

### Think box 10.1

Has D committed the AR of assault in the following cases?

1. D waits until V has passed him and then jumps on V from behind a bush?
2. D angrily shakes his fist at V but V thinks it is funny?
3. D sees V standing on the other side of a busy street with four lanes of traffic. D shakes his fist at V?
4. D thrusts a weapon towards V who is sitting inside a locked car?
5. D is on a train and leans out of the window as it is leaving the station to shake his fist at V who he sees standing on the platform?

### Answer guidance

1. Has V apprehended harm? Technically not, although force has been applied and so he has been subject to a battery. The term assault also includes battery. There is a technical distinction between assault and battery: assault consists in causing V to apprehend fear of violence whereas battery consists of the application of force. However, if a battery accompanies an assault, the technical distinction would probably not be regarded as significant.

2. D may intend an assault but since V apprehends no harm, this will not be a technical assault.

3. If it is obvious that the threat cannot be immediately carried out, then there is no assault. Presumably therefore there would be no assault here.

4. The issue here is apprehension of imminent rather than immediate harm, but the cases above – Logdon etc- would seem to include these circumstances. Thus the AR of assault would probably have been committed. MR would also need to be proved – see below.

5. Although a threat is implied here, it is clear that it cannot be either immediately or imminently carried out and thus there is no assault.

**Thinking point 10.2**

D is a former acquaintance of V now living 50 miles away. He sends her frequent emails letters and flowers which V finds annoying and to which she does not respond. After several months the emails become threatening and D says that he will burn down her house. D then begins to make late night silent telephone calls to her. V becomes distraught. Has D committed the AR of assault?

**Answer guidance**

The House of Lords in Ireland/Burstow stated words and even silent telephone calls can amount to an assault. In order to be assaulted V must fear the possibility of immediate personal violence. Whether the threatened personal violence is immediate, the extent to which it is feared and the nature of V's fear is a question of fact for the jury. Immediate can mean imminent. The delay between the threats and the feared harm is a potential problem but it would be for the jury to decide. An assault may have been committed here. If V's fear is clinically diagnosed as serious it could amount to either ABH/GBH – see later. In order to give a complete answer here you would also need to consider mens rea: did D intend or was he subjectively reckless as to causing V to fear immediate violence? - see below.

**Thinking point 10.3**

Has D committed the AR of battery in the following situations?

1. D digs a pit outside V's front door. V falls into it when emerging from his house one night.
2. D sets his dog on V in order to attack V.
3. D throws a firework into a crowd of people who barge into each other to escape.
4. D slaps V hard on the back in greeting him at a party.
5. A store security guard suspects V of shop-lifting and in order to detain her for questioning he grabs hold of her sleeve.

**Answer guidance**

A battery consists of the infliction of personal force or violence but it need not be directly applied to the body of the V. In these situations force is indirectly applied to V and this would constitute the AR of battery in each case.

- D slaps V hard on the back in greeting him at a party?

There is implied consent to reasonable harm in everyday activities.

- A store security guard suspects V of shop-lifting and in order to detain her for questioning he grabs hold of her sleeve?  
Collins v Wilcock: this would be an unlawful application of force and violence hence a battery and also false imprisonment unless to effect an arrest in which case the contact would be lawful.

#### Thinking point 10.4

On a street, D pushes V out of the way causing V to bump into a lamp-post and hurt herself. Does D have the MR for battery on V if:

- D disliked V and wanted to cause harm?
- D knew she pushed V harder than was reasonable?
- D was in a hurry and did not even think about the possibility of harm?

#### Answer guidance

- D disliked V and wanted to cause harm? (Yes – intention.)
- D knew she pushed V harder than was reasonable? (Yes – subjective recklessness: she knowingly took a risk of harm.)
- D was in a hurry and did not even think about the possibility of harm? (No – there was no awareness of the risk of harm.)

#### Thinking point 10.5

In a neighbour dispute, D threatens to set his dog on V. V is scared of the dog. He jumps over a fence and falls, breaking his wrist. Has D committed ABH under s47?  
You will first need to consider whether:

- the harm amounts to ABH
- D committed the AR/MR elements of an assault
- there is a causal link to the harm.

#### Answer guidance

AR: Assault/battery - D has clearly caused V to apprehend immediate personal violence. D appears to have done so intentionally and thus both the AR and MR of assault are present.

ABH: A broken wrist would amount to ABH( Miller). Any clinical psychiatric condition could constitute ABH (Chan Fook, Ireland/Burstow), possibly even GBH.

Occasioning: This means causing. Is there an unbroken chain of causation between D's act and V's harm? Yes, it is reasonably foreseeable that V will attempt to escape (Roberts).

MR: Only the MR for assault/battery need be proved: intention/subjective recklessness. No foresight is required in respect of the harm.

### Thinking point 10.6

1. A police officer, V, attempts to arrest D for breach of the peace and grabs D roughly by the arm. D is wearing a large metal studded arm-band. Has D committed an offence under s20 in any of the following situations (ignore the offences of assaulting or obstructing a police officer in the execution of duty)?

You will need to consider whether:

- The harm amounts to wounding or GBH
- D has committed the AR of s20 (infliction)
- D has MR (intention or recklessness).

a. D pulls away from V but in so doing his arm-band causes a 2 centimetre cut to V's face.

b. D runs off leading V round the corner where D sticks out his leg hoping V will fall over it and into a shallow hole left unprotected by workmen. V falls in and breaks his arm.

### Answer guidance

a) D pulls away from V but in so doing his arm-band causes a 2 centimetre cut to V's face. s20: AR – GBH: a wound will constitute GBH if it is a cut and not a superficial scratch (McLoughlin). It does not need to be serious to constitute GBH.

Infliction – there is now no need for either an assault or for the direct application of force (Burstow/Ireland overruling Clarence and Wilson). Force has been applied through contact with the arm-band.

MR- intention or subjective recklessness as to the risk of some harm (Mowatt). D will only be guilty if he foresaw such a risk. He should not be guilty if harm was accidental and unforeseen. See the criticisms of Savage/Parmenter above.

b) D runs off leading V round the corner where D sticks out his leg hoping V will fall over it and into a shallow hole left unprotected by workmen. V falls in and breaks his arm. (A broken arm is really serious harm and thus GBH (Smith); since harm can be inflicted without either an assault or the direct application of force (Ireland/Burstow), it can be caused in any manner and seems to have been

the result of a battery here. MR: intention to commit some harm seems to be present (Mowatt).

**Thinking point 10.7**

Is D guilty of s20 or s18 GBH in the following situations?

1. D pushes a broken bottle into V's face causing serious wounding. It was his intention to cause really serious harm.
2. D forcefully throws beer at V aware of the risk that the glass might slip out of her hand at the same time. She causes wounds to V's face.

**Answer guidance**

See s18 and s20.

**Thinking point 10.8**

1. If D intentionally injures V's genitals, in which of the following would D have committed an offence against the person: Female circumcision? Gender reassignment surgery? A streetfight? Whilst committing a youthful prank?
2. D, a man, canes V by consent, causing minor bruises and cuts. D's motive was sexual. Has D committed a criminal offence in any of the following situations: V is a female prostitute? V is an 18-year-old boy? V is D's long-term homosexual partner? V is a longterm heterosexual partner?
3. In a game of rugby, player D head-butts player V as they are standing at the back of a scrum. V suffers a broken nose.

This question invites you to consider and apply Barnes.

**Answer guidance**

1. You need first to consider the relevant offence with which D might be charged and then whether there is a relevant defence.

Offence: Until the Female Genital Mutilation Act 2003, mutilating the labia or clitoris is an offence. Given that parliament has now legislated, this activity would have been considered to be outside the public interest, not falling within a relevant exception.

Offence: ABH/GBH.

Defence: The public interest allows sport, surgery and rough horseplay as exceptions to the general rule that consensual injuries inflicted for no good reason amount to an offence. Thus, the public interest would apply to the

operation. Whether it would apply to the prank would depend on whether female diversions would be given equal protection under the law to manly diversions - highly unlikely! Street-fighting and female circumcision are unlawful and contrary to the public interest.)

2. D, a man, canes V by consent, causing minor bruises and cuts. D's motive was sexual. Has D committed a criminal offence in any of the following situations?

V is a female prostitute? V is an 18 year old boy? V is D's long term homosexual partner? V is a long-term heterosexual partner?

This question invites you to consider the majority and minority judgments in *Brown*.

It is difficult to predict whether this will be regarded as criminal in each case. The offence in question is ABH and/or sexual assault (see Chapter 11). The issue is whether consensual harm intentionally inflicted for sexual gratification purposes is a defence. If the majority view in *Brown* is followed, then it will be regarded as an offence of violence and will not fall within the public interest exception even though such harm is consensual. This view is supported by *Donovan*, *Boyea* and *Emmett* and the ECHR decision in *Laskey*, etc.

Each involved prostitutes, homosexual and heterosexual partners. On the other hand, *Wilson* followed the minority view in *Brown*, that sexual harm is primarily a private, sexual matter, not an act of violence. This concerned heterosexual partners but there was no evidence of sexual motive for the branding. If sexual motive is the reason for the distinction then D will probably have committed ABH in each case. This confirms that harm inflicted during activity which is legally regarded as unconventional or distasteful is an offence.)

3. In a game of rugby, player D head-butts player V as they are standing at the back of a scrum. V suffers a broken nose. (This is unlikely to be regarded as a tackle within the rules. It is clearly intentional and therefore an offence of ABH: *Barnes*.)

### Thinking point 10.9

In which of the following situations will D have committed s20 GBH?

D has a sexual disease and conceals it from V to whom he transmits the disease through:

- a) unprotected consensual sexual intercourse
- b) oral sex
- c) kissing.

You need to consider the AR/MR elements of any relevant offence followed by any relevant defence.

Example: Offence – s20. What are the AR/MR elements and which authorities are relevant?

Look at Burstow/Ireland and Dica.

Defence:

Can you consent • to sexual disease transmission?

- Will apparent consent be negated by fraud?
- Look at Tabassum, Dica and Konzani.

### Answer guidance

(Outline answer:

S20 – AR: Infliction. Dica says that infliction no longer requires either an assault or directly inflicted harm. Burstow/Ireland were followed and Clarence was overturned on this point. The ratio of Dica is concerned with reckless disease transmission (HIV) through consensual sexual intercourse. Whether wider disease infection is covered by the Dica principle in relation to other forms of sexual transmission is an open and untested question. Harm has been inflicted in a) according to Dica but not necessarily in b) or c).

Harm. Does the disease amount to GBH? The ratio of Dica was concerned with HIV but the prevalence of Chlamydia and other STDs was noted in the judgment.

MR: Intention/recklessness (maliciousness) as to some harm: If there is an intentional spread of sexual disease through concealment and consensual sexual intercourse then an offence under s18 (below) would have been committed and consent would be no defence (Brown).

However, if D knew of his condition and was aware of the risk of transmission then Dica says that he is reckless for the purposes of s20. This would depend on how much knowledge D had in relation to the risks of disease transmission.

Defence: Consent to the immediate act of intercourse can provide a defence to the risk of infection (Dica). This is a question of fact in each case. There can be no such consent where the risk is concealed from V. The Clarence categories of fraud as to nature and identity have been extended by Tabassum & Dica. Konzani says that consent must be informed thus in order for actual consent to be regarded as a defence, there must have been no concealment. It would

appear that V's consent is not informed and thus cannot be relied upon by D as a defence to s20. But V's consent to sexual intercourse would provide a defence to rape on the basis of obiter statements in Dica.

**Think box 10.10**

Suppose that an assault is accompanied by the following insults, some of which are racially stereotypic. Consider whether they are racially aggravated under s28 (1) (a) or (b) Crime & Disorder Act 1998.

1. A Scot is called "a skirt-wearing sheep-shagger"
2. An Asian doctor is called "an immigrant doctor"
3. A Turkish chef of a takeaway shop is called a "bloody foreigner"

**Answer guidance**

1. This was held to amount to racial hostility in an unreported case cited by E. Burney in 'Using the Law on Racially Aggravated Offences' [2003] Crim LR at 33.
2. This insult was held to be racially hostile to a racial group under s28 (1) (a) in AG's Ref (No 4 of 2004) [2005] EWCA 889.
3. This insult was held to demonstrate racial hostility under s28 (1)(a) in DPP v M [2004] EWHC 1453.