Consent as a Defence to Assaults Occasioning Bodily Harm – The Queensland Dilemma

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The International Commission of Jurists in their publication *The Rule of Law in a Free Society* (at 248–249) stated

> "The Criminal Law must be certain . . . (all) the law should aim at creating the maximum certainty regarding the rights and duties of citizens but that where, as in the criminal law, their life and liberty is at stake their requirement of certainty becomes imperative . . . "[1]

Taking this statement as the ideal, it may be argued that the advancement of clarity in the criminal law in Queensland (at least with respect to the defence of "consensual fight") falls far short of the ideal.

This paper will discuss the concept of consent to assaults occasioning bodily harm from its development as an exception to the general rule that an assault with consent is a contradiction in terms, through to the debate in Queensland as to the applicability of the common law principles to s.339 Criminal Code. It will attempt to argue that the denial of the applicability of consent as a defence to assaults occasioning bodily harm arose as an unclear jumble of principles which applied as an exception in the vaguely named "prize-fight" situations, being finally rationalised as policy decisions whose boundaries of applicability were unclear.

The paper will conclude with an examination of the Queensland Court of Criminal Appeal's decision in *R. v. Raabe*[2] which, for the first time, considered the applicability of the defence of consent in relation to assaults occasioning bodily harm. It will be argued that this case has done little to clear up the confusion concerning assaults occasioning bodily harm.

Assaults Occasioning Bodily Harm at Common Law

In relation to offences against the person or against property it is the general rule that acts are criminal only when they are done against the will of the person affected or the owner of the property concerned.[3] Moreover, in relation to assault it has long been the law that "The term assault of itself involves the notion of want of consent. An assault with consent is not an assault at all."[4] Popularly, consent has been described as a defence to assault. However, as O'Connor and Fairall have pointed out, consent is not a defence as such, but rather the failure of the prosecution to prove beyond reasonable doubt one of the elements of the offence (viz. the

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1. Reported in *Obiter*, August, 1971 (no. 2) pg. 1.
2. (1985) 1.Qd R 115.
3. Halsburys Laws of England, 4th ed., Vol 11, par. 23.
4. *Schloss v. Maguire* (1897) Q.C.R. 337 at 339.

absence of consent). It is in this sense that this paper utilises the misnomer "defence".

The development of criminal law has seen the common law adopt a distinction between common assaults and serious assaults. Thus it has been held that a person cannot consent to the infliction upon himself or herself a degree of harm which is itself unlawful.

The law relating to the vitiating of a person's consent was first applied in relation to "prize-fights". The problem has been, as Williams notes

> "Although the law on this point is clear enough, the authorities are difficult because of their obscure use of the term 'prize fight' "[5]

Williams argues that there is a legal distinction between a fight and a contest, with the question of a prize being totally irrelevant. In Williams' terms, although a professional boxing match is a fight *for* a prize it is *not* a prize fight. Russell on Crime states not only that

> "prize fights are altogether illegal"[6]

but that

> "where sports are unlawful and productive of danger riot or disorder, so as to endanger the peace, and death ensues in the pursuit of them, the party killing is guilty of manslaughter."[7]

Williams takes objection to the breadth of this latter statement in the terms

> "a death accidentally caused in the course of a boxing match does not become manslaughter merely because of disorder on the part of the spectators."[8]

Foster, in 1762 differentiated between cudgelling and wrestling on the one hand, and prize-fighting and public boxing matches on the basis that the former were

> ". . . nor more than a friendly exertion of strength and dexterity . . . manly diversions (which) . . . give strength skill and activity and make people fit for defence".[9]

whereas the latter

> ". . . are exhibited for lucre, and can serve no valuable purpose: but on the contrary encourage a spirit of idleness and debauchery."[10]

Foster then, places emphasis on the monetary nature of prize fights and the tendency towards debauchery. Pollock on the other hand highlights the fact that associated with prize fights were

> ". . . serious riots . . . when the onlookers, to save their bets, cut the ropes and forcibly put an end to the fight. These riots . . . (being) of more concern to the magistrates than the injury received by the com-

5. "Consent and Public Policy" 1962 *Criminal Law Review* 77 at 78.
6. Russell on Crime 11th edition, p. 662.
7. *Ibid.*, p. 661.
8. *Op. cit.*
9. Crown Law (1762) at 260.
10. *Ibid.*

> batants, because they carried a greater threat of extensive civil disorder."[11]

It may also be that the law relating to "prize-fights" is not as clear as Williams suggests. The classic case on the subject of consent in relation to "prize fights" is *R. v. Coney*.[12] In that case, two men were engaged in a knuckle fight before Coney and other spectators. Although the spectators bet on the outcome, there was no evidence that the fight was for a prize. The Court for Crown Cases Reserved nonetheless held the fight was a prize fight, the consent of the participants in the fight was vitiated and accordingly the fight amounted to mutual assaults.

Stephen, J. (at 549) stated that

> "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."

Clearly, then, to Stephen, J. it is a question of the public interest. Matthews, J. on the other hand at 547 stated the issue of consent was irrelevant in relation to a prize fight because

> "the fists of trained pugilists are dangerous weapons which they are not at liberty to use against each other."

This raises the question of whether any professional fight (however well controlled) is permissible. Lord Coleridge C.J. and Hawkins, J. held to the same view that consent was irrelevant because a prize fight

> "is, or has the direct tendency to, a breach of the peace."

The author is in agreement with Williams[13] in relation to this point in as much it is difficult to conceive why conduct of spectators in itself should be enough to vitiate consent given by the combatants, although it may be a reason for regarding the proceedings as an affray or a riot. Cave, J. (at 539) held that

> "a blow struck in anger, or which is likely or intended to do corporal hurt, is an assault . . . and that, an assault being a breach of the peace and unlawful, the consent of the person being struck is immaterial."

It is worth noting that the comments of their Lordships in Coney's case were obiter as they referred to the conduct of the principal combatants, whereas the appeal to them was based on Coney's conviction as principal in the second.

11. 1912 28 *Law Quarterly* Review 125.
12. (1882) 8 Q.B.D. 534.
13. *Ibid.*

In the light of the differing views of the Judges, the fact that their remarks are dicta and the confusion concerning the term "prize fight" the "bindingness" of the decision is questionable. At best, the conclusion to be drawn is that if a boxing competition consists of a contest likely to continue until one capitulates from exhaustion then it is likely to be declared as a "prize fight" in which the issue of consent is irrelevant.

Some fifty years later the Court of Appeal an *R. v. Donovan*[14] considered the question of consent in relation to assaults occasioning bodily harm. In that case, Donovan, to obtain sexual satisfaction had caned a girl in a private garage. Notwithstanding that there was evidence to support Donovan's claim that the girl had consented to the assault, he was convicted by the trial court. The Court of Appeal quashed Donovan's conviction for indecent assault and common assault because the trial judge had not made it clear to the jury that the burden of negativing consent lay on the prosecution. The Court of Appeal also held that the question of whether the blows inflicted by Donovan were likely intended to produce bodily harm was not left to the jury as it should have been. The Court then considered whether the victim's consent would operate as a "defence" to an assault occasioning bodily harm.

Swift J. after referring to the judgment of Cave J. in Coney stated (at 507)

> "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 licence 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."

The exceptions referred to by Swift J. encompassed "rough and undisciplined sport and play, where there is no anger and no intention to cause bodily harm" as well as "reasonable chastisement of a child by a parent". Another exception listed refers to the "cudgels, foils or wrestling" which Foster discussed earlier, because they are manly diversions. The circularity inherent in Swift J's reasoning has been noted by many commentators.[15] There seems something logically wrong with the idea that the infliction of bodily harm vitiates consent because it is itself unlawful, when the source of the unlawful-

14. (1934) 2K.B. 498.
15. See e.g. Howard *Criminal Law* Melbourne Law Book Company, 3rd ed. p. 132, 1977.

ness (the fact that the infliction of bodily harm constitutes an assault) depends on the presence or absence of consent.

Howard[16] suggests this circularity can be avoided if Donovan's case can be read as establishing an arbitrary rule that, subject to certain exceptions, consent to an assault which leads to serious harm cannot be given. Unfortunately however, the delineation of exceptions is at best perfunctory.

The most recent authority at common law has done little to dispel the uncertainties created by Coney and Donovan's cases. In the *Attorney General's Reference (No. 6 of 1980)*[17] two people engaged in a fist fight in a street. The younger of the two sustained a bleeding nose and bruises and the elder was charged with assault. The trial judge directed the jury that an agreement to fight was sufficient basis to find an acquittal provided the defendant used reasonable force. The defendant was acquitted whereupon pursuant to s.36 of the Criminal Justice Act 1972, the case was referred to the Court of Appeal on 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?"

The court answered the question "no" because, wherever the assault occurred, the combatants would have been guilty of assault if they intended to and/or did cause actual bodily harm.

Lord Lane C.J., Phillips and Drake J.J. stated at 1059

> "The answer to this question, in our judgement, is that it is not in the public interest that people should try to cause or should cause each other actual bodily harm for not good reason. Minor struggles are another matter. So, in our judgement, 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."

Some commentators[18] have described the Attorney-General's reference as marking a "new approach" to the consent issue. However, it is argued that it is very little more than a re-vamp of Stephen J's judgement in Coney. His Lordship stressed the element of public interest when he stated (at 549)

> ". . . 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 health of the combatants should be endangered by blows . . ."

It is worthwhile taking stock of the situation at common law. If an assailant intends and or causes bodily harm, the complainant can-

16. *Op. cit.*
17. (1981) 2 All E.R. 1057.
18. See e.g. O'Connor, D. and Fairall, P.A. *Criminal Defences* Sydney, Butterworths, 1984.

not consent to that assault. This principle started as an exception in the case of "prize fights" although the term "prize fights" was itself unclear. Finally it has come to apply to all assaults as a matter of policy more than precedent dependent upon the "public interest".

The Queensland Approach

S.339 Criminal Code creates the offence of an assault occasioning bodily harm. Since assault is specifically mentioned in the section it takes the status of a "defined element of the offence". S.245 defines assault which includes "a person who strikes . . . *without* his consent . . ."

It has been argued that s.246 enshrines the principles espoused in Coney's case. S.246 states "the application of force by one person to the person of another may be unlawful although it is done with the consent of that other person. Alternatively s.246 could be limited to situations where greater force was applied than was consented to."

The issue of consent to assaults occasioning bodily harm came before the Court of Criminal Appeal in Queensland for the first time in *R. v. Raabe.*[19] In that case, the appellant, seeing the complainant (his father-in-law) verbally abused him. Both men then discussed the possibility of fighting one another, at which stage the complainant removed his open footwear (replacing them with a pair of shoes) and put on a pair of brick-layers gloves. The appellant then armed himself with a fence paling and in the ensuing fight, the complainant suffered a broken jaw and a laceration to his scalp. The appellant admitted that the injuries sustained by the plaintiff amounted to bodily harm. The trial judge instructed the jury that "The law will not permit a man to consent to be seriously injured . . . No person can consent to excessive force being applied to him and no more force than is reasonable in the circumstances can be applied." The appellant apart from other things appealed from this direction.

Connolly J. reviewed the position at common law with respect to defence of consensual fight and concluded that the decision reached by the Court of Appeal in *Re Attorney General's Reference (no.6 of 1980)* was "avowedly a policy decision rather than the application or exposition of principle." Connolly J. concluded that the Queensland Court of Criminal Appeal did not have such flexibility and was bound to seek the answer to the consent question within the confines of the criminal code.

His honour noted that s.245 of the code itself imposed no limitation on the circumstances in which consent could be given. He paid some attention to s.246 which, as may be recalled, provides that "the application of force may be unlawful although done with the consent of the other party." The presence of s.246, his honour suggests, justifies recourse to the common law as it "introduces an element of ambiguity."

19. *R. v. Rabbe ibid.*

The authority of *Stuart v. Queen*[20] which Connolly J. relies upon to justify this use of the common law seems, with respect, inappropriate. Gibbs J. (as he was then) in Stuart's case stated

> ". . . it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning . . . it should be remembered that the first duty of the interpreter of its provisions is to look at the current text rather than at the old writing which has been erased: if the former is clear, the latter is of no relevance."

Arguably, the code in s.339 is clear. It creates an offence of assault occasioning bodily harm. The definition of assault is provided by s.245 and provides for no limitation as to the circumstances relating to the applicability of consent. There would seem then no justifying circumstances for recourse to the common law – the words of s.339 and s.245 are clear and unambiguous.

Moreover, with greatest respect, Connolly J's statement that (at 119)

> "there is the express provision in s.339 of an assault occasioning bodily harm and there is no provision in the Criminal Code which provides for consent to bodily harm. It would be an odd result if an act charged as an assault simpliciter but which in fact occasioned a degree of bodily harm were held to be no offence by reason of consent whereas the same act if charged as an assault occasioning bodily harm would be a criminal act."

seems to beg the question – *Would* such an assault be a criminal act? Why is it not just as logical to say that, in the absence of a provision stating that it is *not* possible to consent to an assault occasioning bodily harm, that whether an offence was charged as an assault impliciter or as assault occasioning bodily harm the applicability of the defence of consent would be the same.

Consent could then be seen as a defence to all types of assault, the only differentiating factor being the degree of harm consented to.

If, however, one comes to the same conclusion as Connolly J. that consent is not possible to an assault occasioning bodily harm (which to his honour has the dual benefit of discouraging violence and bringing the law into line with the current law of England) is it intended that the law of Attorney General's reference (no.6 of 1980) is taken to be an accurate statement of the law in Queensland?

If this be so, then there is a two-fold problem. Firstly, Connolly J. described the decision in Attorney General's reference as being (at 118)

> ". . . a policy decision rather than the application or exposition of principle. The question posed by the court was at what point the public interest required consent to be irrelevant."

The concept of the "public interest" is an uncertain term and would likely change. This reliance upon this notion would leave the criminal law dependent upon the modern equivalent of "the length of the Chancellor's Foot".

20. 1974 134 C.L.R. 426 at 437.

Secondly, as Connolly J. noted (at 118) "It will be an assault (occasioning bodily harm) if actual bodily harm is intended and or caused." It would follow that there would be an assault occasioning bodily harm in three different factual situations. viz.

1. Where the accused committed an assault upon the complainant, bodily harm resulted but the accused testified he had no intention to cause such a result.
2. Where the accused intended to do the complainant bodily harm and bodily harm results from the accused's assault.
3. Where the accused had an intention to do bodily harm to the complainant but no bodily harm actually occurred as a result of the assault.

There is no objection raised to 1. – the second paragraph of s.23 Criminal Code states that the result which the offender intended to cause by his act is immaterial.

The second and third way to commit the offence break new ground however. If the offence could be committed simply by the guilty intent, surely it would cease to be an assault *occasioning* bodily harm. More importantly, however, to define an offence in terms of the requisite intent (as in 2. and 3.) would seem to make that offence an offence of specific intent. It would follow, that second line of s.28 would then apply to the offence of an assault occasioning bodily harm to allow voluntary intoxication to be used as a defence where it can be shown the accused was so intoxicated as to be incapable of forming the requisite intent.

This would seem to be an unexpected consequence of Connolly J.'s decision, which would mean an assault occasioning bodily harm charged under s.339 would allow an accused an additional ground of defence, such ground of defence denied to him had he been charged with an assault simpliciter.

In his judgement, Derrington J. is clearly of the impression that the whole question of whether one can consent to an assault occasioning bodily harm does not strictly arise in Queensland. This is because the absence of consent refers to the infliction of violence, rather than the degree of harm caused. However, as his honour went on to point out (at 124, 125) the consent referred to "is not of an abstract nature . . . the consent contains a factor as to degree . . . it is often possible to determine with ease whether the bodily harm caused manifests a degree of violence which is within the limit consented to". His honour concluded that the trial judge "left to the jury in unqualified form the true question here – whether the degree of violence exceeded that which was consented to", accordingly he dismissed the appeal.

It is interesting to note that Derrington J. was of the opinion no reference to the common law was warranted since the words of s.245 and s.339 were clear. Moreover, he dismissed the possibility of s.246 being relevant because (at 125)

> "a general provision such as (s.246) could not, without more, so affect a specific one (s.339). It merely makes it clear that those offences involving the application of force to a person where the absence of consent is not made an element, e.g. murder or grievous bodily harm, are indifferent to consent and remain unlawful despite its presence and the absolving effect of that presence in the case of assault."

The author respectfully endorses this view.

In summary then, it would follow from Derrington J.'s view of s.339 that the question of consent should be left to the jury as a defence, but only in regard to the level of violence consented to, this having some relevance often towards the degree of harm resulting to the complainant.

Thomas J., while expressly reserving the question of the so-called defence consensual fight expressed in obiter some views which tend towards the same view as Derrington J. His honour stated (at 123)

> "It is for a jury to perceive the limits of any implied consent, and this must allow for different shades and degrees of violence. In some cases the consent will be limited to slaps or hair-pulling, and in others to hard blows, in some cases to quite trivial assault and in others to bodily harm (assuming the law permits this last consent to be effective).

Although Derrington J. would probably not agree with Thomas J.'s running together of the two concepts of inflicting violence and causing harm; the similarity between their two judgements is notable.

It is interesting to note also that Thomas J. interpreted the trial judge's summing up that

> "The law will not permit a man to consent to being seriously injured"

as referring not to assaults occasioning bodily harm, but to the offences of wounding or causing grievous bodily harm; which offences do not have assault as a defined element.

As a result of Raabe's case the law relating to assaults under s.339 of the Criminal Code if Connolly J.'s view is adopted is that it is not possible to consent to assaults occasioning bodily harm. However, with respect, his honour's reasoning is flawed in implying common law notions to a clear statutory provision. The judgements finding, as noted, leads to the conclusion that a s.339 offence becomes one of specific intent, which opens the pandora's box voluntary intoxication and defence. Moreover, and perhaps most worryingly, a perusal of Thomas and Derrington J.J.'s judgements leads to an opposite reasoning to that expressed as the finding in the headnote to the case.

It is submitted that Derrington J.'s view as to the defence of "consensual fight" is preferable and should be applied in future cases.