5.5.1. The possibility of rape within marriage

This case study examines the way in which the common law develops over time through cases. It also involves an analysis of the ways in which the courts apply the rules of statutory interpretation. The subject matter of the study relates to the once generally accepted legal doctrine that men could not commit the crime of rape against their wives. As will be seen, whilst the common law had been able to conduct piecemeal reform and to reduce the ambit of the rule by limiting its sphere of operation, by the late 20th century, social circumstances and attitudes had so changed that the law had reached a state of crisis that required the total rejection of the doctrine. If the law were not to be reconstructed, then it would be brought into disrepute. The question was whether, and if so how, the common law could achieve such a radical alteration.

In his *History of the Pleas of the Crown* (1736), Sir Matthew Hale made the following pronouncement:

> But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.

As Hale had held the office of Chief Justice for five years, there can be little doubt that what he wrote was an accurate expression of the common law as it then stood, even though he had died some 60 years before the publication of the work. Hale's justification for his statement was that, on marriage, the wife gave up her body to her husband and gave her irrevocable consent to sexual intercourse.

That Hale's pronouncement was accepted as an enduring principle of the common law is evidenced by the first edition of Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822), which simply stated: 'A husband also cannot be guilty of a rape upon his wife.'

Although some doubts were raised about the doctrine in *R v Clarence* (1888), it was not until in *R v Clarke* (1949) that Byrne J held that the husband's immunity was lost where the justices had made an order providing that the wife should no longer be bound to cohabit with the defendant. But even Byrne J had to recognise that:

> As a general proposition it can be stated that a husband cannot be guilty of rape on his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them.

However, in *R v Miller* (1954), Lynskey J ruled that Hale's proposition was correct and that the husband had no case to answer on a charge of rape, although the wife had before the act of intercourse presented a petition for divorce, which had not reached the stage of a *decree nisi*. This was followed by *R v O'Brien* (1974), in which Park J ruled that a *decree nisi* effectively terminated a marriage and revoked the consent to marital intercourse given by a wife at the time of marriage. And in *R v Steele* (1976), it was held that where a husband and wife are living apart and the husband has made an undertaking to the court not to molest the wife, that is in effect equivalent to the granting of an injunction and eliminates the wife's implied consent to sexual intercourse.

The courts had thus developed the doctrine of implied consent as a means of mitigating the stark harshness of Hale's original doctrine, but as the 20th century drew towards its final decade, it became increasingly apparent that such tinkering with the doctrine was not sufficient. Thus, in Scotland, whose legal system had also harboured a similar doctrine since 1797, the courts in *S v HM Advocate General* (1989) held that the whole concept of a marital exemption in rape was misconceived. Then, in *R v R* (1992), at first instance, Owen J clearly expressed his reluctant acquiescence with Hale's general pronouncement, and the need to extend the exceptions to the doctrine of implied consent as follows:

> I accept that it is not for me to make the law. However, it is for me to state the common law as I believe it to be. If that requires me to indicate a set of circumstances which have not so far been considered as sufficient to negative consent as in fact so doing, then I must do so. I cannot believe that it is a part of the common law of this country that where there has been withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, that that does not amount to a revocation of that implicit consent. In those circumstances, it seems to me that there is ample here, both on the second exception and the third exception, which would enable the prosecution to prove a charge of rape or attempted rape against this husband.

That ruling was followed by two other conflicting decisions, both at first instance.

In *R v C (Rape: Marital Exemption)* (1991), Simon Brown J, concentrating on the common law, took the radical step of holding that Hale's proposition was no longer the law. As he stated:

> Were it not for the deeply unsatisfactory consequences of reaching any other conclusion upon the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late 20th century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape.

However, in *R v J (Rape: Marital Exemption)* (1991), the argument was based on statutory interpretation. The wording of s 1(1) of the Sexual Offences (Amendment) Act 1976 provided that:

> For the purposes of section 1 of the Sexual Offences Act 1956 a man commits rape if – (a) he has *unlawful* sexual intercourse with a woman who at the time of the intercourse does not consent to it . . .

The contention was that the Act of 1976 provided a statutory definition of rape and that the only possible meaning which could be ascribed to the word '*unlawful*' was 'illicit', effectively meaning outside the bounds of matrimony. Consequently, Parliament's intention must have been to preserve the husband's immunity.

Rougier J not only accepted this argument, but went on to try to constrain further attempts to limit Hale's doctrine beyond what had already been achieved. Thus, he stated that:

> Once Parliament has transferred the offence from the realm of common law to that of statute and, as I believe, had defined the common law position as it stood at the time of the passing of the Act, then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallised as at the making of the Act and only Parliament can alter it.

Thus stood the authorities when *R v R* was heard by the Court of Appeal, also in 1991. The court was clearly of the view that the ancient rule had to be removed, but how was that *desideratum* to be achieved? According to Lord Lane CJ, who delivered the decision of the court:

> The . . . radical solution is said to disregard the statutory provisions of the Act of 1976 and, even if it does not do that, it is said that it goes beyond the legitimate bounds of judge-made law and trespasses on the province of Parliament. In other words the abolition of a rule of such long standing, despite its emasculation by later decisions, is a task for the legislature and not the courts . . . Ever since the decision of Byrne J in *R v Clarke*, courts have been paying lip service to the Hale proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes. There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour . . . It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant parliamentary enactment.

Nonetheless, the Court of Appeal obviously felt constrained by its constitutional position and its position within the operation of *stare decisis* for, rather than just dismissing Hale as wrong law, it had to say that it never was law. Thus:

> [It] can never have been other than a fiction, and fiction is a poor basis for the criminal law.

That dealt with the common law, but the statutory provision remained and was dealt with as follows:

> . . . in the end [it] comes down to consideration of the word 'unlawful' in the Act of 1976 . . . The only realistic explanations seem to us to be that the draftsman either intended to leave the matter open for the common law to develop in that way . . . or, perhaps more likely, that no satisfactory meaning at all can be ascribed to the word and that it is indeed surplusage. In either event, we do not consider that we are inhibited by the Act of 1976 from declaring that the husband's immunity as expounded by Hale no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

Such a radical decision could not but go to the House of Lords, which unanimously followed the decision and reasoning of the Court of Appeal. Their Lordships agreed that Hale's pronouncement never was law; it was always a fiction that had infiltrated the common law. What the present case did was merely to put the common law back on its correct tracks. As for the interpretation of the Sexual Offences (Amendment) Act 1976, the appearance of 'unlawful' in s 1(1) was mere surplusage.

Subsequently, the word 'unlawful' was removed from the definition of rape under the Criminal Justice and Public Order Act 1994. Thus was the fiction of marital consent removed forever: reality remains a more intractable matter.