NON-FATAL OFFENCES AGAINST THE PERSON

The ladder of offences:

Fatal

- Murder (Mandatory life sentence)
- Manslaughter (Max = life)

Non-fatal

- Wounding/Causing gbh with intent (s18 OAPA 1861: Max = life)
- Wounding/inflicting gbh maliciously (s.20 OAPA 1861: Max = 5yrs)
- Assault Occasioning actual bodily harm (abh) (s.47 OAPA 1861: Max = 5yrs)
- Battery (CJA 1988 s.39:Max = 6m)
- Assault (CJA 1988 s.39:Max = 6m) both common law crimes.

Why such disparity? The three main statutory crimes were not new in 1861, cut and pasted from old legislated with very little thought as to the language and the consistency of the penalty.
Old law, modern problems. Many constructive crimes amongst them. How well would you expect the OAPA 1861 to cope with issues such as:

- Making harmful, upsetting or threatening comments using social media/mobile phones?
- Causing another person to suffer injury that manifests in mental rather than physical harm?
- Transmission of HIV and other similar conditions?

1. ASSAULT & BATTERY

S. 39 Criminal Justice Act 1988: 'common' assault and battery summary offences only- only tried in the magistrates (Max 6 months / level 5 fine).
Assault and battery are charged under CJA 1988 s.39, but **depend on the common law for definition**:
Haystead v CC Derbyshire [2000] (LJ Laws)

Assault and battery are separate offences. But the terms 'assault', and 'common assault', are (confusingly) sometimes used to mean 'assault or battery', eg in s.47 OAPA. The context should make the meaning clear

The distinction between the AR of assault and battery:

- "An assault is an act which causes another person to apprehend the infliction of immediate, unlawful force on his person;
- a battery is the actual infliction of unlawful force on another person" (Per Robert Goff LJ in Collins v Wilcock [1984])

'apprehend' is a better word than 'fear' though both are commonly used- V need not be 'afraid' of D it is merely the anticipation of contact.

Thus the actus reus of assault involves the creation of a mental state in another person ('apprehension') whereas the actus reus of battery requires physical contact ('force')

Adapting the **AR** of assault to cover stalking:

R v Ireland; R v Burstow [1997] 4 All ER 225

Victim, over a period of some months, received silent and terrifying phone calls from the defendant. This led to symptoms of psychiatric harm. Ireland had a record of making offensive calls, convicted under section 47 on the basis that he had assaulted these victims and that the harm caused to them constituted ABH. This was quite novel to fit this into the framework of assault. Sentenced to 3 years.
Burstow convicted (s 20)

Problems -

- Could words, without physical gesture, be assault? Older authority Meade v Belt stated that no words could amount to an assault.
  HL – Yes: 'a thing said is also a thing done' (Lord Steyn). A silent phone call could also be something done, provided that-
  - the prosecution could prove apprehension of 'immediate' unlawful force.

- Is the apprehension immediate enough? Not face to face with the defendant
  HL took a step further:

  "Fear may dominate [V's] emotion, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the possibility of immediate personal violence. As a matter of law, the caller may be guilty of an assault" (Lord Steyn)

R v Constanza [1997] 2 Cr App R 492

D wanted a relationship with the victim and sent her over 800 letters over a four month period. He kept watch on her home, she thought he might do something 'at any minute' the victim then suffered with clinical depression. D charged under s.47. But was there an assault?

How do you define immediate?

CA: adopted almost exactly the same approach as the parallel litigation mentioned above "the essential issue … is whether it is enough if the Crown have proved a fear of violence at some time not excluding the immediate future. In our judgment it is." COULD BE ABOUT TO HAPPEN
Can sending a letter be an assault? After 800 of them, how realistic is an inference of fear of immediate violence?

Since the Protection from Harassment Act 1997 was introduced, no further need to use assault for stalking offences . still possible, if serious option occurs, better option as sentencing under 1997 act it is limited to 6 months whereas under section 47 the maximum sentence is 5 years.

Mens Rea for Assault:

R v Savage, Parmenter [1992] 1 AC 699

S threw beer from a glass at V, and accidentally let go of the glass. The issue concerned liability under s.47, but Lord Ackner clearly stated:

'It is common ground that the mental element of assault is an **intention** to cause the victim to apprehend immediate and unlawful violence **or recklessness** whether such apprehension be caused' (citing Venna [1976] QB 421)

'Recklessness' in non-fatal offences cases means 'subjective' recklessness – so D who causes V apprehension is only reckless if he realizes this may be the effect of his conduct.

MR and AR correspond. Always mean subjective recklessness when recklessness is mentioned.

BATTERY – ACTUS REUS

- Minimum force suffices: no need to prove injury (Collins v Wilcock [1984] 79 Cr App R 229)
- Where injury occurs, battery is a suitable charge for any harm unless the injury is serious (CPS Charging Standards) http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/
- Requires some 'application of force', so the silent telephone caller, even if he causes psychiatric harm, commits no battery (Ireland & Burstow [1997] 4 All ER 225).
- Battery has been upheld where force is applied indirectly (Haystead v CC of Derbyshire [2000]

Haystead

D struck a mother, holding V. caused her to drop V and cause injury. After considering Ireland, LJ Laws thought that the approach was to narrow the limitation to contact or force. The force against m was the immediate cause of V's injuries, this was therefore sufficient.

K (1990)

D put acid from a school science lab into a hand dryer. V used the dryer and suffered from burns. The burns themselves were sufficient for the section 47 offence, needed to prove that the harm was done by assault or battery. had to go for battery as there was no apprehension.
Held it was battery, drew an analogy with setting a trap to which the victim then falls into.
Court is trying to repurpose the offence of battery to get the right result. If the victim were left without redress here it would be unjust.

- Battery has also been upheld without a positive act (R v Santana-Bermudez [2004] Crim LR 471.)

Santana-Bermudez

D searched by police officer, syringe was found. V asked D if he had any needles, lied and said no. put hand in pocket and was pricked. Divisional court cited Miller, defendant had created a dangerous situation, knew there was danger and did nothing to avert it from happening (omission)

Some older authorities suggest direct force is needed (Fagan v MPC [1969] 1 QB 439; MPC v Wilson [1984] AC 242.)

Fagan v MPC

D accidently parked car on policeman's foot, then works out what he had done and left the car there. Problem of coincidence of AR and MR. divisional court said that there must be a positive act, went on to find that the 'continuing act' from the moment of the parking satisfied this.

Miller had not been decided before Fagan was decided, no reason why it cannot be that an omission can lead to battery.

- V cannot complain about contact which is ordinarily acceptable in daily life, eg touching to attract attention (Collins v Wilcock, there is a general implied consent to such touching incidental to everyday life and Pegram v DPP [2019])

Pegram

V was a demonstrator and the police officer came close to the line by warning him from conduct, and holding him whilst doing so. Was not convicted.

- Consent negatives battery

- References to need for act to be 'hostile' should be understood to mean 'without consent': 'if a person tells another that he or she refuses to be touched or struck in a particular way and the other carries on and does it, the fact that he is motivated by misdirected affection will not save it from being an assault'.

B [2013]

D had a mental illness and forced his wife to eat garden leaves, thinking it was good for her. CA: the critical issue was whether he understood that she did not consent to this act. If he did it was an assault, even if he acted out of affection.

Brown [1994] 1 AC 212,

HL dicta, dealt with sadomasochism suggesting that hostility might be a necessary component of battery. no suggestion of what it might mean, no modern case helping defining such element of hostility.

As with assault, requires **intention or recklessness** as to the actus reus:

"…We see no reason in logic or in law why a person who recklessly applies physical force to the person of another should be outside the criminal law.." (

Venna [1976]

D kicked out of officers and broke V's hand. Question whether battery was a crime of intention or recklessness. Recklessness was sufficient.

NB the doctrine in Caldwell that the 'test' for recklessness was objective never took hold in non-fatal offences (Savage, Parmenter (above)).

The law as stated in G [2004] in relation to criminal damage thus puts damage to property and non-fatal harm to people on the same (subjective) footing.

ASSAULT OCCASIONING ABH (S 47)

Assault or battery are the base offence where the outcome is that actual bodily harm is caused. The possible penalty rises from six months to five years.

Bodily harm has its ordinary meaning and includes any hurt calculated to interfere with the health or comfort of the victim: such hurt need not be permanent, but must be more than transient and trifling: (CPS Charging Standards

Miller [1954] 2 QB 282

D kept victim locked up and mistreated her. Court decided that ABH includes any hurt that interferes with the health or comfort of the victim.

Charging Standards reserve s.47 for injuries too serious to be reflected by battery. 'In determining whether or not the injuries are serious, relevant factors may include, for example, the fact that there has been significant medical intervention and/or permanent effects have resulted. Examples may include cases where there is the need for a number of stitches (but not the superficial application of steri-strips) or a hospital procedure under anaesthetic.'

CPS has raised the standard and read extra content into the act in order to meet the raised maximum sentence.

Cutting off V's hair? DPP v Smith [2006] EWHC 94

> Cut of ex-partners hair without physical injury. Harm did not necessarily mean injury. Hair is not living tissue but it is attached to the body and forms part of it.

Stefanski [2019] EWCA Crim 831.

> D got 6 months for forcibly cutting his partners hair

Crime expresses itself in terms of physical harm, but as medical knowledge has grown, we know that long lasting injury manifests itself in other psychiatric elements:

ABH may include recognised psychiatric injury: 'bodily' incorporates the nervous system and brain

Chan Fook [1994] 2 All ER 552

> Body covers the whole person including non-physical injury. Harm must mean harm- so prosecution does need to be based on medical evidence, which was lacking in this case

approved in Ireland, Burstow- clear evidence of the injury suffered.

"the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury."
Lord Steyn in *Ireland*, rejecting the idea that the court was confined to what 'bodily' meant in 1861. In a criminal statute of this kind we are not tied to the understanding at the time of drafting, entitled to look at the best current scientific appreciation through modern eyes to recognize psychiatric injury.

R v Dhaliwal [2006] EWCA Crim 1139

> does not include distress/grief/anxiety falling short of recognised illness.

MENS REA:

S.47 requires proof of assault or battery PLUS a causal link between that and the ABH:

> "once the assault was established, the only remaining question was whether the victim's harm was the natural consequence of that assault. The word 'occasioning' raised solely a question of causation, an objective question which does not involve enquiring into the accused's state of mind." -Savage

Savage

> 'occassioning' :Whether the injury flowed naturally from the act. Justified on the basis that it is hard to predict how much injury you could cause, if the injury goes beyond what you predicted, law can punish you more severely. However significant gap.
>
> Lord Ackner, cites R v Roberts (1971) 56 Cr App R 95. Thought it would generate more debate.

How can it be right that the difference between common assault (6 months) and s.47 (5 yrs) depends simply on the result, not on any difference in the mens rea?

S 20 MALICIOUS WOUNDING/INFLICTING GBH

AR can come about in form of a wound, or grievous bodily harm. Grievous meaning really serious.
'inflict' used to describe how the serious injury must occur.
This is not true, these offences were cut and pasted from previous legislation, so this is why the penalty is the same- it is five years. interpretation therefore needs to be careful, drafting not intended to impose a heavier sanction.

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument shall be guilty of [an offence]" [Max 5 yrs]

- Wound = **puncture of the inner and outer skin accompanied by bleeding** (Moriarty and Brooks (1934) 6 C&P 684; JCC V Eisenhower (1984) 78 Cr App R 48**). Internal injuries are not wounds** (but may be GBH).

- GBH = **really serious injury** (DPP v Smith [1961] AC 290), including psychiatric injury R v Ireland; R v Burstow. Takes account of impact on particular victim if vulnerable – R v Bollom [2003] EWCA Crim 2846

Jury decides whether really serious harm has been caused, provided that the harm is capable in law of being really serious.

<u>R v Burstow</u>

Issue of whether psychiatric injury could constitute GBH. HL: yes it could.

<u>Bollom</u>

Jury may take into account the vulnerability of the victim in deciding whether the harm was serious or not.

Have to consider the Crown Prosecution charging standards in actus reus element. CPS had tried to iron out some of the anomalies between the sections. Technically a wound here, can still be relatively small. The act treats wounding and GBH as equivalent, the charging standards does not.

"The definition of wounding may encompass injuries that are relatively minor in nature, for example a small cut or laceration. An assault resulting in such minor injuries should more appropriately be charged as Common Assault or, where a sentence of more than 6 months' imprisonment is likely, ABH. An offence contrary to section 20 should be reserved for those wounds considered to be really serious (thus equating the offence with the infliction of grievous, or serious, bodily harm under the other part of the section)." (CPS Charging Standards s.20)

Minor lacerations now unlikely to lead to serious injury, if it did, GBH would then be brought. Runs against what the act specifies.

Charging standards- injury shifts from being 'serious' to 'really serious'

Grievous bodily harm means really serious bodily harm. It is for the jury to decide whether the harm is really serious. However, examples of what would usually amount to really serious harm include:

- injury resulting in permanent disability, loss of sensory function or visible disfigurement;
- broken or displaced limbs or bones, including fractured skull, compound fractures, broken cheek bone, jaw, ribs, etc;
- injuries which cause substantial loss of blood, usually necessitating a transfusion or result in lengthy treatment or incapacity;
- serious psychiatric injury, courtesy of Burstow

(CPS Charging Standards s.20)

'inflicit' – narrower than to case injury?

Clarence

D recklessly passed on a serious STD to his wife via consensual intercourse. No assault or battery by the husband- no section 20 offence. In approaching s20 as requiring an assault, trying to make it fit with section 47 in court. if we were to do that, lose the ability to prosecute for serious injuries caused by other means.
Clarence gradually discredited.

Wilson

HL: Clarence was unduly restrictive in seeking to limit section 20 to assaults or batteries. Notion of inflict still suggested some notion of violently applied force, which it does in the ordinary use of the word.

R v Ireland

Harm that came about in the s 20 case, (Burstow) was psychiatric, not violently applied force. HL took a further step away from Clarence and Wilson, stated that it didn't think in practical terms that there was any difference between what inflict and what cause means.

R v Dica [2004]

Reckless transmission of HIV from D, who knew he had the virus, to his partners, who were unaware of the risk they were taking. READ.
We have moved on, from the understanding that the court had in Clarence, the facts of that case would be decided differently today.
Issue of the partner's consent was not relevant here, even if they consented to sex, didn't mean they consented to the risk of catching HIV.

Golding applies this in the instance of herpes

Brady [2006]

Court considered Dica and Ireland in context of D, who had been drinking, perched on the rail of a nightclub balcony, then fell/jumped over. He flattened someone dancing beneath, caused her really serious injuries.
CA: in cases such as Ireland and Dica, the injury had been brought about by the deliberate, non-accidental conduct of the defendant, this equates to being caused by D.
The problem went beyond that, D argued that the fall was purely accidental. CA stated that it was possible even if he fell, to argue that this was deliberate conduct because the perching on the rail was deliberate and it put him in a precarious position, which was the cause of his fall.

Push the idea of inflicting so far away from the original notion, becomes just the equivalent of the term 'caused'. Conviction quashed on other grounds here. Thought it was at least a possibility to convict.

MR: expressed in the word 'maliciously'

Means intention /recklessness as to injury (Cunningham [1957] QB 396 : s.23 OAPA 'malicious' administration of noxious substance) not the murder Cunningham

Cunningham

D trying to break into gas meter to get money. Broke a gas pipe and caused the gas to escape. Charged with maliciously administering a noxious substance.
What does maliciously mean?
Trial judge- had to act wickedly.
CA- wrong in law. the legal meaning of maliciously, is acting intentionally, deliberately, or acting recklessly in the subjective sense.

R v Mowatt

D hit V, who was trying to retrieve some stolen money. Applied in such a way as to make section 20 a constructive crime.
CA agreed that the word maliciously means at least awareness that his act may have consequences, but the consequence they stipulate is that of causing some physical harm to another person.
Level of injury, not the type.

In s. 20: "the word maliciously does import upon the part of the person…an awareness that his act may have the consequence of causing some physical harm to some other person…It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in [section 20]" R v Mowatt [1968] 1 QB 421

Gap between what D thinks is going to happen and what actually materialises.

Can it be right that D's mens rea need not extend to the full harm caused?

R v Savage, R v Parmenter

Parmenter, d caused serious injury to baby son, said he didn't realise that the way he handled the child was likely to cause injury. The trial judge went wrong, gave the jury what appealed to be an objective direction- the defendant should have realised.
HL simply accepted that trial judge should have followed Mowatt's subjective test.

Argument against constructive crimes, HL said if you look into whether there is a rule against such crimes, there is no hard and fast principle.
Mowatt: Ackner pointed out in murder and MS there is a constructive element. But there was criticism of these offences that they are far too constructive. Would have been good to debate, whether correspondence of AR and MR would be a better rule

WOUNDING/CAUSING GBH WITH INTENT (S 18)

"Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of [an offence] and being convicted thereof shall be liable to [imprisonment for life]"

- Requires wound or gbh but 'cause by any means whatsoever' avoids suggestion encountered with 'inflict' that the means should be direct. Mirrors section 20, provided that inflicted doesn't mean anything other than to cause- use the same cases.