

Episode 139: Summary

Episode name: Piercing the Limits: The Defence of Consent in *Russell v R*

Guest(s): Michael Gleeson

What area(s) of law does this episode consider?

Criminal law; grievous bodily harm (GBH); female genital mutilation (FGM); manslaughter; consent as a defence to assault related offences.

Why is this topic relevant?

The NSW Criminal Court of Appeal's recent landmark decision of *Russell v R* grapples with complex legal questions around the concept of consent as a defence to various kinds of assault. As non-traditional practices which may challenge conventional notions of consent become more popular over time, such as body modification and sadomasochism, it becomes increasingly important to fine tune how consent may be offered or restricted in different criminal offences.

Possessing an acute understanding of the distinction between lawful activity and unacceptably harmful conduct, ultimately requires thoughtful contemplation of how the value of personal autonomy ought to be weighed against the need for public safety. The formula to strike a successful balance between the two is relevant far beyond the courtroom of one case, and will continue to generate future debate in both courts and academic discourse.

What legislation is considered in this episode?

Crimes Act 1900 (NSW) ('*Crimes Act*')

Evidence Act 1995 (NSW) ('*Evidence Act*')

Interpretation Act 1987 (NSW)

What cases are considered in this episode?

[*Russell v R* \[2023\] NSWCCA 272](#)

- Mr. Russell, an extreme body modification artist, was convicted of FGM, GBH and manslaughter, with the court examining the role of consent and the interpretation of s 45(1) of the *Crimes Act*. He argued on appeal that consent should negate GBH liability and that the FGM charge was misapplied. The Court of Criminal Appeal upheld the GBH and manslaughter convictions, ruling that consent cannot generally excuse GBH, but overturned the FGM conviction, interpreting s 45(1) as limited to ritualistic practices involving children, reducing his sentence to 7 years.

[*R v Brown* \[1993\] UKHL 19](#)

- Five men were convicted for engaging in consensual sadomasochistic acts that caused actual bodily harm, discovered during an unrelated investigation, under

the *Offences Against the Person Act 1861* (UK). The appellants argued that consent should be a valid defence, likening their activities to accepted practices like tattooing and piercing, but the court deliberated whether such consent absolved liability for intentional harm. The House of Lords, in a 3-2 decision, ruled that consent was not a defence for causing actual bodily harm, citing public policy concerns about moral corruption, unpredictability, and a lack of justification beyond sexual gratification.

[*R v Coney* \(1882\) 8 QBD 534](#)

- Two men engaged in a prize fight in a makeshift ring near a road, drawing a crowd that included Coney and others, who stayed to watch and were subsequently charged with assault for allegedly aiding and abetting the fight. The court held that consent to injuries in prize fights is irrelevant because such fights are injurious to public interest, involve a breach of the peace, and pose risks to life and health, rendering mutual blows unlawful assaults. Thus, Coney could be held liable for aiding and abetting an assault and the assault was not negated by the fighters' consent.

[*The Queen v A2* \(2019\) 269 CLR 507](#)

- The High Court examined the interpretation of s 45(1)(a) of the *Crimes Act*, which prohibits FGM, in a case involving charges against A2, Magennis, and Vaziri for performing a ritual called "khatna" on two young girls. The defendants argued that "mutilates" required irreparable damage and that "clitoris" did not include the clitoral hood. The High Court overturned the appellate court's decision, ruling that "mutilates" should be interpreted broadly to include acts like cutting or nicking and that "clitoris" encompasses the hood, remitting the case for consideration of other appeal grounds.

[*Perre v Apand Pty Ltd* \(1999\) 198 CLR 180](#)

- The High Court considered whether a manufacturer of potato seeds owed a duty of care to farmers who suffered economic loss due to an infected batch of seeds that led to a trade ban in their region. The court emphasised the importance of respecting individual autonomy, particularly in commercial dealings, avoiding rigid frameworks for establishing duties of care that could overly restrict private arrangements or commercial freedom. This discussion of autonomy relates to cases involving consent to GBH by reinforcing that autonomy - whether in consenting to harm or managing private risks - must be carefully balanced against broader legal and policy concerns to prevent abuse or unjustifiable impositions.

What are the main points?

- Mr. Russell was convicted on three counts of extreme body modification procedures in Newcastle, New South Wales, and sentenced to 10 years in prison, later reduced on appeal. One of the charges involved female genital mutilation, where he performed a labiaplasty procedure on a victim known as AA without fully obtaining her consent, resulting in partial excision of her labia minora.
- Mr. Russell also performed an abdominoplasty on a female victim named BB, resulting in adverse health outcomes and significant scarring, leading to emergency corrective surgery.
- Section 45(3) of the *Crimes Act* specifies the exceptions to a charge of FGM, including performing surgical operations by medical practitioners is not considered an offence, such as when necessary for the person's health, in labour, or for medical purposes post-labour or birth, including sexual reassignment procedures. Section 45(4) specifies that only medical factors should be considered when determining if an operation is necessary for a person's health.
- Mr. Russell's defence team, including Mark Tedeschi, argued for the reading down of section 45(1) of the *Crimes Act* based on the case of *A2*, which focused on the protection of children. Despite the lack of explicit guidance in *A2*, the Court of Criminal Appeal followed its dicta to quash the FGM count against Mr. Russell.
- Mr. Russell was found to owe a duty of care to BB, the victim of the third charge in the case; manslaughter.
- In sports, such as boxing, the law takes a step back, allowing individuals to consent to assault. This is particularly the case in sanctioned, affiliated matches, as opposed to unsanctioned fights.
- Both sides in a legal case have the chance to influence the outcome by presenting arguments and evidence on behalf of their clients. This process allows for the defense to actively participate and shape the case through submissions.

What are the practical takeaways?

- If you are a law student or junior lawyer, it is recommended that you read Judge Syme's decision from the District Court linked below, particularly focusing on Her Honour's handling of the grievous bodily harm charge.
- Cosmetic procedures are gaining popularity and body modification is becoming increasingly complex. Consult a medical expert to understand the necessity

and potential health reasons behind such procedures. Use expert evidence in determining what is medically necessary under section 79 of the *Evidence Act*.

- The criminal law is rapidly evolving, specifically around domestic violence, with recent coercive control laws in New South Wales reflecting this shift. With this evolution, lawyers should take a common-sense approach when assessing cases.
- Having mentors in the legal profession is crucial, as they provide encouragement and valuable advice. As you start your career, remember to ask questions and be proactive in seeking guidance from experienced professionals.
- We love this advice from Michael: “Good luck. Roll up your sleeves. Don't be afraid to ask questions. Hustle. Do good and fear no one.”

Show notes

[Gleeson, M. \(2024\), 'The Limits of Personal Autonomy - Consent No Defence to Grievous Bodily Harm', NSW Bar Association News.](#)

[R v Russell \[2021\] NSWDC 782](#)

[Bar News, Autumn 2024 Edition](#)