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Assault

R. v Hobday

Court of Appeal Criminal Division: Edis LJ, Lavender J & HH Judge Leonard KC: 31 January 2025; [2025] EWCA Crim 46

Offences Against the Person Act 1861 s.47 – assault occasioning actual bodily harm – consent no defence – exceptions

The appellant, H, was convicted of assault occasioning actual bodily harm. The Crown’s case was that H met the complainant, V, a girl aged 17, in a bar. She was looking for “speed”. She instigated and consented to sexual activity with H during which she started and he finished carving an M (the first letter of H’s first name) onto her right buttock with a Stanley knife. The cuts were superficial but H admitted that there was some bleeding. H and V met subsequently and there was some sexual activity. H did not give evidence. The judge directed the jury that, barring exceptional cases such as tattooing, consent was not a defence to a charge of assault occasioning actual bodily harm. H was convicted. He appealed against conviction, submitting that the judge should not have distinguished *Wilson* [1997] Q.B. 47 or emphasised that (unlike in *Wilson*) there was no long-term loving relationship between H and V; and failed to give appropriate weight to the nature and quality of the act itself. The judge wrongly introduced a value judgment about the wisdom of a valid consent

Held, dismissing the appeal, that consent was a defence to assault occasioning actual bodily harm only if the activity in the course of which the assault occurred is one of the exceptions to the general rule (*Brown* [1994] AC 212). Notions of consent had developed since 1994; consent must be informed and truly voluntary, and not the result of coercion or duress. Although the factual situations were different, the court followed *Brown* and *BM* [2018] EWCA Crim 560. *Wilson* was distinguishable as a case involving tattooing. New exceptions should not be created on a case-by-case basis.

Per curiam. Cutting the skin is a commonly encountered form of self-harm to which the young and vulnerable are particularly prone. There are good reasons why people should not be permitted to do this to others and no good reason, outside the recognised *Brown* exception of medical intervention, why they should be.

Brown [1994] AC 212; *Wilson* [1997] Q.B. 47; *BM* [2018] EWCA Crim 560; *Smith, Hogan and Ormerod* Criminal Law, 17th Edition, at page 719; *Boyea* [1992] Crim LR 574-576 considered.

R Fitt for the appellant.

Ms. E Rutherford for the Crown.

Commentary

This case is the latest in the infamous web of case law on whether bodily “harm” can be consented to. It applies the well-known rule from *Brown* that consent is generally unavailable for actual bodily harm (ABH) or above, except in certain recognised categories.¹ The exception at issue in the present case was that of body adornment – specifically, whether an analogy could be drawn to tattooing, and its previous application in *Wilson* to cover branding.²

The application of the *Brown* approach has been widely criticised for its lack of clarity and principle. It has, for example, been described as “piecemeal and arbitrary”.³ The courts themselves have

¹ [1994] AC 212.

² [1997] Q.B. 47.

³ J Tolmie, ‘Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making’ [2012] Crim LR 656, 657.

acknowledged this issue: in *BM*, Lord Burnett CJ bluntly noted that the cases “do not lend themselves to a coherent statement of underlying principle”.⁴

A key concern is the policy-based, arguably value-laden and ad hoc approach the courts have taken to drawing the lines around consent. Tolmie points out that the cases are, in reality, a “‘patchwork’...loosely based on assessments about what is ‘normal’”.⁵ In *Barnes*, Lord Woolf CJ noted that the exceptions are based on public policy, finding the “advantage” that this “renders it unnecessary to find a separate jurisprudential basis for application of the defence”.⁶ Less enthusiastically, others have observed that this approach simply:

“allows the courts to maintain the incoherent list of exceptions and to add or subtract from that list based on their perception of the utility of particular conduct and the circumstances in which it occurs.”⁷

Against this background, whenever a new case in this area comes along, it is worth considering the following questions: What does it reveal about the courts’ evolving approach to consent as a defence to bodily harm? To what extent does it take the opportunity to bring greater clarity or coherence to the area? To what extent does it address concerns about the role of the courts, and reliance on policy or value judgements?

This case does offer some notable developments. The court refines a strict analogy-based approach, closely tied to the exceptions in *Brown*, and warns against their expansion. This is motivated by a concern for clarity and avoiding ad hoc, value-based reasoning. On one specific issue – the irrelevance of the parties’ marital status to the availability of consent – this case does succeed in bringing welcome clarity and principle. However, as this commentary will argue, the case also illustrates the limitations of an analogy-based approach in achieving the clarity and objectivity the court seeks. Criticisms like those above are unlikely to fade.

1. The reasoning in *Hobday*: a chain of analogies

Before exploring those issues, it is worth clarifying the chain of reasoning central to the decision. While the ultimate question in this case was whether consent could be a defence to ABH for the carving of initials onto buttocks, the key reasoning contains surprisingly little discussion of that act itself. This is due to the history of the case and the way it was argued. At both trial and appeal, the argument revolved around how best to interpret *Wilson*, in which consent was allowed for the *branding* of initials onto the buttocks. All sides argued by analogy to *Wilson*, which had, in turn, relied on an analogy to the tattooing exception in *Brown*.

The trial judge distinguished *Wilson* on the basis that *Hobday* did not involve an “equivalent loving relationship” to the husband and wife involved in *Wilson*.⁸ He had considered the nature of the activity as “private husband and wife activity” to be at the heart of *Wilson* ([14]). The appellant argued that this was a flawed reading and involved the courts in a “value judgment about the wisdom of a valid consent” ([17]). Instead, the nature of the acts in *Wilson* and *Hobday* were similar enough to also bring the present case within the tattooing-like exception from *Brown*.

The Court of Appeal rejected both analogies. It found that *Wilson* should be read as based on an

⁴ [2018] EWCA Crim 560 at [24].

⁵ J Tolmie, 'Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making' [2012] Crim LR 656, 663.

⁶ [2005] EWCA Crim 3246 at [11].

⁷ D Ormerod, K Laird and M Gibson, *Smith, Hogan, and Ormerod's Criminal Law* (17th edn, OUP 2024), 729.

⁸ *Hobday* [2025] EWCA Crim 46 at [14]. Paragraph numbers in the text refer to the *Hobday* judgment.

analogy between the acts of tattooing and branding (*not* on the marital status of the parties). However, even that analogy was flawed. Tattooing, the court pointed out, “does not involve branding”, and, indeed, branding was one of the very activities rejected in *Brown* ([40]).

As a result, *Wilson* was seen as “hard to justify as an application of the rule in *Brown*”. As Hobday’s argument had been built on *Wilson*, it was undercut: “It would, therefore, be even harder to describe a further extension of the decision in *Wilson* as a close analogy with an exception in *Brown*” ([40]).

This is the rather indirect, technical basis on which the case was decided. As will be discussed below, it might be wondered whether a direct analogy between tattooing and carving would have fared any better.

An immediate side-effect of this reasoning is that the exception for branding as personal adornment – thought to have existed since *Wilson* – is now in serious doubt. Given the court’s reasoning, it is difficult to see how it can survive. On this issue, we may well see a future case seeking further clarification.

2. The irrelevance of the nature of the relationship

The detailed discussion of *Wilson* did give the court the opportunity to finally put to bed the idea that the marital status of the parties could determine the availability of consent. This suspicion had been fuelled by some closing remarks in *Wilson* that:

“Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution”.⁹

Were this the basis of the decision, it would make criminal liability dependent on a judicial valuing of different relationship statuses – as reflected in the trial judge’s references in this case to the relationship’s “loving” nature (or lack thereof). It could also raise discrimination concerns in the protection of private and family life under the ECHR.¹⁰

Happily, the Court of Appeal is now clear that such a distinction is unprincipled and arbitrary:

“The proposition that conduct which would be criminal in other circumstances is not so where the alleged offender and the proposed victim are married to each other is not one which can be sustained as a rule of criminal law.” ([32])

On this issue, then, the Court of Appeal has successfully eliminated a problematic value judgement from the application of the law on consent. More broadly, it signals that future courts should focus narrowly on the nature of the activities involved.

3. Doubling down on *Brown*: the strict analogy approach

This case also sees the Court of Appeal doubling down on the *Brown* categories. We see this both in the reasoning summarised above – requiring a convincing chain of analogy going back to one of the exceptions as expressed in *Brown* – and in some more explicit comments made.

Building on its comments in *BM* that “[n]ew exceptions should not be recognised on a case-by-case,

⁹ [1997] Q.B. 47 at 50 (Russell LJ).

¹⁰ See D Ormerod, K Laird and M Gibson, *Smith, Hogan, and Ormerod’s Criminal Law* (17th edn, OUP 2024), 732, fn193.

save perhaps where there is a close analogy with an existing exception”,¹¹ the Court of Appeal emphasised its limited freedom to develop this area from the position in *Brown*. If a change is needed, “that is a matter for Parliament” ([41]). The list is, essentially, closed.

The alternative – that the Court of Appeal can expand *Brown*’s exceptions based on its own assessment of the “relevant considerations” – would “lead to uncertainty in the law” ([41]). As warned in *BM*, a looser approach would also involve the courts in “value judgement[s] which [are] policy laden” and subject to “conflicting views in society”.¹²

This is a step away from earlier comments, such as those from Lord Woolf CJ, effectively leaning into a policy-based, ad hoc approach. Evidently concerned with ensuring clarity, and distancing itself from controversial policy choices, the Court of Appeal’s solution is to anchor itself firmly to the *Brown* categories.

This explains why the court framed the question not as whether, in its judgement, “cutting the skin of a young person with an unsterile Stanley knife should be a lawful activity if she consented to it”, but only whether it can be convincingly placed under an existing *Brown* category ([43]).

In doubling down on *Brown*, however, this judgment will not do much to alleviate concerns that this approach, and these categories, are already lacking in principle and coherence.

It is also worth recalling – as the courts occasionally have – that the *Brown* categories were themselves based on policy. What logic can be found for the existing categories, we were told in *BM*, is based on the courts’ recognition of a “discernible public benefit” from the activity, and the assessment that it would be “regarded as unreasonable for the common law to criminalise the activity if engaged in with consent”.¹³

Thus, the court’s solution to the risk of making controversial policy-driven decisions on an ad hoc basis appears to be to fix the law to the ad hoc policy decisions and values recognised by the courts of the 1990s. Whether this is a step forwards or backwards is open to debate.

4. The clarity of the analogy approach

How much clarity the analogy approach brings in practice is also questionable. The elephant in the room is that analogies – and their persuasiveness – depend on how the nature of the act is characterised in the first place, as well as how the exception is described. The problem is that the same activity can be described in various ways, emphasising different details, or at different levels of abstraction.

To see this, we can look more closely at the basis on which the court rejected the analogy between tattooing and branding (and, by extension, carving). It took a narrow, seemingly technical approach: “Tattooing is the infiltration of ink into the surface of the skin...It does not involve branding.” ([40]).

Some may see the court’s definition of tattooing as missing some rather important details. It makes no mention of the fact that this “infiltration” occurs through the repeated and *painful* insertion of a *sharp instrument* through *both layers* of the skin, to leave a *lasting* – often *permanent* – mark. Described *this way*, a direct analogy between carving and tattooing would be more straightforward: carving also involves the *painful* insertion of a *sharp instrument* through *both layers of the skin* with the aim of leaving a *lasting mark* (although notably in this case it was not clear how permanent the mark would be ([6])).

¹¹ [2018] EWCA Crim 560 at [41].

¹² [2018] EWCA Crim 560 at [41].

¹³ [2018] EWCA Crim 560 at [40].

Had a more direct analogy been suggested between carving and tattooing (not going via *Wilson* and branding) the court may have had to confront this more explicitly. Unfortunately, that was not the argument presented.

Returning to branding vis-à-vis tattooing on which the court *did* focus its attention, we can also see the difference taking a plausible alternative description would make. While tattooing may not involve the technical act of burning the skin, and branding may not involve the infiltration of ink, both do involve the *painful marking of both layers of skin* to create a *lasting adornment*. Something like this appears to be what *Wilson* had in mind when it found no “logical difference” between the branding of initials and the tattooing of initials.¹⁴

This illustrates that even a seemingly technical “nature of the act” approach will involve discretion over how to characterise the activities being compared in the first place. These descriptions are not self-evident. They involve choices as to which feature(s) to emphasise as essential parts of that activity. We can therefore still expect arguments over how convincing an analogy is, and more fundamentally, over what the essential features of an activity are. This approach to analogising with *Brown* brings considerably less certainty than the court appears to realise.

This is not surprising. We have, over the past two centuries, seen a similar fate for the “nature of the act” approach to consent in cases of deception and sexual offences. There, we continue to see the fine – at times surprising – distinctions these approaches are apt to lead to (see for example, the latest distinction between contraception through condom use, and contraception through vasectomy drawn in *Lawrance*).¹⁵

Clarity aside, there is also a risk that the malleability of analogies, or the what we might call definitional discretion involved also leaves room for value judgements to creep back in. Indeed, despite rejecting the idea that the court’s own assessment of the relevant considerations is relevant to deciding cases in this area, the court nonetheless ends the judgment by providing just that:

“Cutting the skin is a commonly encountered form of self-harm to which the young and vulnerable are particularly prone. There are good reasons why people should not be permitted to do this to others and no good reason, outside the recognised *Brown* exception of medical intervention, why they should be.” ([44])

Given that the decision was based on the technical distinguishing of branding and tattooing, as well as the applicability of *Wilson*, these comments are *obiter*. Nonetheless, the references to “good” reasons do not sit easily in a judgment otherwise concerned with moving the court away from relying on its own evaluations of particular activities.

5. Conclusions

Hobday suggests the courts will now view the *Brown* exceptions as largely fixed. There is little scope to extend them except by a very strong, perhaps irresistible analogy. In recent years, the Court of Appeal has been concerned to instil a clearer structure to this area and to move away from suspicions

¹⁴ [1997] Q.B. 47 at 50.

¹⁵ *Lawrance* [2020] EWCA Crim 971. For criticism, see Beatrice Krebs, ‘Rape, Consent and Lie about Fertility’ (2020) 86(6) *Journal of Criminal Law* 622. For a historical tracing of the “nature of the act” test, see K L Murray, ‘Sexual Offences and Defined Consent: Lessons from the Past and a Framework for the Future’, in S Franklin, H Piercy, A Thampuran and R White (eds), *Consent: Legacies, Representations, and Frameworks for the Future* (Routledge 2023) 188.

that it is drawing lines where it sees fit at the time, based on its own judgements about the reasonableness of the consent, or on wider policy.

However, the success of this approach is inherently limited owing to the malleability and contestability of analogies. Arguments will likely continue on the question of when an analogy is "close enough", or the specific characterisations of an act they rely on. Indeed, we may well see a future appeal seeking clarity on where precisely this leaves branding after the court's distancing of itself from *Wilson*.

What is clear, however, is that the court has no intention of moving away from the much-criticised *Brown* approach, and any hopes of moving towards a more autonomy-driven stance – where individuals determine for themselves what constitutes a “good reason” for consent, or what should happen to their bodies – will not be taken up by the court anytime soon. Amendments to the *Brown* approach may have to come from Parliament, if at all.

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