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ASSAULT:

Consent to Assault:

Consent to Harm:

Brown [1994] p. 601

Facts:

- 5 appellants were charged with a number of counts of unlawful and malicious wounding and assault occasioning actual bodily harm- belonged to a group of men who engaged in consensual, sado-masochistic, homosexual activities.
- Trial judge ruled- consent was not important
- Appeals were dismissed in Court of Appeals

House of Lords: Lord Templeman: Majority- you cannot consent to these activities

- "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."
- "The differences between actual bodily harm and serious bodily harm cannot be satisfactorily applied by a jury in order to determine acquittal or conviction."
- Application:
- "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 and worthless."
- Conclusion: **"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 Act of 1861...Society is entitled and bound to protect itself against a cult of violence."**

Lord Mustill: dissent:

- Can't find authority- he goes through the various types of consent to harm and says that he can't find a general pattern
- Adopts 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
- We should not interfere with people's private lives
- "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"
- Need to consider public interest
- Donovan: level of violence and a foreseeability of harm
- "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
- Conclusion: "I would allow these appeals and quash their convictions"

Appealed to the European Court of HR on the basis that their convictions were in breach of Art 8 of the 'European Convention on HR': Appeals were dismissed in the end.

- Court held that the state is entitled to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm, including activities in the course of sexual conduct.
- This was justified in this case because the activities involved a significant degree of injury or wounding.

Other Case Law:

'Stein' [2007] p. 608:

- Bondage session between the accused, a prostitute and the deceased who was tied up and left gagged around the head and mouth.
- Court of Appeal held that there could also not be consent to this level of harm:
 - "There was a foreseeable risk of serious injury"
 - "Once that had occurred in circumstances where a risk of serious injury arose, the issue of consent became irrelevant."

'Wilson' [1997] p. 609:

- A conviction for assault occasioning actual bodily harm arising out of the consensual branding of a husband's initials on his wife's buttocks was quashed
- UK Court of Appeal
 - "Does public policy or the public interest demand that the appellant's activity should be visited by the sanctions of the criminal law?"
 - Does not believe this is the case in this situation

'Criminal Law Theory and Doctrine (2004) by AP Simester and GR Sullivan p. 609

- In 'Wilson', there was no "Aggressive intent" as there had been in 'Brown'
- 'Brown' was also a "Truly extreme" case involving "physical torture"
- The branding procedure was characterised as a form of tattooing and not, like the various acts in 'Brown', as sadomasochism.

Consent to Medical Treatment:

- Medical examinations and surgical operations are only lawful where the procedure has been consented to by the patient, or emergent conditions make the procurement of consent impractical.
- Usually the subject of civil suits for damages rather than criminal prosecutions.
- Relationship between consent under the criminal law and the doctrine of informed consent was considered in 'Richardson' (1998)- continued to treat patients after being suspended from practising.
 - English Court of Appeal held that under the criminal law, only a mistake as to the nature of the act or the identity of the person doing it vitiates consent
 - The concept of informed consent has no place in the criminal law