

**OXFORD CAMBRIDGE AND RSA EXAMINATIONS  
A2 GCE**

**G154/01/RM**

**LAW**

**Criminal Law Special Study**

**SPECIAL STUDY MATERIAL**

**FRIDAY 24 JUNE 2016: Morning**

**DURATION: 1 hour 30 minutes  
plus your additional time allowance**

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# **G154 CRIMINAL LAW**

## **SPECIAL STUDY MATERIAL**

### **SOURCE MATERIAL**

#### **SOURCE 1**

**Extract adapted from the judgment of Russell L.J. in  
'R v Wilson' [1996] 3 WLR 125.**

**We are abundantly satisfied that there is no factual comparison to be made between the instant case and the facts of either 'Donovan' or 'Brown': Mrs Wilson not only consented to that which the appellant did, she instigated it. There was no aggressive intent on the part of the appellant. On the contrary, far from wishing to cause injury to his wife, the appellant's desire was to assist her in what she regarded as the acquisition of a desirable piece of personal adornment, perhaps in this day and age no less understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative jewellery.**

**In our judgment 'Brown' is not authority for the proposition that consent is no defence to a charge under section 47 of the Act of 1861, in all circumstances where actual bodily harm is deliberately inflicted. It is to be observed that the question certified for their Lordships in 'Brown' related only to a "sado-masochistic encounter." However, their Lordships recognised in the course of their speeches, that it is necessary that there**

must be exceptions to what is no more than a general proposition. The speeches of [several of their Lordships] ... all refer to tattooing as being an activity which, if carried out with the consent of an adult, does not involve an offence under section 47, albeit that actual bodily harm is deliberately inflicted. 25

For our part, we cannot detect any logical difference between what the appellant did and what he might have done in the way of tattooing. The latter activity apparently requires no state authorisation, and the appellant was as free to engage in it as anyone else. We do not think that we are entitled to assume that the method adopted by the appellant and his wife was any more dangerous or painful than tattooing ... 30 35

... we are firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution ... 40

In this field, in our judgment, the law should develop upon a case by case basis rather than upon general propositions to which, in the changing times in which we live, exceptions may arise from time to time not expressly covered by authority. 45

## SOURCE 2

Extract adapted from 'Criminal Law'. 10th Edition.  
Michael Jefferson. Pearson Education Ltd. 2011. P 517.

Neither a wife nor anyone else can consent to the reckless infliction of serious harm. This was the strong view of the Court of Appeal in *Dica*... The court held that where the victim is unaware of the fact that the accused is infected with a disease, 5 here HIV/AIDS, and the latter had unprotected sexual intercourse with the former, the victim did not impliedly consent to the risk of being infected. If the victim was aware of the accused's condition, then the consent to sexual intercourse would be consent 10 to the risk of infection and therefore a defence to s 20 ... Consent will only be effective if the victim gives informed consent. It is not informed consent if the victim does not know that the accused has the disease. Even where the victim knows that the 15 accused is HIV positive, and thereby consents to the risk of being infected, the latter is guilty of GBH with intent to commit GBH contrary to s 18 of the OAPA. There was a second appeal in *Dica*... after a retrial. The Court of Appeal dismissed the 20 appeal and refused leave to appeal but did certify a point of law of general public importance: 'in what circumstances, if any, might a defendant who knows or believes that he is infected with a serious sexually transmitted infection and recklessly 25 transmits it to another through consensual sexual activity be convicted of inflicting grievous bodily harm, contrary to s 20 of the Offences against the Person Act 1861?' It would have been useful for the highest court to have resolved the issue. 30

### **SOURCE 3**

**Extract adapted from the judgment of Lord Templeman in ‘R v Brown’ (and other appeals) [1994] 1 AC 212 (House of Lords).**

**In the present case each of the appellants intentionally inflicted violence upon another (to whom I 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 section 47 or section 20 of the Act of 1861 unless the consent of the victim was effective to prevent the commission of the offence or effective to constitute a defence to the charge.** 5 10

**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 ... 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 ...** 15 20 25

Counsel for the appellants argued that consent should provide a defence to charges under both section 20 and section 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 ...

... 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 ...

In principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic 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 65  
glorify cruelty and result in offences under sections  
47 and 20 of the Act of 1861.**

## **SOURCE 4**

**Extract adapted from ‘Unlocking Criminal Law’.  
4th Edition. Jacqueline Martin and Tony Storey.  
Routledge. 2013. P 211.**

**There are limits to anyone’s right to consent to the  
infliction of harm upon themselves. Consensual  
killing is still murder (or possibly manslaughter  
on the ground of diminished responsibility), or  
euthanasia as it is popularly known. According 5  
to Lord Mustill in ‘Brown and others’ ... ‘The  
maintenance of human life is “an overriding  
imperative”.’ However, V may consent to a high risk  
of injury, or even death, if justified by the purpose  
of D’s act. This depends on the social utility of the 10  
act. Where the act has some social purpose, it is  
a question of balancing the degree of harm which  
will or may be caused, against the value of D’s  
purpose. In ‘Attorney-General’s Reference’ (No. 6  
of 1980) ... two youths, aged 17 and 18, decided to 15  
settle an argument with a bare-knuckle fist fight.  
One sustained a bloody nose and a bruised face.  
Following acquittals, the Court of Appeal held that  
the defence of consent was not available in this  
situation. Lord Lane CJ said: 20**

**‘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... Nothing which we have  
said is intended to cast doubt on the accepted  
legality of properly conducted games and sports, 25  
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.'**

**30**

## **SOURCE 5**

**Extract adapted from the judgment of Lord Woolf C.J. in 'R v Barnes' [2005] 1 W.L.R 910.**

**The fact that the participants in, for example, a football match, implicitly consent to take part in a game, assists in identifying the limits of the defence. If what occurs goes beyond what a player can reasonably be regarded as having accepted 5 by taking part in the sport, this indicates that the conduct will not be covered by the defence. What is implicitly accepted in one sport will not necessarily be covered by the defence in another sport ...**

**On the other hand, the fact that the play is within 10 the rules and practice of the game and does not go beyond it, will be a firm indication that what has happened is not criminal. In making a judgment as to whether conduct is criminal or not, it has to be borne in mind that, in highly competitive sports, 15 conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal. That 20 level is an objective one and does not depend upon the views of individual players. The type of the sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, the state of mind of the defendant are 25 all likely to be relevant in determining whether the defendant's actions go beyond the threshold.**

**Whether conduct reaches the required threshold**

to be criminal will therefore depend on all the  
circumstances. However, there will be cases that 30  
fall within a 'grey area', and then the tribunal of fact  
will have to make its own determination as to which  
side of the line the case falls. In a situation such  
as we have on this appeal, to determine this type  
of question the jury would need to ask themselves 35  
among other questions whether the contact was  
so obviously late and/or violent that it could not  
be regarded as an instinctive reaction, error or  
misjudgment in the heat of the game ...

We appreciate the difficulty that the judge had 40  
summing up this case because of the state of  
the authorities. The concept of 'legitimate sport'  
in itself is not unhelpful. However, it required an  
explanation of how the jury should identify what  
is and what is not 'legitimate' in the context of the 45  
relevant sport. The case called out for the jury to  
be given help as to the approach they should adopt  
in determining what is or is not 'legitimate sport'.  
The judge should have given the jury a direction to  
determine for themselves what actually happened 50  
at the critical time when the injury was inflicted.  
Broadly speaking, were they satisfied that the case  
for the prosecution was correct? They should have  
been told that if they were not, and they thought that  
the appellant's description of what occurred might 55  
be correct, then that was in all probability the end  
of the case. It should have been pointed out to the  
jury that even if the offending contact was a foul, it  
was still necessary for them to determine whether  
it could be anticipated in a normal game of football 60  
or was it something quite outside what could be  
expected to occur in the course of a football game.

**The summing up should also have made it clear that even if a tackle results in a player being sent off, it may still not reach the necessary threshold to constitute criminal conduct.**

**65**

## **SOURCE 6**

**Extract adapted from 'Criminal Law'. 4th Edition.  
Alan Reed and Ben Fitzpatrick. Sweet and Maxwell.  
2009. Pp 416–417.**

**Most of the contentious issues concerning what constitutes a valid consent arise in the area of sexual offences ... However, the principles are the same for both sexual and non-sexual offences ...**

**In some situations the law holds that consent which 5  
has been given is not valid. This might be because  
the victim who has purported to give the consent is  
too young to appreciate what he is consenting to;  
in sexual offences there are offences which specify  
the age at which a valid consent might be given. In 10  
the non-sexual field, age limits are rarely specified,  
but the court will decide whether the person could  
be expected to understand the consent he or she  
was giving. Consent may also be invalid because  
the person is mentally incapable of making a sound 15  
decision. Parents and guardians may give consent  
on behalf of their children, for example, in relation  
to surgical operations.**

**Where the consent is obtained by force or threats of  
force it will be invalid. The law draws a line between 20  
real consent and mere submission.**

**Where the victim has given consent due to a  
mistake as to the nature and quality of the act or  
the identity of the person with whom it is to be  
performed the consent will be ineffective. This will 25  
normally occur due to fraud by the accused, but**

not necessarily so; the nature of the fraud vitiating  
 consent is strictly construed ... In 'Richardson'  
 a dentist who had been suspended from dental  
 practice by the General Dental Council was 30  
 convicted of assault occasioning actual bodily harm  
 for treatment given to patients whilst disqualified.  
 The Court of Appeal accepted the defendant's  
 argument that the patients had consented to  
 receiving proper dental treatment and that is what 35  
 they received. It was immaterial that the patients  
 would not have consented to treatment had  
 they realised the dentist had been struck off the  
 Register. Would, however, the answer have been the  
 same had the person performing the treatment no 40  
 qualifications whatsoever. Would she have received  
 proper dental treatment or would this now be a  
 mistake as to the nature of the act and identity of  
 the person? Would it make any difference whether  
 or not the treatment given was the correct treatment 45  
 albeit at the hands of a complete amateur? It is  
 suggested that a different outcome would follow;  
 the act consented to was construed to be proper  
 dental treatment by a dental practitioner. There  
 must be a fundamental deception of the very 50  
 attributes of the criminal act before it will vitiate  
 consent. In 'Tabassum' ... The Court of Appeal  
 determined that whilst the victims had consented  
 to the nature of the act, which constituted the  
 touching of the breasts, they had not consented to 55  
 the *quality* of the act since they had falsely believed  
 that he was medically qualified and that they were  
 being touched for sound medical reasons. In  
 truth, the women would not have submitted to the  
 defendant's acts if they had not believed that he 60  
 had medical qualifications; and that he knew that



this was so. The victim's mistake as to the *quality* of the act was fundamental rather than the fact that the mistake derived from any misrepresentation by the defendant that was material. If followed subsequently this represents a novel distinction between lack of consent as to either nature or quality of the act vitiating consent.

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