The More Things Change, the More They stay the same: Consent to Serious Assaults in Queensland

John Devereux
Lecturer in Law, Keble College, Oxford; Assistant Professor of Law, Bond University, Australia.

The Queensland Court of Criminal Appeal recently had the chance to reconsider the applicability of a "defence" of consent to assaults occasioning bodily harm.[1] Existing Queensland case law suggested that no person be permitted to consent to the doing of serious harm to himself. These authorities are consistent with the Common Law approach.[2] However, academic comment argued that there is no reason why a person in Queensland is not free to consent to bodily harm.[3] In *Lergesner* v. *Carroll*[4] the Court of Criminal Appeal has definitively decided the issue for Queensland. The decision is also significant for the court's "new approach" to answering the serious assaults question. Cooper J. has resolved the uncertainty by establishing the role the various "inflicting harm" sections play in the Code.

The Source of the Problem

Section 339 of the Criminal Code creates an offence where a person assaults another and thereby occasions him bodily harm. Section 245 defines assault as encompassing two types of action.

1. Where force is applied to another without that other's consent.

or

2. Where by bodily act or gesture someone threatens the application of force to another, without that other's consent, and the person making the threats has:
   (a) an actual ability to carry out his threats, or
   (b) an apparent ability to carry out his threats.

It has long been established that by virtue of s 245, "the term assault of itself involves the notion of want of consent (so that) an assault with consent is not an assault at all".[5] Since an assault is an integral part of the definition of an assault occasioning bodily harm, prima facie, a person who consents to having bodily harm inflicted upon him takes himself outside the protection of the criminal law.

Doubts that this is the correct view emanate from two sources. First, s

1 Strictly speaking consent is not a defence at all. Lack of consent is an element which the Crown must prove to secure a conviction for assault. It is in this sense which this paper uses the misnomer "defence". See generally Fairall P., and O'Connor D., *"Criminal Defences"* Butterworths, Sydney, 2nd ed p. 92.

2 See for example, *Attorney-General's Reference (No.6 of 1980)* (1981) 2 All. ER 1057.

3 See Devereux JA, "Consent and Defence to Assaults Occasioning Bodily Harm — The Queensland Dilemma", 14 U.Q.L.J. 151.

4 (1990) Unreported; see C.A. no. 34, 1990.

5 *The Queen* v. *Schloss and Macquire* (1887) 8 Q.L.J.R. 21 at 22 per Griffith CJ (Cooper & Real JJ. concurring).

246 of the Criminal Code. Secondly, the position of serious assaults at Common Law.

Section 246 Criminal Code

The first part of s 246 simply declares assaults to be unlawful unless authorised, justified or excused by law. The second part of s 246 states that 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.

It has been held[6] that the second part of s 246 operates so as to "introduce an element of ambiguity" to s 339. The ambiguity is claimed to be that s 246 anticipates that the law declares certain use of force to be not able to be consented to. It is claimed to be unclear whether bodily harm comes within this "non-consensual" area. In such circumstances, resort to the Common Law may be made to assist in resolving the ambiguity.[7]

The Common Law Position

The situation at Common Law has been outlined elsewhere.[8] A brief recapitulation follows. At common law a distinction is made between common assaults and serious assaults. In relation to the latter, it has been held that a person cannot consent to the infliction upon himself or herself of a degree of harm which is itself unlawful. While the degree of harm is a necessary condition for an infliction of harm to be not able to be consented to, reference in the "prize fight" cases is also made to the surrounding circumstances in which the harm was inflicted. Where prize fights were involved, the serious harm inflicted was not able to be consented to. This was traditionally distinguished from professional boxing fights whose force was legal because boxing matches were "a friendly exertion of strength and dexterity . . . manly diversions (which) . . . give strength, skill and activity and make people fit for defence"[9] whereas prize fights ". . . [were] exhibited for lucre, and [could] serve no valuable purpose: but on the contrary encourage[d]s spirit of idleness and debauchery".[10]

More modern commentators have focused on the "incidents" which often surrounded prize fights (presumably breaches of the peace) as providing public policy reasons for vitiating apparent consent.[11] These two approaches which focus not only on the violence but on the surrounding breach of the peace and the purpose of the fight, can be seen in the 19th Century decision of *R* v. *Coney*.[12] There, two men were involved in a fight before a number of spectators (one of them Coney). The Court for Crown Cases Reserved held that the consent of the participants in the fight was vitiated and that therefore the fight amounted to mutual assaults.

An alternative view as to why the serious harm should be not able to be consented to may be seen in the judgment of Matthews J. who noted in

6 *R* v. *Raabe* [1985] 1 Qd.R. 115.
7 See for example, *Stuart* v. *R* (1979) 134 C.L.R. 426 at 442-3.
8 See Devereux, 14 U.Q.L.J. 151.
9 Foster *Crown Law* (1762) at 260.
10 Ibid.
11 Pollock "(1912) 28 L.Q.R. 125. For an argument against this view see Williams G, *Consent and Public Policy* 1962 Criminal Law Review 77 at 78.
12 (1882) 8 QBD 534.

Coney, "the fists of trained pugilists are dangerous weapons which they are not at liberty to use against each other". On Matthews J's view it may be questioned whether any boxing match could ever be legal.

The question of whether consent could be given to serious assaults was left to languish for fifty years until reviewed by the Court of Appeal in *R* v. *Donovan*[13] 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 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 L.J. suggested that if an act was unlawful in the sense of it being a criminal act, it was clear that it could not be made lawful by the vehicle of consent. It has been pointed out by many commentators that such a statement, is inherently circular.[14] In effect Swift L.J. said no more than that the infliction of serious harm vitiates consent because it is itself unlawful, when the source of the unlawfulness (the fact that the infliction of bodily harm constitutes an assault) depends on the presence or absence of consent.

Howard suggests the circularity can be avoided if *Donovan* is read as establishing an arbitrary rule that subject to certain exceptions, consent to a serious assault cannot be given. The problem with this approach is that Swift L.J.'s delineation of exceptions is at best perfunctory. The Judge refers to three: "rough and undisciplined sport and play, where there is no anger and no intention to cause bodily harm"; "reasonable chastisement of a child by a parent" and "cudgels, foils or wrestling".

The most recent case in English Common Law has done little to resolve uncertainties created by *Coney* and *Donovan*. In the *Attorney-General's Reference (No 6 of 1980)*[15] two men were engaged in a street brawl. The younger of the two sustained a bleeding nose and some bruises. The elder was charged with assault. The trial judge took the view that an agreement to fight was sufficient to take the victim outside of the protection of the criminal law, provided the attacker used only reasonable force. A question of law in the following terms was remitted to the Court of Appeal:

> "where two persons fight (otherwise than in the course of sport) in a public place, can it be a defence arising out of the fight that the other consented to fight?"

The Court of Appeal 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.

13 (1934) 2 KB 498.

14 See e.g. Howard *Criminal Law*, Law Book Company, Melbourne 3rd edition 1973 at p. 132.

15 [1981] 2 ALL E.R. 1057.

Lord Lane CJ, Phillips and Drake LJJ, found this to be the law because it reflected the public interest — an approach which had earlier found favour with Stephen J. in *Coney*.[16] The Court of Appeal extended the exceptions to the rule stated in *Donovan* so as to exclude from non-consensual interventions reasonable surgical interference and dangerous exhibitions. The thread which tied these exceptions together was said to be the exercise of a legal right or the public interest.

The Queensland Cases

(i) Raabe

Until 1985, there were no decided cases on serious assaults. Since that time the development of the law has been confused by a number of conflicting approaches as to whether the consent is to the assault itself or as to the level of violence.

In *R* v. *Raabe*[17] the appellant verbally abused his father-in-law (the complainant). Both men discussed the possibility of fighting one another. The complainant removed his open footwear, replaced it with a pair of shoes and put on a pair of bricklayer's gloves. The appellant armed with a fence paling, belaboured the complainant and gave him a broken jaw and a lacerated scalp. The Trial Judge's directions were 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".

Connolly J. held that the Criminal Code of Queensland was ambiguous as to whether a person could consent to an assault occasioning bodily harm. He suggested that since the Code contained no provision expressly allowing consent to bodily harm, it would be odd 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.[18] As has been noted elsewhere, this does no more than beg the question.[19] It is just as plausible 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 occasioning bodily harm, the applicability of the defence of consent is the same.

Connolly J. embraced the principle in *Attorney-General's Reference (No 6 of 1980)*[20] and in so doing it may be inferred that it would be an assault occasioning bodily harm irrespective of consent in three situations:

(i) Where the accused committed an assault on the complainant, bodily harm resulted, but the accused testified he had no intention of causing such a result. No objection is raised to this. It is consistent with s.23 of the Criminal Code.

16 (1882) 8 Q.B.D. 534 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".

17 [1985] 1 Qd. R. 115.

18 Ibid at 119.

19 See Devereux, op cit 157.

20 [1981] 2 All ER 1057.

(ii) Where the accused intended to do the complainant bodily harm and bodily harm results from the accused's assault. Again, no objection is raised.

(iii) 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. This interpretation of assaults occasioning bodily harm breaks new ground. If the offence can be committed simply by a guilty intent, surely the offence ceases to be an assault *occasioning* bodily harm.

By contrast, Derrington J. opined in *Raabe* that the common law 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 not to the degree of harm caused but to the infliction of violence.[21] On the question of the second paragraph of s. 246 Derrington J. noted that this paragraph being a general provision could not affect a specific provision such as s.339.[22] Derrington J. thus considered that there was no ambiguity in the words of ss. 339 or 245 of the Code. His Honour stated that the question in all assault cases (including assaults occasioning bodily harm) is whether the "harm caused manifests a degree of violence which is within the limit consented to."[23]

The third Judge in Raabe's case, Thomas J., expressly reserved the question of the defence of consensual fight. He nonetheless suggested that it was "for the jury to perceive the limits of any implied consent and this must allow for different shades and degrees of violence"[24] and also noted that the second paragraph of s 246 did not refer to assault charges at all but to other offences under the code.[25]

(ii) Watson

The issue of consents to assaults occasioning bodily harm in Queensland was mentioned in *R* v. *Watson*.[26] In that case the appellant and the deceased were Palm Islanders. They wereinvolved in a relationship but the deceased left the appellant. The appellant asked her to return. The deceased refused. The appellant, using a kitchen knife, cut the deceased. She died from the wound. The appellant said he had no intention of killing the deceased or doing her grievous bodily harm, he was simply inflicting a disciplinary measure on "his woman". It is clear in these circumstances the issue of consent to assaults occasioning bodily harm did not strictly arise for consideration.

The trial judge excluded evidence which the appellant tried to call that:

(a) the appellant had received serious knife and bottle wounds in the past and that he had personally made light of the same;

(b) that the inflicting of knife wounds as a process of domestic discipline was widespread in the Palm Island community;

(c) by an expert that a large section of the Palm Island community believed that a male person has a right to discipline the female person

21 *Raabe*, op. cit. at 124.

22 Presumably because of the maxim *generalia specialibus non derogant*.

23 Ibid at 125.

24 Ibid at 123.

25 For example, wounding or causing grievous bodily harm.

26 [1987] 1 Qd. R. 440.

with whom he shares a domestic relationship by the infliction of a knife wound;

(d) that for that section of the community such discipline is associated with a firm belief that the person inflicting the discipline does not intend to seriously harm or kill the object of the knife wound; and

(e) that injuries inflicted in this way are readily accepted by the community and are not considered serious.

MacPherson J. noted inter alia that a cut of the order inflicted by the appellant constituted bodily harm. In such circumstances, he said (relying upon the authority of *Raabe*) the law does not recognise the consent of the victim as being a defence. Thus, to MacPherson J. the evidence the appellant sought to adduce was irrelevant,

> "even if in some unexplained fashion it could be construed as constituting the giving in advance by each and every woman in the Palm Island community, of her consent to physical cutting as a form of discipline, it would afford no legal justification or exculpation".[27]

However, with respect to MacPherson J. it seems that a consideration of the serious assaults question was at best peripheral to the main issues of wounding and killing and MacPherson J's comments should be treated as strictly obiter.

(iii) Carroll

In *Lergesner* v. *Carroll*[28] the question of consent to serious assaults arose squarely for consideration. There the mutual assaults were between two police officers in a police social club. On the night of the incident the complainant and appellant had worked on the same shift and had a heated discussion.

After both retired to the social club, the complainant made a provocative remark to the appellant concerning his honesty. The appellant then asked the complainant if he wanted to "settle the matter" outside. The appellant said he wanted to settle it there. Both men stared at one another for a short time. The complainant then said "well". In response the appellant hit him. The appellant then walked over and the complainant kicked the appellant. The appellant hit the complainant a few more times. The complainant then admitted he was beaten.

The appellant was convicted of an assault occasioning bodily harm. He submitted that the convicting magistrate failed to consider amongst other things, the possibility that the complainant may have consented to the assault. It appears that *Raabe* was not cited to the court.

On appeal, Shepherdson J. reviewed *Raabe* and opined that the case was not authority for the principle that consent is not a defence to a charge of assault occasioning bodily harm. Although Shepherdson J's statement is in conflict with the headnote in *Raabe* in this respect, the learned Judge is clearly correct. There was no clear majority for the principle that consent is not a defence to assaults occasioning bodily harm in *Raabe*. Connolly J. in *Raabe* was the only Judge who enunciated this as the law. Shepherdson J. stated in *Carroll* that it was a question of fact to be decided in respect of the assault said to have been consented to whether the degree

27 *R* v. *Watson* (1987) 1 Qd.R. 440 at 444.

28 (1990), unreported, (C.A. no. 34 of 1990).

of violence used in the assault exceeded that to which consent had been given. In so doing, Shepherdson, J. endorsed the approach of Derrington J in *Raabe*.

Shepherdson J. noted that *Watson* was not binding on the Court. This is also clearly correct. MacPherson J's views in *Watson* were merely obiter. Shepherdson J. further found that as it was unclear which blow or blows caused the bodily harm in *Carroll* there was doubt as to whether the appellant consented to the assaults or not. Accordingly, Shepherdson J. allowed the appeal.

Cooper J. agreed that *Raab* did not determine whether the Crown was obliged to negative consent to the application of force to the person of another on a charge of assault occasioning bodily harm and that the remarks of McPherson J. in *Watson* were obiter. Cooper J. then reviewed the operation of Part V of the Criminal Code. In so doing the Judge outlined a novel analysis to the serious assaults question. He looked not only at the words of ss. 246 and 339 but also how they fit in to the structure of that part of the Code.

Part V of the Code is headed "Offences against the Person . . .". Cooper J. noted that Part V established two types of offences. The first type was an assault with or without circumstances of aggravation. Section 339 falls within this category. The second type of offence is that which is regarded as more serious and of which assault is not an element. Cooper J. noted that the legislature had determined areas where consent was immaterial by making them non-assault offences and could have done so in the case of inflicting bodily harm. This bipartite distinction of inflicting harm was identified in *Kaporonovski*[29] and later applied in *R* v. *Johnson.*[30] Cooper J. concluded that "by including assault as an element in certain offences the legislature, as a policy matter, has determined that some conduct which involves the application of force to the person can be consented to".[31] In rejecting Connolly, J's views in *Raabe*, Cooper J. noted that the second limb of s 246 (which was said by Connolly J. to have introduced ambiguity into the area of assaults), does not deal with assaults at all. All it does is reiterate the bipartite approach of Chapter V — the first limb of s 246 dealing with assaults and the second limb dealing with more serious, non-assault applications of force.

By way of conclusion Cooper J. noted that the limbs of consent to assaults occasioning bodily harm are set by the person giving consent, and are not imposed as a matter of law. The consent is to the application of force not to the consequence that follows from it. The judge suggested that while policy reasons had been identified by Connolly J. in *Raabe* whereby consent should not be permitted to an assault occasioning bodily harm, any such policy reasons for restricting consent were a matter for the legislature. The decision in Lersegner's case reinforces the code/common law distinction in Australia.

Cooper J's analysis of s 246 in terms of its role within Part V nicely resolves the uncertainty which has surrounded s 246's meaning; although it is suggested that Derrington J's view in *Raabe* as to s 246 is also the

29 (1975) 133 C.L.R. 209 at 217 per McTiernan, A.C.J., Menzies, J. See also Walsh, J. at 223.

30 (1961) 1 Qd. R. 5 per Philp A C.J.

31 Cooper J's Judgment at p.4.

correct analysis. It appears as though the spectre of the common law view of serious assaults can finally be exorcised from the Queensland Criminal Code.