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## **Informed Consent and the Transmission of Sexual Disease: Dadson Revivified**

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*Abstract This article examines the impact of the decisions in R v Dica (2004) and R v Konzani (2005) on the extent of the defence of consent. As well as analysing the impact of the decisions on the extent of the defence where a defendant faces criminal liability for the transmission of sexual disease, it also considers and examines the wider issue of whether the presence or absence of consent forms part of the actus reus of the relevant assault offence or whether it is a separate and independent element that stands outside of the conduct component of the offence. It is argued that recent developments have given insufficient consideration to accepted doctrine and revived much criticised principles by focusing on unknown circumstances of justification rather than the defendant's state of knowledge and mind.*

### **Consent as a defence**

The liability of a defendant for the transmission of sexual disease<sup>1</sup> has attracted considerable attention as a result of *R v Dica*<sup>2</sup> and *R v Konzani*.<sup>3</sup> These decisions have raised some interesting issues concerned with the defence of consent.

First, in dealing with the specific issues that arise in the cases, the Court of Appeal has also touched upon one of the cornerstones of general criminal liability. It has always been a matter of some debate and disagreement as to whether or not the presence or absence of consent forms part of the *actus reus* of the relevant assault offence or whether it is a separate and independent element that stands outside of the conduct component of the offence. This may be a matter without any great practical significance but it has nonetheless stimulated debate on an interesting academic question of law and reflects some deeply embedded philosophical differences. If 'absence of consent' is regarded as an ingredient of the conduct element of the offence then, if the assault is consented to, a vital element is missing and there is no legal wrong of any kind. If, however, consent is seen as a defence falling outside of the *actus reus* then there remains a 'legal wrong' which, in the circumstances existing at the time, may be justified by the consent of the victim.<sup>4</sup>

The former interpretation is supported by those legal scholars who emphasise the role that criminal law has in supporting a person's autonomy, i.e. there is no legal wrong if someone consents to conduct which harms no one other than themselves. No useful purpose is served by criminalising behaviour to which someone has freely consented and which harms no one else or wider society. The latter interpretation is supported by

those legal scholars who emphasise the role that criminal law has in protecting and supporting the wider moral codes that regulate society generally. The intentional or reckless infliction of harm on another person, even one who may consent, undermines society as a whole and such conduct should, generally speaking, be outlawed unless there are special circumstances which may justify it. The majority of legal opinion seems to favour the interpretation that consent operates as a defence outside the *actus reus* of the offence although there is considerable authority to the contrary.<sup>5</sup>

Secondly, and as Weait has suggested,<sup>6</sup> the criminalisation of the transmission of sexual disease raises fundamental questions about the purpose and function of criminal law as a tool of social control. It has also highlighted the ability and suitability (or inability and unsuitability) of criminal law to regulate an intimate and fundamental aspect of an individual's private life. It can be concluded that *Konzani* has opened up a door that could allow a defendant who acts with full *mens rea* to escape conviction and the consequences of his actions simply because the victim has acquired, perhaps from a third party, knowledge of his condition. Why would (or should) the criminal law excuse a culpable actor from conviction because unknown to him, she or he possesses knowledge of his condition. Is it right that a person who acts with full culpability and moral blameworthiness can evade conviction?

## The decisions in *Dica* and *Konzani*

In *Dica* the defendant infected two sexual partners with the HIV virus. The defendant had not revealed his condition to his sexual partners and the Court of Appeal held that a sexual partner could not give effective consent to the risk of infection by merely consenting to sexual intercourse whilst in ignorance of D's condition. In *Konzani*, the defendant who was HIV+ had sexual intercourse with several women from whom he concealed his condition. The women became infected with the virus as a result of the intercourse. The convictions for inflicting grievous bodily harm, contrary to s. 20 of the Offences against the Person Act 1861, were upheld.

In relation to the defence of consent, the Court of Appeal stated:

There is a critical distinction between taking a risk of the various, potentially adverse and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease. For the complainant's consent to the risks of contracting the HIV virus to provide a defence, it is at least implicit from the reasoning in *R v Dica*, and the observations of Lord Woolf CJ in *R v Barnes* confirm, that her consent must be an informed consent. If that proposition is in doubt, we take this opportunity to emphasise it.<sup>7</sup>

In reaching its decision, the Court of Appeal emphasised the personal autonomy of the victim stating:

[T]he principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant. Equally, her personal autonomy is not normally protected by allowing a defendant who knows that he is suffering from the HIV virus which he deliberately conceals, to assert an honest belief in his partner's informed consent to the risk of the transmission of the HIV virus. Silence in these circumstances is incongruous with honesty, or with a genuine belief that there is an informed consent.<sup>8</sup>

It seems clear then that 'informed' consent (i.e. where the victim knows that the defendant is infected and has sexual intercourse aware of that fact) can act as a defence. Equally, it is apparent that the defendant may plead the defence of consent where he has an honest belief in the victim's consent. But what of a situation, which may well arise, where the victim has acquired knowledge of the defendant's condition by some other means but the defendant is completely ignorant of this fact?<sup>9</sup> In other words, he proceeds with sexual intercourse knowing of his condition (and is therefore behaving recklessly) but in complete ignorance of the victim's level of awareness of his condition. *Konzani* suggests that the defence would be available in these circumstances. The Court of Appeal stated:

[W]e accept that there may be circumstances in which it would be open to the jury to infer that, notwithstanding that the defendant was reckless and concealed his condition from the complainant, she may never-

theless have given an informed consent to the risk of contracting the HIV virus. By way of example, an individual with HIV may develop a sexual relationship with someone who knew him while he was in hospital, receiving treatment for the condition. If so, her informed consent ... would remain a defence, to be disproved by the prosecution, even if the defendant had not personally informed her of his condition. Even if she did not in fact consent, this example would illustrate the basis for an argument that he honestly believed in her informed consent. Alternatively, he may honestly believe that his new sexual partner was told of his condition by someone known to them both. Cases like these, not too remote to be fanciful may arise.<sup>10</sup>

If D recklessly (or intentionally) infects V through an act of sexual intercourse why should his criminal liability depend upon the state of mind of the victim--at least where he is ignorant of that state of mind? He acts with moral blameworthiness and moral culpability. His conduct is, arguably, deserving of the stigma of a criminal conviction and it seems somewhat illogical to absolve him from liability simply because the victim has acquired knowledge of his condition from a source other than him. Does his culpability or blameworthiness disappear because of the victim's actual state of mind? It is submitted that it does not.<sup>11</sup> It may be true that the personal autonomy of the victim is not compromised in these circumstances but should not the criminal law be concerned with something greater than personal autonomy?

It is one of the functions of criminal law to convict and punish those who recklessly or intentionally inflict harm on other members of society yet in these circumstances, unlike other circumstances where the defence of consent operates, there appears to be no requirement that the defendant knew or honestly believed that the victim was consenting to the risk. Where the defence of consent is to operate, it should surely be limited to those situations where it removes the defendant's culpability and blameworthiness because he is aware that the victim has knowledge of the risk at the relevant time and is therefore consenting. In seemingly preferring the view that consent forms part of the *actus reus* of the offence, *Konzani* permits the morally culpable to avoid conviction and may leave the defendant's criminal liability dependent upon the chance fact of whether or not the 'victim' has an awareness, howsoever acquired, of his condition.<sup>12</sup>

### ***Revivification of Dadson-type principles***

A further difficulty arises from the reliance in *Konzani* on informed consent of the victim, whether obtained from hospital authorities or extraneous third parties, which as a consequence serves to insulate D from liability for reckless transmission of HIV. The focus on victim awareness or conduct raises the spectre of unknown justification exculpating a defendant from liability.<sup>13</sup> General principles of criminal liability, since the fundamental decision in *Dadson*,<sup>14</sup> have been traditionally accepted as precluding reliance on such conceptual analysis. By sleight of hand, the illustrations presented by the Court of Appeal in *Konzani* unwittingly supports an unknown justification type argument on lack of *actus reus* ingredients.

A corollary may be made in this respect between *Konzani* and *Dadson*. The supposition from *Konzani* is that reckless transmission of HIV may be rendered 'lawful' where wholly unknown to D an outside knowledge of status has been acquired by V. This resonates with unknown circumstances of justification. Consider, by way of hypothetical illustration, that D is driving past a bar when he sees P crossing the road ahead of him. He knows that P has been having an affair with his wife and so he deliberately drives his car at P intending to kill him; P is killed instantly. It is later discovered that P is a member of a terrorist gang and was about to throw a bomb into the crowded bar where it would almost certainly have caused death. Should D be treated as a criminal for his murderous intent against P or should he be treated as a hero for saving the customers in the bar? One may view this as an extremely unlikely situation, but the same problem arose in *Dadson*--D was charged with unlawfully and maliciously shooting at any person with intent to maim, disfigure or disable such person or to do some other grievous bodily harm to such person.<sup>15</sup> It was a police officer whose patrol area included a copse from which there had been a large number of thefts of wood. D saw a person running away from the copse and he shouted to him to stop. When he failed to do so D shot and wounded the suspect. At that time it was considered perfectly lawful for an officer to shoot at an escaping felon to prevent his escape.<sup>16</sup> Stealing wood was a misdemeanour unless the accused had two previous convictions for stealing wood, in which case it became a felony.<sup>17</sup> D had no reason to believe that this suspect had any previous convictions for stealing wood, but as a matter of fact he had, and therefore on this occasion he was an escaping felon. It is quite clear that the prosecution could establish that D had deliberately shot at the suspect with the necessary intent. It was, however, argued that since the suspect was, in fact, an escaping felon, the

shooting was not unlawful; in other words the prosecution had failed to prove all the elements of the offence.<sup>18</sup> On the face of it, this seems to be a good argument; it would appear that the killing is not in fact unlawful and, therefore, the prosecution cannot prove the existence of all elements.

The Court for Crown Cases Reserved, however, upheld his conviction. Pollock CB said, 'The prosecutor (suspect) not having committed felony known to the prisoner at the time when he fired, the latter was not justified in firing at the prosecutor; he was guilty of shooting at the prisoner with intent to do him grievous bodily harm, and the conviction is right'.<sup>19</sup> Thus, in *Dadson*, the prosecution could not prove that the shooting was unlawful.

The answer lies in the nature of the defence of justification. What the court in *Dadson* said was that in certain circumstances the accused will be justified in inflicting grievous bodily harm or even death, but only if he is aware of the circumstances when he does the otherwise prohibited act.<sup>20</sup> In contradistinction to *Konzani* the focus is on D's awareness/knowledge as a defence, and the perpetrator's state of mind, rather than unknown belief or circumstances attached to the victim. If the prosecution can establish that the accused was unaware of the circumstances which would constitute justification the defence fails and the prosecution have established that the act was unlawful.<sup>21</sup> So long as the accused is aware of the facts which justify the shooting he may rely on the defence; it would not matter that he was unaware that the law provided such a justification. Thus, if *Dadson* was aware that the suspect had two previous convictions for theft of wood, he would have been acquitted; it would not have mattered that he did not know that it was legal to shoot escaping felons.

Professor Ormerod has cogently analysed the *Dadson* outcome in the following terms:

D did not deny that he shot at V or that he intended to cause him grievous bodily harm. He admitted the necessary constituents of the crime (other than 'unlawfulness') but went on to assert other facts that, he alleged, made his act lawful. Whether his act was lawful depended on what were the constituents of the defence that he raised; and the case decided that the defence, like duress and self-defence, required the assertion not merely of external facts but also of a state of mind. A doctrine of *actus reus* which says that such a course must be wrong, as contravening a fundamental principle, is much too constricting. Whether the defence should consist simply in the external facts, or in the facts plus the state of mind, is a matter of policy; *and it was a not unreasonable decision of policy to say that a man who deliberately shot another should be guilty of an offence unless he knew of circumstances justifying or excusing his conduct.* (emphasis supplied)<sup>22</sup>

In similar vein, paraphrasing Professor Ormerod's contention highlighted above, it would not be an unreasonable decision of policy to require that an HIV-aware individual, recklessly engaging in sexual intercourse, should be guilty of an offence unless he knew of circumstances justifying or excusing his conduct. A revived *Dadson*-type argument derived from unknown justification and victim awareness from extraneous third sources is palpably insufficient. It is over-generous in favour of a culpable defendant and arguably drives a coach and horses through accepted doctrine on 'informed consent' as a defence.

## Fraud vitiating consent

The court in *Konzani*, as Weait asserts,<sup>23</sup> made it clear that the wilful concealment of HIV status on the part of a defendant, 'almost inevitably means that V is deceived'.<sup>24</sup> The implied rationale is that informed consent is not operable as, 'she cannot give an informed consent to something of which she is ignorant'.<sup>25</sup> This raises the wider issue surrounding the nature of types of deception which vitiate consent as a defence. The overarching significance of this question arose in the important case of *R v EB*,<sup>26</sup> regarding the offence of rape and deliberate concealment of HIV status. The ambit of fraud vitiating consent requires consideration under both legislative and common law principles. More specifically, at issue in *R v EB*, was whether an implied deception was operative which vitiated consent under s. 74 of the Sexual Offences Act 2003 or constituted a conclusive presumption as to lack of consent under s. 76 of that Act.

In *R v EB*, D had approached V at a bus stop having been out socially with friends. They had, apparently, engaged in conversation and then walked together to a nearby street. Sexual intercourse occurred, but at trial the fundamental question under consideration was V's consent. V's contention was that she had been subjected to a truly dreadful assault. D was HIV positive and had had this status from September 2001, with

his full knowledge. D asserted that V did consent to the intercourse and that there were several witnesses to this, two of whom he called in support during the trial. At issue, *inter alia*, was the inclusionary nature of D's HIV status as a matter of evidence, and its import as a matter vitiating consent as an implied deception.

While s. 75 of the Sexual Offences Act 2003 deals with 'evidential presumptions', which can be rebutted by the defendant, s. 76 contains 'conclusive presumptions'. If the defendant is proved to have intentionally penetrated the victim, and particular circumstances are proved to exist, the victim is presumed not to have consented, and the defendant cannot rebut the presumption. The circumstances are set out in s. 76(2):

- (a) the defendant intentionally deceived the complainant as to the *nature or purpose of the relevant act*,
- (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant. (emphasis supplied)

Section 76 builds on the common law position prior to the 2003 Act wherein consent was negated only if the victim was mistaken about the *nature* of the act to which she was consenting or as to the *identity* of the person with whom she was consenting to have intercourse. The issue arose in the historic case of *R v Flattery*.<sup>27</sup> The defendant professed to give medical and surgical advice for money. The victim, a young woman of 19, consulted him with respect to an illness from which she was suffering. He advised that a surgical operation should be performed and, under pretence of performing it, had carnal connection with her. She submitted to what was done, not with any intention that he should have sexual connection with her, but under the belief that he was merely treating her medically and performing a surgical operation, that belief being fraudulently induced by the defendant. It was held that he was guilty of rape. It was stated by Field J that: 'The question is one of consent, or not consent; but the consent must be to sexual connexion. There was no such consent.'<sup>28</sup> It is noteworthy that this decision was strongly criticised by Sir James Fitzjames Stephen in his *Digest of the Criminal Law*,<sup>29</sup> on the ground that it overruled the principle thought to persist at the time, 'that where consent is obtained by fraud the act does not amount to rape'. Stephen's view, however, was firmly rejected in *Williams*,<sup>30</sup> a case where the defendant, a singing instructor, was held properly convicted of rape when he had sexual intercourse with a girl of 16 under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. Consent obtained by fraud in these medical treatment cases was not a defence to rape or cognate offences.

The next judicial step was taken in *Clarence*.<sup>31</sup> The decision was simply that a husband who infects his wife with venereal disease (she said if she had known she would have refused consent) is not thereby guilty of inflicting grievous bodily harm under s. 20 of the Offences against the Person Act 1861. However, more importantly it led to the judges giving more general attention to what precisely was involved in the wife's consent, and the types of fraud which would and would not vitiate consent to a non-fatal 'offence'. The fundamental dichotomy between the different types of fraud involved here was made by Wills J when he stated that:

That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent ... Take, for example, the case of a man without a single good quality, a gaol-bird, heartless, mean and cruel, without the smallest intention of doing anything but possessing himself of the person of his victim, but successfully representing himself as a man of good family and connections prevented by some temporary obstacle from contracting an immediate marriage, and with conscious hypocrisy acting the part of a devoted lover, and in this fashion, or perhaps under the guise of affected religious fervour, effecting the ruin of the victim. In all that induces consent there is not less difference between the man to whom the woman supposes she is yielding herself and the man by whom she is really betrayed than there is between the man bodily sound and the man afflicted with a contagious disease.<sup>32</sup>

A crucial distinction should thus be drawn here as to a consent given under a deception or mistake as to *the thing itself*, i.e. the act of sexual intercourse, and a consent to that act of sexual intercourse itself induced by a deception or mistake as to *a matter antecedent or collateral thereto* (fraud in the inducement does not deceive the reality of the apparent consent; fraud in the *factum* does).<sup>33</sup> Under the first category there will be

cases where the woman is deluded into supposing that she is undergoing medical treatment as in *Flattery* and *Williams* above, and the cases where in the dark she is induced to assume that it is her husband who is the man with whom she is having sexual intercourse such as *Jackson*.<sup>34</sup> Within the second heading will come consent induced by fraudulent representations given by the man as to matters such as his wealth, lack of sexual infections, freedom to marry the woman or the promise to pay for the sexual services provided. It should be palpably clear that consent obtained through the device(s) of fraud of the latter type should still constitute a valid and subsisting consent. The correct line needs to be drawn over these quite different headings.

In terms of Commonwealth authorities in this substantive arena the key decision remains that of the High Court of Australia in *Papadimitropoulos*.<sup>35</sup> The issue, *inter alia*, was whether the defendant could be convicted of rape when the 'victim' consented to sexual intercourse under the belief, fraudulently induced by the defendant, that she was married to him, following a fake marriage ceremony. The High Court unanimously decided that, whatever other offences may have been committed, the defendant was not guilty of rape. Their Lordships, stated quite categorically that the following principle applies:

Rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. *But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.* (emphasis supplied)

The crux of the decision is that fundamentally there was consent to *the* act of sexual intercourse itself. The 'victim' knew the nature of the act and the identity of the person and consented to sexual intercourse in full knowledge of those crucial determinants. The fraud itself related to an ancillary matter, i.e. the husband/wife relationship existing.

In the light of their Lordships' decision it now seems clear that the earlier decision of the Supreme Court of Canada in *Bolduc and Bird*<sup>36</sup> can no longer be supported. It is incorrect in principle. Here a doctor (A) requested the permission of his patient to the presence of (B), represented as a medical intern requiring experience, during the conduct of a vaginal examination on the patient. In reality B was simply an itinerant musician, not a medical student, and his presence there was simply to satisfy prurient interest. The convictions of both A and B for indecent assault were quashed. This was on the basis that there was no fraud on A's part on what he was supposed to do and actually did. The patient consented to a vaginal examination from A, she was not touched by B, and that was what she received. She consented to B's presence and the court held that there was no fraud as to the nature and quality of what was done. The dissenting judgment of Spence J though now seems to be crucial. Spence J said: 'Let us examine for a moment what was the consent obtained from the complainant. Surely ... it was consent to the examination by A ... in the presence of a doctor, not a mere medical student or a layman ... She only gave this consent to such a serious invasion of her privacy on the basis that B was a doctor intending to commence medical practice and who desired medical experience ... That was the consent which the complainant granted'.<sup>37</sup> Arguably there was fraud here both as to the nature of the act and identity of the person: that fraud should have vitiated consent and led to the conviction of both A and B for indecent assault.

It was long accepted that if a woman consented to intercourse with a man she wrongly believed to be her husband, there was no valid consent. It was not clear to what other relationships this rule extended. In *Elbekkay*,<sup>38</sup> the complainant had lived with her boyfriend for about 18 months. On the night in question E was staying as a guest and all three had had too much to drink. During the course of the night the complainant became aware of someone touching her and felt herself being entered by a penis. For about 20 seconds she assumed it was her boyfriend, but then realised it was E. V thereupon punched E and cut him with a knife. At E's trial for rape the complainant alleged that she had consented only so long as she thought it was her boyfriend. The Court of Appeal held that the rule was not restricted to the impersonation of husbands. Sexual intercourse is a highly personal act and it cannot be said that a woman who consents to intercourse with A has consented to intercourse with B. The amendments to s. 1 of the Sexual Offences Act 1956, which were effected by s. 142 of the Criminal Justice and Public Order Act 1994, post-dated *Elbekkay* and there was no change to s. 1(3) which provides that a man commits rape if he induced a married woman to have sexual intercourse with him by impersonating her husband. Section 76(2)(b) of the Sexual Offences Act 2003 is a noticeable improvement on what went before, providing for a conclusive presumption of a lack of consent

where D impersonates 'a person known personally' to the complainant. It is not absolutely clear who counts as 'a person known personally to the complainant' for the purposes of s. 76(2)(b). While the section is designed to deal with the defendant who impersonates a partner or spouse, it probably does not cover the defendant who seeks to pass himself off as a famous person for the purposes of persuading the complainant to have sexual intercourse with him. Although the complainant may know who the famous person is, their knowledge of the famous person is not of a personal nature.

At common law, fraud which did not induce a mistake about the nature of the act or of the identity of the man was irrelevant. Thus in *Linekar*,<sup>39</sup> L persuaded a prostitute to have intercourse with him on the basis that she would receive a sum of money. After the intercourse he walked off without paying and she claimed that she had been raped. The Court of Appeal held that the issue was not that of fraud, but of whether the woman had consented to sexual intercourse with L. This she clearly had done; the fact that she would not have had intercourse but for the promise of money was irrelevant. There was no fraud relating to the nature of the act or to the identity of the person. It is clear that many people allow another to have intercourse with them because of some promise that has been made. This might be that the victim is offered money, status or marriage in return for sexual intercourse. However, on one view, the position may now be different under s. 76(2)(a) of the 2003 Act. The deception as to payment may be viewed as altering the nature or *purpose* of the act in question, consequently it could be argued that D should be classified as a rapist under the new provisions. If this represents the extant position, then it is a glaring anomaly. The Sexual Offences Act 2003 ought to have incorporated an offence previously contained in s. 3(1) of the Sexual Offences Act 1956 whereby, 'it is an offence for a person to procure a woman, by false pretences or false representations, to have sexual intercourse in any part of the world'.<sup>40</sup> This charge embodies the gravamen of the conduct, not rape. Failure to recognise this in the legislation is an unfortunate lacuna.

In *Tabassum*,<sup>41</sup> the parameters of consent obtained by fraud in the context of sexual activity were re-evaluated by the Court of Appeal. It was the prosecution case that D had asked several women to take part in a breast cancer survey he was carrying out in order to prepare a database software package to sell to the doctors. The three complainants consented to D showing them how to carry out a breast self-examination, which involved taking off their bras and allowing D to feel their breasts. D had no medical qualifications or training and each of the victims said that they had only consented because they thought he was so qualified. There was no evidence of a sexual motive. On behalf of the defendant, it was contended that the case should be discontinued on the premise that the complainants had undoubtedly consented, and such consent was not negated by deception, except where identity was in issue and the nature and quality of the act done was different from that for which consent was given. Furthermore, it was submitted that lack of medical qualifications on the part of D did not change the nature and quality of the act, which was comparable with what had been consented to by the women.

The Court of Appeal, in upholding D's conviction, on three counts of indecent assault, determined that the women were consenting to touching for medical purposes and not indecent behaviour. Hence, there was consent to the *nature* of the act but not its *quality*. In the absence of a sexual motive, *Tabassum* would not be covered by s. 76(2)(a) of the 2003 Act, as there was no deception as to either the nature or the purpose of the relevant act. Moreover, it was fundamental that an intimate examination for the purpose of creating a database by a medically qualified person is an act of a different *quality* from the same act done for the same purpose by a person not medically qualified. A by-product of the decision was that the outcome in *Clarence* was thrown into even graver doubt. The wife may have consented to sexual intercourse which was the nature of the act, but following *Tabassum* it may be that she did not consent to the risk of contracting venereal disease which is embodied by the quality of the act. Similar analysis applied in *Dica* to the risk of HIV infection.

Confusion now reigns as to which types of fraud vitiate consent in the context of sexual activity. The decision in *Dica* (infliction of grievous bodily harm within s. 20 of the Offences against the Person Act 1861 where D recklessly conceals HIV status), following *Tabassum*, in allowing qualitative mistakes to negate consent is palpably inconsistent with a long line of authority dating back to *Clarence*. If qualitative errors destroy consent at common law, then the logical corollary may be that the victim has endured either a rape or an assault. The decision in *R v EB*, however, detailed below shows this may not be the case for legislative purposes. If a qualitative error as to D's state of health destroys consent then, by parity of reasoning, other mistakes as to 'quality' also destroy consent. Embraced herein will be collateral matters such as suppression of



the truth as to D's lack of intention to pay for sexual services, D's wealth, or even a promise of marriage. The difficulty, of course, is that the core transaction itself has been the subject of consent.

## The outcome in *R v EB*

Their Lordships, in *R v EB*,<sup>42</sup> the leading judgment that of Latham LJ, were explicit that a dissonance applied between the offence of infliction of grievous bodily harm under s. 20 of the Offences against the Person Act 1861 and rape.<sup>43</sup> In the case of the former the reckless concealment of HIV status (see *Dica* and *Konzani*) and failure to inform V (informed consent), precludes D's ability to rely on V's consent to the risk of transmission. This preclusion applies, of course, unless V has received 'informed consent' of D's HIV+ status through extraneous sources or third party information. Further comment on the perversity of this unknown justification windfall for culpable defendants is rendered superfluous! In the latter scenario, however, of rape, there is no mention in the conclusive presumptions contained within s. 76 of the Sexual Offences Act 2003 of 'implied deception'. It was not for the courts through 'implicit judicial legislation' to read this into the Act. Moreover, HIV status by itself cannot operate to vitiate consent within s. 74 of the Sexual Offences Act 2003. Latham LJ clearly stated<sup>44</sup> that it was wrong to allow D's positive HIV status to go before the jury: '[A]ll we need to say is that, as a matter of law, the fact that the appellant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under Section 74 in relation to the sexual activity in this case'. It remains for later days to explore fully the nature of deceptions which vitiate consent. The ambit of common law applicability remains as opaque as ever.

## Conclusion

This article has addressed the parameters of informed consent and transmission of sexual disease. It is suggested that the current position is delineated more by mud than by crystal; successful prediction of legitimate principles remains as likely as tattooing soap bubbles. The gateway to culpability opened in *Konzani*, derived from chance occurrence of 'victim' awareness from disparate sources, has skewed accepted doctrine in preferring the view that consent forms part of the *actus reus* of the offence. In truth, it ought to be D's awareness that is in issue. An awareness that V has knowledge of the risk at the relevant time and is therefore consenting to intercourse in an informed manner. The subliminal resonance of *Konzani* is to revivify a *Dadson*-type argument derived from unknown justification--principles rejected for over a century and a half. More generally, an examination of the contextual ambit of types of fraud vitiating consent presents a picture of beguiling obfuscation.

<sup>1</sup> See generally S. Ryan, 'Reckless Transmission of HIV: Knowledge and Culpability' [2006] Crim LR 981; M. Davies, '*R v Dica: Lessons in Practising Unsafe Sex*' (2004) 68 JCL 498; M. Weait, 'Knowledge, Consent and the Transmission of HIV' (2004) 154 NLJ 826; M. Weait, '*Knowledge, Autonomy and Consent: R. v. Konzani*' [2005] Crim LR 763.

<sup>2</sup> [2004] EWCA Crim 1103, [2004] QB 1257.

<sup>3</sup> [2005] EWCA Crim 706, [2005] 2 Cr App R 14.

<sup>4</sup> This mirrors the general debate on constituent elements of an offence relating to *actus reus* and *mens rea* ingredients. Professor Glanville Williams asserted: '*Actus reus* includes ... the absence of any ground of justification or excuse, whether such justification or excuse be stated in any statute creating the crime or implied by the courts in accordance with general principle ...'; see *Textbook of Criminal Law*, 2nd edn (1983). A different perspective was propounded by Professor Lanham: 'As a matter of analysis we can think of a crime as being made up of three ingredients, *actus reus*, *mens rea* and (a negative element) absence of a valid defence'; see [1976] Crim LR 276.

<sup>5</sup> See *R v Brown* [1993] 1 AC 212 where the majority saw consent as a defence operating outside the *actus reus* of the offence but in *R v K* [2001] UKHL 41 a contrary view was taken by Lord Hobhouse who expressed the view that absence of consent formed part of the *actus reus*. A similar view was taken by Laws LJ in *R v Andrews* [2003] Crim LR 477.

<sup>6</sup> M. Weait, '*The Sexual Transmission of HIV: R v Dica*' (2005) 68 MLR 121.

<sup>7</sup> *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14 at [41].

<sup>8</sup> *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14 at [42].

<sup>9</sup> Ryan has recently advocated a requirement of *full knowledge* on the part of D as to status and conduct for liability: 'This paper has sought to argue that knowledge of the accused as to both HIV positive status and modes of transmission should be a necessary requirement for the imposition of liability. It suggests that basic principles of fairness and wider concerns regarding the potential for discrimination and prejudice, if the law were to be otherwise, make it essential that this should be the case. However, despite some suggestions to the contrary, it would seem that actual knowledge as to HIV positive status is not required under current law and that liability may be imposed upon a finding of wilful blindness on the part of the accused as to their HIV positive status. Knowledge regarding modes of HIV transmission has to a large extent been ignored and its significance to issues of culpability has been overlooked ... [I]t seems clear that what is now required is an urgent reconsideration and clarification of the parameters of criminal liability for reckless transmission of HIV. The relevance of knowledge as to HIV positive status and means of transmission must be treated as an essential part of any such consideration': see Ryan, above n. 1 at 991-2.

<sup>10</sup> *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14 at [44].

<sup>11</sup> Similar arguments have been advanced where a defendant charged with robbery has sought to evade liability based on the state of mind of the victim. In the offence of robbery, the defendant is guilty if at the time of stealing, he puts or seeks to put his victim in fear of being then and there subjected to force. Defendants who have argued that they are not liable on the basis that the victim was not *actually* put in fear of being then and there subjected to force have failed, the courts stressing that it is the *perpetrator's* state of mind that constitutes the necessary ingredient of the offence and therefore the necessary culpability; see *R v DPP; B v DPP*, *The Times* (27 March 2007).

<sup>12</sup> Weait criticises the *Konzani* approach from a fundamentally different perspective derived from principles of knowledge and autonomy: '[T]he court's choice of examples demonstrates its rejection of any argument based on *general* knowledge about the risks associated with the unprotected sexual intercourse with a person about whose HIV status one is uncertain. Both of the hypotheticals are ones where there has, in effect, been disclosure--either through content (the hospital treatment setting) or through a third party. As such, these concessions are extremely limited in their scope and suggest that even where a person adverts consciously to the possibility that a non-disclosing sexual partner may be HIV positive (e.g. because that person is aware of the partner's unsafe sexual behaviour with others, or because of a prior history of injecting drug abuses, such conscious advertence should not provide the person who transmits HIV to them with a defence': Weait, 'Knowledge, Autonomy and Consent', above n. 1.

<sup>13</sup> On the ambit and nature of this general principle, see B. Hogan, 'The *Dadson* Principle' [1989] Crim LR 679. This article is strongly in favour of the view that D should not be able to rely on unknown circumstances of justification.

<sup>14</sup> (1850) 175 ER 499.

<sup>15</sup> See, generally, R. L. Christopher, 'Unknown Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence' (1995) 15 OJLS 229.

<sup>16</sup> At that time crimes were divided into felonies (the more serious offences) and misdemeanours. This distinction survives in some common law jurisdictions, but was abolished in the UK by the Criminal Law Act 1967.

<sup>17</sup> Larceny Act 1827, s. 39.

<sup>18</sup> There is no general agreement as to whether absence of justification is part of the *actus reus* or *mens rea*. What is clear, however, is that once the issue of justification is raised, the prosecution will lose the case unless it can prove the absence of justification.

<sup>19</sup> (1850) 175 ER 499.

<sup>20</sup> In the Criminal Law Bill attached to *Legislating the Criminal Code: Offences against the Person and General Principles*, Law Com. Report No. 218, Cm 2370 (1993) it is proposed that the *Dadson* principle ought to be retained in the criminal law; D must actually know the facts which will justify his action.

<sup>21</sup> Under the Police and Criminal Evidence Act 1984, s. 28(3) it is incumbent upon a police officer to inform a suspect of the grounds for arrest, see e.g. *R v Chapman* (1998) 89 Cr App R 190.

<sup>22</sup> D. Ormerod, *Smith and Hogan Criminal Law*, 11th edn (Oxford University Press: Oxford, 2005) 43.

<sup>23</sup> Weait, 'Knowledge, Autonomy and Consent', above n. 1 at 767.

<sup>24</sup> [2005] EWCA Crim 706, [2005] 2 Cr App R 14 at [42]; and see also Weait, above n. 6 at 126-9.

<sup>25</sup> *Ibid.*

<sup>26</sup> [2006] EWCA Crim 2945, [2007] 1 Cr App R 29.

<sup>27</sup> (1877) 2 QBD 410.

<sup>28</sup> *Ibid.* at 414.

<sup>29</sup> 3rd edn (1883) at 185.

<sup>30</sup> [1923] 1 KB 340.

<sup>31</sup> (1888) 22 QBD 23.

<sup>32</sup> *Ibid.* at 27-9.

<sup>33</sup> See *R v Harms* (1944) 2 DLR 61.

<sup>34</sup> (1922) Russ and Ry 487.

<sup>35</sup> (1957) 98 CLR 249.

<sup>36</sup> (1967) 3 CCC 294. See, generally, P. Alldridge, 'Sex, Lies and the Criminal Law' (1993) 44 NILQ 250.

<sup>37</sup> (1967) 3 CCC 294.

<sup>38</sup> [1995] Crim LR 163.

<sup>39</sup> [1995] QB 250.

<sup>40</sup> It is submitted that this ought to have been the charge brought in *Linekar*. The maximum sentence was two years' imprisonment. The false pretences may be by words or conduct, and D's conduct in *Linekar* itself falls squarely into this provision. The conduct of the defendant was egregious, but arguably it would have been no less egregious if his rape conviction had been upheld.

<sup>41</sup> [2000] Crim LR 686. See also *R v Cort* [2004] EWCA Crim 1103. Note that in *Tabassum* the Court of Appeal, *obiter*, sought to distinguish *Clarence* on spurious lines. It was asserted that the wife in *Clarence* did consent to sexual intercourse knowing both the nature and quality of D's act despite the 'additional unexpected consequences of infection'.

<sup>42</sup> [2006] EWCA Crim 2945, [2007] 1 Cr App R 29.

<sup>43</sup> *Ibid.* at [15].

<sup>44</sup> *Ibid.* at [21].