homicide; but if the sport be unlawful in itself, or productive of danger, riot, or disorder, from the occasion, so as to endanger the peace, and death ensue; the party killing is guilty of manslaughter … manly sports and exercises which tend to give strength, activity, and skill in the use of arms, and are entered into merely as private recreations among friends, are not unlawful; and therefore persons playing by consent at cudgels, or foils, or wrestling, are excusable if death ensue. For though doubtless it cannot be said that such exercises are altogether free from danger; yet are they very rarely attended with fatal consequences; and each party has friendly warning to be on his guard. And if the possibility of danger were the criterion by which the lawfulness of sports and recreations were to be decided, many exercises must be proscribed which are in common use, and were never heretofore deemed unlawful … But the latitude given to manly exercises of the nature above described, when conducted merely as diversions among friends, must not be extended to legalise prize fightings, public boxing matches and the like, which are exhibited for the sake of lucre, and are calculated to draw together a number of idle disorderly people … And again, such meetings have a strong tendency in their nature to a breach of the peace …'

In his work on *Crown Law* (3rd edn, 1809) p 230 Sir Michael Foster put the matter in a similar way when he distinguished beneficial recreations such as single-stick fighting from—

'prize-fighting and … other exertions of courage, strength and activity … which are exhibited for lucre, and can serve no valuable purpose, but on the contrary encourage a spirit of idleness and debauchery.'

Thus, although consent is present in both cases the risks of serious violence and public disorder make prize-fighting something which 'the law says shall not be done', whereas the lesser risk of injury, the absence of the public disorder, the improvement of the health and skills of the participants, and the consequent benefit to the public at large combine to place sparring into a different category, which the law says 'may be done'.

That the court is in such cases making a value judgment, not dependent upon any general theory of consent is exposed by the failure of any attempt to deduce why professional boxing appears to be immune from prosecution. For money, not recreation or personal improvement, each boxer tries to hurt the opponent more than he is hurt himself, and aims to end the contest prematurely by inflicting a brain injury serious enough to make the opponent unconscious,

or temporarily by impairing his central nervous system through a blow to the midriff, or cutting his skin to a degree which would ordinarily be well within the scope of s 20 of the 1861 Act. The boxers display skill, strength and courage, but nobody pretends that they do good to themselves or others. The onlookers derive entertainment, but none of the physical and moral benefits which have been seen as the fruits of engagement in manly sports. I intend no disrespect to the valuable judgment of McInerney J in *Pallante v Stadiums Pty Ltd* (*No 1*) [1976] VR 331 when I say that the heroic efforts of that learned judge to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from criminal process have convinced me that the task is impossible. It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.

4. '*Contact*' *sports*

Some sports, such as the various codes of football, have deliberate bodily contact as an essential element. They lie at a mid-point between fighting, where the participant knows that his opponent will try to harm him, and the milder sports where there is at most an acknowledgement that someone may be accidentally hurt. In the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body (for example by a rugby tackle) what would otherwise be a painful battery. By taking part he also assumes the risk that the deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm. But he does not agree that this more serious kind of injury may be inflicted deliberately. This simple analysis conceals a number of difficult problems, which are discussed in a series of Canadian decisions, culminating in *R v Ciccarelli* (1989) 54 CCC (3d) 121, on the subject of ice hockey, a sport in which an ethos of physical contact is deeply entrenched. The courts appear to have started with the proposition that some level of violence is lawful if the recipient agrees to it, and have dealt with the question of excessive violence by inquiring whether the recipient could really have tacitly accepted a risk of violence at the level which actually occurred. These decisions do not help us in the present appeal, where the consent of the recipients was express, and where it is known that they gladly agreed, not simply to some degree of harm but to everything that was done. What we need to know is whether, notwithstanding the recipient's implied consent, there comes a point at which it is too severe for the law to tolerate. Whilst common sense suggests that this must be so, and that the law will not license brutality under the name of sport, one of the very few reported indications of the point at which tolerable harm becomes intolerable violence is in the direction to the jury given by Bramwell LJ in *R v Bradshaw* (1878) 14 Cox CC 83 that the act (in this case a charge at football) would be unlawful if intended to cause 'serious hurt'. This accords with my

own instinct, but I must recognise that a direction at nisi prius, even by a great judge, cannot be given the same weight as a judgment on appeal, consequent upon full argument and reflection. The same comment may be made about *R v Moore* (1898) 14 TLR 229.

5. *Surgery*

Many of the acts done by surgeons would be very serious crimes if done by anyone else, and yet the surgeons incur no liability. Actual consent, or the substitute for consent deemed by the law to exist where an emergency creates a need for action, is an essential element in this immunity; but it cannot be a direct explanation for it, since much of the bodily invasion involved in surgery lies well above any point at which consent could even arguably be regarded as furnishing a defence. Why is this so? The answer must in my opinion be that proper medical treatment, for which actual or deemed consent is a prerequisite, is in a category of its own.

6. *Lawful correction*

It is probably still the position at common law, as distinct from statute, that a parent or someone to whom the parent has delegated authority may inflict physical hurt on his or her child, provided that it does not go too far and is for the purpose of correction and not the gratification of passion or rage: see *R v Conner* (1835) 7 C & P 438, 173 ER 194, *R v Cheeseman* (1836) 7 C & P 455, 173 ER 202, *R v Hopley* (1860) 2R v Brown [1993] 2 All ER 75 F & F 202, 175 ER 1024, *R v Griffin* (1869) 11 Cox CC 402. These cases have nothing to do with consent, and are useful only as another demonstration that specially exempt situations can exist and that they can involve an upper limit of tolerable harm.

7. *Dangerous pastimes*; *bravado*; *mortification*

For the sake of completeness I should mention that the list of situations in which one person may agree to the infliction of harm, or to the risk of infliction of harm by another includes dangerous pastimes, bravado (as where a boastful man challenges another to try to hurt him with a blow) and religious mortification. These examples have little in common with one another and even less with the present case. They do not appear to be discussed in the authorities although dangerous pastimes are briefly mentioned and I see no advantage in exploring them here.

8. *Rough horseplay*

The law recognises that community life (and particularly male community life), such as exists in the school playground, in the barrack-room and on the

factory floor, may involve a mutual risk of deliberate physical contact in which a particular recipient (or even an outsider, as in *R v Bruce* (1847) 2 Cox CC 262) may come off worst, and that the criminal law cannot be too tender about the susceptibilities of those involved. I think it hopeless to attempt any explanation in terms of consent. This is well illustrated by *R v Jones* (*Terence*) (1986) 83 Cr App R 375. The injured children did not consent to being thrown in the air at all, nor to the risk that they might be thrown so high as to cause serious injury. They had no choice. Once again it appears to me that as a matter of policy the courts have decided that the criminal law does not concern itself with these activities, provided that they do not go too far. It also seems plain that as the general social appreciation of what is tolerable and of the proper role of the state in regulating the lives of individuals changes with the passage of time, so we shall expect to find that the assumptions of the criminal justice system about what types of conduct are properly excluded from its scope, and about what is meant by going 'too far', will not remain constant. 9. *Prostitution*

Prostitution may well be the commonest occasion for the voluntary acceptance of the certainty, as distinct from the risk, of bodily harm. It is very different from the present case. There is no pretence of mutual affection. The prostitute, as beater or beaten, does it for money. The dearth of reported decisions on the application of the 1861 Act clearly shows how the prosecuting authorities have (rightly in my view) tended to deal with such cases, if at all, as offences against public order. Only in *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207 amongst the English cases, has the criminality of sexual beating been explored.

The facts were as follows. The accused met the complainant and immediately asked her: 'Where would you like to have your spanking, in Hyde Park or in my garage?' Previous telephone conversations had made it clear that he wanted to beat her for sexual gratification. She went with him to his garage, where he caned her in a manner which left seven or eight marks indicative, as a medical witness said, of 'a fairly severe beating'. He was charged with indecent assault and common assault. The defence was that the girl consented and that it was for the prosecution to prove that she did not. The chairman of quarter sessions directed the jury that the vital issue was 'consent or no consent', apparently without giving any guidance on burden of proof. After retiring for an hour the jury asked a question about reasonable belief and consent, which again the chairman answered without reference to burden of proof.

The Court of Criminal Appeal (Lord Hewart CJ, Swift and du Parcq JJ) quashed the conviction. The judgment fell into two entirely distinct parts. The first was concerned with the direction on consent and proceeded on the footing that consent was material to guilt and that the burden was on the Crown to

disprove it. This part of the judgment concluded ([1934] 2 KB 498 at 506, [1934] All ER Rep 207 at 210):

'It is, in our view, at least possible that [a correct direction] would have resulted in the acquittal of the appellant, and we are, therefore, compelled to come to the conclusion … that the trial was not satisfactory.'

On the face of it this conclusion was fatal to the conviction, but the court went on to consider an argument for the Crown that this was not so, because on the facts the striking of the girl was not an act for which consent afforded a defence; so that the absence of a proper direction upon it made no difference. On this question the court held that it was for the jury to decide whether the situation was such that the consent of the girl was immaterial, and that since the issue had never been left to the jury and the trial had proceeded on the footing that consent was the key to the case, the appeal ought to be decided on the same basis. Accordingly, the direction on consent being unsatisfactory the conviction must be quashed.

How did the court arrive at the opinion that there was an issue for the jury which ought to have been tried? As I understand it, the course of reasoning was as follows. (1) On the basis of a statement of Cave J in *R v Coney* (1882) 8 QBD 534 at 539 and the old authorities on which it was founded the court was of the opinion—:

'If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer.' (See [1934] 2 KB 498 at 507, [1934] All ER Rep 207 at 210.)

(2) 'There are, however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected' (see [1934] 2 KB 498 at 507, [1934] All ER Rep 207 at 210). (3) 'As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial' (see [1934] 2 KB 498 at 507, [1934] All ER Rep 207 at 210). (4) The former distinction between maim and other types of injury was out of date. Beating with the intent of doing some bodily harm is malum in se to which consent is not a defence. (5) There are exceptions to this general rule, such as sparring, sport or horseplay. (6) But what happened in the instant case did not fall within any of the established exceptions. (7) For the purpose of the general rule bodily injury meant any hurt or injury calculated to interfere with the health or comfort of the prosecutor; it need not be permanent, but must be more than merely

transient or trifling. (8) It was for the jury to decide whether the appellant had inflicted or intended to inflict bodily injury in this sense.

My Lords, the first two of these propositions have more than once been criticised as tautologous. I do not accept this, but will not stay to discuss the point for its seems to me that they are right, as the instances of prize-fighting and duelling make plain, and as all the counsel appearing in the present appeal have agreed. The law simply treats some acts as criminal per se irrespective of consent.

It is with the next stages in the reasoning that I part company. Donovan was charged only with indecent assault, and the latter is an offence to which, it is common ground, consent is a defence. Yet the Court of Criminal Appeal proceeded on the basis that the critical level of violence was that of actual bodily harm, and that the jury should have been directed to decide whether he was guilty of facts establishing an offence under s 47 of the 1861 Act: an offence with which he had not been charged. There is something amiss here. What is amiss is that the dictum of Cave J in *R v Coney* and the old cases said to support it are taken out of their context, which was in each instance the kind of battery regarded for reasons of public policy as being in a special category which is automatically criminal. Plainly the court in *R v Donovan* did not put the beating of the complainant into that category, or the appeal would have taken a quite different course. All that the court had to say about the nature of the beating was that it was not, as the present appellants would have us say, in a category which is automatically innocent.

10. *Fighting*

I doubt whether it is possible to give a complete list of the situations where it is conceivable that one person will consent to the infliction of physical hurt by another, but apart from those already mentioned only one seems worth considering, namely what one may call 'ordinary' fighting. This was the subject of *A-G's Reference* (/No 6 of 1980/) [1981] 2 All ER 1057, [1981] QB 715. The accused fell into an argument with another youth in a street. They agreed to settle it there and then by a fight, which they did, and as a result the other person suffered a bleeding nose and a bruised face. The accused was charged with common assault. There was no evidence that anyone was present except one bystander, nor that there was any public disorder other than the fight itself. The judge directed the jury that the fight did not necessarily amount to an assault, and that they should consider whether it was a case of both parties agreeing to fight and use only reasonable force. The Attorney General referred for the opinion of the Court of Appeal the question—

'Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?'

When answering this question the court consciously broke new ground. No reliance was placed on the unsystematic old cases on sparring, or on *R v Donovan*, or even as I understand it on *R v Coney*, except as showing that public interest may demand a special response to a special situation. Indeed, the protection of public order, which had been the principal ground for the recognition of prize-fighting as a special category in *R v Coney* was explicitly discarded. Instead, the court began by stating that in general consent is a defence to a charge of assault, and went on to observe that there might be cases where the public interest demanded otherwise. Such a case existed 'where people … try to cause or … cause each other bodily harm for no good reason' (see [1981] 2 All ER 1057 at 1059, [1981] QB 715 at 719).

My Lords, I am not sure that I can detect here the inconsistency for which this judgment has been criticised. Perhaps it is unduly complicated to suggest that the public interest might annul the defence of consent in certain situations and then in the shape of 'good reason' recreate it. Nevertheless I am very willing to recognise that the public interest may sometimes operate in one direction and sometimes in the other. But even if it be correct that fighting in private to settle a quarrel is so much against the public interest as to make it automatically criminal even if the fighter is charged only with assault (a proposition which I would wish to examine more closely should the occasion arise), I cannot accept that the infliction of bodily harm, and especially the private infliction of it, is invariably criminal absent some special factor which decrees otherwise. I prefer to address each individual category of consensual violence in the light of the situation as a whole. Sometimes the element of consent will make no difference and sometimes it will make all the difference. Circumstances must alter cases. For these reasons I consider that the House is free, as the Court of Appeal in the present case was not (being bound by *A-G's Reference* (*No 6 of 1980*)), to consider entirely afresh whether the public interest demands the interpretation of the 1861 Act in such a way as to render criminal under s 47 the acts done by the appellants.

II. AN UNLAWFUL ACT

A question has arisen, not previously canvassed, whether the appellants are necessarily guilty because their acts were criminal apart from the Offences against the Person Act 1861, and that accordingly a defence of consent which might otherwise have been available as an answer to a charge under s 47 is to be ruled out. This proposition if correct will have some strange practical consequences. First of all, it means that solely because the appellants were guilty of offences under the Sexual Offences Act 1967, with which they had not been charged and of which they could not (because of the time limit) be convicted they can properly be convicted of crimes of violence under a different statute carrying a much larger maximum penalty. The logic of this

argument demands that if the prosecution can show that a sexual harming constitutes some other offence, however trifling and however different in character, the prosecution will be able to establish an offence of common assault or an offence under the 1861 Act, even if in its absence the defendant would not be guilty of any offence at all. Surely this cannot be right.

Moreover, if one returns to offences of the present kind further practical anomalies may be foreseen. Not all grossly indecent acts between males are indictable under the Sexual Offences Act 1956. Thus, if the criminality of conduct such as the present under the Offences against the Person Act 1861 is to depend on whether the conduct is criminal on other grounds, one would find that the penal status of the acts for the purposes of s 47 would depend upon whether they were done by two adult males or three adult males. I can understand why, in relation to a homosexual conduct, Parliament has not yet thought fit to disturb the compromise embodied in the Sexual Offences Act 1967, but am quite unable to see any reason to carry a similar distinction into the interpretation of a statute passed a century earlier, and aimed at quite different evil. Since the point was not raised before the trial judge, and the House has properly not been burdened with all the committal papers, it is impossible to tell whether, if advanced, it might have affected the pleas offered and accepted at the Central Criminal Court, but its potential for creating anomalies in other cases seems undeniable.

I would therefore accede to this argument only if the decided cases so demand. In my opinion they do not, for I can find nothing in them to suggest that the consensual infliction of hurt is transmuted into an offence of violence simply because it is chargeable as another offence. Even in the prize-fighting cases, which come closest to this idea, the tendency of these events to attract a disorderly crowd was relevant not because the fighters might have been charged, if anyone had cared to do so, with the separate offence of causing a breach of the peace, but rather because this factor was a reason why the events were placed as a matter of policy in a category which the law treated as being *in itself* intrinsically unlawful notwithstanding the presence of consent. I am satisfied that it was in this sense that the courts made reference to the unlawfulness of the conduct under examination, and not to its criminality aliunde.

III. THE EUROPEAN CONVENTI0N ON HUMAN RIGHTS

The appellants relied on the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) for two reasons. First, because it was said to support an argument that the law as it now stood should be interpreted or developed in a sense favourable to the appellants, and, secondly, because in the event of failure before the House the appellants intend to pursue the matter before the European

Court of Human Rights, and for this purpose must show that their local remedies have been exhausted.

Two provisions of the convention are called in aid. The first is art 7, the proposition being that the convictions cannot be upheld without making the appellants guilty in respect of acts which were not criminal when they were committed. I am satisfied that this argument is unsound. Many of the acts relied on took place after the decision in *A-G's Reference*(*No 6 of 1980*) [1981] 2 All ER 1057, [1981] QB 715, and all of them long postdated *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207. The ruling of the trial judge was perfectly comprehensible in the light of these and other decisions. The law was being applied as it was then understood. If the view which I now propose were to prevail the law would be understood differently. If this happened the appeals would succeed, without any reference to art 7. And if, as I understand to be the case, your Lordships hold that on the law as it already exists the trial judge's ruling was right, there is no change of any kind, whether retrospective or otherwise, that could possibly infringe art 7.

The second argument, ably presented by Miss Sharpston, is altogether more substantial. Not of course because the enunciation of a qualified right of privacy in art 8 leads inexorably to a conclusion in the appellants' favour, since even after all these years the United Kingdom has still failed to comply with its treaty obligation to enact the convention. Nor because I consider that the individual provisions of the convention will always point unequivocally to the right answer in a particular case. Far from it. Emphasis on human duties will often yield a more balanced and sharply-focused protection for the individual than the contemporary preoccupation with human rights. The sonorous norms of the convention, valuable as they unquestionably are in recalling errant states to their basic obligations of decency towards those in their power, are often at the same time too general and too particular to permit a reasoned analysis of new and difficult problems. Article 8 provides a good example. The jurisprudence with which this article, in common with other terms of the convention, is rapidly becoming encrusted shows that in order to condemn acts which appear worthy of censure they have had to be forced into the mould of art 8, and referred to the concept of privacy, for want of any other provision which will serve. I do not deny that the privacy of the conduct was an important element in the present case, but I cannot accept that this fact on its own can yield an answer.

Nevertheless, I believe that the general tenor of the decisions of the European Court of Human Rights does furnish valuable guidance on the approach which the English courts should adopt, if free to do so, and I take heart from the fact that the European authorities, balancing the personal considerations invoked by art 8(1) against the public interest considerations

called up by art 8(2), clearly favour the right of the appellants to conduct their private lives undisturbed by the criminal law: a conclusion at which I have independently arrived for reasons which I must now state.

IV. PUBLIC POLICY

The purpose of this long discussion has been to suggest that the decks are clear for the House to tackle completely anew the question whether the public interest requires s 47 of the 1861 Act to be interpreted as penalising an infliction of harm which is at the level of actual bodily harm, but not grievous bodily harm; which is inflicted in private (by which I mean that it is exposed to the view only of those who have chosen to view it); which takes place not only with the consent of the recipient but with his willing and glad co-operation; which is inflicted for the gratification of sexual desire, and not in a spirit of animosity or rage; and which is not engaged in for profit.

My Lords, I have stated the issue in these terms to stress two considerations of cardinal importance. Lawyers will need no reminding of the first, but since this prosecution has been widely noticed it must be emphasised that the issue before the House is not whether the appellants' conduct is morally right, but whether it is properly charged under the 1861 Act. When proposing that the conduct is not rightly so charged I do not invite your Lordships' House to indorse it as morally acceptable. Nor do I pronounce in favour of a libertarian doctrine specifically related to sexual matters. Nor in the least do I suggest that ethical pronouncements are meaningless, that there is no difference between right and wrong, that sadism is praiseworthy, or that new opinions on sexual morality are necessarily superior to the old, or anything else of the same kind. What I do say is that these are questions of private morality; that the standards by which they fall to be judged are not those of the criminal law; and that if these standards are to be upheld the individual must enforce them upon himself according to his own moral standards, or have them enforced against him by moral pressures exerted by whatever religious or other community to whose ethical ideals he responds. The point from which I invite your Lordships to depart is simply this, that the state should interfere with the rights of an individual to live his or her life as he or she may choose no more than is necessary to ensure a proper balance between the special interests of the individual and the general interests of the individuals who together comprise the populace at large. Thus, whilst acknowledging that very many people, if asked whether the appellants' conduct was wrong, would reply 'Yes, repulsively wrong', I would at the same time assert that this does not in itself mean that the prosecution of the appellants under ss 20 and 47 of the Offences against the Person Act 1861 is well founded.

This point leads directly to the second. As I have ventured to formulate the crucial question, it asks whether there is good reason to impress upon s 47 an

interpretation which penalises the relevant level of harm irrespective of consent: ie to recognise sado-masochistic activities as falling into a special category of acts, such as duelling and prize-fighting, which 'the law says shall not be done'. This is very important, for if the question were differently stated it might well yield a different answer. In particular, if it were to be held that as a matter of law all infliction of bodily harm above the level of common assault is incapable of being legitimated by consent, except in special circumstances, then we would have to consider whether the public interest required the recognition of private sexual activities as being in a specially exempt category. This would be an altogether more difficult question and one which I would not be prepared to answer in favour of the appellants, not because I do not have my own opinions upon it but because I regard the task as one which the courts are not suited to perform, and which should be carried out, if at all, by Parliament after a thorough review of all the medical, social, moral and political issues, such as was performed by the Wolfenden Committee (see the *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247 (1957)). Thus, if I had begun from the same point of departure as my noble and learned friend Lord Jauncey of Tullichettle I would have arrived at a similar conclusion; but differing from him on the present state of the law, I venture to differ.

Let it be assumed however that we should embark upon this question. I ask myself, not whether as a result of the decision in this appeal, activities such as those of the appellants should cease to be criminal, but rather whether the 1861 Act (a statute which I venture to repeat once again was clearly intended to penalise conduct of a quite different nature) should in this new situation be interpreted so as to make it criminal. Why should this step be taken? Leaving aside repugnance and moral objection, both of which are entirely natural but neither of which are in my opinion grounds upon which the court could properly create a new crime, I can visualise only the following reasons.

(1) Some of the practices obviously created a risk of genito-urinary infection, and others of septicaemia. These might indeed have been grave in former times, but the risk of serious harm must surely have been greatly reduced by modern medical science.
(2) The possibility that matters might get out of hand, with grave results. It has been acknowledged throughout the present proceedings that the appellants' activities were performed as a prearranged ritual, which at the same time enhanced their excitement and minimised the risk that the infliction of injury would go too far. Of course things might go wrong and really serious injury or death might ensue. If this happened, those responsible would be punished according to the ordinary law, in the same way as those who kill or injure in the course of more ordinary sexual activities are regularly punished. But to penalise the appellants' conduct even if the

extreme consequences do not ensue, just because they might have done so, would require an assessment of the degree of risk, and the balancing of this risk against the interests of individual freedom. Such a balancing is in my opinion for Parliament, not the courts; and even if your Lordships' House were to embark upon it the attempt must in my opinion fail at the outset for there is no evidence at all of the seriousness of the hazards to which sado-masochistic conduct of this kind gives rise. This is not surprising, since the impressive argument of Mr Purnell QC for the Crown did not seek to persuade your Lordships to bring the matter within the 1861 Act on the ground of special risks, but rather to establish that the appellants are liable under the general law because the level of harm exceeded the critical level marking off criminal from non-criminal consensual violence which he invited your Lordships to indorse.

(3) I would give the same answer to the suggestion that these activities involved a risk of accelerating the spread of auto-immune deficiency syndrome (AIDS), and that they should be brought within the 1861 Act in the interests of public health. The consequence would be strange, since what is currently the principal cause for the transmission of this scourge, namely consenting buggery between males, is now legal. Nevertheless, I would have been compelled to give this proposition the most anxious consideration if there had been any evidence to support it. But there is none, since the case for the Crown was advanced on an entirely different ground.

(4) There remains an argument to which I have given much greater weight. As the evidence in the present case has shown, there is a risk that strangers (and especially young strangers) may be drawn into these activities at an early age and will then become established in them for life. This is indeed a disturbing prospect but I have come to the conclusion that it is not a sufficient ground for declaring these activities to be criminal under the 1861 Act. The element of the corruption of youth is already catered for by the existing legislation; and if there is a gap in it which needs to be filled the remedy surely lies in the hands of Parliament, not in the application of a statute which is aimed at other forms of wrongdoing. As regards proselytisation for adult sado-masochism the argument appears to me circular. For if the activity is not itself so much against the public interest that it ought to be declared criminal under the 1861 Act then the risk that others will be induced to join in cannot be a ground for making it criminal.

Leaving aside the logic of this answer, which seems to me impregnable, plain humanity demands that a court addressing the criminality of conduct such as that of the present should recognise and respond to the profound dismay which all members of the community share about the apparent increase of cruel and senseless crimes against the defenceless. Whilst doing so I must repeat for the last time that in the answer which I propose I do not advocate the decriminalisation of conduct which has hitherto been a crime; nor do I rebut a

submission that a new crime should be created, penalising this conduct, for Mr Purnell has rightly not invited the House to take this course. The only question is whether these consensual private acts are offences against the existing law of violence. To this question I return a negative response.

V. CONCLUS10N

Accordingly I would allow these appeals and quash such of the convictions as are now before the House.

LORD SLYNN OF HADLEY. My Lords, the Court of Appeal, Criminal Division when granting leave to the appellants to appeal to the House of Lords certified that a point of law of general importance was involved in its decision to dismiss the appeal, namely:

'Where A wounds or assaults B occasioning him actual bodily harm in the course of a sadomasochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 and section 47 of the 1861, Offences Against the Person Act?'

By s 20: 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person … shall be liable [to imprisonment]' and by s 47: 'Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable [to imprisonment].' The trial judge ruled as a preliminary issue that:

'1. It is an assault deliberately to strike or touch another person other than in self-defence with the intention thereby to cause bodily harm, or a fortiori so to act so that bodily harm is thereby caused intentionally or recklessly. 2. Such an act or touching can be excused on the grounds that it was lawfully carried out. Therefore whether consent is an element of the offence itself, or whether it is to be treated as a defence in exception to the general rule that I have stated, it is, accordingly, in some cases a defence to the charge that the subject consented. The circumstances of this case do not permit these defendants to rely on consent as a defence in law if any of them have carried out acts satisfying the conditions under my first heading.'

On the basis of that ruling the appellants pleaded guilty to the charges under s 47 of the 1861 Act (actual bodily harm) and to wounding (though not to inflicting grievous bodily harm) under s 20 of that Act.

Some of the appellants and certain others also pleaded guilty to other offences concerned with keeping a disorderly house, for which longer sentences were imposed than those on the assault charges, and with the publication and possession of obscene or indecent articles, for which sentences of imprisonment were also imposed.

The argument on both sides has proceeded on the basis of earlier authorities that bodily harm means any hurt or injury that is calculated to or does interfere with the health or comfort of the subject but must be more than

transient or trifling, that grievous bodily harm means really serious bodily harm and that wounding involves the breaking of the whole skin. Common assault would include any physical touching which did not fall within these categories.

The facts upon which the convictions under appeal were based are sufficiently and clearly set out in the judgment of Lord Lane CJ and fortunately it is not necessary to repeat them. Nor is it necessary to refer to other facts which are mentioned in the papers before the House which can only add to one's feeling of revulsion and bewilderment that anyone (in this case men, in other cases mutatis mutandis, men and women or women) should wish to do or to have done to him or her the acts so revealed. Some of those other facts, though no less revolting to most people than the facts set out in the charges, could not possibly have constituted an assault in any of the degrees to which I have referred.

The determination of the appeal, however, does not depend on bewilderment or revulsion or whether the right approach for the House in the appeal ought to be liberal or otherwise. The sole question is whether, when a charge of assault is laid under the two sections in question, consent is relevant in the sense either that the prosecution must prove a lack of consent on the part of the person to whom the act is done or that the existence of consent by such person constitutes a defence for the person charged.

If, as seems clear on previous authority, it was a general rule of the common law that any physical touching could constitute a battery, there was an exception where the person touched expressly or impliedly consented. As Robert Goff LJ put it in *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177: 'Generally speaking, consent is a defence to battery …' As the word 'generally' suggests, the exception was itself subject to exceptions. Thus in *Stephen's Digest of the Criminal Law* (3rd edn, 1883) pp 141–142, art 206 it is stated: 'Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim.' By way of footnote it is explained: 'Injuries short of maims are not criminal at common law unless they are assaults, but an assault is inconsistent with consent.' Maim could not be the subject matter of consent since it rendered a man less able to fight or defend himself (see 1 *Hawkin's Pleas of the Crown* (8th edn, 1824) p 107, s 1). Nor could a person consent to the infliction of death (see *Stephen's Digest of the Criminal Law* (3rd edn, 1883) p 142, art 207) or to an infliction of bodily harm in such manner as to amount to a breach of the peace (art 208). It was 'uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another' (art 209), where the example given suggests that dangerous acts rendering serious bodily harm likely were contemplated.

The law has recognised cases where consent, expressed or implied, can be a defence to what would otherwise be an assault and cases where consent cannot be a defence. The former include surgical operations, sports, the chastisement of children, jostling in a crowd, but all subject to a reasonable degree of force being used, tattooing and ear-piercing; the latter include death and maiming. None of these situations, in most cases pragmatically accepted, either covers or is analogous to the facts of the present case.

It is, however, suggested that the answer to the question certified flows from the decisions in three cases.

The first is *R v Coney* (1882) 8 QBD 534. This is a somewhat remarkable case in that not only the two participants in a prize-fight but a number of observers were convicted of a common assault. The case was said to be relevant to the present question since it was decided that consent was not a defence to common assault. It is, however, accepted in the present appeal that consent can be a defence to common assault. Moreover it is plain from the judgment as a whole that a fight of this kind, since in public, either did, or had a direct tendency to, create a breach of the peace. It drew large crowds who gambled, who might have got excited and have fought among themselves. Moreover it was plain that such fights were brutal—the fighters went out to kill or very gravely injure their opponents and they fought until one of them died or was very gravely injured. As Mathew J put it (at 544):

'… the chief incentive to the wretched combatants to fight on until (as happens too often) dreadful injuries have been inflicted and life endangered or sacrificed, is the presence of spectators watching with keen interest every incident of the fight.'

This emphasis on the risk of a breach of the peace and the great danger to the combatants is to be found in all of the judgments in the case (for example, at 538, 544, 546, 554, 562, 567). I cite only the judgment of Stephen J (at 549):

'The principle as to consent seems to me to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults.'

The second case is *R v Donovan* [1934] 2 KB 498, [1934] All ER Rep 207. Here the appellant, in private for his sexual gratification, caned a girl, who consented and was paid. The appeal was allowed because the question of consent was not left to the jury, yet it was said that, if the act done was itself unlawful, consent to the act could not be a defence. This, however, was a long way from *R v Coney*, upon which the essential passage in the judgment was

largely based, where the act was held to be unlawful in all circumstances regardless of consent. In *R v Donovan* there was accepted to be an issue for the jury as to whether the prosecution had proved that the girl had not consented and whether the consent was immaterial.

The third case is *A-G's Reference*(*No 6 of 1980*) [1981] 2 All ER 1057, [1981] QB 715. Here two youths fought following an argument. There was one bystander but no suggestion of public disorder as in *R v Coney*. If the judgment had been limited to the fact that the fight took place in public then there would clearly have been a possibility of a breach of the peace being caused; but the court laid down that even consensual fighting in private constitutes an assault on the basis that consent is no defence where 'people … try to cause or … cause each other bodily harm for no good reason' (see [1981] 2 All ER 1057 at 1059, [1981] QB 715 at 719).

I am not satisfied that fighting in private is to be treated always and necessarily as so much contrary to the public interest that consent cannot be a defence. In any event I think that the question of consent in regard to a fight needs special consideration. If someone is attacked and fights back he is not to be taken as consenting in any real sense. He fights to defend himself. If two people agree to fight to settle a quarrel the persons fighting may accept the risk of being hurt; they do not consent to serious hurt, on the contrary the whole object of the fight is to avoid being hurt and to hurt the opponent. It seems to me that the notion of 'consent' fits ill into the situation where there is a fight. It is also very strange that a fight in private between two youths where one may, at most, get a bloody nose should be unlawful, whereas a boxing match where one heavyweight fighter seeks to knock out his opponent and possibly do him very serious damage should be lawful.

Accordingly I do not consider that any of these three cases is conclusive in resolving the present question.

These decisions are not in any event binding upon your Lordships' House and the matter has to be considered as one of principle.

Three propositions seem to me to be clear.

It is '… inherent in the conception of assault and battery that the victim does not consent' (see Glanville Williams 'Consent and Public Policy' [1962] Crim LR 74 at 75). Secondly, consent must be full and free and must be as to the actual level of force used or pain inflicted. Thirdly, there exist areas where the law disregards the victim's consent even where that consent is freely and fully given. These areas may relate to the person (eg a child); they may relate

to the place (eg in public); they may relate to the nature of the harm done. It is the latter which is in issue in the present case.

I accept that consent cannot be said simply to be a defence to any act which one person does to another. A line has to be drawn as to what can and as to what cannot be the subject of consent. In this regard it is relevant to recall what was said by Stephen J in *R v Coney* (1882) 8 QBD 534 at 549. Even though he was referring to the position at common law, his words seem to me to be of relevance to a consideration of the statute in question.

'In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used that, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football, and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.'

There are passages in the judgment of McInerney J in the Australian case of *Pallante v Stadiums Pty Ltd*(*No 1*) [1976] VR 331, where a boxing match was in issue, which also seem to me to be helpful. Thus (at 340):

'It is easy to understand the proposition that if the harm to which consent is alleged to have been given is really grievous, as, for instance, in a case of maiming, the consent should be treated as nugatory: see, for instance, *Stephen's Digest of Criminal Law* (7th edn, 1926, art 290). In *Cross and Jones*' "/An Introduction to Criminal Law/" (7th edn, 1972, p 40) it is suggested as a reason for this conclusion that the injured person is likely to become the charge of society. This may be a good enough reason, though I would think it is not the primary reason. The primary reason, I would think, is that, as a general proposition, it injures society if a person is allowed to consent to the infliction on himself of such a degree of serious physical harm … Grievous bodily harm is now to be understood as meaning "really serious bodily harm". So understood, the dictum of Stephen, J., in *Coney's Case* ((1882) 8 QBD 534 at 549) [ie that the infliction of the blows is regarded as injurious to the public as well as to the person injured] may, as Cross and Jones point out in the work cited (at p 40), require to be understood as meaning that a person can lawfully consent to the infliction of bodily harm upon himself provided it falls short of being grievous bodily harm.'

I do not think a line can simply be drawn between 'maiming' and death on the one hand and everything else on the other hand. The rationale for negating consent when maiming occurred has gone. It is, however, possible to draw the line, and the line should be drawn, between really serious injury on the one hand and less serious injuries on the other. I do not accept that it is right to take common assault as the sole category of assaults to which consent can be a defence and to deny that defence in respect of all other injuries. In the first place the range of injuries which can fall within 'actual bodily harm' is wide—the description of two beatings in the present case show that one is much more substantial than the other. Further, the same is true of wounding where the test is whether the skin is broken and where it can be more or less serious. I can see no significant reason for refusing consent as a defence for the lesser of these cases of actual bodily harm and wounding.

If a line has to be drawn, as I think it must, to be workable it cannot be allowed to fluctuate within particular charges and in the interests of legal certainty it has to be accepted that consent can be given to acts which are said to constitute actual bodily harm and wounding. Grievous bodily harm I accept to be different by analogy with and as an extension of the old cases on maiming. Accordingly, I accept that, other than for cases of grievous bodily harm or death, consent can be a defence. This in no way means that the acts done are approved of or encouraged. It means no more than that the acts do not constitute an assault within the meaning of these two specific sections of the Offences against the Person Act 1861.

None of the convictions in the present cases have been on the basis that grievous bodily harm was caused. Whether some of the acts done in these cases might have fallen within that category does not seem to me to be relevant for present purposes.

Even if the act done constitutes common assault, actual bodily harm or wounding, it remains to be established that the act was done otherwise than in public and that it was done with full consent. I do not accept the suggested test as to whether an offence is committed, to be whether there is expense to the state in the form of medical assistance or social security payments. It seems to me better to ask whether the act was done in private or in public: is the public harmed or offended by seeing what is done or is a breach of the peace likely to be provoked? Nor do I consider that 'hostility' in the sense of 'aggression' is a necessary element to an assault. It is sufficient if what is done is done intentionally and against the will of the person to whom it is done. These features in themselves constitute 'hostility'.

In *R v Wollaston* (1872) 26 LT 403 at 404 (where indecent assault was charged) Kelly CB, with whom the rest of the court concurred, said:

'If anything is done by one being upon the person of another to make the act a criminal assault, it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case there was actual participation by both parties in the act done, and complete mutuality.'

In the present cases there is no doubt that there was consent; indeed there was more than mere consent. Astonishing though it may seem, the persons involved positively wanted, asked for, the acts to be done to them, acts which it seems from the evidence some of them also did to themselves. All the accused were old enough to know what they were doing. The acts were done in private. Neither the applicants nor anyone else complained as to what was done. The matter came to the attention of the police 'coincidentally'; the police were previously unaware that the accused were involved in these practices though some of them had been involved for many years. The acts did not result in any

permanent or serious injury or disability or any infection and no medical assistance was required even though there may have been some risk of infection, even injury.

There has been much argument as to whether lack of consent is a constituent of the offence which must be proved by the prosecution or whether consent is simply raised by way of defence. Reliance is placed on the Canadian case of *R v Ciccarelli* (1989) 54 CCC (3d) 121 at 123, where it is said that in the absence of express consent the Crown must prove that the victim did not impliedly consent to the act done. That decision, however, is in the context of s 244 of the Criminal Code (Revised Statutes of Canada 1970), which provides:

'A person commits an assault when, without the consent of another person, or with consent (a) he applies force intentionally to the person of the other, directly or indirectly …'

In the present statute there is no such provision, but it seems to me that here too the onus is on the prosecution to prove that there was no consent on the part of the person said to have been assaulted.

It has been suggested that if the act done is otherwise unlawful then consent cannot be a defence, but it can be a defence, if the act is otherwise lawful, in respect of injury which is less than really serious injury. That would produce the result in the present case that if these acts are done by two men they would be lawful by reason of s 1 of the Sexual Offences Act 1967, even though the acts are far away from the kinds of homosexual acts which the Wolfenden Report had in mind (see the *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247 (1957)) para 105); in that situation, consent, it is said, would be a defence. If on the other hand three men took part, the activity would be unlawful under the 1967 Act, so that there could be no consent to the acts done. But it would also appear to mean that if these acts were done mutatis mutandis by a man and a woman, or between two men and a woman, or a man and two women, where the activity was entirely heterosexual, consent would prevent there being an offence. I do not find that this distinction produces an acceptable result.

My conclusion is thus that, as the law stands, adults can consent to acts done in private which do not result in serious bodily harm, so that such acts do not constitute criminal assaults for the purposes of the 1861 Act. My conclusion is not based on the alternative argument that for the criminal law to encompass consensual acts done in private would in itself be an unlawful invasion of privacy. If these acts between consenting adults in private did constitute criminal offences under the 1861 Act, there would clearly be an invasion of privacy. Whether that invasion would be justified and in particular whether it would be within the derogations permitted by art 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms

(Rome, 4 November 1950; TS 71 (1953); Cmd 8969) it is not necessary, on the conclusion to which I have come, to decide, despite the interesting arguments address to your Lordships on that question and even on the basis that English law includes a principle parallel to that set out in the European Convention on Human Rights.

Mr Kershen QC contended in a very helpful argument that the answer to the question should be on the basis (a) of existing law or (b) that a new ruling was to be given. My conclusion is on the basis of what I consider existing law to be. I do not consider that it is necessary for the House in its judicial capacity to give what is called 'a new ruling' based on freedom of expression, public opinion and the consequences of a negative ruling on those whom it is said can only get satisfaction through these acts; indeed the latter I regard as being of no or at best of little relevance to the decision in this case. Nor do I think that it is for your Lordships to make new law on the basis of the position in other states so that English law can 'keep in line'. All these are essentially matters, in my view, to be balanced by the legislature if it is thought necessary to consider the making criminal of sadomasochistic acts per se. The problems involved are carefully analysed by Dr L H Leigh in 'Sado-masochism, consent and the reform of the criminal law' (1976) 39 MLR 130.

The Director of Public Prosecution contends in her written submissions:

'In the end it is a matter of policy. Is/are the state/courts right to adopt a paternalistic attitude as to what is bad or good for subjects, in particular as to deliberate injury.'

I agree that in the end it is a matter of policy. It is a matter of policy in an area where social and moral factors are extremely important and where attitudes can change. In my opinion it is a matter of policy for the legislature to decide. If society takes the view that this kind of behaviour, even though sought after and done in private, is either so new or so extensive or so undesirable that it should be brought now for the first time within the criminal law, then it is for the legislature to decide. It is not for the courts in the interests of 'paternalism', as referred to in the passage I have quoted, or in order to protect people from themselves, to introduce, into existing statutory crimes relating to offences *against* the person, concepts which do not properly fit there. If Parliament considers that the behaviour revealed here should be made specifically criminal, then the Offences against the Person Act 1861 or, perhaps more appropriately, the Sexual Offences Act 1967 can be amended specifically to define it. Alternatively, if it is intended that this sort of conduct should be lawful as between two persons but not between more than two persons as falling within the offence of gross indecency, then the limitation period for prosecution can be extended and the penalties increased where sado-

masochistic acts are involved. That is obviously a possible course; whether it is a desirable way of changing the law is a different question.

I would therefore answer the question certified on the basis that, where a charge is brought in respect of acts done between adults in private under s 20 of the Offences against the Person Act 1861 in respect of wounding and under s 47 in respect of causing actual bodily harm, it must be proved by the prosecution that the person to whom the act was done did not consent to it.

Accordingly, I consider that these appeals should be allowed and the convictions set aside.

Appeals dismissed.

Mary Rose Plummer Barrister.

[CIRP Note: This decision resulted in an appeal to the European Court of Human Rights (Strasbourg) based on Article 8 of the European Convention on Human Rights (1950), but the Court denied the appeal in its decision so this case now stands as the law of England and Wales.]

Citation:

- R v Brown [1993] 2 All ER 75.
