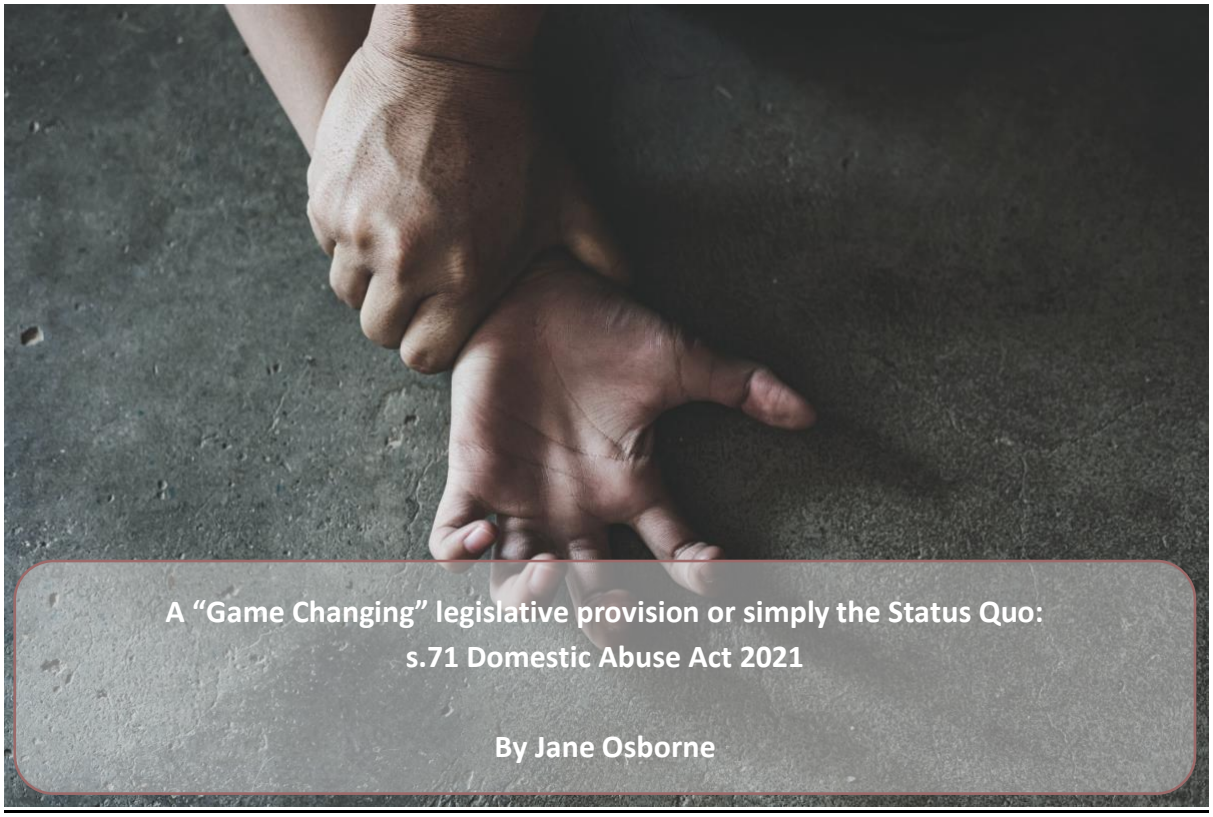

A "Game Changing" legislative provision or simply the Status Quo: s.71 Domestic Abuse Act 2021

By Jane Osborne

The Domestic Abuse Act 2021 received Royal Assent on the 29th April 2021. One of the provisions that came into force with immediate effect was section 71, entitled "Consent to Serious Harm for sexual gratification not a defence". Whilst both press and legislators heralded it as pioneering legislation bound to protect women from domestic abuse and manipulative abusers, was this actually just a provision introduced to satisfy campaign groups whilst retaining the status quo?

Campaigning for this legislation followed a string of high-profile trials where men accused of killing their partners told the court, either in mitigation or during the course of their trial, that the fatal injuries they had inflicted were the result of ostensibly consensual sexual activities. In the press this was described variously as the "rough sex" defence or "sex game" defence but generally involved the infliction of violence for the purposes of sexual gratification, or the use of asphyxiation in order to enhance sexual pleasure.

A number of influential campaign groups argued that men (although the provisions are not gender specific) should not be permitted to use "rough sex" as a defence to allegations of serious assault and homicide and should be prohibited from arguing that the deceased consented to the infliction of serious injuries that led directly to their death. The concerns were expressed in two ways, firstly that defendants should not be permitted to "slur the character" of the deceased in circumstances where the deceased was unable to defend themselves and secondly, that defendants should not receive a lesser conviction (e.g.

manslaughter as opposed to murder) or sentence on the basis that the deceased was consenting to the acts that caused their own death.

These arguments were adopted by legislators. During parliamentary debates of the Domestic Abuse Bill the new provision was described variously by MPs as a provision "removing the rough sex defence", a "a game changer", a clause to "prevent men getting away with murder", and a means of ensuring that the defence cannot "call on the [rough sex] defence to lessen their sentence".

Is s.71 of the Domestic Abuse Act 2021 ["s.71 DAA"] a "gamechanger"? Is it going to prevent defendants from telling a court that their partner derived sexual pleasure from rough or violent sex? Or is this a legislative provision introduced to satisfy campaign groups, but destined to have no noticeable effect in the criminal courts?

The Provisions of s.71 DAA

The main provision is at s.71(2):

2). It is not a defence that V consented to the infliction of the serious harm for the purposes of obtaining sexual gratification…

If serious harm has been inflicted upon another person, it is not a defence that the person harmed consented to the infliction of that serious harm for the purposes of obtaining sexual gratification [s.71(2)]. It does not matter, for the purposes of this provision, whether the person obtaining the sexual gratification is the person inflicting the harm, having the harm inflicted upon them, or another [s.71(5)]

There are some caveats to this provision:

- It only applies to offences contrary to s.47 (causing Actual Bodily Harm), s.20 (inflicting grievous bodily harm) or s.18 (causing grievous bodily harm with intent) of the Offences Against the Person Act 1861 [s.71(3)].
- It only applies when the act is done for the purposes of someone's sexual gratification.
- It does not apply where the serious harm alleged is the transmission of a sexually transmitted infection and when the person harmed consented to engage in unprotected sexual intercourse knowing (or believing) that the other person had such infection and could pass it on (s.71[6]).

Rather than changing anything about the existing law, this provision merely enshrines in statute what was previously already heavily entrenched in case law. It seems highly unlikely that it will make any difference to the outcome of cases where serious harm has been inflicted in the context of a sexual relationship and during the course of sexual activity. It will also make no difference to the evidence that can be given, or presented, by a defendant during the course of any trial.

Codification or New Provision: What was the existing law on consent to serious injury?

The leading authority arose in the context of sado-masochistic activities. The House of Lords gave general guidance on whether, when offences contrary to s.47 and s.20 OAPA 1981 were alleged, the prosecution had to prove a lack of consent on the part of the injured party. It is an authority well known to all law students, and forms the backbone of any consideration of the doctrine of consent to violence.

R v Brown (& others) (1993) WL 962323 involved men engaging in sado-masochistic activities that caused Actual Bodily Harm, Grievous Bodily Harm or a wound. The activities were such that these injuries were intentional. No-one sought to argue that nailing body parts to wooden planks, or deliberated incising one another (intimately) with a scalpel, resulted in unintended or unforeseen injury. Those harmed made no complaint about the activities and indeed the men were prosecuted on the basis of video recordings discovered in the course of an unconnected investigation; consent was therefore assumed in the proceedings, or at least the prosecution accepted that, should it be necessary, they were not in a position to disprove consent.

The question for the House of Lords was whether the defence of consent, which was already established within precedent, as a defence to assaults not resulting in bodily harm, and the infliction of intentional and foreseeable bodily harm in the course of some lawful activities (such as for example surgery and regulated sports), should be extended to private sado-masochistic activities.

The court held, by a majority (with two dissenting judgements given) that consensual violence which led to bodily harm (either actual or grievous), occurring in private, was primarily unlawful. The court declined to extend the established categories of what constituted "lawful activity", to encompass sexual gratification:
"The violence of sadists and the degradation of their victims have sexual motivations but sex is no excuse for violence" [Lord Templeman]

Decided as it was almost thirty years ago now, the judgements perhaps unnecessarily focused upon the homosexual nature of the sexual activities with the activities described as "encounters which breed and glorify cruelty" [Lord Templeman]. However, close

examination of the principles established, shows that they are equally applicable to consensual sexual violence in any relationship, which leads to bodily harm.

This was not a new conclusion. In the context of heterosexual relations, the court stated as long ago as 1934 (R v Donovan [1934] 2 KB 498):
"…it is an unlawful act 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".
This was in circumstances where the beating with a cane had taken place in private, consensually, for the purposes of sexual gratification.

It was re-affirmed a few years after the ruling in Brown (R v Emmett [1999] EWCA Crim 1710) that the principles established in Brown applied to violence for the purposes of sexual gratification in any context. Whereas in Brown there had been no dispute about whether those involved had intended to cause harm, Emmett involved two consenting adults who had expressly not intended harm. They had consensually engaged in potentially dangerous practices involving asphyxiation and the ignition of lighter fluid upon the skin. The defendant admitted in evidence that he was aware that the activities they both agreed to participate in were potentially dangerous and he was conscious of the risk of harm to his partner. Whether in fact he foresaw the injuries or not, he would have been guilty of assault occasioning actual bodily harm and the consent of his partner was no defence to the charges.

When considered against the background of these clear authorities, the new legislative provision (s.71) appears to do no more than enshrine in statute what was previously well established by precedent. It could be argued that this is a proper purpose of legislation in order to ensure that the law is certain, but it certainly doesn't make the provision "game changing".

Will s.71 prevent those accused of serious domestic assaults or murders from adducing evidence that they and the deceased were engaged in "rough" or even sado-masochistic sexual activities? To understand why this won't change, it is necessary to understand that evidence of an interest in "rough" or sadomasochistic sex arises not from the need to prove that admitted assaults were unlawful but because, in all cases aside from allegations of Assault occasioning Actual Bodily Harm, either foresight of harm being caused or an intention to cause harm must be proved:

- A person cannot be convicted of wounding, or causing/inflicting grievous bodily harm (s.20 OAPA 1861) unless they wounded or caused grievous bodily harm to a person and they foresaw that some harm would be caused (Cunningham recklessness)
- A person cannot be convicted of wounding or causing/inflicting grievous bodily harm with intent (s.18 OAPA 1861) unless they wounded, or caused/inflicted grievous bodily harm to a person and they intended that serious or grievous bodily harm would be caused.

- A person cannot be convicted of murder unless they intended to kill or to cause serious harm.

When it is necessary for the prosecution to prove what a defendant intended or foresaw then it must be permissible, on reasons of fairness alone, for a defendant to be able to adduce evidence to negative this alleged intention or foresight. This would apply as much to an allegation of causing serious harm as to murder.

If it is alleged that, during the course of consensual vaginal (or anal) penetration, injuries were caused (whether by an object or a body part), it would be a defence for the defendant to say that they were inflicted accidentally. Assuming consent to penetration was not in issue (and if it was, the act should also have been charged under s.1 or 2 of the Sexual Offences Act 2003), and both agreed to the act neither intending nor foreseeing that any injury would occur, then the defendant would have a complete defence to the charges; he neither intended nor foresaw harm.

Taking that scenario a step further, if an object were used, and if that object were fairly unusual, the defendant would be entitled to adduce evidence that they had previously used a similar object without injury, and therefore he had no intention to cause injury, or foresight that such injury would be caused, because it hadn't been previously. Whether this scenario accorded with the account of the complainant or not, it would be for the jury to decide whether it was accurate or not, on the basis of the evidence before them.

R v Meachen [2006] EWCA Crim 2414 demonstrates this principle. The complainant in the case had suffered serious anal injuries following a sexual encounter with the defendant during the course of which she had voluntarily taken drugs. As a result of the drugs the complainant had no recollection of the cause of the injuries. The defendant provided an account of what had occurred between them, maintaining that the complainant was an enthusiastic participant, and said that he had no intention to cause serious injury or indeed foresaw that any injury might occur from his actions. There was dispute between the crown and the defence as to causation of the injuries, and the Crown adduced expert evidence to the effect that the defendant's explanation of events was unlikely to have resulted in such injuries.

In determining that the lower court had been incorrect to rule that the defence of consent would not be left to the jury, the court said:
"The fact that serious injury had in fact occurred or was objectively likely, did not mean that there was no defence at the time the ruling was given, even though there was ample evidence on which the jury could have concluded that the appellant had the necessary intention to cause injury"
In that case, the jury had, in any case rejected the defendant's version of events and he had been convicted of s.18 OAPA, a conviction that stood. The jury were entitled to hear the

defendant's version of events, including the assertions he made as to the enthusiastic consent of the complainant, because it was relevant to his defence. The jury were equally entitled to reject those assertions.

The application of this is perhaps most stark in fatal incidents where it is accepted that the defendant caused death through an illegal act but denies that he possessed the intention either to kill or to cause serious harm, which would have to be present for a murder conviction. In such cases he would inevitably be permitted to adduce evidence to demonstrate his lack of mens rea. For example, in cases where it is alleged that a defendant choked their partner to death, it would remain permissible for the defendant to seek to demonstrate that because they had previously engaged in identical activity together, consensually, which had resulted in no injuries, he lacked the intention on this occasion to kill. It would then be for the jury to decide on the evidence, whether there was an intention to kill and consequently whether they were guilty of murder (or alternatively manslaughter).

When the domestic abuse act was going through parliament, the primary intention appeared to be for this provision to protect the deceased from scandalous accusation, and to protect families from seeing their loved ones being demeaned before the courts. Once again, however, parliament has created a provision that does no more than to enshrine in statute, the position that has long existed before the courts, with no practical change in the way that evidence will be produced before the courts.

In reality, parliament could do no more, without removing a defendant's right to a fair trial, but maybe it is time that that position was understood by those responsible for legislating so that more unnecessary legislation doesn't appear on the statute books.