LEGAL IMPLICATIONS OF VOLUNTARY STERILIZATION OPERATIONS

By G. W. BARTHOLOMEW*

A sterilization operation is a surgical means whereby a person can be rendered incapable of procreation. Such operations are used for a variety of reasons which may be classified under three main heads, namely, therapeutic, eugenic and contraceptive. Sterilization operations which are performed for therapeutic reasons give rise to no particular problems in this context and will not therefore be discussed further in this paper.[1] In the case of sterilization operations resorted to on eugenic grounds a distinction must be drawn between voluntary and compulsory sterilization. In some countries sterilization is imposed, by statute, on certain classes of the community, mainly the criminal and the insane, with the object of preventing cacogenic reproduction.[2] The controversy raised by such legislation has generated a considerable literature, chiefly in the United States, but is a matter which will not be pursued further in this paper.[3] We are therefore left with voluntary eugenic and contraceptive sterilization, in which individuals seek to have themselves sterilized for either eugenic or contraceptive reasons, and it is these forms of sterilization which concern us here.

Before proceeding further it will be helpful to sketch in, very briefly, the relevant surgical background. There are many operations which have the effect of producing sterility, such as castration[4] in the male and hysterectomy[5] and ovariectomy[6] in the female. These operations are, however, relatively radical procedures and surgically are indicated only in those cases in which they are therapeutically necessary. So far as voluntary sterilization is concerned the two relevant operations are vasectomy[7] in the case of the male and salpingectomy[8] in the case of the female. Of these vasectomy is a minor operation which has been compared in gravity with the extraction of a tooth, whereas salpingectomy is a rather more serious affair comparable perhaps with appendicectomy. Our concern in this paper is

* B.Sc. (Econ.), LL.B. (London); Lecturer in Law in the University of Tasmania.

[1] The only major problem to which therapeutic sterilization gives rise appears to be that of defining those circumstances under which a sterilization is therapeutically justified.

[2] Sterilization statutes are in force in a large number of American States, in Alberta and British Columbia, in Denmark, Switzerland (Vaud), Germany, Norway, Sweden, Finland, Vera Cruz, and Mexico, although the extent to which these statutes are or have been enforced appears to vary considerably. Both New Zealand and Tasmania apparently drafted such statutes but these have never been passed.

[3] On compulsory sterilization see Myerson *et al.* (eds.) *Eugenical Sterilisation* (1936), which contains a bibliography.

[4] Removal of the testes.

[5] Removal of the uterus.

[6] Removal of the ovaries.

[7] The ligaturing or cutting of the *vas deferens*.

[8] The ligaturing or cutting of the fallopian tubes.

with the legal implications of these operations when performed with the consent of the patient for eugenic or contraceptive purposes.

As early as 1934 a Departmental Committee on Sterilization, in the United Kingdom, expressed the opinion that voluntary sterilization operations were probably illegal:[9]

> The legal position in regard to the eugenic sterilization of persons of normal mentality is less certain, but most authorities take the view that it is illegal. This is the view commonly adopted by the medical profession and acted upon by hospitals, and we understand that the medical defence organizations agree in refusing to indemnify any practitioner undertaking eugenic sterilization. In theory the point is not entirely free from doubt, but in practice it appears to be almost universally accepted that eugenic sterilization is illegal and involves the surgeon concerned in the risk of legal proceedings, even though the full consent of the patient has been obtained.

No actual authorities were cited to support this opinion, but it would appear that medical literature in general continued to accept this view.

In 1955, however, in *Bravery v. Bravery*,[10] the Court of Appeal were unable to agree on the point. Lord Denning (as Denning L.J.) argued for the illegality of such operations, but failed to convince his colleagues (Evershed M.R. and Hodson L.J.) with the result that a certain amount of confusion has been generated which the succeeding years have not dissipated.

Lord Denning argued in the following terms:[11]

> In this respect an analogy is, I think, to be found from the criminal law about surgical operations. 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. . . . Likewise with a sterilization operation. When it is done with a man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an 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 sterilization 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 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 a change of mind on either side. It is illegal, even though the man consents to it. . . .

The majority of the Court of Appeal, however, commented as follows:[12]

> We also feel bound to dissociate ourselves from the more general

[9] Cmd. 4485 (1934) 6. [10] [1954] 3 All E.R. 59. [11] *Ibid.*, 67. [12] *Ibid.*, 63-64.

observations of Denning L.J., at the end of his judgment, in which he has expressed his view (as we understand it) that the performance on a man of an operation for sterilization, in the absence of some 'just cause or excuse' (as was not, in his view, shown to exist in the present case) is an unlawful assault, an act criminal *per se,* to which consent provides no answer or defence . . . in the present case both the general question, whether an operation for sterilization is *prima facie* illegal, and the more particular question whether the operation here performed was a criminal assault, are alike irrelevant to the issue to be determined. We have heard no argument adduced to the general or to the particular question . . . and we are not prepared to hold in the present case that such operations must be regarded as injurious to the public interest.

The confusion which this conflict of opinion has engendered can be seen by comparing two comments which appeared in the medical literature shortly after the decision was given. In the *British Encyclopaedia of Medical Practice* Dr Forbes, after quoting Lord Denning's opinion, added:[13] 'the effect of the judgment must be to reinforce the doubt upon the legality of sterilization without proper cause.'

In the *British Encyclopaedia of Surgical Practice,* however, two learned writers, after quoting the opinion of the majority of the Court of Appeal, added:[14] 'At all events there is now considerable support for the view that a sterilization operation is lawful provided the patient consents.'

The existence of this confusion seems sufficient justification for a reconsideration of the problems raised by the practice of sterilization.

In *Bravery v. Bravery* a woman petitioned for divorce on the ground of cruelty alleging that her husband had, after the birth of their first child, submitted to a sterilization operation which, according to her, had been performed without her consent. The majority of the Court of Appeal held that there was insufficient evidence that the operation had in fact been performed without her consent, and further held that there was no evidence that she had suffered in health as a consequence of her husband's operation. Their Lordships therefore held that no charge of cruelty had been made out, but they added:[15]

As between husband and wife for a man to submit himself to such a process without good medical reason (which is not suggested here) would, no doubt, unless his wife were a consenting party, be a grave offence to her which could without difficulty be shown to be a cruel act, if it were found to have injured her health or to have caused reasonable apprehension of such injury.

Lord Denning, on the other hand, held not only that the wife had in fact not consented to the operation, but suggested that, even if she had done so, that would not prevent her from complaining subsequently if in fact her health suffered (and his Lordship seemed to

[13] *Annual Volume* (1956) 112.
[14] *Annual Volume* (1955) 176.
[15] [1954] 3 All E.R. 59, 61.

imply that in this case her health had suffered, contrary to the finding of the majority). The argument by which his Lordship reached this conclusion was by analogy with the position in criminal law. He argued that just as there are cases in the criminal law in which consent constitutes no defence, so also in the matrimonial law there are certain forms of cruelty for which consent is no answer. His Lordship stated:[16]

> Those cases under the criminal law have a bearing on the problem now before the court, because the divorce law, like the criminal law, has to have regard to the public interest, and consent should not be an absolute bar in all cases. If a husband undergoes an operation for sterilization without just cause or excuse, he strikes at the very root of the marriage relationship. The divorce courts should not countenance such an operation any more than the criminal courts. It is severe cruelty. Even assuming that the wife, when young and inexperienced, consented to it, she ought not to be bound by it when in later years she suffers in health on account of it, especially when she was not warned that it might affect her health.

There are thus two quite distinct issues raised by Lord Denning's opinion. The first relates to the question whether sterilization operations are illegal: the second, whether resort to such an operation will constitute matrimonial cruelty despite the consent of the complaining spouse to the performance of the operation. We will consider first the question of the legality of these operations.

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Lord Denning's argument, to the effect that these operations are illegal even though the patient consents, was based, as we have seen, on the analogy of other surgical operations which his Lordship regarded as lawful only if performed for the sake of the patient's health and with his consent. All writers would undoubtedly agree that, save in exceptional circumstances, an operation performed without the consent of the patient is illegal in the sense that it will constitute an assault.[17] There is very little English or Australian authority on this point (although there is a very considerable body of American authority),[18] but it is sufficient to refer to the Canadian decision in *Murray v. McMurchy*[19] which actually involved a sterili-

[16] *Ibid.*, 68.

[17] Throughout this paper the term 'assault' will be used, as it is commonly used in criminal law, as including both assault and battery.

[18] The American authorities are discussed in Foley, 'Consent as a Prerequisite to a Surgical Operation' (1940) 14 *University of Cincinnati Law Review* 161-183 and Smith, 'Antecedent Grounds of Liability in the Practice of Surgery' (1942) 14 *Rocky Mountain Law Review* 233-293. See also Nathan, *Medical Negligence* (1957).

[19] [1949] 2 D.L.R. 442. This decision may be compared with the unreported English decision in *Beatty v. Cullingworth* (1896) *British Medical Journal* 1546 in which a surgeon performed a bilateral ovariectomy. The evidence was to the effect that prior

zation operation. This was performed during a Caesarian section, and the surgeon, who found numerous fibroids in the uterus, tied off both tubes on the ground that any subsequent pregnancy would be dangerous. The woman was, of course, in no condition to consent, although her husband, who was consulted, told the surgeon to do whatever he thought was best. In a subsequent action against the surgeon, the woman recovered damages on the ground that she had not consented, it being held that there was insufficient emergency to justify the surgeon in proceeding without consent.

Admitting, therefore, that a sterilization operation, as any other operation, will constitute an assault if the patient's consent has not been obtained (unless there is sufficient emergency to justify the surgeon's proceeding without such consent) we must turn to consider Lord Denning's second criterion for determining the legality of a surgical operation, namely, that it must be performed for the sake of the patient's health.[20] An application of this criterion necessarily involves the conclusion that any surgical operation performed for any other reason would be illegal in the sense that it would constitute an assault to which the consent of the patient would be no defence for the surgeon. This, it is respectfully submitted, must be regarded as a very doubtful proposition. If it is justified then presumably medical practitioners who engage in ear-piercing or face-lifting, or dentists who perform dental operations for purely aesthetic reasons are engaged in criminal activities. Operations of this nature do not necessarily represent the most noble aspects of the profession of surgery, but it is a very different thing to say that they are illegal operations.[21]

It is indisputable that consent cannot make legal that which is *per se* illegal. Thus consent cannot justify an abortion which is induced for other than therapeutic reasons.[22] On the other hand many acts are only illegal if they are done without consent, as for example in the case of rape. The problem, therefore, is to determine

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to the performance of the operation the woman, who was engaged to be married, had informed the surgeon that if he found both ovaries diseased he was to remove neither. The surgeon testified that he had replied, 'You must leave that to me', which remark the plaintiff denied having heard. The court held that there had been tacit consent and the surgeon was therefore held not liable.

[20] Lord Denning appears to be involved in a slight inconsistency over this point. Earlier in his judgment he made it clear that he regarded eugenic sterilization ('to prevent the transmission of an hereditary disease') as lawful, but a sterilization performed for a purely eugenic purpose cannot be regarded as an operation performed for the sake of a man's health and therefore on his Lordship's own argument should be regarded as illegal.

[21] Thus Stephen in his *Digest of the Criminal Law* states, 'It seems absurd to say that if A gets a dentist to pull out a front tooth of A's because it is unsightly, though not diseased, A and the dentist both commit a misdemeanour.' This passage, which was retained until at least the sixth edition—where it appears in footnote (2) on page 166—, does not appear in the eighth edition. (I have been unable to consult the seventh edition.)

[22] On therapeutic abortions see *R. v. Bourne* [1939] 1 K.B. 687.

whether a surgical operation which is performed for other than therapeutic reasons is illegal *per se,* in that the consent of the patient provides no lawful justification for its performance. It seems clear, apart from specific statutory provision, that if a surgical operation is illegal it is so on the ground that it constitutes an assault, either common or aggravated—for it is difficult to see what other crime could be involved.[23] If this is so, then the problem resolves itself into one of determining the extent to which consent may be a defence to a charge of assault, and this appears to be a complex problem, in which it is difficult satisfactorily to reconcile all the authorities. We must therefore digress slightly and examine this problem so that later we may be in a position profitably to discuss its relation to sterilization operations.

Most textbooks state that although as a general rule consent will operate as a defence in cases of assault there are nevertheless some exceptions, that is, cases in which an act will be an assault even though the victim consented.[24] There is, however, authority for the view that no act which is done by consent can constitute an assault on the ground that it is of the essence of an assault that it is done against the will of the party alleged to have been assaulted. This view was clearly expressed by Lord Denman C.J. in *Christopherson v. Bare*[25] in which his Lordship stated:[26] 'as to the assault, it is a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission.'

In the same case Patteson J. put the position as follows:[27] 'An assault must be an act done against the will of the party assaulted: and therefore it cannot be said that a party has been assaulted by his own permission.'

The point was directly raised in *R. v. Martin*[28] in which the prisoner was indicted for having carnal knowledge of a girl between the ages of ten and twelve, and also for having assaulted her. The question as to the effect of the girl's consent was reserved by Alderson B. and the opinion of fifteen judges was:[29]

> inasmuch as it appeared that the child consented, the Judges are of the

[23] There is actually one other possibility, namely, maim, which is considered later.

[24] The standard textbooks reveal a surprising lack of agreement regarding even the definition of assault. See, for example, the comments of J. W. C. Turner, 'Assault at Common Law' in Radzinowicz and Turner (eds.) *Modern Approach to Criminal Law* (1948) 344.

[25] (1848) 11 Q.B. 473. This was, of course, a civil case which actually turned on a point of pleading. We are not here concerned with the civil aspect of assault, but the fundamental principles are the same as those applicable in criminal law.

[26] *Ibid.*, 477. [27] *Ibid.* [28] (1840) 9 C. & P. 213.

[29] *Ibid.*, 215. Also *R. v. Meredith* (1838) 8 C. & P. 589, 590, 'To support a charge of assault you must shew an assault which could not be justified if an action were brought for it and leave and licence pleaded', *per* Lord Abinger C.B.; *R. v. Banks* (1838) 8 C. & P. 574, 574-575, 'I have great difficulty in saying there was any assault as there was consent', *per* Patteson J., *arguendo.*

> opinion that the charge was not properly laid, and that as the child consented it was not an assault.

In subsequent proceedings Patteson J. explained this opinion as follows:[30]

> although a child between ten and twelve cannot by law consent to have connection, so as to make that connection no offence, yet where the essence of the offence charged is an assault (and there can be in law no assualt unless it be against consent); this attempt, although a criminal offence, is not an assault.

Finally we may note the opinion of Kelly C.B. in *R. v. Wollaston,*[31] a case which involved indecent practices between the prisoner and two youths about fourteen years old, practices to which the youths consented. His Lordship stated:[32]

> It is clear that, upon the circumstances of the case, there is nothing which constitutes an assault in law. If anything is done by one being upon the person of another, to make the act an assault, it must be done without the consent and against the will of the person upon whom it is done . . . in the present case there was actual participation by both parties in the act done, and complete mutuality. We should be overturning all the principles of law to say that in this case there was any assault in law.

It must, of course, be emphasized that the consent referred to in the above cases must be freely given by a person who knows what he is doing. The term 'consent' is perhaps a rather vague term. As Dr Glanville Williams has pointed out:[33] 'it includes states of mind ranging from eager desire at the one extreme to passive and reluctant acquiescence at the other.'

The requirement in these cases is not that of 'consent-in-fact', but rather of 'consent-in-law'. The cases are legion in which consent-in-fact has been obtained to some act by means of some deception or misrepresentation, and in which the courts have consistently held that there was no consent-in-law, presumably on the basis that there can be no consent-in-law unless the person consenting has full knowledge of all the circumstances.[34]

One particular manifestation of the distinction between consent-in-fact and consent-in-law which should perhaps be referred to here is that between consent and submission. This distinction, which was referred to by Kelly C.B. in *R. v. Wollaston,* was expressed by Coleridge J. (as he then was) in *R. v. Day*[35] as follows:[36]

> this case, being now reduced to a charge of common consent only, consent or non-consent on the part of the prosecutrix becomes material

[30] (1840) 9 C. & P. 215, 217.
[31] (1872) 12 Cox C.C. 180.
[32] *Ibid.*, 182.
[33] *Criminal Law: The General Part* (1953) 611.
[34] *E.g., R. v. Rosinski* (1824) 1 Lew. C.C. 11 and *R. v. Nichol* (1807) Russ. & Ry. 130.
[35] (1841) 9 C. & P. 722.
[36] *Ibid.*, 724.

> . . . but then we must look at the nature of the circumstances from which consent is to be inferred. There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such consent as will justify the prisoner in point of law.

However, given such consent as is regarded by law as sufficient, then the decisions considered above stand as authorities for the proposition that there can be no assault if the act is one to which the victim has consented. These decisions do not figure very prominently in most modern textbooks, yet they appear never to have been doubted, let alone overruled. Despite this the learned editors of Roscoe are alone among contemporary writers in adopting a position which is consistent with these decisions:[37]

> An attempt is sometimes made to treat that as an assault which is consented to on the part of the assaulted. But on examination it will be found that there is no authority for such a position.

More recent decisions, however, have indicated that consent may operate in a rather different fashion. Instead of in itself directly negativing the possibility of assault it may react on the nature of the act itself and prevent the latter from constituting an assault. In *D.P.P. v. Rogers*[38] the prisoner was charged with indecent assault in that he placed his arm around his daughter's shoulder and led her upstairs for an indecent purpose. The child, although unwilling, did not resist. Lord Goddard C.J., reluctantly upholding an appeal against conviction, said:[39]

> if it could be shown here that the respondent had done anything towards this child which by any fair use of language could be called compulsion, or had acted, as I have said in other cases, in a hostile manner towards her—that is, with a threat or a gesture which could be taken as a threat, or by pulling a reluctant child towards him—that would, undoubtedly, be assault.

The fact of the child's consent, therefore, rendered the father's act something which did not constitute an assault. Had the child not consented, the father would have either to have desisted or committed an assault to achieve his purpose. His Lordship put the same point rather more shortly in *Fairclough v. Whipp*,[40] a case which also involved indecent assault on a child, when he said:[41] 'The question

[37] *Criminal Evidence* (17th ed. 1952) 376. [38] [1953] 2 All E.R. 644.
[39] *Ibid.*, 645. Also *R. v. Burrows* [1952] 1 All E.R. 58 n. [40] [1951] 2 All E.R. 834.
[41] *Ibid.* It is respectfully submitted that the distinction between consent and submission is one which could well have been taken in these cases and which if applied

of consent or non-consent only arises if there is something which can be called an assault, and, without consent, would be an assault.'

Whilst in cases such as *R. v. Martin* it would appear to be true to say that it was held that consent operates in such a way as to prevent the commission of the necessary *actus reus,* the assumption being that the *actus reus* of a battery consists in the application of force to another without his consent, in cases such as *D.P.P. v. Rogers* it seems that the consent is operating so as to prevent the formation of the necessary *mens rea,* on the assumption that the *mens rea* for a battery consists of a violent or hostile intent as shown by the manner in which the force is applied.[42]

None of the standard textbooks undertake any analysis of the nature of the *mens rea* required in the case of battery, but the view implied by Lord Goddard C.J. in *D.P.P. v. Rogers,* that it is a violent or hostile intent, is certainly supported by many authorities. Thus in *Cole v. Turner*[43] Holt C.J. laid it down that:[44]

> First, . . . the least touching of another in anger is a battery. Secondly, if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery.

Much the same point was made in the well known case of *Tubervell v. Savadge*[45] in which the report reads:[46] 'it was farther sworn the plaintiff with his elbow puncht the defendant, which if done in earnest discourse, and not with intent of violence, is no assault.'
In *Williams v. Jones*[47] Lord Hardwicke C.J. stated:[48]

> every laying on of hands is not a battery; for the party's intention must be considered: for people will sometimes by way of joke, or in friendship, clap a man on the back; and it would be ridiculous to say, that in every such case a man must justify, and may not plead not guilty.

In *Coward v. Baddeley*[49] the plaintiff touched the defendant's arm for the purpose of drawing his attention to something, at which the defendant promptly gave him into custody for assault. Pollock C.B., holding that there had been no assault, stated:[50]

> The jury found that what the plaintiff did was done with the intent to attract the attention of the defendant, not with violence to justify giving the plaintiff into custody for an assault.

Finally we may refer to the definition of battery given by Hawkins

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would have led to a different result. This, however, does not affect the question of principle under discussion. So far as the United Kingdom is concerned the position has now been changed by the Sexual Offences Act 1956, s. 14 (2) of which provides that 'a girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.' (S. 15 (2) contains a similar provision applying to boys under the age of sixteen.)

[42] Turner, *op. cit.,* 355.
[43] (1705) 6 Mod. 149. [44] *Ibid.* [45] (1669) 2 Keb. 545. [46] *Ibid.*
[47] (1736) Cas. *t.* Hard. 298. [48] *Ibid.,* 301. [49] (1859) 4 H. & N. 478. [50] *Ibid.,* 481.

which is to the same effect. He defined battery as:[51] 'any injury whatever, be it never so small, being actually done to the person of a man in an angry, or revengeful or rude or insolent manner.'

The conclusion which can be drawn from these authorities is that in those cases in which an assault involves the actual application of force (that is, a battery) it is necessary to establish a violent or hostile intention, an intention, in most cases, presumed from the manner in which the force is applied, and it would certainly be true, generally speaking, that where the act was one to which the victim had consented the necessary intention would be absent, for in performing an act to which the victim has consented the relation between the parties is one of co-operation rather than of hostility.

However, the two lines of authority considered above do not always result in the same conclusion. Thus, to consider the case of professional boxing, if the attitude adopted in *Christopherson v. Bare* is followed the mere fact that each has consented to be hit by the other, within the limits allowed by the rules, implies that, in regard to blows within these limits, no assault is committed which is in need of justification, whereas, on the view that consent may negate the necessary *mens rea,* the same situation leads to the conclusion that the blows do constitute an assault which could be the foundation of a charge, unless justified in some way, for it is hardly possible to say that the consent of the parties in professional boxing has in any way affected the existence of a violent or hostile intent.

It does not seem possible at the moment, and in any case it is not necessary to our purpose, finally to decide between these two views as to the operation of consent, but it is submitted that we are justified in stating that, as a general proposition, the existence of consent is inconsistent with assault. This proposition, it should be noted, is not quite the same as that which seems to be implied in most textbooks when it is stated that, as a general rule, consent is a defence in assault. Most, if not all, textbooks seem to use the term 'defence' in the sense of justification, that is, the act constitutes an assault, but the consent justifies it. The proposition which we are submitting is not that consent justifies assault, but that, in general, its presence prevents the act from being an assault which needs justification.

This conclusion itself, however, raises difficulties, for most textbooks agree that, as was stated above, there are exceptions to the general rule that consent is a defence in assault, and our problem is therefore that of reconciling the existence of admitted exceptions with a general rule which, on the face of it, seems to allow little scope for any exceptions.

One exception which is sometimes suggested is that no one may

[51] *P.C.* i, Ch. 62, s. 2.

consent to the infliction on himself of an injury which constitutes a maim.[52] Such a proposition, at least in this context, is rather equivocal. It involves two distinct problems. First, whether, on indictment for maim, consent will be a defence. Second, whether, on a charge of assault, which has resulted in the infliction of an injury which in fact constitutes a maim, consent will operate as a defence.

As to the first it seems probable that where the prisoner is charged with maim consent will not in fact operate as a defence. Maim (or mayhem) was originally an offence which would support an appeal of felony, but became an indictable trespass during the thirteenth century,[53] and presumably is still a misdemeanour at common law, although its place seems very largely to have been taken by the various statutory aggravated assaults. The authorities relating to an indictment for maim are therefore few and far between, but such as there are suggest that consent is no defence in such cases. One case which is usually cited in this connection is *R. v. Wright*,[54] in which 'a young and lustie rogue' prevailed on a friend to cut off his left hand, that he might better be able to beg. Both were found guilty and the report in Coke makes it clear that the offence concerned was maim.

Sir James Stephen in his *Digest of the Criminal Law* mentioned, in this connection, the practice, at one time common in the British Army, whereby a soldier would prevail on a dentist to remove his front teeth so as to enable him to avoid rifle drill, which in those days involved biting the cartridge. Stephen expressed the view that this would be an offence at common law, but again it is quite clear that the offence of which he was thinking was maim.[55]

Although the authorities are rather scanty we may nevertheless conclude that on an indictment for maim consent of the person maimed is no defence.[56] Such a conclusion, however, does not justify the inference that on a charge of assault which results in the infliction of an injury which in fact constitutes a maim consent will be no defence. To argue in this fashion would be the same as arguing that,

[52] *E.g., Halsbury's Laws of England* (3rd ed. 1955) x, 285, 741, and *Russell on Crime* (10th ed. 1950) 760.

[53] Pollock & Maitland, *History of English Law* (2nd ed. 1898) ii, 489.

[54] Co. Litt. 127a; East *P.C.* i, 396; and Hale *P.C.* i, 412. This case was cited by Lord Denning in support of his argument in *Bravery v. Bravery*.

[55] This opinion, which was retained until the sixth edition (1904), in which it appears in footnote (2) on page 166, does not appear in the eighth edition, although it was cited by Lord Denning in support of his argument in *Bravery v. Bravery*. The view that Stephen must have been thinking of maim rather than assault is necessitated by the fact that in those editions in which this opinion is expressed the view is also advanced that a man may consent to the infliction upon himself of an injury not amounting to a maim (*op. cit.* (6th ed.), 165).

[56] This view would appear to be consistent with the historical basis of the law of maim. As Coke put it (Co. Litt. 127b), 'the life *and members* of every subject are under the safeguard and protection of the king . . .' (italics added).

if a surgeon who had induced an abortion without therapeutic justification was charged merely with assault, he could not rely on the patient's consent as a defence to the lesser charge because it would not have been a defence to the more serious offence.[57] Such an argument runs counter to decisions such as *R. v. Martin* and it is submitted cannot be sustained. There appear to be no authorities directly in point on this issue, but it is submitted, on general principle, that where the offence charged is that of assault consent is available as a defence even though consent would have been no defence had the charge been one of inflicting a maim.

We may conclude, therefore, that where the offence charged is that of inflicting a maim the consent of the party maimed will be no defence, but where the offence charged is assault then, even on the same fact situation, consent will operate as a defence, since as a general principle consent and assault are incompatible. We must now turn to consider the application of this conclusion to the problem of sterilization operations.

It follows, it is submitted, that where the surgeon is charged with assault he will be able to rely on the consent of his patient as a defence, unless some other exception to the general rule covers the case. This leaves the problem of the position that arises if he is charged with the infliction of a maim, and this in turn will depend upon whether sterilization amounts to a maim.[58]

The normally accepted definition of a maim is that it comprises any injury which results in a man being less able to defend himself.[59] What justification can there be for saying that a sterilization operation produces this result? There is admittedly the opinion of Hawkins to the effect that castration constituted a maim,[60] but there is all the world of difference between castration and vasectomy. In the first place, in maim it is necessary to establish that the injury is permanent, whereas in the case of vasectomy there is always the possibility of reversal—although this is admittedly a possibility which diminishes as the number of years from the operation increases. Secondly, the justification for holding castration to be a maim was presumably the diminished vigour and courage which was supposed to be a conse-

[57] I know of no case in which a charge of assault has been brought under these circumstances. There are, however, a large number of American cases in which civil actions for assault have been brought by consenting patients against surgeons who have performed abortions. Smith, *op. cit.*, 267-276.

[58] In the case of a surgical operation performed for therapeutic reasons, it may be presumed that, whatever the nature of the operation, it would not constitute a maim on the ground that even if it involved the removal of an arm or leg the patient would nevertheless be better able to defend himself after the operation than before it (otherwise the operation could hardly be said to be therapeutically justified). In the case of non-therapeutically justified operations, the possibility of an indictment for maim, assuming that the operation constituted a technical maim, remains.

[59] East *P.C.* i, 393; Hawkins *P.C.* i, Ch. 44, s. 1.

[60] *P.C.* i, Ch. 44, s. 3.

quence thereof. Although it cannot be said with complete certainty that vasectomy has no untoward psychological effects, they are certainly not those traditionally associated with the *castratii.*[61]

The same arguments appear to be valid in the case of salpingectomy (with the possibility of reversal a good deal lower than in the case of vasectomy), but if, as Dr Glanville Williams has stated, the law of maim historically had no application to women then presumably it is immaterial to discuss the nature of the operation in this context.[62]

We would therefore submit that there is no justification for the assumption that sterilization operations constitute a maim, from which it follows that the only offence with which a surgeon could be charged for performing such an operation would be that of assault to which consent will be a defence unless the case can be brought under one or other of the other so-called exceptions to the rule that consent is in general a defence to such a charge, it being submitted that the infliction of a maim does not constitute such an exception, and, further, that even if it did sterilization does not constitute a maim so as to bring it within such an exception.

Another so-called exception to the rule that consent is a defence in charges of assault which is often set out in the textbooks is that consent is no defence if the assault involves a breach of the peace.[63] Such a proposition raises many difficulties. In one sense all crimes are breaches of the peace, but clearly this is not what is meant by those who assert that consent is no defence where an assault is in breach of the peace. As Dr Glanville Williams has put it:[64] 'Every crime is a breach of the royal peace, but the notion of crimes involving a breach of *the* peace is a specific one.'

After pointing out that 'There is lack of an authoritative definition of what constitutes a breach of the peace' he further suggests, considering the matter from the point of view of jurisdiction to bind over to keep the peace or to be of good behaviour, that a crime is in breach of the peace if it 'involves some danger to the person'.[65] It is equally clear, however, that viewed from the problem of consent in assault this definition is too wide. It thus leads Dr Glanville Williams to the conclusion that:[66] 'A battery is clearly a breach of the peace, and so is an assault in the same sense of a threatened battery.'

Quite obviously therefore such a definition of a breach of the peace is too wide for the purpose of considering the problem of consent in assault, for on this view consent would never be a defence. It is sub-

[61] It appears that there is less danger of psychological complications in women than in men. Women may even experience an increase in libido, whereas men may suffer 'serious personality distortion'. Erikson, *Therapeutic Abortion* (1952) 57 ff.

[62] *The Sanctity of Life and the Criminal Law* (1958) 103.

[63] *E.g.*, Halsbury, *op. cit.*, x, 285; Russell, *op. cit.*, 760-761; Archbold, *Criminal Pleadings* (33rd ed. 1954) 996.

[64] *Criminal Law: The General Part* (1953) 561. [65] *Ibid.* [66] *Ibid.*, 560.

mitted that, as used in this context, breach of the peace is a term referring to what is sometimes known as 'breach of the *public* peace' and is thus concerned with such offences as riot, rout and unlawful assembly.

This interpretation is supported, it is submitted, by consideration of the cases usually cited in this connection. Most of these cases involve so-called prize-fights, *R. v. Coney*[67] being the leading authority. The actual point at issue in this case was whether the prisoners were accessories when their sole participation in the proceedings had been that of passive spectators. In holding that they were not accessories the court laid down the general principle that consent is no defence where a breach of the peace is involved. As Hawkins J. put it,[68]

> whatever may be the effect of consent in a suit between party and party, 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 debar a criminal prosecution.

A point which, it is submitted, must be remembered in this context is that for two persons to fight in a public place to the terror of Her Majesty's subjects constitutes the independent offence of affray, an offence which is in breach of the public peace and for which quite obviously the consent of the participants is no defence.[69] Furthermore assemblies gathered together for the purpose of a prize-fight can constitute unlawful assemblies which may easily turn into riots. These matters were decisive factors in many of the prize-fight cases decided before *R. v. Coney*, and indicate, it is submitted, the sense in which the term 'breach of the peace' is used in this context.[70] It does not follow, therefore, merely because on an indictment for affray or riot consent of the participants provides no defence, that if the charge is simply one of assault the consent will not provide an effective defence.

The true position, it is submitted, is that which appears in *R. v. Perkins*,[71] a prize-fight case in which the prisoners were indicted for riot and assault. The jury found them guilty of riot, but not guilty of assault on the ground that consent ruled out the possibility of a

[67] (1882) 8 Q.B.D. 534. [68] *Ibid.*, 553.

[69] *E.g.*, Kenny, *Outlines of Criminal Law* (17th ed. 1958) 390. In the fifteenth edition the view was expressed that 'an assault committed in a *public* place becomes an "affray".' (*op. cit.*, 175, n. 1). See also Halsbury, *op. cit.*, x, 584; Russell, *op. cit.*, 265; Archbold, *op. cit.*, 1308.

[70] *E.g.*, *R. v. Billingham* (1825) 2 C. & P. 234; *R. v. Hargrave* (1831) 5 C. & P. 170; *R. v. Brown* (1841) Car. & M. 314; *cf. R. v. Hunt* (1845) 1 Cox C.C. 177, in which Alderson B. expressed the view that an indictment for an assault would lie even though the prisoners were guilty of neither affray nor riot. It should be added that another factor operating in these cases was that prize-fights, in those days, were dangerous in that they involved the risk of death. *R. v. Perkins* (1831) 4 C. & P. 537, *cf. R. v. Young* (1866) 10 Cox C.C. 371, in which a distinction was drawn, in a case involving manslaughter, between prize-fights and sparring with gloves, and also *R. v. Orton* (1878) 14 Cox C.C. 226.

[71] *Supra*, n. 70.

conviction for assault. It must be admitted that it is difficult to reconcile all the cases on this point, for the judges have frequently indulged in unnecessarily wide *dicta*,[72] but the conclusion which nevertheless emerges is that breach of the public peace is an offence independent of assault for which consent is no defence, but this no more involves the conclusion that consent will be no defence where the offence charged is merely assault than does the conclusion that consent is no defence on an indictment for maim necessitate the view that consent is no defence where the only offence charged is assault.

This conclusion does little to support the claim that sterilization operations are illegal in the sense that consent will be no defence since whatever view be taken it can hardly be argued that sterilization operations amount to or have a tendency to create breaches of the peace.

Thus far all that we have established is that consent is probably no defence to an indictment for maim and that consent is no defence where a breach of the peace is concerned, but neither of these involves any exceptions to the proposition that consent and assault are incompatible. We have further tried to show that, on any view, sterilization operations amount to neither a maim nor a breach of the peace so as to bring them within the scope of either of these alleged exceptions, but so far we have discovered no case in which it can be said that consent is no defence to an assault as such. Most textbooks, however, add a third exception to the effect that there can be no consent to an assault which involves the infliction of bodily injury.[73] This exception rests almost entirely on the authority of *R. v. Donovan*,[74] in which a man of sadistic impulses arranged with a girl of seventeen that she would allow him to beat her. On being charged with assault he alleged that she had consented and contended that this was a sufficient defence. Since this decision is crucial in this context it must be considered in some detail.

The case came before the Court of Criminal Appeal on an appeal against conviction for indecent and common assault on the grounds of misdirection and that the verdict was unreasonable and against the weight of the evidence. The Chairman had ruled that the vital question was 'consent or no consent' ('If there is consent that is a complete answer'), but he did not direct the jury that the burden of proof was on the prosecutrix to negative consent. The argument of the Crown was that, since this burden would only be upon her if the

[72] *E.g., Matthews v. Ollerton* (1692) Comb. 218, *per curiam:* 'licence to beat me is void, because 'tis against the peace'; and *R. v. Lewis* (1844) 1 Car. & K. 419, 421, *per* Coleridge J.: 'no one is justified in striking another except it be in self-defence; and it ought to be known, that, whenever two persons go out to strike each other, and do so, each is guilty of an assault.'

[73] *E.g.*, Halsbury, *op. cit.*, x, 286; Russell, *op. cit.*, 760; Archbold, *op. cit.*, 996.

[74] [1934] 2 K.B. 498.

case was one in which consent would be a defence, and since in this case consent would not have been a defence, the verdict should stand.

Swift J., delivering the judgment of the court, stated the law as follows:[75]

> As a general rule, although it is a rule to which there are well established exceptions, it is unlawful to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial. We are aware that the existence of this rule has not always been clearly recognized.

On the question of fact, as to whether the prosecutrix had consented or not, his Lordship stated:[76]

> We have no doubt that the facts proved in the present case were such that the jury might reasonably have found consent; it is, indeed, difficult to reconcile some of the admitted facts with absence of consent.

With regard to the nature of the blows which had been inflicted his Lordship added:[77]

> Always supposing, therefore, that the blows which he struck were likely or intended to do bodily harm, we are of opinion that he was doing an unlawful act, no evidence having been given of facts which would bring the case within any of the exceptions to the general rule.

On the ground, therefore, that the direction to the jury should have been to the effect that consent was only a relevant issue if the blows struck were not likely or intended to do bodily harm, the conviction was quashed and the appeal allowed.

It seems clear that the court was influenced by the circumstances in which the blows were inflicted:[78]

> Nothing could be more absurd or more repellent to the ordinary intelligence than to regard his [the prisoner's] conduct as comparable with that of a participant in one of those 'manly diversions' of which Sir Michael Foster wrote.

From many points of view we cannot but agree that there is all the world of difference between 'manly diversions' and conduct whereby a man relieves an abnormal sexual passion. On the other hand, however, viewed from the point of view of the assault actually inflicted the difference seems very slight. The risk of serious injury in a case such as *R. v. Donovan* is a good deal less than that encountered in modern professional boxing despite the use of gloves and the Marquis of Queensberry rules.

The decision has not escaped criticism. Dr Glanville Williams, pointing out that at least part of the argument used in the judgment is tautologous, states:[79] 'Cases in which the moral indignation of the

[75] *Ibid.*, 507. [76] *Ibid.*, 504. [77] *Ibid.*, 509. [78] *Ibid.*
[79] *The Sanctity of Life and the Criminal Law* (1958) 105.

judge is aroused frequently make bad law. Donovan's case is an example.'

The learned editor of Stephen's *Digest of the Criminal Law* states, in a footnote to Article 311 :[80]

> The original article was stated in *R. v. Donovan* . . . to be no longer law, but it is submitted that the formulation of the law taken from that case leaves the matter in a vague and unsatisfactory condition.

Whether unsatisfactory or not the decision is very germane to our subject, for whatever else may be said about sterilization operations it is clear that they involve the infliction of bodily injury,[81] and on the face of it, therefore, such operations might seem to be included within the scope of the decision, that is to say, involve acts to which consent cannot be given. Our problem is that of determining the exact limits of the application of the decision in *R. v. Donovan*. It is quite clear that to say that any assault which results in the infliction of bodily harm is an assault for which consent is no defence is to state the *ratio* of *R. v. Donovan* too widely, for there are a number of well established cases in which consent will be a defence even though bodily harm is inflicted, as was admitted by Swift J. Thus in many sporting activities serious bodily harm will frequently result, yet no conviction for assault is obtainable in such cases.[82] We are not, of course, suggesting that sterilization operations come under the heading of sporting activities; it is rather that the existence of such exceptions raises the problem of determining the basis upon which they rest. Consideration of this problem will enable us to see whether the basis of these exceptions can be said to comprehend sterilization operations as well as rugby football.

According to most authorities the exceptions are cases in which the infliction of bodily harm is 'justified'.[83] The assumption seems to be that two professional boxers pounding each other into a state of insensibility are justified, whereas the prisoner in *R. v. Donovan* was not justified. The adoption of such a criterion does not of course solve the problem; it merely raises the further problem of determining what is meant by the term 'justified', and more particularly, whether the infliction of bodily harm in a sterilization operation must be regarded as unjustifiable. This is a highly subjective matter, and we can only attempt here briefly to indicate our reasons for respectfully dissenting from Lord Denning's opinion that 'such operations are plainly injurious to the public interest.'

If we consider the case of contraceptive sterilization, we may note

[80] (9th ed. 1950) 258, n. 9. [81] *E.g., R. v. Cox* (1818) Russ. & Ry. 362.
[82] *E.g.*, Archbold, *op. cit.*, 997; Russell, *op. cit.*, 762.
[83] The term is that used by Russell, *op. cit.*, 729. In *Bravery v. Bravery* Lord Denning employed the phrase 'just cause'.

that the courts have held no other form of contraception to be contrary to the public interest, and indeed the use of contraception and family planning is regarded by many as positively in the public interest. On what ground, therefore, is contraceptive sterilization regarded as contrary to the public interest and unjustifiable? The only possible ground upon which sterilization can be distinguished from other forms of contraception appears to be the suggestion that sterilization does not allow of a change of mind. This, it is submitted, cannot be taken as a sufficient criterion of distinction. In the first place, the possibility of reversing a vasectomy always remains, although admittedly the chances of success diminish as the years pass. In the second place there is at least some evidence to support the view that the extensive use of mechanical contraception in early married life produces involuntary secondary sterility subsequently.[84] Further, since the fertility of women of child-bearing age varies inversely with age, the use of any form of contraception in early married life diminishes the possibility of conception later. The idea, therefore, that the possibility of a change of mind is excluded only by sterilization appears in fact to have little foundation. This being so there seems to be no reason for distinguishing between the various forms of contraception and holding that one form is unjustified. It seems therefore to follow that there is no reason to suppose that sterilization operations would fall within the rule in *R. v. Donovan* on the ground that the infliction of harm is not unjustified.[85]

Summing up the results of our enquiry so far we may say that it seems to show that the legality of voluntary sterilization operations depends upon whether the consent of the patient is a sufficient defence to the surgeon, and we have submitted as a general proposition that consent is inconsistent with assault. Of the three exceptions to this rule normally enunciated in the textbooks, we have endeavoured to show that the alleged exception in the case of assaults resulting in the infliction of a maim is of doubtful validity; that the exception where the assault is in breach of the peace is equally doubtful, and that in either case, assuming both to be real exceptions, sterilization would not come within their scope. The third exception is one which rests upon very slender authority—a single decision of the Court of Criminal Appeal unsupported by any previous authority —and, although over twenty years old, it appears to have been fol-

[84] Gyllensward, 'The Incidence of Involuntary Marital Childlessness' (1954) 43 *Acta Paediatrica* 358.

[85] It may perhaps be added that a distinction can be drawn between the *R. v. Donovan* situation and voluntary sterilization, based on the view that in the former the presence of consent does not affect the nature of the blows inflicted to the same extent as it does in the case of a sterilization operation.

lowed once only, and that in an unreported case.[86] Even admitting the existence of this exception, however, it has been suggested that sterilization operations would not fall within its scope.

We therefore conclude that, in the present state of the law, the case for the illegality of sterilization operations has not been established. It is, however, submitted that the better view is that a voluntary sterilization operation will be completely justified, so far as the surgeon is concerned, by the consent of the patient.

II

We now turn to consider the second aspect of Lord Denning's opinion in *Bravery v. Bravery,* namely, the implications of a sterilization operation in the field of matrimonial law, and we may first note the effect of such an operation as regards decrees for nullity. The only circumstances in which the performance of such an operation could be relevant in such a context would be those in which it was alleged that the performance of the operation had rendered the consummation of the marriage impossible and in which a decree of nullity was claimed on the ground of non-consummation or wilful refusal to consummate. It is quite clear, however, that no such claim could be sustained. Two earlier conflicting decisions *J v. J*[87] and *L v. L*[88] were considered by the House of Lords in *Baxter v. Baxter,*[89] in which the law was settled that consummation does not in any way depend upon the possibility of procreation, but simply on the ability to effect *vera copula,* the possibility of which is in no way affected by any of the sterilization operations with which we are concerned here.

We therefore turn to the problem of divorce, and must consider the two grounds which are *prima facie* relevant to our purpose, namely, desertion and cruelty. As regards desertion we must distinguish between actual and constructive desertion. As to the former there is little that need be said here. The House of Lords in *Weatherly v. Weatherly*[90] decided that a refusal of normal sexual intercourse did not constitute desertion, and *a fortiori* it is hardly likely that a mere refusal to procreate would be held to constitute desertion.[91]

[86] *R. v. Lawson* (1936), referred to in Archbold, *op. cit.,* 996.

[87] [1947] 2 All E.R. 43, a case in which the husband was sterilized before marriage and in which, following *Cowen v. Cowen* [1946] P. 36; [1945] 2 All E.R. 197, a decree of nullity was granted.

[88] (1922) 38 T.L.R. 697, a case in which a woman had undergone sterilization before marriage and in which a decree of nullity was refused.

[89] [1948] A.C. 274. It should be noted that in *Bravery v. Bravery* Lord Denning, observing that *J v. J* was the only reported case in which the husband had had himself sterilized, noted the decision therein with approval, but made no mention of the fact that it had been expressly overruled by the House of Lords in *Baxter v. Baxter.*

[90] [1947] A.C. 628.

[91] In *White v. White* [1948] P. 330 Willmer J. put forward the view that *Rice v. Raynold-Spring-Rice* (1948) 64 T.L.R. 119 decided that *coitus interruptus,* if practised

As to constructive desertion, our problem is essentially that of deciding whether submission to such an operation by one spouse constitutes conduct of sufficiently grave and convincing a character to justify the conclusion that it is equivalent to driving the other spouse away. It is important to note, however, that in cases of constructive desertion it must be established that the offending spouse intended to bring the matrimonial cohabitation to an end. In the words of Lord Greene M.R. in *Buchler v. Buchler*:[92]

> In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to 'driving the other spouse away' . . . from the matrimonial home and to have done so with the intention of bringing the matrimonial *consortium* to an end.

It must further be noted that in establishing the existence of this intention reliance may be placed on the presumption that a man intends the natural and probable consequences of his acts, although the presumption is not irrebuttable.[93] There are therefore two quite distinct problems. The first is whether, assuming the necessary intention to exist, resort to such an operation is equivalent to 'driving the other spouse away', and the second, whether in establishing the existence of the necessary intention it could be said that the natural and probable consequences of either spouse resorting to such an operation would be that the other would leave the matrimonial home, so that the necessary intent could be presumed from the mere fact that the operation had been performed, unless there was evidence in rebuttal.

The difficulties in determining, in regard to any specific type of conduct which has not yet been before the courts, whether it will amount to constructive desertion are notorious. The earlier authorities provide little guidance and no prognostication attempted here would have much value. The only point that may be worth making is that it appears not unreasonable to suggest that a distinction should be drawn between those cases in which the complaining spouse has consented to the operation and those in which he or she has not done so. Whatever may be the position in the case in which the complaining spouse has not consented to the performance of the operation, we would submit that where he or she has so consented he or she could not subsequently rely on the performance of the operation as an act of constructive desertion. We would justify this submission by reference to the argument that where the consent of the other spouse has been obtained it is difficult to see how the act could be said to be one which was intended to bring the matrimonial

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by one party against the will of the other, would constitute a good defence to a claim based on desertion. See, however, Jackson, *The Formation and Annulment of Marriage* (1951) 218-219.

[92] [1947] P. 25.

[93] *Lang v. Lang* [1955] A.C. 402.

cohabitation to an end. Where, however, consent has not been obtained, it does not appear unreasonable to suggest that submission to such an operation might well be considered to be an act of constructive desertion, but this is an opinion for which there is no authority.

We turn, therefore, to consider the case of cruelty, and here we must distinguish at the very outset between those cases in which the petitioning spouse consented to the performance of the operation and those in which he or she did not so consent. It seems clear, where the petitioning spouse has not consented to the performance of the operation, that it may well amount to cruelty. This was the opinion of the Court of Appeal in *Bravery v. Bravery*, and with respect it is submitted that it is in harmony with the modern concept of matrimonial cruelty.

It has thus been recognized for some years now that insistence on the use of contraceptives or on *coitus interruptus* can constitute cruelty. This appears first to have been suggested in *White v. White*,[94] a suggestion which has frequently been acted upon since.[95] In these cases the injury to the petitioner's health derives from frustration of the desire to have children. This is precisely the situation which arises where a sterilization operation has been performed without the consent of the petitioner, and therefore on principle it is submitted that for one spouse to submit to a sterilization operation without the consent of the other will, where as a result the petitioner's health suffers, constitute an act of cruelty.[95a]

This leaves the case in which the petitioner has consented to the performance of the act but subsequently wishes to rely on the operation as an act of cruelty. It was the opinion of Lord Denning in *Bravery v. Bravery* that a consenting spouse could subsequently rely on the operation as an act of cruelty when his or her health in fact suffered, and it is this opinion which we wish to consider.

At first sight it is a little startling to contemplate the possibility that an act to which the petitioner has consented can be relied upon subsequently as constituting cruelty, Rayden states quite categorically:[96]

> To constitute cruelty it is necessary that the act should be done against the will of the party complaining, and in consequence consent is a good defence.

[94] (1948) 64 T.L.R. 332.

[95] *E.g.*, *Walsham v. Walsham* [1949] P. 350; *Cackett v. Cackett* [1950] P. 253; *Knott v. Knott* [1955] P. 249; *cf. Fowler v. Fowler* [1952] 2 T.L.R. 143.

[95a] 'If a wife deliberately and consistently refuses to satisfy this natural and legitimate craving, and the deprivation reduces the husband to despair, and affects his mental health, I entertain no doubt that she is guilty of mental cruelty within the definition on which this court always acts.' *Forbes v. Forbes* [1956] P. 16, 23, *per* Mr Commissioner Latey Q.C.

[96] *Divorce* (5th ed. 1949) 86.

This was certainly the view of the court in *Statham v. Statham*,[97] in which a wife petitioned for divorce on the ground of cruelty, alleging that her husband had forced her to submit to an act of sodomy. The court found that the wife had in fact consented to the act, and therefore held that it could not constitute an act of cruelty. In the words of Russell L.J.,[98]

> In these circumstances it is impossible for her to obtain a decree for divorce based solely upon an act of the husband to which she was a consenting party.

In the opinion of Greer L.J. in the same case,[99]

> It seems to me impossible to say that where two people commit sodomy together, either of them is entitled to ask the Court for a decree based on an act to which he or she was a party.

This decision is of particular significance in this context since Lord Denning based his argument in *Bravery v. Bravery* upon the analogy of the criminal law and argued that, just as there were cases in the criminal law in which consent would be no defence, so in the matrimonial law there were cases in which consent could not operate as a defence. In *Statham v. Statham* the act alleged was sodomy, to which consent is no defence in the criminal courts, yet it was held that the wife's consent precluded her from relying upon this act for the purposes of matrimonial relief.[1]

Another group of cases which also appear to run counter to Lord Denning's opinion are the cases mentioned above, in which it has been held that insistence on contraception or *coitus interruptus* may constitute cruelty. In all these cases the courts have been to great pains to establish that the resort to these practices did not meet with the consent of the petitioner. There is certainly no suggestion in any of these cases that decrees would have been granted if the petitioner had been found to have consented to the practice. These cases are again of some significance since the basis of cruelty alleged, namely, that of frustration of the desire to have children, is the same as that resulting from sterilization.

However, the decision in *Statham v. Statham* and the cases involving *coitus interruptus* hardly constitute decisive authorities against Lord Denning's view that sterilization may amount to cruelty despite consent, but they seem to justify a more detailed examination of the whole problem of consent in matrimonial cruelty.

Consent operates, within the field of matrimonial cruelty, in two distinct ways. First, there is that consent which is given prior to the

[97] [1929] P. 131. [98] *Ibid.*, 156. [99] *Ibid.*, 145.

[1] *Cf. Lawson v. Lawson* [1955] 1 All E.R. 341 and *D.B. v. W.B.* [1935] P. 80, both of which turn on the issue of corroboration and do not affect the principle relating to consent.

act in question; second, there is the consent which is given after the act which is alleged to be cruel. The latter problem is related to and involves the question of condonation, whereas the problem of consent properly so called is confined to those cases in which the consent precedes the act. It is with this case that we are concerned here, and it is submitted that the operation of this type of consent is closely bound up with the question whether, in such cases, there is any necessity for an intention to injure.

If an intention to injure is a necessary ingredient of matrimonial cruelty, then it is difficult to see how an act to which consent has been given could be held sufficient to sustain a charge of cruelty: the obtaining of consent would, surely, rule out the possibility that the necessary intention existed. If, on the other hand, there is no such requirement of intention in matrimonial cruelty, then the possible effect of consent in such cases seems to be a good deal less. Indeed we would go so far as to submit that the operation of consent, in this field, is dependent upon its effect in negativing intention, and therefore the question as to whether an intention to injure is a necessary ingredient of matrimonial cruelty is crucial for our purpose. Unfortunately, this is a matter of very considerable complexity, and the decided cases reveal the greatest possible confusion. In *Astle v. Astle*,[2] Henn Collins J. expressed his opinion thus:[3] 'in my judgment intention or malignity is an essential ingredient in cruelty.'

On the other hand, in *Hadden v. Hadden*,[4] Sharman J., in a much quoted passage, said:[5] 'I do not doubt he had no intention of being cruel but his intentional acts amounted to cruelty.'

Alongside these two conflicting opinions we may put the view of Lord Merriman P. as to the state of the authorities. In *Waters v. Waters*[6] his Lordship stated:[7]

> I am not going to attempt the task, which I think would be difficult, if not impossible, of reconciling all the recent cases in the Court of Appeal on these topics, or of reconciling some of them with some of the older cases.

Bearing in mind, therefore, the confused state of the authorities we must refer to the recent examination of this problem undertaken by Sir Carleton Allen, who has concluded:[8]

> It now seems to be well established that a specific 'intent to injure',

[2] [1939] P. 415. [3] *Ibid.*, 420. [4] *'The Times'*, 5 Dec. 1919, 5, col. 3.
[5] Cited by Tucker L.J. in *Squire v. Squire* [1949] P. 57, 57.
[6] [1956] P. 344. [7] *Ibid.*, 355.
[8] 'Matrimonial Cruelty—II' (1957) 73 *Law Quarterly Review* 512, 524. Sir Carleton Allen formulates this problem (*ibid.*, 523) as follows: 'In its simplest terms, the problem is this: Is cruelty established when injury is the natural and probable consequence, as he or she must have known as a reasonable creature, of the respondent's proved acts; or is it necessary to prove, in addition to reasonable foreknowledge, an actual intention to injure?'

> though we still hear echoes of it from time to time, is not essential to matrimonial cruelty.

With great respect we would submit that the problem is rather more complex than Sir Carleton Allen's analysis suggests.

If in fact there is no specific intent to injure as an ingredient of matrimonial cruelty, then, on the face of it, any act by the husband which in fact causes injury to his wife's health would be cruelty irrespective of the husband's intention. Such a proposition, however, was expressly denied by the House of Lords in *Jamieson v. Jamieson,*[9] and we may therefore conclude that in addition to an act by the husband with consequent injury to the wife's health there must be some additional element before the act can be considered cruel. In our submission this additional element is an element of culpability on the part of the husband in relation to the suffering of his wife.[10] It may be that this element is not adequately described by the term intention—that is a matter which will be discussed later—but for the present it is sufficient for our purpose to conclude that the decision in *Jamieson v. Jamieson* necessitates the view that there is a mental element in cruelty in addition to injury to the wife's health or reasonable apprehension of such injury.

A second factor which, we would submit, suggests that such a mental element (which is usually described as intention) is essential in cruelty cases turns upon the decision of the Judicial Committee of the Privy Council in *Lang v. Lang,*[11] a decision upon which Sir Carleton Allen relies to a considerable extent. This was a case which came before the Judicial Committee on appeal from New South Wales on a point of constructive desertion. The point taken was whether the presumption that a man intends the natural and probable consequences of his acts is rebuttable in such cases or not. The view taken by the Judicial Committee was that the presumption was rebuttable:[12]

> *Prima facie,* a man who treats his wife with gross brutality may be presumed to intend the consequences of his acts. Such an inference may indeed be rebutted, but if the only evidence is of continuous cruelty and no rebutting evidence is given, the natural and almost inevitable inference is that the husband intended to drive out the wife. The court is at least entitled and, indeed, driven to such an inference unless convincing evidence to the contrary is adduced. In their Lordships' opinion

[9] [1952] A.C. 525, 541, *per* Lord Merriman. The actual point which his Lordship was discussing was the Lord President's view that the application of the presumption would lead to the conclusion that any conduct which caused injury to health would amount to cruelty and it was this view that Lord Merriman rejected, but the rejection is equally applicable to the view discussed above. Although we refer only to the husband, for the sake of simplicity, the same principles apply of course in the case of cruelty by the wife.

[10] Thus in *Swan v. Swan* [1953] P. 258, 263 Hodson L.J. stated: 'The word "cruel" carries with it implications of guilt.'

[11] [1955] A.C. 402.

[12] *Ibid.,* 428.

> this is the proper approach to the problem, and it must therefore be determined whether the natural inference has been rebutted in the present case.

It is a point of some significance that the decision in *Lang v. Lang* has been followed by Lord Merriman P. in cases turning upon cruelty in addition to cases turning upon constructive desertion. Thus in *Waters v. Waters* his Lordship stated:[13]

> although these observations were directed to cases of constructive desertion I know of no reason why precisely the same considerations should not be applied to mental cruelty. If a reasonable man (if I may paraphrase) would know—and this husband did know—that continuance in the course of conduct complained of would have an injurious effect on his wife's mental health, what more is necessary?

The significance of such a decision lies in the fact that, as already emphasized, it is undisputed that in cases of constructive desertion proof of an intention to end the matrimonial cohabitation is necessary. Now, in cases in which it is necessary to prove such a specific intent, arguments about the application of the presumption that a man intends the natural and probable consequences of his acts are understandable, but it is difficult to see just what the relevance of such a presumption would be in cases of cruelty if it were not necessary to prove some specific intention. The application of the presumption is a matter which goes to the manner in which intention is proved: where it is unnecessary to prove any intention then obviously the presumption can have no application. We would therefore submit that decisions to the effect that such a presumption applies in cases of cruelty support, by necessary implication, the proposition that in cases of cruelty it is necessary to establish an intention of some kind.

Assuming, therefore, that we are correct in supposing that in cruelty cases it is necessary to establish intention of some kind, or at the very least some sort of mental attitude connoting culpability on the part of the husband, we must turn to consider possible ways in which this requirement can be formulated.

In *Jamieson v. Jamieson* the Lord President (Lord Cooper) laid down such a formulation which was approved by Lord Normand in the House of Lords and which was as follows:[14]

> where the cruelty is of the type conveniently described as 'mental cruelty', the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim.

This test was spoken of with approval by Lord Merriman P. in *Waters v. Waters,* in which, after discussing the application of the presump-

[13] [1956] P. 344, 361. See also the observation of Lord Merriman P. in *Simpson v. Simpson* [1951] P. 320, 333.

[14] [1951] S.C. 286, 294; quoted by Lord Normand, [1952] A.C. 525, 535.

tion that a man intends the natural and probable consequences of his acts, his Lordship added:[15] 'In what does that differ from the test which Lord Normand adopted in *Jamieson v. Jamieson* . . . ? It seems to me that essentially the two phrases convey the same idea.'

In our submission the position is adequately summed up by Hodson L.J. in *Warburton v. Warburton*,[16] in which his Lordship stated:[17]

> As I understand the law, there must be at least some evidence in considering cruelty either of an intention to injure the other spouse or of facts from which an intention can be inferred.

In *Fowler v. Fowler*[18] his Lordship put the position as follows:[19]

> I would begin by drawing attention to the obvious fact that in considering cruelty some actions are, on the face of them, cruel, and some are not. The word 'cruel' itself, in its ordinary meaning, seems to me to imply the notion of malignity, but it is not necessary to prove affirmatively an intention to be cruel if the acts themselves readily allow that inference to be drawn; that is to say, when acts are, on the face of them, cruel and quite obviously directed by one person to another with the object of inflicting injury. When acts are not such as to render that inference readily to be drawn, the Court will look to see whether there is an intention to injure, and I think that that view is strongly supported by what the House decided in *Jamieson v. Jamieson.*

Although, not perhaps surprisingly, the courts have varied in the terminology employed in their attempts to formulate the position in cases of cruelty, it is submitted that the position may be summed up by saying that there must be proof either of a positive intention to injure or of acts of such a nature that the necessary intention will be presumed by the application of the presumption that a man intends the natural and probable consequences of his acts, unless there is further evidence rebutting the presumption.

It seems not unlikely, as the courts have frequently emphasized, that in many cases of cruelty the husband's mental attitude will be one of indifference rather than one of positive intention. In such cases one can argue either that the necessary intention will be presumed on proof of facts justifying the application of the presumption, and on the absence of any evidence in rebuttal, or alternatively say, with Lord Normand in *Jamieson v. Jamieson,* that it will be sufficient to establish facts justifying the inference that the husband was reckless as regards the effect of his conduct on his wife's health. As Lord Merriman P. pointed out in *Waters v. Waters,* these are really only two ways of saying the same thing.

Thus consideration of the numerous cases in recent years in which this problem has been discussed leads to the conclusion that much

[15] [1956] P. 344, 361-362.
[16] '*The Times*', 10 July 1953.
[17] Quoted in *Cooper v. Cooper (No. 1)* [1954] 3 All E.R. 415, 422, *per* Karminski J.
[18] [1952] 2 T.L.R. 143.
[19] *Ibid.*, 145.

of the controversy is in fact purely verbal, turning upon nothing more than the use of the term 'intention'. Upon the use of this term there would appear to be two 'schools of thought'.[20] One view is that to say that there must be an intention to injure implies that the wife must establish directly that her husband intended to injure her, and, since it is quite clear that there is no such necessity, those who adhere to this view deny that there is therefore any necessity to establish an intention to injure in cases of matrimonial cruelty. The other view is that the phrase 'intention to injure' implies not only an intention which is proved to exist in fact, but also an intention which is presumed to exist by virtue of the application of the presumption that a man intends the natural and probable consequences of his acts, although such an intention may not exist in fact.

The choice between these two uses of the term 'intention' is not a matter of the first magnitude, provided only that whichever is adopted is used consistently. It may be noted, however, that in constructive desertion the wider use of the term 'intention' has never been questioned. Thus the proposition that in such cases it is necessary to prove an intention to end the matrimonial cohabitation is as well established as the proposition that this intention may be presumed from an application of the presumption of intention of natural and probable consequences. Since the problem of cruelty is so closely linked with that of constructive desertion, and since, as Lord Merriman P. emphasized in *Waters v. Waters,* the position, on this point, in both cases, is essentially the same it would seem desirable to use the term 'intention' in the same sense in both cases.

However, the question of the use of the term 'intention' is not a matter which directly concerns us here. It is sufficient for our purpose to state, as it is submitted we are able to do, that in cases of matrimonial cruelty there must be proof either of an intention to injure or of facts from which such an intention can be inferred. It would seem to follow from this conclusion that prior consent will operate to prevent the act to which consent has been given from constituting cruelty. Under what circumstances could it be said that a husband, doing an act to which his wife had consented, has either an intention to injure her, or is being reckless as to the consequences of his conduct to her health?[21] Even if the act were one which might seem on the face of it to be a cruel act, the fact that the wife had consented would

[20] The phrase that is used by Lord Denning in *Hosegood v. Hosegood* (1950) 66 T.L.R. 735 relating to the interpretations of the effect of the application of the presumption that a man intends the natural and probable consequences of his acts in constructive desertion. *Cf.* the view of Lord Merriman P. in *Simpson v. Simpson* [1951] P. 320, 332.

[21] It should be emphasized that the consent of the other party must be a genuine consent, in the same way that the consent of the person undergoing an operation must be genuine to prevent the operation from becoming unlawful.

surely be sufficient to rebut the presumption of the intention of natural and probable consequences. In so far, therefore, as consent rules out the possibility of the necessary intention or recklessness we would submit that, whatever the act, the fact that it has been consented to rules out the possibility of the act constituting cruelty for matrimonial purposes.

Applying this conclusion to the case of voluntary sterilization operations, we would submit that if either spouse consents to the other's undergoing such an operation then he or she cannot subsequently rely on that act as cruelty, on the ground that the prior consent, by negativing the necessary mental element, prevents the act from constituting an act of cruelty.

We would therefore sum up this part of our discussion by concluding that submission by one spouse to a sterilization operation without the consent of the other will be an act of cruelty if as a consequence the health of the other spouse suffers, but that submission to such an operation cannot be considered as cruelty if the petitioner has consented to its performance.

In conclusion we must emphasize that we have far from exhausted the legal implications of sterilization operations, and we may perhaps be permitted to observe that the state of uncertainty as to the law applicable to such operations is particularly unfortunate in that it has an inhibiting effect on surgeons who will, not unnaturally, be reluctant to perform such operations save on purely therapeutic grounds, thus ruling out even voluntary eugenic sterilization. The problems facing the medical profession are difficult enough without uncertainty as to the law making their task even more difficult.