Assault, battery and indirect violence

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Table of Contents

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Crim. L.R. 557 The absence of any Offences Against the Person Bill from the Government's current legislative programme keeps alive a question which has aroused conflicting opinions for over a hundred years. Must a battery involve the direct application of unlawful force upon the victim? To put it another way, must it involve an attack upon the victim, or at least some physical molestation of the victim by the offender? Or can indirect measures, such as the setting of a booby trap, also lead to the infliction of a battery?

Most commentators, including the authors of almost all those textbooks which discuss the point, conclude that a battery does not in fact require any direct application of force. [1] The authorities most frequently cited in support of this view are *Clarence,* [2] *Martin* [3] and *DPP v. K,* [4] but I would submit that *Clarence* and *Martin* are of no real authority on this issue; that *K* was decided in error; and that the House of Lords has (albeit by implication) defined a battery as a direct physical attack on the victim.

Clarence and *Martin*

The facts of *Clarence* are well known, and have little to do with our question. Stephen J., however, opined in that case that D would be guilty of battery if he were to set a trap into which V fell. Stephen J.'s judgment was supported by several members of the court, but his reference to a trap was manifestly *obiter.* As for *Martin,* this merely decided that M was guilty of inflicting grievous bodily harm, contrary to section 20 of the 1861 Act, when he turned out the lights in a theatre and barred the exits, causing a crush in which several persons were badly injured. There is no reference to assault or battery, which is understandable, because M did not attack anybody. [5] It is sometimes argued that such a reference must be implied, ***Crim. L.R. 558*** on the basis that Nineteenth Century judges would have assumed that any section 20 offence involved battery, [6] but this is unconvincing, since the judges in *Clarence* were divided on that very issue. [7]

DPP v. K

K poured acid into a hot-air drier in his school toilets, and the next pupil to use the machine was sprayed with the acid and burned. A Divisional Court held that K had subjected his victim to a battery under section 47 of the 1861 Act, "Just as truly … as if he had himself switched the machine on", [8] but this conclusion was reached without regard to the authorities. It seems,

moreover, that K originally poured the acid into the drier in order to conceal his theft of it, and that his crime arose from his subsequent failure to rectify the dangerous situation he had created, making it a crime not just of indirect violence, but of omission. This makes the decision doubly problematic, as we shall see.

Salisbury and *Wilson*

The first problem with *K* is that the relationship between a battery and the infliction of grievous bodily harm had previously been considered by the House of Lords in *Wilson,* [9] a precedent which was never cited in *K*. The issue in *Wilson* was whether a conviction for assault occasioning actual bodily harm could be imposed on an indictment alleging only the infliction of grievous bodily harm. That question was answered in the affirmative, but Lord Roskill, who delivered the unanimous opinion of the House, did not reach this conclusion by equating infliction with assault. On the contrary, he endorsed the following *dictum* of the Supreme Court of Victoria in *Salisbury* [10] :

"Although the word, "inflicts' … does not have as wide a meaning as the word, "causes' … [it] does have a wider meaning than it would have if it were construed so that inflicting grievous bodily harm always involved assaulting the victim … Grievous bodily harm may be inflicted … either where the accused has directly and violently inflicted it by assaulting the victim, or where the accused has inflicted it by doing something … which though it is not itself a direct application of force … does directly result in force being applied violently to the body of the victim …"

Whilst not a model of clarity, this passage implicitly asserts that the indirect infliction of violence cannot involve assault or battery. Lord Roskill's subsequent analysis of *Martin* and *Clarence* confirms that this was his view, although he went on to hold that an indictment alleging a section 20 offence might still *by implication* include an allegation of assault under section 47.

Was *K* therefore decided *per incuriam* ? This depends on how one construes the *ratio* of *Wilson*; but in my submission Lord Roskill's endorsement of the passage from *Salisbury* was central to his reasoning, and it was this that led him to the ***Crim. L.R. 559*** conclusion that a section 47 offence was only impliedly included in a charge laid under section 20. My answer to the above question would accordingly be, "Yes". In any event, one must have regard to the endorsement of *Wilson* in later House of Lords cases.

Savage and *Ireland*

In *Savage,* [11] Lord Ackner, delivering the opinion of the House of Lords, cited *Wilson* with evident approval,

"Lord Roskill in *Wilson* was content to accept that there can be an infliction of grievous bodily harm … without an assault being committed. For example, [it] could be committed by creating panic. Another example provided to your Lordships … was interfering with the breaking mechanism of a car, so as to cause the driver to be involved in an accident …"

Lord Ackner went on to reject an argument calling for the overruling of *Wilson.*

Salisbury and *Wilson* were also examined by the House of Lords in *Ireland,* where Lord Steyn considered them to be, "neutral in respect of the issue as to the meaning of "inflict' …". [12] He went on to re-define the concept of inflicting in terms little different from those applicable to "causing" under section 18 of the Act; but at no point did he re-define the concept of battery. Faced with the suggestion that battery might be committed over the telephone, he replied that it was "not feasible to enlarge the generally accepted meaning of a battery" so as to include calls which cause psychiatric injury. [13] Lord Hope was more explicit: the appellant "plainly" could not have committed a battery over the telephone because, "at no time was there any kind of physical contact between [him] and his victims". [14]

Whilst recognising that assault could be committed over the telephone, their Lordships were each content to define it as conduct giving rise to the apprehension of imminent unlawful violence. Their illustrations all involved threats of direct physical attack. At no point did they suggest that an assault might involve the threat of any indirect "battery".

Fagan

In contrast to *Wilson, DPP v. K* has rarely been cited judicially, except for the purpose of rejecting its assumption that *Caldwell* recklessness might be relevant in cases of assault. [15] There is also the problem of *Fagan v. M.P.C.,* [16] which should have been

binding on the court in *K,* but was ignored. *Fagan* decides that a battery must be committed by a positive act, accompanied by the requisite *mens rea,* whereas K was convicted on the basis that he had omitted to rectify a dangerous situation which he had originally created without *mens rea.* Here again, the decision in *K* may be considered erroneous.

***Crim. L.R. 560** **A ready-made solution**

If the arguments put forward here are correct, the law governing offences against the person is even more deficient than we have generally supposed it to be. Deadly traps, or traps which cause serious injury, may give rise to criminal liability, [17] but those which cause less serious injuries must go unpunished. Enactment of the Draft Offences Against the Person Bill [18] would largely resolve the problem, however. Clause 3 of the Bill would replace section 47 of the 1861 Act with an offence of "intentionally or recklessly causing injury". Clause 4 would create a new offence of assault, embracing any conduct which intentionally or recklessly "causes an impact on the body of another" or gives rise to fear of imminent impact. [19] Until these proposals become law, however, we must live with the idiosyncrasies of the old law.

Footnotes

1 See for example *Smith & Hogan on Criminal Law* (8th ed.) at p.417; *Ashworth* (2nd ed.) at p.316; *Card, Cross & Jones* (14th ed.) at p.146; *Wilson* at p.327; *Allen* (4th ed.) at p.300; *Bloy & Parry* (3rd ed.) at p.369. In contrast, *Clarkson & Keating* (4th ed.) at pp.587-588 adopt a relatively non-committal stance. *Archbold* 1999 and Carter & Harrison, *Offences of Violence* (2nd ed.) do not really address the issue. A dissenting view (my own) can be found in *Blackstone's Criminal Practice* 1999, at B2.5.

2 (1888) 22 Q.B.D. 23.

3 (1881) 8 Q.B.D. 54.

4 [1990] 1 W.L.R. 1067.

5 Contrast *Roberts* (1971) 56 Cr.App.R. 95, in which there was clearly both an assault and a battery.

6 *cf. Taylor* (1869) L.R. 1 C.C.R. 194.

7 Hawkins and Day JJ., in *Clarence,* considered it "impossible' that Parliament could have intended to confine section 20 to cases involving assault.

8 [1990] 1 W.L.R. 1067 at 1071.

9 [1984] A.C. 242.

10 [1976] V.R. 452 at p.461. *Salisbury* is also reported at (1983) 76 Cr.App.R. 262(n).

11 [1992] 1 A.C. 699.

12 [1998] A.C. 147.

13 *ibid.* at 161.

14 *ibid.* at 165.

15 See *Spratt* [1990] 1 W.L.R. 1073

16 [1969] 1 Q.B. 439.

17 The setting of a spring-gun or man-trap may sometimes amount to an offence under section 31 of the 1861 Act; and there may also be an offence under ss.18 or 20 if serious injury is caused.

18 Home Office consultation paper: *Violence: Reforming the offences Against the Person Act 1861* (1998).

19 But would clause 4 cover a case such as *Munks* [1964] 1 Q.B. 304, in which M connected the handle of a French window to main electricity? This was held not to be an offence under section 31 of the 1861 Act (note 17, above) nor would it appear to involve any "impact" on the body of the victim, for clause 4 purposes. If it caused injury, it would, however, come within clause 3.

