

PART VIII
MISCELLANEOUS

Chapter 25: Offences



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Chapter 25

OFFENCES

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25.01 Introduction

Part IX of the Mental Health Act is concerned with offences that are generally intended to ensure that the statutory functions of those acting in pursuance of the Act are able to be carried out, and to ensure that those carrying out their functions do so honestly and without harming those in their charge. Thus documents should not be forged nor false statements made (s. 126); patients should not be ill treated or wilfully neglected (s. 127); patients liable to detention or subject to guardianship should not be induced or knowingly assisted in escaping or absenting themselves without leave, and they should not be knowingly harboured (s. 128); and those carrying out their various duties and functions under the Act should not be obstructed (s. 129). A local social services authority may institute proceedings in respect of any offence under Part IX, and an offence for ill-treatment of patients (s. 127) also requires the consent of the Director of Public Prosecutions.

Section 128 of the Mental Health Act 1959 is not repealed by the 1983 Act. That section makes it an offence for a member of staff to have extra-marital relations with a woman who is receiving treatment

for mental disorder in the hospital or home as an out-patient or in-patient. It is also an offence for a man to have extra-marital relations with a woman who is subject to his guardianship or otherwise in his custody or care. A number of other offences involving sexual relations with a severely mentally handicapped woman are also provided for under the Sexual Offences Act 1956. The final offence discussed in this chapter is the sale of firearms to a mentally disordered person.

A. OFFENCES UNDER PART IX OF THE ACT

25.02 Forgery and False Statements

Section 126 makes it an offence to forge or to make false statements in respect of any document required or authorised to be made under the Act including an application for compulsory admission under Part II and a medical recommendation or report (s. 126(3)). In particular any person who without lawful authority has in his possession or under his control any such document which he knows or believes to be false is guilty of an offence (s. 126(1)). (As to the meaning of "false", see s. 9 of the Forgery and Counterfeiting Act 1981). Further any person who without lawful authority makes or has in his possession or control any document so closely resembling any such document as to be calculated to deceive is guilty of an offence (s. 126(2)). To deceive is "to induce a man to believe a thing to be true which is false and which the person practising the deceit knows or believes to be false";¹ it also includes the inducing of a person to believe a thing to be false which is true.²

Section 126 applies not only to false or forged documents themselves but to false statements made within such documents. Thus it is an offence wilfully to make a false entry or statement in any application, recommendation, report, record or other document made for the purposes of the Act. It is similarly an offence if, with intent to deceive, a person makes use of any such entry or statement which he knows to be false (s. 126(4)). Any entry or statement may be false on account of what it omits, even though the statement or entry is in itself literally true.³

A local social services authority is entitled to institute proceedings for an offence under section 126 (s. 130). Any person found guilty is liable on summary conviction to not more than six months imprisonment and/or a fine not exceeding the statutory maximum (see

¹ *Re London and Globe Finance Corp. Ltd.* [1903] 1 Ch. 728, 732, per Buckley, J.

² *Welham v. DPP* [1961] A.C. 103, per Lord Radcliffe.

³ *R. v. Lord Kylsant* [1932] 1 K.B. 442.

s. 145(2)); and on conviction on indictment, to not more than two years imprisonment and/or to a fine of any amount (s. 126(5)).

25.03 Ill-Treatment of Patients

25.03.1 Hospital patients

It is an offence for any officer on the staff of, or otherwise employed in, or who is one of the managers of, a hospital or mental nursing home:

- (i) to ill-treat or wilfully to neglect a patient for the time being receiving treatment for mental disorder as an in-patient in that hospital or home; or
- (ii) to ill-treat or wilfully to neglect, on the premises of which the hospital or home forms part, a patient for the time being receiving such treatment there as an out-patient (s. 127(1)).

Thus a person charged with such an offence must have a specific relationship to the hospital—*e.g.* administrator, doctor or nurse. The patient must also have a specific connection with the same hospital or home. He must either be an in-patient, or an out-patient receiving treatment for **mental disorder**. The ill-treatment or wilful neglect of an **in-patient** need not take place on the hospital premises but could occur, for example, while a nurse was accompanying the patient on an outing in the community. However, the ill-treatment or wilful neglect of an **out-patient** must be in the hospital or otherwise on the premises in which the hospital or home is situated.

25.03.2 Guardianship patients

It is also an offence for any individual to ill-treat or wilfully to neglect a mentally disordered patient for the time being subject to guardianship under the Act (s. 127(2)); there is no territorial limitation imposed.

25.03.3 Patients under custody or care

It is also an offence for any individual to ill-treat or wilfully to neglect a mentally disordered patient in his custody or care, whether by virtue of any legal or moral obligation or otherwise (s. 127(2)). (As to “legal custody”, see s. 137, and para. 21.17 *ante*). This is a considerably wider provision which does not necessarily require a highly specific relationship between a person in authority and the patient. It is clear that the person need not at the time be receiving treatment for mental disorder; further, even though the term “patient” is used (see the specific definition in section 145(1) discussed at para. 20.20.1 *ante*) the person need not be in a hospital or home or under guardianship. This provision would apply to a member of staff such as a social worker

(and perhaps even a volunteer) caring for a mentally disordered person in a residential care home; it would apply to a police officer in whose custody a mentally disordered person was; and it could apply to a teacher in an adult education centre. Arguably it might apply to a family member (perhaps even a friend) who was caring for a mentally disordered person in his home. This would depend upon the construction of the phrase a “moral obligation” to care.¹

In *R. v. Newington*,² the Court of Appeal construed section 127(2) of the Mental Health Act. The Court overturned the conviction of the owner of a residential home on charges of ill treatment of an elderly patient who was mentally ill. The Court held that “ill treatment”: (1) “cannot be equated with ‘wilfully to neglect,’ for the latter expression involves consideration of a particular state of mind whilst the simple word ‘neglects’ may not”; (2) is a deliberate form of conduct; (3) need not result in actual injury or even unnecessary suffering or diminished health for the patient; (4) requires mens rea involving either an appreciation at the time that she was inexcusably ill-treating the patient or that she was recklessly acting in that way; and (5) requires proof that the victim was a mentally disordered patient. Watkins LJ in *R. v. Newington* viewed the trial judge’s summation as unsatisfactory according to the above standards. (See 25.03.4 below.)

25.03.4 Construction of “ill-treatment” or “wilful neglect”

The Court of Appeal in *R. v. Newington*³ took the opportunity to carefully construe the terms “ill treatment” and “wilful neglect” in overturning the conviction, under section 127(2), of an owner of a residential nursing home for the elderly (see para. 25.03.3 above). The allegations were that she assaulted and otherwise ill-treated residents, failed to provide a satisfactory and humanitarian standard of diet, clothing, bedding, heating, and sufficient and adequate staff. Watkins LJ first held that the terms “ill treatment” and “wilfully to neglect” are mutually exclusive. “Wilfully to neglect” refers to some failure to

¹ Older cases construing the term “ill treatment” such as *R. v. Pelham* (1846) 2 Cox C.C. 17, [1846] Q.B. 965 per Lord Denham, may not be reliable. See *R. v. Newington*, *The Times* 27 February 1990 (Transcript: Marten Walsh Cherer), CCA. *Pelham* involved a prosecution for ill-treatment of a lunatic. The Court of the Queen’s Bench held that the person must be under the custody or care of the defendant when he committed the acts for which he was charged; that the defendant must owe a duty of care to the person; and that the acts of commission or omission must actually have caused injury. *Pelham*, however, was not brought under legislation referring to “moral obligation.” In *R. v. Newington*, Watkins LJ distinguished the term “wilfully to neglect” in the Mental Health Act, with “neglects” in the Children and Young Persons Act 1933. Therefore, any reliance on 1933 Act cases such as *R. v. Sheppard* [1981] AC 394 is misplaced.

² *The Times* 27 February 1990, *The Independent* 21 March 1990 (Transcript: Marten Walsh Cherer) 23 February 1990, CCA per Watkins LJ.

³ *The Times* 27 February 1990 (Transcript: Marten Walsh Cherer) 23 February 1990, CCA per Watkins LJ.

act when moral duty demands action,¹ while "ill treatment" refers to some deliberate course of action. Nor should "wilfully to neglect" be equated with the simple word "neglects." A trial judge could appropriately direct a jury to exclude from their minds mere neglect. It follows, said Watkins LJ, that when the Crown Prosecution Service brings proceedings under section 127, charges of "ill treatment" and of "wilfully to neglect" should be put in separate counts in the indictment.

In a charge of "ill treatment" the judge should deal correctly with both the *actus reus* and the *mens rea* of the offence. The judge, in dealing with the *actus reus* of the offence, should properly direct the jury that "ill-treatment" is a deliberate form of conduct. Further, the ill-treatment need *not* have resulted in actual injury or even unnecessary suffering or poor health, since section 127 makes no reference to the consequences of the ill-treatment.

The judge, in dealing with *mens rea*, must go beyond the fact that the defendant acted deliberately or even that she committed violence. The defendant must ill-treat the patient intentionally or recklessly. If the defendant genuinely believed that her conduct was in the best interests of the patient (*e.g.*, violence was necessary for the reasonable control of the patient) she would not be guilty of the offence.

The judge's direction to the jury should state that in order to convict a person for "ill-treatment" the Crown must prove; (1) deliberate conduct which could properly be described as ill-treatment whether or not this ill-treatment damaged or threatened to damage the health of the victim and (2) a guilty mind involving either an appreciation at the time that she was inexcusably ill-treating the patient or that she was reckless in inexcusably ill-treating the patient. The Crown must also prove that the person who is "ill-treated" is a mentally disordered patient. Thus, the person must be mentally disordered within the meaning of section 1 of the Act.

It appears, then, that in order to prove "ill-treatment" the Crown must show that the defendant made a positive act toward a mentally disordered person which treated him badly, and that the defendant appreciated that he was treating the person badly or was reckless in doing so. The mentally disordered person need not be injured or even have risked injury.

The *mens rea* requirement can sometimes be difficult to prove and can result in seemingly unfair consequences. If a nurse, for example, adopts a pattern of excessive force towards patients, perhaps involving unnecessary violence, restraint or seclusion, would the nurse have an adequate defence by stating that he genuinely believed his behaviour was appropriate for the patient's management? Certainly, the pros-

¹ "Wilfully" means deliberately and intentionally, not by accident. *R. v. Senior* [1989] 1 Q.B. 283 at 290, 291, CCR per Russell CJ.

ecution may prevail if it can prove intentionality or recklessness, but the Court of Appeal's decision leaves the door open to potentially unfair results.

There is no definition of "ill-treatment" in section 127. The Bodmin Crown Court in *Holmes*¹ referred to the Concise Oxford dictionary, defining ill-treatment as "to treat badly, ill-use, maltreat", and treatment as "action or behaviour towards a person." There was no suggestion in either definition that it must be spread over a period of time; the Court held that ill-treatment could be established by a single act. The ill-treatment may involve elementary batteries not necessarily of great seriousness in themselves. In *Guddoy*² this involved minor batteries ranging from a slap on the buttocks with a ruler to pulling patients about the hair; and in *Fell*³ this involved hitting a patient on the legs and back with a strap causing bruising. Notwithstanding the fact that caring for mentally disordered patients may require "an exemplary degree of patience", and even if committed on a "refractory patient" after provocation, in a bad case a considerable term of imprisonment would be appropriate.⁴

25.03.5 Prosecution

No proceedings for an offence under section 127 can be instituted except by or with the consent of the Director of Public Prosecutions (s. 127(4)). A local social services authority can institute proceedings but only with the consent of the DPP (s. 130). Section 139 (protection for acts done in pursuance of the Act; see paras. 21.25–21.33 *ante*) does not apply to proceedings for an offence under section 127 (s. 139(3)). On summary conviction a person is subject to not more than six months imprisonment and/or to a fine not exceeding the statutory maximum (see s. 145(2)); and on conviction on indictment the person is subject to not more than two years imprisonment and/or to a fine of any amount (s. 127(3)).

25.04 Assisting Patients to Absent Themselves from Hospital Without Leave, etc.

25.04.1 Assisting patients to absent themselves without leave

Any person who induces or knowingly assists another person who is liable to be detained in a hospital or subject to guardianship under the Act to absent himself without leave is guilty of an offence (s. 128(1)). (As to absence without leave, see para. 11.14 *ante*). Knowl-

¹ [1979] Crim. L. Rev. 52. See further *R. v. Hayles* [1969] 1 Q.B. 364, (1969) 53 Cr. App. R. 36, C.A.

² [1978] Crim. L. Rev. 366.

³ [1975] Crim. L. Rev. 349.

⁴ *Ibid.*

edge is an essential ingredient of the offence.¹ Neglect to make reasonable inquiries is not knowledge, but where a person deliberately refrains from making inquiries the results of which he might not care to have, this constitutes actual knowledge.²

25.04.2 *Assisting patients to escape*

Any person who induces or knowingly assists another person who is in legal custody of a person (see s. 137 and para. 21.17 *ante*) to escape from such custody is also guilty of an offence (s. 128(2)). Note that while it is an offence to induce or knowingly assist a patient to escape, a detained patient who escapes does not himself commit an offence.³

25.04.3 *Harbouring patients absent without leave*

Any person who knowingly harbours a patient who is absent without leave or is otherwise at large and liable to be retaken under the Act is guilty of an offence. The offence extends also to giving such a person any assistance with intent to prevent, hinder or interfere with his being taken into custody or returned to hospital or other place where he ought to be (s. 128(3)).

25.04.4 *Proceedings*

A local social services authority may institute proceedings for an offence under section 128 (s. 130). Any person found guilty of such an offence is liable on summary conviction to not more than six months imprisonment and/or to a fine not exceeding the statutory maximum (see s. 145(2)); and on conviction on indictment, to not more than two years imprisonment and/or to a fine of any amount (s. 128(4)).

25.05 Obstruction

Any person who, without reasonable cause, causes obstruction in any of the following ways commits an offence (s. 129(1)):

- (i) refuses to allow the inspection of any premises (see paras. 4.09.1 and 5.07 *ante*);
- (ii) refuses to allow visiting, interviewing or examination of any person by a person authorised under the Act (see *e.g.* paras. 17.04, 18.02.2 and 22.12 *ante*);

¹ As to what constitutes knowledge, see *Gaumont British Distributors Ltd. v. Henry* [1939] 2 K.B. 711.

² See *Taylor's Central Garages (Exeter) Ltd. v. Roper* (1951) 115 J.P. 445 at 450.

³ *R. v. Criminal Injuries Compensation Board, ex parte Lawton* [1972] 3 All E.R. 582, at 584, per Lord Widgery.

- (iii) refuses to produce for inspection of any authorised person any document or record the production of which is required (see e.g. para. 22.12 ante);
- (iv) otherwise obstructs any such person in the exercise of his functions.

In particular, any person who insists on being present when required to withdraw by a person authorised under the Act to interview or examine a person in private is guilty of an offence (s. 129(2)). Section 129, therefore, comprehensively enforces the right of persons authorised under the Act to carry out their statutory functions such as the Mental Health Act Commissioner who seeks access to a detained patient (ss. 120(4), a doctor who seeks to examine a patient for the purposes of advising the nearest relative as to the exercise of his discharge order (s. 24), or an approved social worker who seeks to enter and inspect premises (s. 115).

There have not been any cases illustrating points of laws as to offences under section 128, but a series of cases relating to the offence of obstruction of a constable in the execution of his duty provide some help in construing the section. Obstruction need not involve physical violence;¹ but it is not caused by a mere refusal to answer questions.² In *Green v. Moore*³ the Queen's Bench Divisional Court said the test was whether there was any obstruction; whether the constable was acting in execution of his duty; and whether it was intended to obstruct the constable. Resistance following a verbal warning that an inspection was about to take place could amount to obstruction. Standing by and doing nothing does not amount to obstruction unless there is a duty to act;⁴ but it would be an offence if there has been a request to withdraw (s. 129(2)).

Proceedings for an offence under section 128 can be instituted by a local social services authority (s. 130). A person on summary conviction is liable to imprisonment for not more than three months and/or to a fine not exceeding level 4 on the standard scale.

¹ *Hinchliffe v. Sheldon* [1955] 1 W.L.R. 1207.

² *Rice v. Connolly* [1966] 2 Q.B. 414.

³ [1982] 2 W.L.R. 671.

⁴ *Swallow v. L.C.C.* [1916] 1 K.B. 224, D.C.; *Baker v. Ellison* [1914] 2 K.B. 762, D.C.

B. SEXUAL OFFENCES

25.06 Competency to Consent to Sexual Intercourse

Apart from the specific statutory provisions which follow, there is no general rule that mentally disordered people cannot have sexual intercourse, or that they cannot be allowed to meet in private.¹ Generally, a mentally disordered person can consent to sexual intercourse provided she knows what she is consenting to. The Supreme Court of Victoria² said that for a woman to lack competency to consent to sexual intercourse it must be proved that she did not have sufficient knowledge or understanding to comprehend that "what is proposed to be done is the physical act of penetration . . . or that the act of penetration proposed is one of sexual connection".³ This criterion permits limited scope for negating the consent of a mentally handicapped woman. It therefore upholds, wherever possible, the right of a mentally handicapped person to engage in consensual sexual activity.⁴

25.07 Sexual Intercourse with a Severely Mentally Handicapped Woman

Under section 7 of the Sexual Offences Act 1956,⁵ it is an offence for a man to have unlawful sexual intercourse with a woman who is severely mentally handicapped.⁶ In determining whether a person is severely mentally handicapped and thereby unable to give consent, any "severe impairment of intelligence and social functioning" is to be measured against the standard of ordinary persons. The purpose of the Act is to protect those who are incapable of giving consent, and any other test would remove this protection afforded by Parliament.⁷

The decision as to whether a person is severely mentally handicapped

¹ See *R. v. Fletcher* (1886) L.R. 1 C.C.R. 39, per Pollock, C.B. (Conviction for rape of an "idiot" requires evidence that the act was against her will or without her consent).

² *Morgan* [1970] V.R. 337.

³ Compare with *dicta* in *Fletcher* [1886] L.R. 1 C.C.R. 39 (carnal knowledge of a child is penal, which throws light upon this case. A girl of tender years is incapable of consenting); and *Barratt* (1873) L.R. 2 C.C.R. 81 (an idiot is incapable of assent or dissent).

⁴ See MIND (1982) *Getting Together: Sexual and Social Expression for Mentally Handicapped People*.

⁵ As substituted by the Mental Health Act 1959, s. 127(1)(a).

⁶ The term used in the 1956 Act is "defective", which is defined in s. 45 of that Act (as amended by the Mental Health (Amendment) Act 1982, s. 65(1), Sch. 3, para. 29) as a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning. This should not be equated with "severe mental impairment" under the 1983 Act which must be associated with abnormally aggressive or seriously irresponsible conduct (s. 1(2)). For our purposes the term "severe mental handicap" is the most appropriate. Cf. the Sexual Offences Act 1967, s. 1(3), (3A) (as amended by the 1982 Act, Sch. 3, para. 34) where the term "severe mental handicap" has the same definition given to "defective" in s. 45 of the 1956 Act.

⁷ *R v Hall (J.H.)* (1988) 86 Cr. App. R. 159, C.A.

is a matter for the jury¹. It is open for the prosecutor to support his case by not calling medical experts, but to invite the jury to observe the behaviour and reactions of the complainant and to draw what they consider to be an appropriate inference².

A man is not guilty of this offence if he does not know and has no reason to suspect³ the woman to be severely mentally handicapped. The proper approach to the construction of this provision is the subjective approach. Thus, if the defendant succeeds in establishing on the balance of probabilities that he did not know and had no reason to suspect the woman to be severely mentally handicapped, he is entitled to be acquitted.⁴ However, it would be extremely difficult for a person charged with an offence under section 7 to distinguish between severe and simple mental handicap—even if he were aware of the appropriate statutory definition.

Unlawful sexual intercourse means illicit sexual intercourse—*i.e.*, intercourse outside the bond of marriage.⁵ Sexual intercourse within a marriage where one or both partners is severely mentally handicapped is not an offence. (As to marriage of mentally disordered people see para. 24.10 *ante*).

25.08 Related Offences under the Sexual Offences Act 1956

There are several related offences under the Sexual Offences Act 1956 which all expressly provide for a subjective approach—*i.e.*, it is not an offence if the defendant did not know and had no reason to suspect that the woman was severely mentally handicapped:

25.08.1 Procurement (s. 9)

It is an offence for a person to procure a woman who is severely mentally handicapped to have unlawful sexual intercourse in any part of the world.

² *Ibid.*

³ *R. v. Robbins* [1988] Crim. L. Rev. 744, C.C.A.

⁴ See expansive interpretation of "reason to suspect" in *R. v. Hudson* [1966] 1 Q.B. 448, 49 Cr. App. R. 69.

⁵ See *Archbold: Pleading, Evidence and Practice in Criminal Cases* (1982; 41st ed.) Sweet & Maxwell, London, para. 20–421.

⁶ *R. v. Chapman* [1959] 1 Q.B. 100, [1958] 3 All E.R. 143, C.C.A.

25.08.2 Abduction from parent (s. 21)

It is an offence for a person to take a woman who is severely mentally handicapped out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man. "Guardian" is used to refer to any person having the lawful care or charge of the woman (s. 21(3)). Presumably this could be wide enough to include taking a severely mentally handicapped woman (of whatever age) out of the possession of hospital or residential care staff charged with her care.

25.08.3 Permitting use of premises for intercourse (s. 27)

It is an offence for a person who is the owner or occupier of any premises, or who has or acts or assists in, the management or control of any premises, to induce or knowingly to permit a woman who is severely mentally handicapped to use those premises for the purpose of having unlawful sexual intercourse with men or a particular man. This language is presumably wide enough to make it an offence for the managers of a hospital or home, or the staff who assist in its management or control, to allow a person classified as severely mentally handicapped to use the hospital or home for the purpose of having unlawful sexual intercourse. This provision makes it particularly difficult for hospital and residential care staff to operate a progressive policy of normalisation by allowing, where appropriate, a mentally handicapped man and woman to meet in private. There is a strong case for reform of the law to bring it into line with modern attitudes towards mentally handicapped people.

25.08.4 Causing or encouraging prostitution (s. 29)

It is an offence for a person to cause or to encourage¹ the prostitution in any part of the world of a severely mentally handicapped woman. Further, a woman's parent, relative or guardian may lay information before a justice, *inter alia*, on grounds that the woman is detained in order to have unlawful sexual intercourse and that she is severely mentally handicapped; whereupon the justice can issue a warrant authorising a constable to search for and remove her to a place of safety (s. 43).

25.09 Homosexual Acts with a Severely Mentally Handicapped Man

By section 1(1) of the Sexual Offences Act 1967 it is not an offence for consenting adults to engage in homosexual acts in private.

¹ A person who fails to prevent an offence being committed by a woman in his presence may be "encouraging" it. *R. v. Drury (Alfred)* [1975] Crim. L. Rev. 655.

However by section 1(3), (3A) of that Act,¹ a man who is suffering from severe mental handicap cannot in law give consent to prevent a homosexual act from being an offence. A person cannot be convicted, on account of the incapacity of a severely mentally handicapped man to give consent, of a homosexual act if he did not know and had no reason to suspect the man to be severely mentally handicapped (s. 1(3)).

The decisions about whether a man is severely mentally handicapped and whether he consented are matters for the jury². The judge is entitled to put these questions to the jury even though the prosecution failed to produce medical evidence, and the medical evidence of the defence indicated that the person was not severely mentally handicapped³.

25.10 Sexual Intercourse with Patients by Members of Staff, etc.

25.10.1 Hospital patients

Section 128 of the Mental Health Act 1959 remains in force and provides as follows.⁴ Without prejudice to the provision in section 7 of the 1956 Act (which makes it an offence for **any** man to have sexual intercourse with a severely mentally handicapped woman), it is an offence for a man who is a member of staff, other employee or a manager of a hospital or mental nursing home to have unlawful sexual intercourse with a woman⁵ who is receiving treatment for mental disorder in that hospital or home; or for a member of staff, other employee or manager to have unlawful sexual intercourse on the premises of which the hospital or home forms part with a woman who is receiving treatment for mental disorder as an out-patient (s. 128(1)(a)). This offence can only be committed by specified persons in authority over a patient—*i.e.*, staff, another employee or a manager. Observe that the offence can be committed against a person who is receiving treatment for **mental disorder** (not restricted to severely mentally handicapped people). If the mentally disordered person is an **in-patient** then the offence can take place anywhere; if she is an **out-patient**, the offence can take place only on the premises.

¹ As amended by the Mental Health (Amendment) Act 1982, s. 65(1), Sch. 3, para. 34.

² *R. v. Hall* (J. H.) (1988) 86 Cr. App. R.159, C.C.A.

³ *R. v. Robbins* [1988] Crim. L. Rev. 744, C.C.A.

⁴ Section 128 of the 1959 Act is to be construed as one with the Sexual Offences Act 1956; and s. 47 of that Act applies to s. 128(2) (s. 128(5)). Thus for the purposes of interpretation of s. 128 reference should be made to the 1956 Act; and, in particular, the exception referred to in s. 128(2) is to be construed by reference to s. 47 of the 1956 Act which provides that proof of the exception is to lie on the person relying on it.

⁵ By s. 1(4) of the Sexual Offences Act 1967, any reference in s. 128 of the Mental Health Act 1959 to unlawful sexual intercourse with a woman includes committing buggery or an act of gross indecency with another man.

25.10.2 *Patients under guardianship, in custody or care or in residential care home*

It is also an offence for a man to have unlawful sexual intercourse with a woman who is a mentally disordered patient and is subject to his guardianship under the Mental Health Act 1983 or is otherwise in his custody or care under that Act or in pursuance of arrangements made under Part III of the National Assistance Act 1948 (see paras. 4.05–4.06 *ante*) or the National Health Service Act 1977 (see para. 4.07 *ante*) or as a resident in a residential care home under the Registered Homes Act 1984 (see para. 5.10 *ante*) (s. 128(1)(b)). This provision extends the class of those who may commit an offence under section 128 of the 1959 Act. Thus, in addition to staff, employees and managers of a hospital or mental nursing home, the following people may commit such an offence: guardians under the Mental Health Act 1983; any person who has “custody or care” under that Act (*e.g.*, a police officer or ASW taking a person to a place of safety or a hospital); and any person who has custody or care in accommodation provided by the local authority under the 1948 or 1977 Act or by the independent sector in a residential care home. Under section 128(1)(b) of the 1959 Act the person need not be receiving “treatment” for mental disorder, but must be a mentally disordered person. Any person found guilty of an offence under section 128 is liable on conviction on indictment to a maximum of two years imprisonment (s. 128(3)).

It is not an offence under section 128 for a person to have sexual intercourse with a woman if he does not know and has no reason to suspect her to be a mentally disordered patient (s. 128(3)).¹

No proceedings under section 128 can be instituted except by or with the consent of the Director of Public Prosecutions (s. 128(4)). Where there is reason to believe that an offence has been committed under section 128, the hospital authorities are advised to inform the Chief Constable and to make a report to the DHSS or Welsh Office.²

25.11 Proposals for Reform

The specific crimes under the Sexual Offences Act 1956 all involve a man having sexual intercourse with a severely mentally handicapped woman. Further, the offence in section 128 of the Mental Health Act 1959 must be committed by a man. Although there is no equivalent provision in the case of female staff having sexual intercourse with male patients, it is suggested that such behaviour could fall within the remit of section 127 of the 1983 Act (ill-treatment of patients). The combined effect of the provisions referred to earlier, in theory at least, is to prohibit severely mentally handicapped people from having sexual

¹ As to burden of proof see note 1 to para. 25.10.1 above.

² DHSS (1983) *Mental Health Act 1983: Memorandum on Parts I to VI, VIII and X*, paras. 297–298.

relationships outside marriage. On a strict interpretation of the law, any member of hospital staff who encourages severely mentally handicapped patients to engage in sexual relationships could be charged with aiding and abetting the commission of a criminal offence. No such charge is known to have been preferred, but the law could have a chilling effect on the liberalisation of attitudes to sexual relationships between severely mentally handicapped people.

25.11.1 *Criminal Law Revision Committee*

In mental handicap hospitals and in residential accommodation in the community it sometimes occurs that a severely mentally handicapped man will have sexual intercourse with a severely handicapped woman. In practice men are never prosecuted in these circumstances. But the question is whether such an offence should be capable of arising, as this has implications for staff who might be accused of aiding and abetting the commission of an offence. The law should be concerned only with exploitation of severely mentally handicapped people. The Criminal Law Revision Committee has proposed that the law should cease to treat it as an offence for a severely mentally handicapped man to have sexual intercourse with a severely mentally handicapped woman.

At present a man who has sexual intercourse with a severely mentally handicapped woman has a defence if he did not know that she was severely mentally handicapped (see para. 25.07 above). The Criminal Law Revision Committee proposed that a man should not have a defence if he knew the woman to be mentally handicapped, whether or not he knew her mental handicap to be severe.

The Committee, finally, recommended that a prosecution for any offence relating to sexual intercourse with a severely mentally handicapped person should only be brought by or with the consent of the Director of Public Prosecutions.¹

25.12 **European Convention on Human Rights**

Interesting questions arise as to whether restrictions, or lack of restrictions, in the criminal law on sexual intercourse can contravene the European Convention on Human Rights. Blanket prohibitions in the criminal law on sexual relations could run foul of Article 8 of the Convention which guarantees respect for a private life; but no case has yet been brought on the issue. In *X. and Y. v. the United Kingdom*²

¹ Criminal Law Revision Committee (1984), Fifteen Report *Sexual Offences*, Cmnd. 9213, HMSO, London, Part IX. See, Criminal Law Revision Committee (1980) *Working Paper on Sexual Offences*, HMSO, London; MIND (1982) *Getting Together: Sexual and Social Expression for Mentally Handicapped People*.

² Judgment of the European Court of Human Rights, March 26, 1985.

the European Court of Human Rights said that the **criminal law** must provide some protection against sexual assault of mentally handicapped women. There is a fine line between sexual exploitation of a mentally handicapped woman, and permitting consensual sexual intercourse between mentally handicapped people.

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C. MISCELLANEOUS**25.13 Sale of Firearm to Mentally Disordered Person**

It is an offence for a person to sell or transfer any firearm or ammunition to, or repair, prove or test any firearm or ammunition for, any other person whom he knows or has reasonable cause for believing to be of unsound mind.¹

¹ Firearms Act 1968, ss. 25, 51, Sch. 6, Pt. 1; Criminal Justice Act 1972, s. 28(1), (5)(a).

1944

The following is a list of the names of the persons who were
 present at the meeting held on the 15th day of June, 1944,
 at the residence of the undersigned, at the address of
 1234 Main Street, New York, New York.

Witness my hand and seal this 15th day of June, 1944.