DOCTRINE OF CONSENT IN CRIMINAL LAW

INTRODUCTION

One of the primary aims of criminal law is the protection of life and the integrity of the body. Generally speaking, a person who kills or injures another is punished and this may extend even to an act which has been consented to. Thus, consent is no defence to killing,[1] mayhem or abortion.[2] The law however, does not pursue this aim to the hilt without due consideration being given to individual liberty and so, not every harmful act is punished. Consent may exculpate a person from criminality; otherwise, a doctor might be faced with a criminal prosecution for assault even though the patient had consented to the operation ;[3] a football player or a boxer would not be able to tackle his opponent. There are certain acts which are lawful despite the want of consent. The right of reasonable chastisement is given to parents, guardians, masters and school teachers;[4] a number of statutes give certain persons and authorities the right of corporal punishment over their subordinates.[5] An injury committed in self defence is generally recognised. While the sphere of operation of consent is well defined in certain areas, the extent to which it would put an end to the criminality of an act is not always clear. For instance, can a person consent to a sterilisation operation? At what age can a person consent to an operation (assuming it is lawful) ? Can a person always refuse to give consent? It is proposed in this article to consider the *rationale* of the doctrine of consent and some of the more controversial areas of uncertainty.

1. Although suicide is no longer a crime, nevertheless, aiding, abetting, counselling or procuring the suicide of another is punishable with imprisonment up to fourteen years; see Suicide Act, 1961, section 2(1): as to suicide pacts, see *ibid.*, section 3(2) which repealed section 4(1) and (2) of the Homicide Act, 1957.

2. Where the operation is performed in good faith for the purpose of saving the life of the mother, consent is a defence. See *R.* v. *Bourne* [1934] 1 K.B. 687. See Lord Silkin's Bill on Abortion introduced in the House of Lords in May 1966. It recommended legalization of abortion under certain circumstances and conditions.

3. "A surgeon who performs an operation or part of an operation without his patient's express or implied consent is guilty of trespass." *Halsbury's Laws of England* (3rd ed. 1955) *Quaere:* will consent to an operation always put an end to trespass or assault? See *post.*

4. *Cleary* v. *Booth* [1893] 1 Q.B. 465; *Mansell* v. *Griffin* [1908] 1 K.B. 160; *Ex parte Wright* [1929] 2 K.B. 416. See section 1(7) of the Children and Young Person's Act, 1933, which confirms the common law position by recognising the right of any parent, teacher, master or other person having the lawful control or charge of a child or young person to adminster punishment on him.

5. For example, corporal punishment in pursuance of a court order is provided by the Prison Act, 1952 section 18. See also, Merchant Shipping Act, 1894, sections 220-238 as amended by the Justices of the Peace Act, 1949.

I

RATIONALE OF THE DOCTRINE OF CONSENT

(A) *Mayhem*

At common law, consent was no defence to mayhem.[6] The classic example is that recorded by Lord Coke in 1604[7] where a young man asked his friend to cut off his hand so that he might avoid work and be better able to beg. Lord Coke C.J. held that as this amounted to mayhem, consent was no defence. Both of them were accordingly convicted and fined. The reason for the law of mayhem stated by Lord Coke, is that every subject of the king should serve the King and his country. Therefore every injury which would disable a person from the performance of his duty was a mayhem.[8] For example, the extraction of foreteeth was a mayhem while the cutting off of an ear or a nose was not a mayhem. This was because soldiers had to bite cartridges with their teeth.[9]

A person may consent to suffer an injury less than a mayhem. Sir James Stephen in his *Digest of the Criminal Law* said: ". . . everyone has a right to consent to the infliction upon himself of bodily harm not amounting to maim."[10] The difficulty however, lies in determining the extent to which personal violence short of mayhem may be allowed. As the same writer pointed out: "It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another."[11]

There are two cases which have often been regarded as determining the extent to which consent would put an end to criminality in English law. They are *R.* v. *Coney*[12] and *R.* v. *Donovan.*[13]

(B) *R.* v. *Coney*

In *Coney's* case, the accused, Coney and a few others were present at a prize-fight. They were tried for common assault on the ground that by their presence they aided and abetted men who were engaged in the fight. The court held that mere presence at a fighting did not render them guilty as accessories to the fight. However, on the broader question

6. Mayhem is the "violently depriving another of the use of such of his members, as may render him the less able in fighting, either to defend himself, or to annoy his adversary . . ." See Blackstone's *Commentaries* IV (1769) 205-6. See also I Hawk. P.C. 107; I East P.C. 393.

7. *R.* v. *Wright* Coke upon Litt. 127 a-b.

8. *Ibid.*

9. Blackstone's *Commentaries*., *op. cit*., note 6, *ibid*., see L. LeMerchant Minty, "Unlawful Wounding; Will Consent Make it Legal?" (1956) 24 *Medical Legal Journal,* 54.

10. (6th ed. 1904), editors Herbert and H. L. Stephens, Art. 227.

11. *Ibid*., Art. 230.

12. (1882) 8 Q.B.D. 534.

13. [1934] 2 K.B. 498.

as to whether the consent of the persons actually involved in the fighting was a defence, Stephen J. said: [14]

> The principle as to consent seems 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 upon such circumstances, that its infliction is injurious to the public as well as to the person injured.

(i) *Act Injurious to the Public*

The judges in the *Coney* case took judicial notice of the fact that prize-fights were "disorderly exhibitions mischievous on many obvious grounds." [15] and that very often riots would occur in the course of the fight. This influenced Stephen J. to come to the conclusion that consent is no defence when an act is "injurious to the public." Similarly, Hawkins J. said:[16]

> ... it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution.

It is submitted that a distinction should be made between assault and offences against the public peace. It does not follow that because consent is no defence to breaches of the public peace such as riots, rout, public nuisance and unlawful assembly, it is also no defence to an assault which has led to a breach of the public peace. This is well brought out by the verdict of the jury in *R.* v. *Perkins* [17] a case also involving prize-fights in which Perkins and a few others were indicted for riot and assault. Patterson J. directed the jury thus: [18]

> It is proved that all the defendants were assisting in this breach of the peace, and there is no doubt that persons who are present on such an occasion, and taking any part in the matter are equally guilty as principals.

The foreman of the jury said they doubted whether they could find all the defendants guilty of an assault, whereupon Patterson J. said:[19]

> If all these persons went out to see men strike each other, and were present when they did, they are all in point of law guilty of an assault. There is no distinction between those who concur in the act, and those who fight.

The jury however, convicted all the accused persons of riot, but acquitted them of the assault.

On the other hand, there are *dicta* to the contrary. Thus, for instance Coleridge J. in *R.* v. *Lewis* said, "Whenever two persons go out

14. (1882) 8 Q.B.D. 534 at p. 549.

15. *Ibid.* See also the observations of Lord Coleridge C.J., *ibid.*, at p. 569.

16. (1882) 8 Q.B.D. 534 at p. 553.

17. (1831) 4 C. and P. 537.

18. *Ibid.*, at p. 538.

19. *Ibid.*

to strike each other and do so, each is guilty of an assault."[20] Again, in *Matthews* v. *Ollerton*[21] it was said *per curiam,* "licence to beat me is void, because 'tis against the breach of the peace.' "[22]

It is true that these various *dicta* are difficult to reconcile as judges have framed them in very wide terms. It is submitted that the "assault" and "public injury" aspects of an act are two separate issues. Hence, the fact that an assault has led to a breach of the peace should not *per se* preclude the defence of consent, even though consent is no defence in offences against the public tranquility viz. riot, rout, unlawful assembly and public nuisance. It is submitted that if two persons decide to have a show of force in a busy thoroughfare it should not necessarily follow that their consent to suffer injuries should be no defence, even though their consent is no defence to a charge of creating a public nuisance or affray.

(ii) *Act Injurios to the Person*

Speaking of the extent to which consent may be a defence to an injury, Stephen J. said:[23]

> ... in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.

According to Stephen J. the injury which may generally be consented to is one that would not expose life and limb to "serious danger."[24] The phrase "serious danger" is perhaps equivalent to "grievous harm." The *dictum* of Viscount Kilmur L.C. in the recent case of *D.P.P.* v. *Smith* on the meaning of grievous bodily harm is instructive. He said:[25]

> ... I can find no warrant for giving the words "grievous bodily harm" a meaning other than that which the words convey in their ordinary and natural meaning. "Bodily harm" need no explanation, and "grievous" means no more and no less than "really serious."

The kinds of "hurts" which are classified as "grievous" under the Singapore Penal Code[26] is helpful in delimiting the scope of hurts which should not be consented to in the absence of justifying circumstances. They are:

> Firstly — emasculation;
>
> Secondly — permanent privation of the sight of either eye;

20. (1844) 1 Car. and K. 419.

21. (1692) Comb. 218.

22. *Ibid.*

23. (1882) 8 Q.B.D. 534 at p. 549.

24. *Ibid.*

25. [1960] 3 W.L.R. 546 at p. 560.

26. Laws of Singapore, 1955, Cap. 119, section 320. The Code is modelled on the Indian Penal Code which was drafted by the Indian Law Commissioners under Macaulay.

Thirdly — permanent privation of the hearing of either ear;

Fourthly — privation of any member or joint;

Fifthly — destruction or permanent impairing of the powers of any member or joint;

Sixthly — permanent disfiguration of the head or face;

Seventhly — fracture or dislocation of a bone;

Eighthly — any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

The eighth clause may give rise to practical difficulties for the progress made in the field of medical science will no doubt affect the concept of grievous hurt. For example, even a fairly serious injury may now be cured within a comparatively short space of time and cease to be a danger to life. It may perhaps be desirable that medical evidence be given as to the nature, effect and consequences of the injury for the purpose of determining whether an injury would endanger life.

(C) *R.* v. *Donovan*

Here the accused was charged with indecent and common assault upon a seventeen year old girl by beating her with a cane for the purpose of perverted sexual gratification. Evidence was given that the girl had consented to it. The Chairman of the Quarter Sessions directed the jury on the issue of consent and said that they were to convict only if there had been no consent. The accused was convicted and sentenced. Swift J. delivering the judgment of the Court of Criminal Appeal, allowed the appeal on the ground of misdirection. He indicated that, had "bodily harm" resulted, consent would be no defence.[27]

> In our view, on the evidence given at the trial, the jury should have been directed that, if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied, that it became necessary to consider the further question whether the prosecution had negatived consent.

On the question of bodily harm the learned judge said: [28]

> . . . "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient or trifling.

The category of hurts between what is more than "transient and trifling" and less than "permanent" is a wide one. It is certainly wider than the "bodily harm" test contemplated in *Coney's* case, which must be serious enough to expose life and limb to danger. The reason why the court in *Donovan's* case was not prepared to recognise consent may be that the assault was committed in "circumstances of indecency."[29] It in-

27. [1934] 2 K.B. 498 at p. 509.

28. *Ibid.*

29. Swift J. *ibid.*, took into consideration the motives of the accused: "In the present case it is not in dispute that the motive of the appellant was to gratify

volved a sexual perversion and the court was anxious to extend the law of assault and battery to cover the situation.

It is interesting to examine the reasoning of Swift J. He said:[30]

> 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 license another to commit a crime. So far as the criminal law is concerned, therefore, when 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.

Swift J. declared that if a man beats another with fatal results he is responsible for all the harm he does: "What he did was *malum in se* and he must be answerable for the consequence of it."[31] However, on the evidence given in the case, the beating was far from being fatal. It would therefore appear that by branding the act as falling within an act *malum in se* a formula was used to achieve a particular result. P. J. Fitzgerald[32] pointed out that the objection to the classification of crimes into *mala in se* lies in drawing conclusions from them. Speaking of the defence of consent he pointed out the fallacy of the conclusion that because "an act is *malum in se,* that is in itself unlawful, consent cannot convert it into an innocent act"[33] According to him, this was the fallacy of the Court of Criminal Appeal in *Donovan's* case. It is submitted that what is unsatisfactory is the lack of guidance as to why the court came to the conclusion that the beating was an act *malum in se.*

II

SOME AREAS OF UNCERTAINTY

Coney and *Donovan* may determine the extent English courts are prepared to allow consent to be a defence. But this is not to say the doctrine is to be applied without due consideration being given to the circumstances of the case. Thus, for example, no one would disagree that a therapeutic operation may be consented to even though the operation may endanger the life and limb of the patient or may result in more than a transient and trifling injury. The justification is the curing of the sick. In considering the areas of uncertainty, it is well to remember the *dictum* of Lord Coleridge C.J. in the *Coney* case:[34]

> Practical wisdom, rather than scientific exactness, seems to me to be the

his own perverted desires. If in the course of so doing, he acted so as to cause bodily harm, he cannot plead his corrupt motive as an excuse . . . Nothing could be more absurd or more repellant to the ordinary intelligence than to regard his conduct as comparable with that of a participant in one of those "manly diversions" of which Sir Michael Foster wrote. See G. L. Williams, "Consent and Public Policy" (1962) *Crim.L.R.* 54. See "Indecent Assault" (1952) 16 *Journal of Criminal Law,* 88.

30. [1934] 2 K.B. 498 at p. 507.

31. Foster, *Crown Law* (3rd ed.) 259.

32. "Crime, Sin and Negligence" (1963), 79 *L.Q.R.* 351.

33. *Ibid.*, at p. 359.

34. (1882) 8 Q.B.D. 534 at p. 569.

> thing to aim at in a branch of the law which is concerned with the affairs of men. . .

(A) *Sports and Pastimes*

The law encourages sports and pastimes on the ground that they are "manly diversions, as they intend to give strength, skill and activity, and may fit people for defence public as well as personal, in time of need." [35] However, not all sports are lawful and if a sport is unlawful, consent is no defence to an injury caused in the course of the game. As Bramwell L.J. in *R.* v. *Bradshaw* said, "No rules of practice of any game whatever can make that lawful which is unlawful by the law of the land. . ."[36] Though the justification for an injury caused in the course of a game depends on the lawfulness of the game, nevertheless, it does not follow that if a game is lawful consent will avail as a defence. Thus, although there is nothing unlawful in sparring, yet if the parties fight on until they are so weak that a dangerous fall is likely to result, consent would be no defence.[37]

The leading authority for determining the lawfulness of games and prize-fights in particular, is *Coney's* case. In holding prize-fights illegal Stephen J. said:[38]

> . . . 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 the 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.

The popularity of certain sports *viz.* duelling and prize-fighting did not deter the courts from declaring them illegal.[39] The "mischievousness" of prize-fights can be be gleaned from descriptions given by writers who are familiar with the literature of the game. Minty[40] described prize-fights of the nineteenth century as "men fighting with their bare knuckles for money prizes and side bets, . . . there was no limitation to the period the fight was to last, and every fight was understood to be a fight to a finish with one or the other of the contestants knocked completely insensible, . . . wrestling, tripping, hitting when holding were part of the ordinary technique employed."[41] Not infrequently, men fought until one of them would die of exhaustion. The law in declaring these sports

35. Foster, *op. cit.*, note 31, *ibid.*

36. (1878) 14 Cox C.C. 83-85.

37. *R.* v. *Young* (1866) 10 Cox C.C. 371.

38. (1882) 8 Q.B.D. 534 at p. 549.

39. On the illegality of duelling, see *R.* v. *Young* (1838) 8 C. and P. 644; *R.* v. *Cuddy* (1943) 1 C. and K. 210. See S. G. Vesey Fitzgerald, "The Reform of Criminal Murder" (1949) 2 *C.L.P.* 27 at p. 40. On the illegality of prize-fights, see *R.* v. *Perkins* (1831) 4 C. and P. 537, *R.* v. *Orton* (1878) 14 Cox C.C. 226; *R.* v. *Coney* (1882) 8 Q.B.D. 534 at p. 549.

40. *Loc. cit.*, *ante,* note 9.

41. *Ibid.*, 55.

illegal despite their popularity, displayed a paternalistic attitude in protecting persons who voluntarily involved themselves in such fights. However, as a compromise, the courts recognised pugilism as regulated by the Queensbury Rules which were framed in 1865.[42] The effect of these rules was to minimise the danger to bodily harm which might otherwise result. In recent years there has been some move in favour of prohibiting boxing on the ground that injuries received in boxing may have adverse effects on speech and sight.[43] However, a motion for leave to introduce a Bill in the House of Commons on 21st December, 1960 was defeated.[44]

Sporting activities serve a valuable social function as they promote health and activity. This justifies a certain degree of risk which may be caused. Where the risk to bodily injury is very great as in boxing — for, the intention of the parties is to overawe each other by force — it is doubtful whether any social purpose can be served. Be that as it may, the law has fortunately reserved to itself the right to determine whether consent can avail even though the game is a *prima facie* lawful one. For, "in all cases the question whether consent does or does not take from the application of force to another its illegal character is a question of degree depending upon circumstances." [45]

(B) *Consent to Extra-forensic Punishment*

Lord Devlin in an extra-judicial pronouncement said:[46]

> It is not a defence to any form of assault that the victim thought his punishment well-deserved and submitted to it; to make a good defence the accused must prove that the law gave him the right to chastise and that he exercised it reasonably.

It is clear that the law recognises certain forms of chastisement. Thus, as noted earlier, parents have this right and so has the school-teacher. Quite apart from this, is it true to say that it is not a defence to any form of assault that the victim thought his punishment well deserved and consented to it? Let us examine some cases from other common law jurisdictions as there does not appear to be any direct English authority.

In *State* v. *Beck*[47] an American case, the plaintiff, one Anderson, stole a leather from the defendant. He was given a choice by the defendant of either being whipped or sent to jail. He chose the former. Harper J. said: [48]

42. In 1890, the Marquess of Queensberry laid down further rules to regulate pugilism.

43. See (1960) 2 B.M.J. 151 at p. 1516.

44. See B.M.J., Supplement July 2, 1960, 14.

45. *R.* v. *Coney* (1882) 8 Q.B.D. 534 at p. 549 *per* Stephen J.

46. *The Enforcement of Morals* Maccabaean Lecture in Jurisprudence, (1962) 8. See H. L. A. Hart, *Law, Liberty and Morality* (1963) 31.

47. 1 Hill, 362, 26 Am. Dec. 190 (1883), as reported in Harno, *Cases on Criminal Law,* (1933).

48. 1 Hill, 362 at p. 401. *Cf. Commonwealth* v. *Collberg* 19 Mass. 350 (1875), as reported in Beale, *Cass on Criminal Law* (2nd ed.).

> Where one gave another a licence to beat him, there is a case in which it is said that licence was held void. This may well be ... but in the case before us the defendant had no evil disposition toward Anderson but the contrary; and at his own earnest request, and to save him from what he considered a greater evil, reluctantly consented to inflict the stripes. However ill-judged the act may have been, I cannot think it constituted an assault and battery.

In another American case, *State* v. *Archer*[49] the South Dakota Court cited with approval the law stated by *Bishop on Criminal Law*:[50]

> One who assaults or whips another at his request or with his consent does any other act which under ordinary circumstances would amount to an indictable battery commits no crime.

Similarly, in the Indian case of *Bishamber* v. *Roomal*[51] the Allahabad High Court held that consent was a defence to the punishment given. The complainant had indecently assaulted a Chamer girl. On account of this the Chamers were very angry and about two hundred of them armed with lathis were determined to punish the complainant. They went with the complainant to a Panchayat.[52] The complainant then consented to have his face blackened and also consented to subject himself to a "shoe-beating" by the Panchayat.

P. L. Bhargrave J., held that since the accused persons acted *bona fide* in calling a Panchayat without any criminal intent to punish the complainant for his own indecent behaviour, and since the complainant himself had consented to the mode of punishment, his consent was a defence under sections 87 and 88 of the Indian Penal Code.[53]

In the above cases, there was no indication that the injuries were such as to endanger the health and life of the person. Another point to note is the absence of "criminal motive." What attitude an English court would take may be reflected in the *Coney* and *Donovan* cases. The conclusion would seem to be that consent to the punishment would be a defence provided no bodily injury of a kind would endanger life or health; also there should be an absence of "evil motives."[54] It is interesting to note that the Southern Rhodesian Court in *R.* v. *McCoy*[55] when faced with the question of consent to a chastisement, considered the implications of *Donovan's* case. In that case, an air hostess had committed a breach of a regulation of the Central African Airways Corporation of which she was an employee. The general manager gave her a choice of either being dismissed from service or be subject to a

49. 22 South Dakota 137; 115 N.W. 1075 at p. 1076 (1908).

50. Vol. I, 260.

51. (1950) 52 Cr.L.J. 179.

52. A village headman.

53. These sections are in *pari materia* with sections 87 and 88 of the Singapore Penal Code. They deal with the extent to which consent is a defence to injuries. See post.

54. See Stephen, *History of the Criminal Law* III (London: 1883) 118: "English law looks almost entirely to the intention with which wounds were given or injuries inflicted. . ."

55. [1953] 2 S.A.L.R. 4.

caning. She accordingly chose the latter and gave a written consent to it. He then administered six strokes on her buttocks with a light cane. On the facts of the case, the court held the general manager guilty of assault as the consent had been given under duress. Moreover, the court was influenced by the fact that the punishment had been carried out in humiliating circumstances. Be that as it may, the general attitude of the court was that where harm inflicted does not cause bodily injury within the meaning of *Donovan's* case, consent might well be a defence.

(C) *Perilous Situations*

Although the legality of sports has been judicially determined, the question of the legality of dangerous performances has never come before an English court. It may perhaps be said that the unprosecuted existence of dangerous scientific research activities and other equally dangerous activities such as are seen in circuses is evidence of their legality.

If a person wishes to demonstrate his skill as an acrobat by walking along a tight rope or if he wishes to swim across the English Channel the law cannot prohibit him from so doing. For, there is no law of "self-manslaughter." But what is the position where a person is asked to put himself in a situation of peril? If the person consents to it, will his consent be a defence to the injury caused?

The question arose in the New Zealand case of *R.* v. *McLeod.*[56] The accused, a marksman, conducted what was called a "Wild West Show" giving an exhibition of his skill. During the course of his show, upon invitation, a member from the audience, one Wilson, volunteered to sit at a distance and to smoke a cigarette so that the marksman could blow off the ash with a bullet from his rifle. The marksman took aim, fired but missed the ash and the bullet went through Wilson's cheek and inflicted a wound. The marksman was charged *inter alia,* with causing "actual bodily harm under such circumstances that if death had ensued the prisoner would have been guilty of manslaughter under section 206 of the Crimes Act, 1908." One of the questions put to the jury was: "Did he fire at Wilson with the full consent of Wilson?" The jury's answer was: "Yes." Stout C.J. in directing the jury said:[57]

> It is clear that no person can consent to another killing him (See Stephen's History of Criminal Law Vol. III, at p. 16). An attempt to commit suicide is an offence; and if a person asks another to kill him, and that person does so, that person would be guilty of murder. Duelling has been a crime in English law. It therefore appears to us clear that if, as in this case, bodily harm was caused to Wilson under such circumstances that if death ensued Mcleod would have been guilty of manslaughter, the prisoner comes exactly within s. 206 of our Criminal Code.

With respect, the analogy of attempted suicide is inapt. For there was no intention on the part of the marksman to kill him. Again, the analogy of duelling is not convincing, for in duelling there is an intention to cause bodily harm of a serious nature. Stout C.J. in coming to the

56. [1915] N.Z.L.R. 430.

57. *Ibid.*, 433. At that time, suicide was an offence in England. The offence has since been abolished. See *supra,* note 1.

conclusion that the consent of the volunteer was no defence was clearly influenced by the fact that a rifle, a potentially offensive weapon, was used. He said:[59]

> . . . here although a sport if it can be termed sport was indulged in with the consent of Wilson, still a weapon was used in risky circumstances.

Should the law prohibit dangerous activities? The interference by the criminal law may involve a deprivation of the livelihood of a person in cases where feats of endurance are performed on a professional level.

Dennis Lloyd takes the view that a "contract for foolhardy stunts should be invalid whereas an agreement to perform a dangerous experiment in physiology is lawful."[60] He seems to make a distinction between the seeming usefulness of an occupation and one which is not "useful" to the public. But what is the criterion for judging whether an occupation is useful? A dangerous experiment in atomic energy may be useful in one sense but would it if it leads to the making of a bomb which could wipe out civilisation?

There seems no justification for a total abrogation of dangerous activities whether they be useful or not.[61] But the law could regulate these activities wherever possible by ensuring safety. In foolhardy stunts performed at circuses, for example, the law could insist that a net be strung-up for acrobatic stunts performed twenty feet high. Each case has to be considered in its own light.

(D) *Consent to Operations*

Where consent has been given to an operation, the maxim *volenti non fit injuria* would apply to prevent a civil action for a claim for damages for assault. Thus, Salmond, speaking of the maxim stated:[62]

> It applies, in the first place, to intentional acts which would otherwise be tortious . . . consent to physical harm which would otherwise be an assault, as in the case of boxing match or *a surgical operation.* . . .

However, the scope of the maxim is not altogether free from doubt. Thus, Winfield said:[63]

> The process, game or operation to which assent is given must be one which, quite apart from tortious liability is banned by the law.

He added further, "there is no definite test for deciding what the law will ban in this connection."

There appear to be no cases where the principle of *volens* has not been applied. It is submitted that the better view would seem to be that

59. [1915] N.Z.L.R. 430.

60. *Public Policy* (1953) 29.

61. See G. L. Williams, loc. *cit*., *ante,* note 29.

62. *Law of Torts* (12th ed. 1957, editor R. F. H. Heuston) 38 at p. 39. Italics added.

63. *Law of Torts* (6th ed. 1954, editor T. Ellis Lewis) 29.

it does apply to preclude patients from recovering damages.

That is the position in a civil action. The position in a criminal prosecution may be quite different. For instance, a consent to an abortion may prevent the patient bringing a civil action for damages for assault but a criminal prosecution might lie against the surgeon, for abortions are generally illegal. While the law as to abortion is clear, the legality of certain other operations such as plastic surgery, sterilisation, is not very clear.

There is no doubt that in an accident where a person's face or any other part of his body needs plastic surgery to remedy any defect which may have been caused, this will be an item in the calculation of damages. As such, it would seem to follow that no criminal prosecution can be brought against the surgeon. What if a person goes to a surgeon to have her nose raised, or to have a dimple set or to improve her general appearance by means of plastic surgery? There does not appear to be any reason of public policy against the legality of such operations.[64]

There is no statute in England sanctioning compulsory or voluntary sterilisation.[65] The recommendation of the Brock Committee in 1934[66] that mental defectives be sterilised was not implemented. It is quite clear however, that if sterilisation is performed on therapeutic grounds, it is legal.[67] Apart from this, it is doubtful if such an operation is legal. If the operation is illegal, consent to the operation cannot render it lawful.

In *Bravery* v. *Bravery*[68] Denning L.J. (as he then was) mooted the question. In that case, a wife brought a suit for divorce against her husband on the ground of cruelty alleging that her husband had himself sterilised without her consent. The Court of Appeal (Sir Raymond Evershed M.R. and Hodson L.J., Denning L.J. dissenting) held that cruelty was not established. On the question of sterilisation, Denning L.J. said:[69]

> An ordinary surgical operation, which is done for the sake of a man's health, with his consent, is of course, perfectly lawful because there is just cause for it. If however, there is no just cause or excuse for an operation, it is unlawful even though the man consents to it ... another instance is an operation for abortion, which is "unlawful" within the statute unless it is necessary to prevent serious injury to health. Likewise with a sterilisation operation. When it is done with the man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of a hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the man consents to it. Take a case where a sterilisation operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it. The operation then is plainly

64. See G. L. Williams, *loc. cit., ante,* note 29, 157.

65. In some American states, sterilisation is compulsory under some circumstances, while in other states it is voluntary. See Norman St. John-Stevas, *Life, Death and the Law* (1961), Appendices VII and VIII.

66. Cmd. 4485 (1934).

67. *Bravery* v. *Bravery* [1954] 3 All E.R. 59 at p. 67, *per* Denning L.J.

68. *Ibid.*

69. *Ibid.*

> injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman whom he may marry, to say nothing of the way it opens to licentiousness; and, unlike contraceptives, it allows no room for change of mind on either side. It is illegal even though the man consents to it. ...

According to his lordship, a sterilisation operation in the absence of some "just cause or excuse", is an assault, an act criminal *per se* to which consent provides no answer. He found support from the principle laid down in *Coney's* case which principle he said was well illustrated in *Donovan's* case.

The tests as laid down in the *Coney* and the *Donovan* cases have already been discussed. It suffices to say that the other members of the Court of Appeal disagreed with the general pronouncement of Denning L.J. but did not express any opinion on the legality of sterilisation apart from one performed on therapeutic grounds.

To examine the legality of voluntary eugenic and contraceptive sterilisation, it is well to begin by distinguishing sterilisation from castration. Sterilisation only deprives the patient of the faculty of procreation. On the part of the males, vasectomy[70] is performed and on the part of the females, salpigectomy.[71] The operation does not impair the bodily vigour of the person, nor does it affect his power of consummation. On the other hand, castration does affect the bodily vigour of a person and is considered to amount to mayhem.[72] It has been medically proved that sterilisation does not affect the mental or muscular vigour of a person and is not necessarily permanent. Hence, it follows that sterilisation does not amount to mayhem and this is the opinion of all jurists.[73]

However, this does not dispose of the whole question. For the surgeon performing the operation might well be convicted of criminal assault and battery. Would consent provide a defence? For example, if a man with strong sexual instincts wishes to have a himself sterilised. Would the surgeon performing the operation be guilty of assault and battery? Lord Denning would argue that this is injurious to the public interest and would enable a "man to have the pleasure of sexual intercourse without shouldering the responsibilities."[74]

It is submitted with due respect, that the argument advanced by Denning L.J. is untenable. If there is an objection to allowing a man

70. The operation involves tying the vas above the testes.

71. The operation involves making a break in the fallopian tube which will block the passage between the ovary and the uterus.

72. I *Hawk.* P.C., c. 44, section 1. In *R.* v. *Cowburn* (Lord Parker C.J., Donovan and Salmon JJ.) May 11, 1959 (unreported) the Court of Criminal Appeal refused to express any opinion on the legality of voluntary castration. See [1959] *Crim.L.R.* 554.

73. G. L. Williams, *Sanctity of Life and the Criminal Law* (London, 1958) 78; Norman St. John-Stevas, *Life, Death and the Law* (London, 1961); G. W. Bartholomew, "Legal Implications of Voluntary Sterilisation" (1959-60) *Mel. U.L.R.* 77; L. C. Green, "Sterilisation and the Law" (1963) 5 *Malaya L.R.,* 105.

74. [1954] 3 All E.R. 59 at p. 67.

the pleasure of sexual intercourse without shouldering the responsibilities on grounds of public policy, then why is there no restriction on the sale and distribution of contraceptives?

Does such an operation really open the door to licentiousness? One would say that if it does, then, the same can be said of the sale of contraceptives. Finally, his lordship drew the distinction between sterilisation and the use of contraceptives in that the former does not allow for a "change in mind on either side." [75] With respect, this argument is tenuous. Even if sterilisation does not allow for a "change of mind," should this be sufficient reason to militate against its legality? If contraceptive measures are not illegal and are in fact encouraged, why should it make any difference if it is for one occasion or for all times provided the parties consent to it? It may be argued that this may result in more than a "transient and trifling injury" within the meaning of the *Donovan* case. It is submitted that the mere fact that it may result in permanent injury is not sufficient justification for not admitting the defence of consent, if public interest demands it.

On the question of therapeutic sterilisation, Denning L.J. seemed to think it would be lawful if performed with the consent of the person e.g. "to prevent a hereditary disease." [76] As for eugenic sterilisation, the legal position is still an open one. Perhaps, the observation of Holmes J. in the American case of *Buck* v. *Bell*[77] is appropriate in considering a justification for eugenic sterilisation. In that case, Currie Buck was feeble-minded, and so was her mother. She (Currie Buck) herself had an illegitimate feeble-minded child. She was *ordered* to be sterilised by the Virginia Courts. On appeal to the Supreme Court, Justice Holmes in the course of his judgment said:[78]

> We have seen more than once that the public welfare may call upon its best citizens for their lives. It would be strange if it could not call upon those who have already sapped the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetents. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly, unfit from continuing their kind.

In dismissing the appeal, Justice Holmes exclaimed, "Three generations of imbeciles are enough." In this case it would be noted that there was no consent on the part of the woman to be sterilised, for it was a compulsory sterilisation. Therefore, it may be argued that if the woman had voluntarily consented to the operation, the decision would have been different. As far as the position in England is concerned, what is needed is an explicit ruling from the Legislature and not a *dictum* from the court. For, in this state of uncertainty no surgeon would dare undertake the risk of performing such an operation.

If a case for making voluntary eugenic sterilisation lawful has been

75. [1954] 3 All E.R. 59 at p. 67.

76. *Ibid.*

77. 274 U.S. 200 (1927).

78. *Ibid.*, at p. 208.

made it might be relevant to consider whether there is a case for voluntary eugenic abortion. Admittedly, there is a distinction between sterilisation and abortion — the former prevents conception from taking place, while the latter involves the emptying of the uterus after conception has taken place. Whatever may be the views of theologians about the moment of the existence of the human soul, suffice it to say that the legality of voluntary eugenic abortion should be based on pragmatic reasons. It is submitted that the arguments advanced to support voluntary eugenic sterilisation should equally apply to a case of eugenic abortion.

It is interesting to compare the position in respect of operations and in particular sterilisation under the Singapore Penal Code.[79] Under English law, it has been noted, a surgeon performing a sterilisation operation might be charged with assault and battery. The equivalent of battery under the Penal Code is "criminal force" defined in section 350 which reads:[80]

> Whoever intentionally uses force to any person *without that person's consent,* in order to cause the committing of any offence, or intending by the use of such force *illegally* to cause or knowing it to be likely that by use of such force he will illegally cause injury, fear or annoyance to that person to whom the force is used is said to use criminal force to that other.

Section 43 defines "illegal" as applicable to "everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action . . .". The definition is not very helpful. It seems clear however that if sterilisation is performed with consent it will not furnish a ground for a civil action. Whether or not it is an offence, we have to examine sections 87, 88 and 91. Section 87 reads:

> Nothing, which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any person who has consented to take the risk of that harm.

Section 88 reads:

> Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied to suffer that harm, or to take the risk of that harm.

Under section 87, consent does not extend to the causing of grievous hurt. Furthermore, the person consenting must be over eighteen years of age. On the other hand, under section 88, the only thing that cannot be consented to is the intentional causing of death, but there is a qualification that the act must be done in good faith and for the benefit of the person. There is no age limit to consent.

It would appear that most surgical operations would fall within the

79. Laws of Singapore, 1955, Cap. 119. See G. W. Bartholomew, "Consent to Surgical Operations." (1961) Vol. 2 No. 4 *Singapore Medical Journal* 121.

80. Italics added.

ambit of section 88 as being for the benefit of the patient and therefore the surgeon would be absolved from liability by the consent of the patient. "Benefit" as defined in section 92 excludes "mere pecuniary benefit." It would seem to follow that the case of *R.* v. *Wright*[81] where a "young and lustie rouge" asked his friend to cut off his left hand so that he might be more successful in begging, would be decided in the same way under the Penal Code — consent would be no defence, as the operation is done with a view to receiving some pecuniary benefit.

Similarly, where a sterilisation operation is merely for contraceptive purposes, it may be difficult to regard this as a "benefit." For the parties may wish to alleviate their economic position by "family planning." It is pertinent at this juncture to consider section 91 which reads:

> The exceptions in sections 87, 88 . . ., do not extend to acts which are offences independently of any harm which it may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Causing miscarriage (abortion) is dealt with under sections 312 and 313 of the Penal Code. Unless the miscarriage is caused in good faith for the purpose of saving the life of the woman, it is an offence. The consent of the woman is no defence — it only reduces the punishment. There is however no provision under the Penal Code nor any other law in Singapore which makes sterilisation an offence. It may therefore be concluded that a surgeon performing a sterilisation for the benefit of the patient such as therapeutic sterilisation would be protected under section 88. Where section 88 does not apply, the surgeon may still find protection under section 87 which only excludes the defence of consent where there is an intention to cause death or grievous hurt.

Sterilisation operations do not result in "emasculation" nor would it involve the patient in "twenty days severe bodily pain or prevent him from performing his ordinary pursuits" within the meaning of "grievous hurt" under the Penal Code. It remains only to consider the fifth category which speaks of "destruction or permanent impairing of the powers of any member or joint." Here again, it has been medically proven that a sterilisation operation will not impair the bodily vigour of a person.

It is therefore submitted that a surgeon performing a sterilisation operation would be protected under the Penal Code where the patient has consented whether or not the operation is one for the benefit of the patient.

(E) *At what Age Can a Person Consent to an Operation?*

Assuming that an operation is not unlawful, at what age can a person consent to it? It is clear that a person over the age of twenty-one can consent. But what is the position of a person under twenty-one?

The law recognises to some extent, the authority of parents and guardians over their children or wards. Thus, there is the right of reasonable chastisement. Again, the consent of the parents to the taking away of their child will put an end to kidnapping. It is also generally assumed that parents' consent must be obtained before an operation

81. Coke upon Litt., 127 a-b.

can be performed on an infant and that a surgeon would be open to a charge of assault and battery if the operation is performed in defiance of the parents' wishes. There are no direct English cases on point but in *Banner* v. *Moran,*[82] an American case, Groner C.J. said:[83]

> . . . general recognition of the fact that many persons by reason of their youth are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as property rights ... it is not at all surprising that generally speaking the rule has been considered to be that a surgeon has no legal right to operate upon a child without the consent of his parents or guardian.

The difficulty arises when parents refuse to give consent.[84] Can the infant himself consent to such an operation ? Will it override the parents' refusal? There is no English decision to say that an infant is capable of consenting nor is there anything to suggest that he is not capable of giving consent. Indeed if one examines the law relating to infants, the irresistible conclusion would be that he is capable of consenting. The only problem is to determine the age limit and this has to be left to the Legislature.

In the law of contract for example, the law recognises that although an infant has no full legal capacity, he can bind himself in certain contracts as for instance, a contract for necessaries. There are two theories as to the basis of an infant's liability. One theory is that an infant, like a lunatic has no capacity to contract.[85] Hence, he is liable on a quasi-contract to pay a reasonable price.

The consensual theory, on the other hand, suggests that an infant is capable of making contracts for necessaries. The distinction between the two theories has practical significance. For, if the *consensual* theory is accepted, it leads to a recognition that an infant has capacity to contract in certain cases as an adult. Hence, by parity of reasoning, an infant has capacity to consent to an operation. Even if the consensual theory is rejected in favour of the *re* theory leading to the conclusion that an infant has no contractual capacity whatsoever, an infant is still liable to pay a reasonable sum for necessaries. The term "necessaries" has been held to include "services rendered for the benefit of the infant."[86] If an infant wishes to be operated on even against his parents' will it may be argued that the surgeon performing the operation *bona fide* and for the benefit of the infant can recover on a *quantum meruit* for "services

82. 126 F.2d. 121 (1941).

83. *Ibid*., at pp. 122 and 123.

84. The Sheffield Regional Hospital recommended that a Juvenile Court be set up and the child be removed from the custody of his parents. See *The Times,* March 14, 15, 16 and 17, 1960. Law Journal Observer, March 20, 1960; Trescher and O'Neill, "Medical Care for Dependent Children: Manslaughter of the Christian Scientist" (1961) 109 *U. of Penn. L.Re*v. 103; G. Hughes, "Two Views on Consent in the Criminal Law" (1963) 26 *M.L.R.* 233.

85. See *Nash* v. *Inman* [1908] 2 K.B. 1 at p. 8, *per* Fletcher Moulton C.J. *Cf.* Buckley L.J. at p. 12. See also *Roberts* v. *Gray* [1913] 1 K.B. 520; *Doyle* v. *White City Stadium, Ltd.* [1935] 1 K.B. 110. See Anson's *Law of Contract* (22nd ed. 1964 editor A. G. Guest) 193 at p. 194.

86. *Dale* v. *Copping* (1610) Bulst. 39.

rendered." It would seem strange therefore that while an infant is liable on this score, the surgeon would at the same time be open to a criminal charge for assault and battery.

Again, the criminal law itself recognises the right of disposition an infant has over his/her body. Thus, the statutory age (limit) of consent to sexual intercourse is sixteen.[87] If this is the position, then it would appear that there is nothing objectionable against a child of similar age consenting to an operation.

It is therefore submitted that where an infant appreciates the nature and consequence of the operation there is no reason of public policy why he should not be allowed to consent to such an operation if it is performed *bona fide* and for his benefit. There are a number of American authorities which support this view. In *Bonner* v. *Moran* Groner C.J. observed:[88]

> And where the child is close to maturity, it has been held that the surgeon may be justified in accepting his consent. . . . But in all such cases the basic consideration is whether the proposed operation is for the benefit of the child and is done with a purpose of saving his life and limb.

Similarly, in *Sullivan* v. *Montgomery*,[89] a New York case, an infant twenty years four months, injured his ankle while playing base-ball. On examination by the physician, the child was advised that ether would have to be administered. The boy consented. An unsuccessful action for damages for assault was subsequently brought by the infant and his father. Schackno J. said:[90]

> If a physician or surgeon is confronted with an emergency which endangers the life or health of the patient, or that suffering or pain may be alleviated, it is his duty to do that which the occasion demands ... it would be altogether too harsh a rule to say that under the circumstances disclosed by the testimony in the instant case, the defendant should be liable because he did not obtain the consent of the father to the administration of the anaesthetic; and as he obtained the consent of his patient, I hold that the consent of the father was not necessary.

This was an action in tort but it is submitted that the position would have been the same had the physician been prosecuted for criminal assault and battery.

However, these cases seem to be confined to very special facts — that there must be a danger to life or limb — an emergency case as it were. It is submitted that it should be extended to all operations, provided they are not unlawful. What of an infant of tender years? It would appear that parents' consent is always insisted upon. The difficulty arises however where parents refuse to consent. If the child should die because of the failure to get medical aid, the legal position seems to be that the

87. See Sexual Offences Act, 1956, sections 5 and 6.

88. 126 F. 2d. 121 (1941).

89. (1935) 279 N.Y.S. 575.

90. *Ibid.*

parents may be criminally responsible. Thus, Macnaghten J., in *R.* v. *Bourne* said:[91]

> If the father, for a so-called religious reason, refused to call in a doctor, he ... is answerable to the criminal law for the death of [the] child.

A surgeon who refuses to operate may likewise be responsible. Thus, the same learned judge said[92]

> . . . there are people who, from what are said to be religious reasons, object to the operation being performed under any circumstances ... if a case arose where the life of the woman . . . could be saved by performing the operation and the doctor refused to perform it because of his religious opinions and the woman died, he would be in grave peril of being brought before this Court on a charge of manslaughter by negligence.

The law is thus caught on the horns of its own dilemma. For while the parents and the doctor are liable in such cases, yet where the doctor operates without the parents' consent, he is open to a criminal charge.

It would appear that while parents' consent is always insisted upon before a surgeon can operate, there appears to be no English case to say that a surgeon cannot under any circumstances operate without the parents' consent. This raises the general question whether a person can always refuse to consent to an operation. For if it can be established that a person's consent is unnecessary to an operation it should also be unnecessary in the case of infants.

In the Canadian case of *Mulloy* v. *Hop Sang,*[93] it was held that where a patient has expressly refused to give consent to a particular operation, the surgeon cannot operate even in the face of an emergency. In that case, the defendant had expressly told the plaintiff a surgeon, not to operate on his hand. While the defendant was under anaesthetic, the plaintiff amputed his hand in order to prevent blood poisoning. The defendant refused to pay his medical fees, and the plaintiff brought an action against him. The defendant counterclaimed for assault and battery. The court dismissed the plaintiff's claim and awarded the defendant damages for assault and battery. This case is significant in that the amputation was considered necessary in order to save the life of the patient. Yet, the court held that where there was express refusal, no operation could be performed. This assumes that the person was fully conscious at the time of his refusal. Admittedly, there is a distinction between conscious refusal and inability to consent. In the latter, it seems clear the doctrine of necessity might apply to prevent a criminal prosecuton for assault and battery. Thus, Sir James Stephen, in his *Digest of the Criminal Law* said:[94]

91. [1939] 1 K.B. 687 at p. 693.

92. *Ibid.*

93. [1935] 1 W.L.R. 545.

94. (9th ed. 1950) Art. 310 *fn.* 7, Stephen pointed out: "I know of no authority for these propositions, but of apprehence they require none. The existence of surgery as a profession assumes their truth."

> If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature for similar objects it is not a crime to perform such operations or to inflict such bodily harm upon him without his consent or in spite of his resistence.

The following illustrations were appended:

> (1) *A* is rendered insensible by an accident which makes it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.
>
> (2) If the accident made him mad, the amputation in spite of his resistance would be no offence.
>
> (3) *B* is drowning and is insensible. *A* in order to save his life, pulls *B* out of the water with a hook and injures him. This is no offence.

The illustrations given concern cases of emergency, where the person is incapable of consenting either because he is unconscious or insensible. If the aim of the criminal law is to preserve life, why should a distinction be drawn between express refusal and inability to consent? It may be argued that in the case of a refusal on religious grounds, the law should be more chary of infringing upon such sensibilities which are consistent with the freedom of religion. However, it is known that the law does intervene despite religious sensibilities. Mormon polygamous marriages are not recognised in England. The competing interests involved i.e. the saving of life and the freedom of religion is a difficult one to resolve, but it would appear that on a balance, the saving of life has precedence over the freedom of religion. Hence, parents' refusal on religious grounds or, for that matter, any other idiosnycratic reasons should have no consequence and that a surgeon should not be open to a criminal prosecution provided he does the operation in good faith to save the life of the patient.

It is interesting to compare the position under the Singapore Penal Code. Section 90 clearly states that consent given by a child under twelve is no consent. It reads:

> A consent is not such a consent as is intended by any section of the Code unless the contrary appears from the context ... if the consent is given by a person who is under twelve years of age.

Under section 89 the consent of the guardian may be given where the child is below twelve years of age. It reads:

> Nothing, which is done in good faith for the benefit of a person under twelve years of age, by consent, either express or implied of the guardian or other person having lawful charge of that person is an offence. . . .

The combined effect of sections 90 and 89, would seem to render a surgeon open to a criminal prosecution should he operate on a child under twelve without the guardian's consent even though the consent of the child is given.

The difficulty however arises in the case of a child above the age of twelve but below the age of eighteen. For under section 87, a person must be over the age of eighteen before he can consent to the infliction upon himself of injury not amounting to grievous hurt. This seems to

render the position of a person between twelve to eighteen uncertain. If a boy of seventeen wishes to have an operation to improve his voice would the surgeon be liable? Where the operation is for the "benefit" of the person, the position would be covered by section 88 which does not mention anything about the age of consent. The real problem arises in an operation, which is not performed for the benefit of the person. Under section 87, quite apart from operations involving the causing of grievous hurts (which cannot be consented to), the position remains uncertain. However, it is submitted that the maxim *exclusio unius alterius est* need not be applied, thus, even though the operation were not for the benefit of the infant, so as to bring it within the exception of section 88, nevertheless, it does not follow that consent to grievous hurt cannot be given by a person under eighteen merely because section 87 is so limited on its application.

CONCLUSION

There is a wide area in which it is still difficult to state with certainty whether consent would be a defence. In the very few cases where this question has come up for determination, the conclusion would seem to be that courts have not paid sufficient attention to the balance between the social utility of an activity and the freedom of the individual. Society abounds in competing interests. In some areas, the social utility of an activity is obvious while in others it may not be. Thus, for example, while it is obvious that games and sports serve a useful social function so as to justify a certain amount of risk to the person, that of a show of skill may not be. If a marksman finds that he can blow off the cigarette ash from a person's mouth three thousand times succcessfully to one unsuccessfully with injury, should this justify a prohibition? It would appear that the risk of probability of harm when measured against its social utility, however slight, may shift the balance towards a more liberal attitude in favour of recognition. What is needed is an awareness from the court, if not from the legislature of the social values and philosophy of the day in resolving the problem areas of consent.

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