CASE NOTE

POWER PLAYS: THE MEANING OF GENUINE CONSENT IN *S (CA338/2016) v R*

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I INTRODUCTION

In the abstract, consent is straightforward: a person either has, or has not agreed to an action. In practice, the question of whether a person has agreed, and what is sufficient for genuine agreement to an action, is complicated by a number of factors, which can include the nature of the relationship between the relevant parties. When will, and should, the law intervene and determine that purported consent is insufficient to be 'true' consent?

A recent New Zealand Court of Appeal case, *S (CA338/2016) v R*, has grappled with the issue of when it is appropriate for the Court to withdraw the defence of consent in criminal law.[1] The question arose in that case because the defendant, an older man, argued that his partner, a younger woman, had consented to an assault. Although arguably a straightforward case for the withdrawal of the defence (in that there was no social utility to the assault), the case highlights the difficulties in understanding consent within abusive relationships. The Court addressed both the gender and power dynamics at play, but did not take the opportunity to make a more general comment about consent in such relationships. The judgment leaves the door open to future examination of the meaning of genuine or true consent.

II THE ABILITY TO CONSENT TO ASSAULT

The law venerates consent, most clearly in the civil context through respecting contractual autonomy.[2] Equally, in the criminal context, consent is a defence

* BA/LLB(Hons). This case note was written in August 2017, and reflects the law as at that date.

1 *S (CA338/2016) v R* [2017] NZCA 83.

2 The civil law presumes a signature or other assent to a contract is sufficient, subject only to limited

to both sexual and physical assault that would otherwise be a crime. The reification of consent in the law is based on the public policy rationale of promoting personal autonomy — simply, the belief that individuals are best placed to make choices about themselves.[3]

In the case of physical assault, the Court of Appeal in *R v Lee* (endorsed by the Supreme Court in *Ah-Chong v R*)[4] held that consent is a defence to assault either where no serious injury is intended and caused,[5] or in relation to intentional infliction of harm that is greater than "mere bodily harm", unless (i) there are good public policy reasons to forbid it; and (ii) those policy reasons outweigh the social utility of the activity in question and the value that society places on personal autonomy.[6] This test attempts to strike a balance between the protection of personal autonomy, and a paternalist intervention by the courts in essentially nullifying consent for certain activities. By necessity, the test invokes the personal views of judges about the value of particular activities to society, and when it is 'appropriate' to vitiate consent.

Unsurprisingly, the courts' views reflect societal values and biases, including gendered biases. The test set out in *R v Lee* evolved from the well-known House of Lords case *R v Brown*, in which a majority of the House of Lords held that homosexual men engaging in sadomasochistic sexual behaviour were unable to consent to those interactions.[7] The New Zealand adoption of (in essence) the minority view in *Brown* reflects a general presumption that people can consent to all activities, unless a Judge determines that allowing consent to an activity, in any particular context, would be inappropriate.[8] While the House of Lords' decision reflects the value judgements of the heterosexual Law Lords in respect of homosexual sadomasochism, the valorisation of consent and personal autonomy in New Zealand reflects a differing value judgment — one of non-intervention in personal decisions.

The non-interventionist approach has led to consent being examined on a case-specific basis, with a seeming aversion to defining categories in which the

exceptions. The development of "presumptions" about certain relationships in which undue influence is more likely than in others is one of the key exceptions to this principle.

3 See *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [55].

4 At [50] onwards.

5 With an exception for fighting (also based on public policy reasoning).

6 *R v Lee* [2006] 3 NZLR 42 (CA) at [289]–[318], as summarised in *Ah-Chong*, above n 3, at [55].

7 *R v Brown* [1994] 1 AC 212 (HL).

8 See *Barker v R* [2009] NZCA 186, [2010] 1 NZLR 235 at [116].

presumption of consent is inappropriate. When *R v Lee* was applied in *Barker v R* — a case about whether two young girls aged 15 and 17 could consent to sexualised scarification by an older man — the Court of Appeal was divided on how to apply the test.[9] The division related to both a legal argument about whether the test in *R v Lee* applied to forms of harm lesser than mere bodily injury, as well as whether public policy in this case warranted the removal of the defence of consent. The (male) majority rejected Justice Glazebrook's view that there should be an across the board exception for scarification when done in a sexual context on a child who is under 16, based on an analogy with s 134 of the Crimes Act 1961.[10] The majority also rejected the view that public policy warranted removal of the defence of consent in respect of the older complainant.[11] Justice Hammond's support for allowing the defence of consent in relation to the older complainant centred on a concern about the Court acting paternalistically in removing the ability for individuals to make decisions about themselves,[12] even in respect of "exploitative and tawdry" behaviour.[13] The age of the complainants and the power dynamics of their "consent" were not discussed in any depth by the majority in coming to their conclusions.

III *S (CA338/2016) v R*

The Court of Appeal's decision in *S (CA338/2016) v R* directly addresses the role of power dynamics in consenting within a relationship. The case, an appeal against conviction, arose after the appellant was convicted of a number of charges arising from an abusive relationship.

The appellant was 38 and the complainant 17 — a significant age and power imbalance. He had become involved with the complainant after she had absconded from Child, Youth and Family's care. She began living with him after the appellant picked her up hitchhiking. The appellant was charged with wounding with intent to injure after he broke the complainant's finger with a hammer. The offending occurred after the appellant accused the complainant of sexually assaulting one of his children. The complainant told the Police that

9 *Barker v R*, above n 8.

10 See [119]–[121] per Hammond J and [41]–[143] per O'Regan J.

11 See [122]–[130] per Hammond J and [144]–[149] per O'Regan J.

12 At [125]–[130].

13 At [117].

she admitted to the offending after being drilled by the appellant about the issue. He told her that she would have to leave the house "unless they could work out some way in which she could pay for what she had done".[14] He described to the Police suggesting that he get a hammer and break the finger she had used to touch his child with, so that she would always have a reminder not to touch other people's children. He hit her finger with a hammer once, breaking it, and subsequently called an ambulance.

A High Court judgment

At trial, Justice Brewer withdrew the defence of consent, following *Lee*, on the basis that there were good public policy reasons to do so that outweighed the social utility of the act in question and the value society placed on personal autonomy.[15] His Honour identified four policy reasons to remove the defence: the problem of domestic violence in New Zealand; the significant power imbalance between the appellant and complainant; the complainant's vulnerability given her mental health issues; and finally, a "gender issue".[16] He noted: "It is against public policy to condone a mature man intentionally inflicting serious harm on a teenage female with whom he was in an intimate domestic relationship."[17]

The Judge concluded that the common law did not allow consent to be used as a defence to the intentional infliction of serious harm to a domestic partner where:[18]

> … the purpose of the infliction of serious harm is to punish the consenting partner and where the consenting partner is particularly vulnerable by age, financial reliance, psychological problems and gender.

The appellant was found guilty of a range of charges, including (inevitably) the wounding with intent to injure charge, as he had admitted to deliberately breaking the complainant's finger.[19]

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14 *S (CA338/2016) v R,* above n 1, at [8].

15 *R v S* [2016] NZHC 1185 at [25] [High Court judgment].

16 At [24(d)].

17 At [24(d)].

18 At [25].

19 At [27].

B Court of Appeal judgment

In the Court of Appeal, the appellant argued that the crime of wounding with intent to injure was insufficiently serious to allow the withdrawal of the defence of consent. He argued that the judgment in *R v Lee* only allowed for consent to be withdrawn for grievous bodily harm charges, and the offending he had been charged with did not reach that level.

The Court of Appeal rejected the view that *R v Lee* had created a sharp distinction between the approach for charges involving intent to cause grievous bodily harm and all other kinds of intended harm.[20] The defence of consent could be legitimately withdrawn, following the test set out in *R v Lee*, where the offence involved any harm that was greater than mere bodily harm. Examining the circumstances of the appellant's case, the Court held that the level of harm involved in striking someone's finger with a hammer was sufficient to warrant possibly removing the defence of consent.

The Court then analysed the relevant public policy reasons for removing the defence. It agreed with the trial Judge's conclusions, and stated that the circumstances in which the complainant had consented were "tantamount to duress".[21] Most strikingly, in contrast to *Barker v R* or *R v Lee*, there was no countervailing positive social utility associated with the act to be weighed up. The Court rejected the appellant's submission that allowing the defence to go to the jury would signal the value placed by society on personal autonomy:[22]

> SH's consent could not properly be described as an exercise of personal choice; she was in reality responding to a threat that the relationship would be over unless she submitted to what [the appellant] intended as a form of punishment.

However the Court of Appeal, like the High Court, considered that the decision did not "create a per se exception for cases of domestic violence".[23] The Court of Appeal considered its decision was focused on the particular facts of the particular case, applying *Lee* to that scenario.

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20 *S (CA338/2016) v R*, above n 1, at [41].

21 At [46].

22 At [48].

23 At [49].

IV IMPLICATIONS: THE MEANING OF CONSENT IN THE CONTEXT OF PHYSICAL ASSAULT

The relative ease with which the Court in *S (CA338/2016) v R* concluded it was acceptable to remove the defence of consent, in comparison with cases like *Barker v R*, is a reflection of the particular circumstances of the case.[24] As acknowledged by the Court, it is difficult to conceive of any social utility gained through violent assault for the purpose of punishment in a domestic relationship.[25] In particular, the open discussion by the Court of Appeal and High Court of the seriousness of domestic violence and the significant power imbalance in the relationship is to be welcomed. These statements reflect a societal value judgement about acceptable behaviour in relationships, through the boundaries of what the law will accept as valid consent. Although the Court of Appeal did not specifically endorse the High Court's comments about the "gender issue" as a public policy factor, the wider dimensions of the relationship and the complainant's vulnerable position vis-à-vis the appellant were clearly significant factors in both Courts' judgments.

The reluctance to make a general exception for abusive relationships, or even relationships, can be understood to some extent: there could be practical difficulties in determining when a relationship is sufficiently abusive for consent to be vitiated. However, the Court of Appeal's decision was clearly suffused with value judgements about the nature of the complainant's consent to the assault. The Court stated her consent was not "an exercise of personal choice; she was in reality responding to a threat that the relationship would be over".[26] Given this comment, and an earlier reference to the complainant being under duress, it is clear that the Court did not consider the nature of the complainant's consent to be genuine and worthy of protection. This assessment appears to have been based on an analysis of the overall power dynamics of the relationship (particularly the age difference and the complainant's reliance on the appellant), which meant that the complainant's ability to freely consent to the interaction was significantly impaired. That impairment is reflective of the wider position of other women and men in abusive relationships, and

24 *Barker v R*, above n 8.

25 *S (CA338/2016) v R*, above n 1, at [48].

26 At [48].

the growing understanding of the cycle of power that underlies patterns of domestic violence in relationships.

The Court's clear scepticism about the validity of the complainant's consent, linked but separate to whether it was appropriate to remove the defence of consent, makes it somewhat surprising that the Court was reluctant to draw any wider conclusions about the categories of relationship in which there might be an exception to the general presumption of consent. The concerns about the complainant's consent were based on factors that are common in abusive relationships, albeit in this case at the extreme. It is difficult to conceive of the risk to personal autonomy from the courts recognising that consent to physical assault as punishment, obtained in the context of an abusive relationship, is consent that will not meet the law's standard for rigorous protection. In the sexual assault context, the courts recognise that consent must be given freely by a person "in a position to form a rational judgement", and not obtained by pressure or persuasion.[27] It could be argued that explicit recognition of the effect that an abusive relationship has on someone's ability to genuinely consent to an assault reflects that principle. It is notable that in *Barker*, O'Regan J (agreeing with the view that the defence of consent was available) expressed concern about the genuineness of the complainant's consent, especially as to whether it was "true consent" to the level of harm that had been inflicted.[28] The language of "true consent", as with the Court of Appeal's focus in *S (CA338/2016) v R* on the lack of personal choice on the part of the complainant, appears to be aimed at an underlying issue in relationships with significant power imbalances: of what *quality* is the consent being obtained? In the context of physical assaults, this question has consistently been present in the courts' reasoning. The scene for more extended discussion about the nature of consent to physical assault (and potentially, exploration of the relationship between that consent and the positive consent required for sexual intercourse at law) has been clearly set by *S (CA338/2016) v R*.

V CONCLUSION

S (CA338/2016) v R strengthens the law on the meaning of consent in physical assaults and the context in which the validity of consent is to be judged. Although

27 *R v Cox* CA213/96, 7 November 1996 at 8.

28 *Barker v R*, above n 8, at [148].

the Court of Appeal did not establish abusive relationships as a definitive category in which the presumption of consent might be inappropriate, the judgment recognises the need to interrogate the legitimacy of claims of consent in relationships of unequal power. In this respect, the paternalism of the courts provides a specific and important policing function to protect against consent obtained by pressure and duress. Recognition of the role of gender and power dynamics in obtaining purported consent within relationships is a welcome analysis from the Court of Appeal.