

## **ARE FREEDOM, CAPACITY AND AGREEMENT ALWAYS ESSENTIAL COMPONENTS OF CONSENT?**

### **1. INTRODUCTION**

Consent is a curious creature in the criminal law. Focus on two features: timing and deception.

#### **1.1 Form:**

1. as explicit or an implicit element of a number of offences as can a lack of belief (honest and/or reasonable) in consent.
2. as a free-standing defence.

**1.2 Relevant offences:** (at least) property offences, non-fatal offences against the person and, of course, sexual offences.

**1.3 Source:** typically common law, but this paper looks to comparisons with the Sexual Offences Act 2003 (hence title) with a core definition and rebuttable and irrebuttable presumptions.

*This statutory definition helps to focus attention on what Parliament intended the key components of consent to be, but it leaves a number of questions unanswered about consent, and arguably serves to widen the gap between how consent operates in the context of the sexual offences, and how it operates elsewhere in the criminal law.*

### **2. TIMING OF CONSENT**

**2.1** Consent comes in two forms: explicit consent and non-explicit consent.

Explicit consent arises, for example, when a person (X) chooses to engage in an activity with another person (Y).

Non-explicit consent arises where X engages in conduct or possesses a state of mind from which it can be presumed, implied or imputed that he would have explicitly consented to engage in the activity with Y had he addressed his mind to the choice facing him.

**2.2** Differences relevant offences:

Non-fatal offences against the person: explicit or non-explicit consent.

Sexual offences: only explicit consent.

**2.3** But what about *timing*?

A husband (X) and wife (Y) agree that while he is asleep, she will perform a sexual act upon him. He falls asleep and his wife performs the act as agreed. At the time the act was performed, the husband did not give his contemporaneous explicit consent because he was unconscious and hence incapable of making a choice, but he did give prospective explicit consent. Is that sufficient to mean the act was carried out with his consent or does his inability to give explicit consent at the time of the act mean that it was non-consensual?

**2.3.1** There is no English or Welsh authority precisely on point, but see *R v White* [2010] EWCA Crim 1929 and *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) where the possibly appears to have been left open.

**2.3.2** See ss. 75 SOA 2003, “asleep or otherwise unconscious at the time of the relevant act” as a rebuttable rather than a conclusive presumption that consent was lacking. See also Temkin and Ashworth, *The Sexual Offences Act 2003, (1) Rape, Sexual Assaults and the Problems of Consent* [2004] Crim LR 228.

**2.3.3** Cf. other jurisdictions,

e.g., Scotland. See J Chalmers, ‘Two Problems in the Sexual Offences (Scotland) Bill’, *Scottish Criminal Law*, 2009, 553, and with F Leverick, *The Criminal Law of Scotland*, 4<sup>th</sup> ed. Volume 2 at §38.13.

e.g., Supreme Court of Canada in *R v J(A)* [2011] 2 SCR 440:

*majority*: rejected the concept of prospective explicit consent; key was the inability of the unconscious partner to say ‘no’ and the need to protect him from exploitation  
*minority*: accepted it; need to respect the unconscious partner’s sexual autonomy.

**2.3.4** *Rook and Ward* thinks English and Welsh court would follow *JA* majority. What of the sleeping partner?

**2.3.5** If the law needs to change, how could we do so to protect Y from prosecution for doing no more than X agreed for her to do?

1. Recognize a limited doctrine of prospective explicit consent.
2. Recognize a limited doctrine of retrospective explicit consent.
3. Recognize a limited doctrine of non-explicit consent.
4. Refine the definition of “sexual”.
5. Rely on the *mens rea* requirement.
6. Refine the *mens rea* requirement.
7. Recognize a defence of *de minimis*.
8. Rely on prosecutorial discretion.

### 3. DECEPTION AND CONSENT

**3.1** Peter Westen: explicit consent to conduct consists of actual acquiescence to the conduct - whether attitudinal (i.e. in X’s mind) or expressive (i.e. as communicated to Y) – under such conditions as the relevant jurisdiction provides.

*In other words, in order for X’s attitudinal acquiescence to constitute consent it must be voluntary, and, in the words of Joel Feinberg, it will only be voluntary if X “is a competent and unimpaired adult who has not been threatened, misled, or lied to about relevant facts, nor manipulated by subtle forms of conditioning”.*

**3.2** Joel Feinberg: X has to be sufficiently competent, free and informed in order to act voluntarily and it is only in such a voluntary state that X’s acquiescence to the conduct truly becomes consensual.

Where do those conditions find form in the definition of consent found in the 2003 Act? Competency is there (capacity), as is freedom but what about knowledge? Why does the definition in section 74 make no mention of the need for X's choice to be an informed one? Five possible explanations are worth noting.

*It is important to bear in mind that prior to the 2003 Act, we had an offence of procuring sexual intercourse by deception. The Law Commission proposed its retention but it appears nowhere in the 2003 Act. That means that if knowledge is an essential, albeit, unspecified component of consent then the absence of sufficient information available to X at the time of his acquiescence could transform otherwise lawful intercourse into rape.*

1. First, it may be that **Parliament intended to confine knowledge to the section 76** conclusive presumptions and the failure to refer to it elsewhere (notably in section 74) was deliberate because Parliament did not see the need to criminalize sexual conduct arising from a mistake or a deception. There are grounds to treat deception differently from the other conditions such as competence and freedom, because unlike those other conditions deception may not be uncovered for months or even years, and, if Y makes an autonomous choice to engage in sexual activity which she enjoys, is the harm to Y sufficient that years later X should be branded a rapist because of a lie he told in order to influence that choice? This is not the approach the courts have taken. See *Assange*.
2. Secondly, **knowledge is wrapped up with the concept of capacity**. There is no definition of capacity in the 2003 Act but if it is meant to refer to a person's comprehension then might not a lack of information be relevant to the question of whether the person can understand the choice facing them?
3. Thirdly, **knowledge is folded into freedom**. While we might conceive of freedom as being freedom *from something*, such as pressure, could ignorance qualify as 'something'? Whereas freedom pre-supposes that X has a choice to make (and is not deprived of that choice because of pressure being brought to bear upon him) is the concept elastic enough to mean that X must also have the freedom to be able to weigh up the choices before him to ensure he makes the *right* one?
4. Fourthly, **knowledge is integral to choice**. Assuming that X has the capacity and the freedom to make a choice, he can only do so voluntarily if he is possessed of sufficient information to enable him to decide between two or more competing options. On this view, mis-information affects the decision X has to make and may mean that his acquiescence in the conduct fails to qualify as consent.
5. Fifthly, **knowledge operates in the realm of the common law to vitiate / negate / nullify consent** given under the 2003 Act. It is an extra-statutory concept that Parliament specifically intended to preserve so that it would be able to superintend the operation of the consent provisions in sections 75 and 74. If that is correct then what justification could there be for applying different common law rules to the sexual offences than to any other crimes where consent has a part to play? If the position for non-sexual offences against the person remains that, aside from cases of non-disclosure like *Dica*, the only fraud that vitiates consent is deception as to the identity of the accused or as to the nature of the act, then it is clear that deception has a much greater role to play in the sexual offences.

#### **4. CONCLUSION**

Freedom, capacity and choice are important aspects of the law of consent, but they are not the only aspects.

Other aspects have a role to play too and so far as the sexual offences are concerned those other aspects (timing and deception, so far as this paper is concerned) occupy the dark spaces between the terms defined in section 74 of the 2003 Act. It is time they were brought out into the light to be examined alongside the equivalent aspects in other areas of the criminal law.

If we wish to persevere with consent then it needs to be on the footing that the principles which underpin it are, as far as possible, the same for all offences and clearly set out in a statute or a code. One good example of the way this could be done is in the Draft Criminal Code for Scotland, which bears close scrutiny by those with an interest in harmonizing the rules on consent in our jurisdiction.