2. "If a person consents to what would otherwise be an unlawful touching, there can be no battery." Discuss.

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Introduction

The issues which the statement above refers to revolve around how the defence of consent operates in the Law of Tort, specifically in relation to intentional trespasses to a person, as well as to what extent the defence can be pleaded. It can be said that the statement above is true to a factual extent, but not as to a legal one. In the author's view, the statement appears prima facie to be assuming far too much, and indeed for such reason could well be described as a rebuttabble presumption. As we shall see, there are several factors which must be taken into account before deciding whether to allow the defence to succeed or not, and especially when it comes to defining the scope of the word 'person' and the phrase 'consents to'. This is the debate which is going to be discussed during the course of this essay. We will analyse in turn the piecemeal step by step approaches taken by the courts in England in developing this area of the law. However firstly, and for the purposes of this essay, we must define the two terms 'battery' and 'consent'. A battery is simply an intentional and deliberate unlawful contact of another (*Wilson v Pringle [1987] QB 237).* Consent is a full defence and can be used when a defendant is sued in civil litigation for committing an intentional tort. Hence, it is a complete bar to recovery and the burden of proof is on the claimant to prove that he did not consent. Consent also interrelates very closely with *volenti non fit injuria,* which occurs when a person who expressly or impliedly agrees with another to run the risk of harm created by another. Here, s/he cannot sue in relation to the damages suffered as a result of the materialisation of the risk. The two defences work in such similar ways that

the labels can even be interchanged, though in this article we will merely refer to the defence as one of consent. We shall now turn to the contentious concerns underlying the subject matter of this essay.

Practical Application of the Defence of Consent

It is true to say that if a plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk, impliedly or expressly agrees to incur a certain risk of harm, the defendant can invoke the defence of consent. A classic example is an old American case, namely *O'Brien v Cunard [1891] 28 NE 266,* where it was held that by standing in line and holding out her arm, the plaintiff impliedly consented to being vaccinated. In *Watson v British Boxing Board of Control [2001]* it was held that where the plaintiff consents to fair and reasonable injury by his/her opponent in a boxing ring, no battery ensues. This was so because participants in violent sports impliedly consent to the risks ordinarily incidental to such sports. However, in this same case although the relevant boxer had in fact consent implicitly to the actual injury caused by his opponent whilst in the ring, he had not consented to the injury resulting from inadequate safety arrangements by the sport's governing body, after being hit. Therefore, it can be derived from this that with violent sports, participants do not consent implicitly to excessive violence or deliberate unfair play. *R v Billinghurst [1978] 's* main ratio was that there is an implied consent to physical contact which occurs within the ordinary conduct of some sports and games. The plaintiff in this case was deliberately punched in the face by his opponent in the game of rugby. It was held that battery was inflicted and the defendant could not rely on the defence of consent because even though players are deemed to consent to force 'of

a kind which could be reasonably expected to happen during a game', this does not include foul play which goes beyond what a reasonable participant would expect. The subsequent case of *Condon v Basic [1985] 2 All ER 453* held that consent to reasonable contact is consent only to non-negligent behaviour.

What these authorities demonstrate is a gradual decaying of the validity of the title of this essay, since under certain circumstances, express/implied consent to unlawful touching does not always preclude an action for battery from succeeding. Croom Johnson LJ in *Wilson v Pringle* stated that for the defence to succeed, consent must be to both the act itself and the post-injury/damage sustained by the plaintiff; therefore, the plaintiff must ideally consent to the risk of accruing a potential injury, which is wholly a question of fact. Thus, it can be said that the statement made in the title of this essay is only true to a limited extent.

Nevertheless, *Blake v Galloway [2004] 1 WLR 2844* is a case which comprises of rationale that can be said to be supportive of the legitimacy of our essay title. It was said here that consent must be to the risk of injury and consequential damage that results from it, and thus ultimately consent to a lack of care. The claimant here was held to have consented to participate in a game which might have caused injury, as well as consented to the risk of consequential injury. In a sport which inevitably involves the risk of physical contact, the participants are taken impliedly to consent to those contacts which could reasonably be expected to occur in the course of the game and to assume the risk of injury from such contacts. However, we must be cautious here as to the extent of the type of contact permitted. If the missile in this case was not thrown 'in accordance with those understandings and conventions' of the game, and hence not in a manner to which the

claimant could be said to have impliedly consented to, the defendant would be held liable of the tort of battery. In this sense, the legitimacy of the title of this essay can be said to be undermined, lacking the essential ingredients of consent to 'risk', 'consequential injury' and finally consent as to the 'extent' of a 'specific type' of unlawful touching. The author of this essay proposes that if such elements were to be included, then it could be said that the validity of the statement made is more reflective of the present day modern case law. The court recently in *R v Dica [2004] QB 1257* endorsed such scheme in its reasoning. Here it was held that consent to the initial contact i.e. sexual intercourse, was not consent as to the consequences of the initial contact i.e. the risk of developing a consequential disease. Judge LJ affirmed that only if the victim consents to the actual risk of the disease can there be said to be a valid defence for the defendant in question.

The Court of Appeal in the infamous judicial precedent setting *R v Brown [1992] 2 All ER 552* held that participants in homosexual sado-masochistic games could not rely on the defence of consent to negate criminal liability because the consensual activities were so contrary to public policy. Their Lordships mentioned that it is in the public interest that people should not injure one another for any good reason. Evidently here, even though it appears that a person(s) (i.e. plaintiffs) consented to what would otherwise be an unlawful touching, the defendants were still held liable. Furthermore, under Tort Law, consent obtained by duress is no defence; for example, consent by a woman to sexual intercourse obtained via threats of violence by a man would in a court of law be held to be invalid. This clearly goes against the essence of the statement made in the title,

for in such a scenario where duress has occurred, factual consent would still not function as a valid legal defence.

The claimant must understand both the nature and purpose of the touching in order for there to be a valid consent. In *Chatterton v Gerson [1981] QB 432,* it was said that 'once [a person] is informed in broad terms of the nature of the procedure which is intended and gives [her] consent, that consent is real,'. The difficulty here lies in determining what information is exactly relevant to the 'nature' and 'purpose' of the touching. In this case, the medical treatment involved a direct application of force which was administered differently from that which the consent was given by the patient. It was held that the defendant was liable for battery. Bristow J suggested that battery is possible if information about the risks of medical treatment is deliberately withheld in bad faith. Thus, it can be said that the statement in the title of this essay, in order to hold true, should not be lacking the phrase 'well informed', which should precede 'person'. Consent can also be vitiated by deceit, or if given under a misapprehension as to the nature and purpose of the touching. *R v Williams [1923] 1 KB 340* held a woman not to have provided valid consent to sexual intercourse where she was told that the therapy was for her voice. Here, deceit was as to the nature and purpose of the unlawful touching. For such reasons, if a person is induced deceivably to consent to an unlawful touching, there can still be battery, thus completely rebutting the enormous presumption made in the statement of this essay. Mullis & Oliphant have mentioned that if it is unknown to the claimant that the defendant intended to cause harmful consequences, or was reckless or negligent as to the consequences, any consent is not a valid defence to battery. However,

on the other hand, if the harmful consequences were not a reasonable foreseeable consequence of the requisite consented-to touching, then the defendant should be able to rely upon the defence of consent to actions of battery. Such an intellectual proposition is yet to be administered in judicial decision making. According to this perspective, reasonable results and outcomes would be produced. For instance, if A, knowing he has AIDS, engages in sexual intercourse with the claimant intentionally intending to infect her, consent as to the sexual act by the claimant should not bar recovery by her. Conversely, if say both A and B engage in 'horseplay' and something snaps when A picks up B, causing B to become paralysed, mutually implicitly implied consent by B (and A for that matter) here would act as a valid legal defence to any action brought by B as against A, unless of course A was reckless/negligent as to the consequences caused. B's consent thus to indulge in such 'horseplay' would consequently bar recovery for them.

Child cases and Medical Treatment

As can be seen through a thorough examination of both child and medical treatment cases related to battery and consent, this is yet another area of the law where the validity and integrity of the statement made in the title has not had any favourable weight. Because it is the medical context which is the single most important area of the defence of consent's operation, we shall witness first hand at how unsatisfactory the statement really is, and how it stands after the analysis.

Prima facie, the general rule here is that provided the broad nature of the proposed operation is explained to the patient, any consent given by the latter will usually excuse

what would otherwise be a battery. Even from the start, our statement holds true only to an extent due to this proviso. Difficulties tend to arise in cases involving the treatment of young children, the mentally disabled/ill and the unconscious. Fortunately, s8 of the Family Law Reform Act 1969 states that a minor between the ages of 16 to 18 can give effective consent to surgical, medical or dental treatment. A limitation was placed on this statutory provision during the Act's interpretation in *Gillick v DHSS [1986].* The House of Lords in their dictum asserted that a child can only give effective consent to medical treatment providing s/he has the ability to understand what is involved in the medical procedure proposed. Lord Scarman clarified this by saying that this involved an understanding of the reasons for the doctor touching the child, and the purposes behind the touching, as well as an understanding of wider social and moral implications.

In terms of a very young child, consent must be sought from a proxy i.e. parent/guardian, in order for any touching by a doctor or surgeon to be held lawful. The case of *Re R [1991] 3 WLR 1992* held that parental consent has the ability to render a treatment lawful, even where the child objected. *Re W [1992] 4 All ER 627* qualified this by signifying that where a child is competent to give valid consent and necessarily does so, the parents' objections to the child's treatment will not invalidate the child's consent (again, this is not completely in accordance with the gist of the statement of our essay, since the relevant 'person' must now be 'competent' enough to provide 'valid consent' i.e. real consent, as opposed to merely a 'person' who simply just 'consents to….'). In all cases involving minors however, it must be noted here that the court has an inherent jurisdiction to override the child's consent to, or refusal of, treatment. Henceforth, even

though there may appear to be factual consent given by the child, it would not be eligible as a legal one.

Capacity to Consent

Turning to the issues of patients' capacity to consent, if they do possess the necessary capacity, this is then conclusive of the consent matter even if the decision was made for 'religious reasons, other reasons, rational/irrational reasons or for no reason at all' (*Re MB [1997] 2 FCR 341*, at 553). In paragraphs 533-4 of the same case, their Lordships in the honourable Court of Appeal laid down the test for capacity and consent: "The inability to make a decision will occur when:

(a) The patient is unable to comprehend and retain information which is material to the decision, especially as to the likely consequences of having or not having the treatment in question.

(b) The patient is unable to use the information and weigh it in the balance as part of the process of arriving at a decision".

This test has now been elaborated and enshrined in the Mental Capacity Act 2005 (ss1-5). Therefore, if the 'person' in our hypothetical statement made in the title of this essay is found to have 'no capacity' to validly, legally consent to the unlawful touching, there most certainly can be battery as against the defendant! All here may not be lost though for the defendant, since even where the mentally ill is incapable of consent, medical treatment can still be justified on grounds of necessity - thus providing the defendant doctor/surgeon with a full defence to battery. The statement

made in our title could be validated if we reinterpreted it to say the following: 'even if a person does not consent to what would otherwise be an unlawful touching, there can be no battery as long as the touching was justified by necessity'. In cases of necessity, even if the patient, or their parent/guardian, does not consent to medical treatment, there can be no battery. Thereafter, judging by this, if we are to leave the statement made in the title as it is, it must be said to be incomprehensive and incomplete.

Conclusion

"If a person consents to what would otherwise be an unlawful touching, there can be no battery". The irony is the fact that the contradictory too is also true today, in that "If a person does not consent to what would otherwise be an unlawful touching, there can still be no battery" and "If a person consents to what would otherwise be an unlawful touching, there can still be battery". In bringing an end to this controversial discussion, it must be stated that the statement made in the title is only true to a certain and very limited extent in the modern day's law of tort, as has already been highlighted throughout the course of this discursive and highly critical essay. In order to solve the inconsistencies, the complexities and indeed the unreflective legal nature of the statement, a proposal for a solution follows. We could either take the statement at face value by labelling it as a rebuttabble presumptive statement (rebuttabble by the introduction of the several factors i.e. capacity, age, fraud, deceit, extent of consent, etc, as and when they arise in each given circumstance), or we could reformulate the wording so as to bring it in accordance and coherence with precedent English Tort case-law, as has already been suggested several times by the author.