CONTENTS OF CRIM2021 NOTES:

ASSAULT, CONSENT TO HARM

While a person can consent to a "common assault" where no actual bodily harm is inflicted, rendering the conduct non-criminal, it is another question as to whether a recipient's consent to intentionally (or recklessly) inflicted physical harm thereby can provide a defence to the assault. Historically, certain categories have been characterized as exceptions to what would otherwise be an unlawful assault. These categories have shifted to collaborate with social attitudes.

In *Brown* [1994] 1 AC 212, the House of Lords found that the question of whether the defence of consent should be extended to the consequences of sado-masochistic encounters could "only be decided by consideration of policy and public interest." The appellants were charged with counts of unlawful and malicious wounding, and assault occasioning actual bodily harm, under ss 20 and 47 of the *Offences Against the Person Act 1861 (UK)* for engaging in consensual, sado-masochistic, homosexual activities. No victim had complained; charges were laid on the strength of evidence of videotapes, which police had found in the course of other unrelated investigations. After a ruling from the Judge Rant QC, that in the particular circumstances the prosecution did not have to prove lack of consent from the victim, the appellants pleaded guilty and were convicted. However, they appealed on the basis that the judge had erred in law. The House of Lords agreed to hear the matter on the basis it involved a point of law of general public importance.

Lord Templeman: "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 consented. 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.

The attitude of the public towards homosexual practices changed in the second half of the 21st century, leading to a change in the law. In the *Sexual Offences Act* 1967, Parliament recognized and accepted homosexuality.

The appellants argued that consent should provide a defence to charges under both ss 20 and 47 because every person has a right to deal with his body as he pleases. 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. The appellants in this case did not mutilate their own bodies; they inflicted bodily harm on willing victims.

The evidence disclosed that drink and drugs were employed to obtain consent and increase enthusiasm. The victim had no control over the harm, which the sadist might inflict. The appellants must have appreciated the dangers involved in administering violence because 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.

There is a difference between violence, which is incidental and violence that 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 glorify cruelty and result in offences under ss 47 and 20 of the 1861 Act."

Lord Mustill: "I cannot accept that the infliction of bodily harm, and especially the private infliction of it, is invariably criminal absent from 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 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 the *Attorney General's Reference* to consider entirely afresh whether the public interest demands the interpretation of the Act of 1861 in such a way as to render criminal under s 47 the acts done by the appellants.

The European Convention on Human Rights:

The general tenor of the decisions of the European Court does furnish valuable guidance on the approach, which the English court should adopt if free to do so and I take heart from the fact that the European authorities clearly favour the right of the appellants to conduct their private lives undisturbed by the criminal law.
The House of Lords were unable to come to a unanimous decision, and so the appeal was dismissed.
The co-accused appealed to the European Court of Human Rights on the grounds that the prosecution was in breach of Article 8 of the *European Convention on Human Rights*. The issue before the court was whether this interference by public authority into the private life was necessary in a democratic society. The court held that the state is entitled to seek to regulate, through the operation of the criminal law, activities that involve the infliction of physical harm including activities in the course of sexual conduct. The determination of the level of harm to be tolerated where the victim consents is a matter for the state. The court did not accept the contention that the behaviour forms part of private morality, which is not the states business to regulate, because the activities involved a significant degree of injury or wounding. The court also held that the state was entitled to have regard not only to the actual seriousness of the harm caused but to the potential for harn inherent in the act. The court rejected the allegation of bias against homosexuals. In short, there was no violation of Article 8 of the Convention.

In *Coney* (1882) 8 QBD 534, the court held that a prize-fight in public was unlawful. Cave J said "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 stuck is immaterial." Stephen J said "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, of the injury is of such nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured."

In *Donovan* [1934] 2 KB 498 the appellant in private beat a female of 17 for purposes of sexual gratification. It was said with her consent. Swift J said "it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probably consequence, and when such an act is proved, consent is immaterial."

Stein [2007] VSCA 300 followed the decision in *Brown*. This case involved a bondage session between the accused, a prostitute and the deceased who was tied up and left gagged around the head and mouth. The deceased showed signs of distress but the accused stayed in the room without providing assistance; the deceased died. The accused was charged with murder and convicted of unlawful and dangerous act manslaughter - the unlawful acts being the assault, there being no evidence of consent to the gag. The Court of Appeal held that there could not also be consent to this level risk of harm. The circumstances in which that foreseeable risk of serious injury arose included circumstances whereby the deceased was restrained and gagged there was no possibility of his articulating his lack of consent or indeed for that matter articulating his distress. Once the gag had been placed on him he was totally in the hands of the applicant. Once that had occurred in circumstances where a risk of serious injury arose the issue of consent became irrelevant.
It may be that this issue will be revisited if social attitudes around such practices change. It is noted that in the UK in 2013 a man was acquitted of the charge of assault occasioning actual bodily harm on the basis that the woman consented. The charge arose from a master sex-slave session inspired by '*Fifty Shades of Grey*'. A newspaper report on the case described the woman as being chained like a dog to the man's bedroom floor where he whipped her repeatedly with a rope.

ASSAULT, CONSENT TO MEDICAL TREATMENT
Medical examinations and surgical operations are only lawful where the procedure has been consented to by the patient or some other person authorized to provide consent where the individual does not have the capacity to do so, or in emergency situations where the procurement of consent is impractical. The case law in this area has developed a difficult concept of informed consent, which requires that the patients consent be freely given after an explanation of the basic nature and risks of the procedure.

The relationship between consent under the criminal law and the doctrine of informed consent was considered in *Richardson* (1998) 43 BMLR 21, where a dentist continued to treat patients after being suspended from practicing. She was charged with assault occasioning actual bodily harm. Following the trial judges ruling that her patients consent to treatment was vitiated by fraud (allowing them to believe that she was qualified to practice) she pleaded guilty. On appeal the English Court of Appeal held under the criminal law only a mistake as to the nature of the act or the identity of the person doing in vitiates consent. The courts also held that the concept of informed consent has no place in the criminal law and quashed the conviction.
The concept of consent was discussed by the High Court in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218. This case in the NT involved in application by the parents to have their child with a severe intellectual disability sterilized. This required the court to analyse the provisions of the criminal code (NT) for assault and when for the Code an act is unlawful if it is done without authorization, justification or excuse.
The major issue referred to in this judgement arises specifically from the examination of parental consent as an exception to the need for personal consent to medical treatment. The question begs whether a minor with an intellectual disability is, or will ever be, capable of giving or refusing informed consent to sterilization on their own behalf. Where the answer to that question is negative, another question arises. Is sterilization, in any case, in a special category that falls outside the scope of a parent to consent to treatment? Is such a procedure outside the scope of parental power? If it is clear as it is in the present case that the particular child is intellectually disabled to such an extent as to be incapable of giving valid informed consent to medical treatment another question arises; mainly whether there are kinds of intervention which are excluded from the scope of parental power, and specifically whether sterilization is such a kind of intervention. Where the child is incapable of giving valid consent to medical treatment, parents and guardians may in a wide range of circumstances consent to medical treatment of a minor. Where this parental power exists, two principles are involved. First the subjective consent of a parent, in the sense of a parent speaking for the child, is ordinarily indispensable. That authority emanates from a caring relationship. Secondly, the overriding criteria to be applied in the exercise of parental authority on behalf of a child, is the welfare of the child objectively assessed. That these two principles become one is a recognition that ordinarily a parent of a child who is not capable of giving informed consent is in the best position to act in the best interests of the child. There are features of a sterilization procedure, and factors involved in a decision to sterilize another person, which indicate that in order to ensure the best protection of the interests of a child such a decision should not come within the ordinary scope of parental power under the *Family Law Act* to consent to medical treatment. Court authorization is necessary and is a procedural safeguard.

Lord Templeman's judgement in *Brown* refers to "ritual circumcision" as a lawful practice.
Concerned about the introduction of the practice of female circumcision by some cultural groups in Australia prompted the enactment of legislation prohibiting female genital mutilation. New South Wales was the first Australian state to enact an offence for performing female genital mutilation by the *Crimes (Female Genital Mutilation) Amendment Act 1994* which inserted a new s 45 into the Crimes Act. This made it an offence punishable originally by up to 7 years imprisonment (now 21 years) for any person who excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or