Burstow R v. Ireland, R v. [1997] UKHL 34 (24th July, 1997)

HOUSE OF LORDS

Lord Goff of Chieveley Lord Slynn of Hadley Lord Steyn
Lord Hope of Craighead Lord Hutton

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

REGINA

v.

BURSTOW
(APPELLANT)
REGINA

v.

IRELAND
(APPELLANT)

ON 24 JULY 1997

LORD GOFF OF CHIEVELEY

My Lords,

I have had an opportunity of reading in draft the speeches prepared by my noble and learned friends, Lord Steyn and Lord Hope of Craighead. I agree with them, and for the reasons they give I would dismiss both appeals.

LORD SLYNN OF HADLEY

My Lords,

I have had the advantage of reading the draft of the speech prepared by my noble and learned friend, Lord Steyn. For the reasons he gives I too would dismiss both appeals. I would, however, reiterate that in *Ireland* the question as to whether there was a fear of immediate violence for the purposes of section 47 of the Act and the question as to how the concept of immediacy is to be applied, in a case where words or silence by someone using the telephone are relied on as constituting the assault, did not arise for decision.

LORD STEYN

My Lords,

It is easy to understand the terrifying effect of a campaign of telephone calls at night by a silent caller to a woman living on her own. It would be natural for the victim to regard the calls as menacing. What may heighten her fear is that she will not know what the caller may do next. The spectre of the caller arriving at her doorstep bent on inflicting personal violence on her may come to dominate her thinking. After all, as a matter of common sense, what else would she be terrified about? The victim may suffer psychiatric illness such as anxiety neurosis or acute depression. Harassment of women by repeated silent telephone calls, accompanied on occasions by heavy breathing, is apparently a significant social problem. That the criminal law should be able to deal with this problem, and so far as is practicable, afford effective protection to victims is self evident.

From the point of view, however, of the general policy of our law towards the imposition of criminal responsibility, three specific features of the problem must be faced squarely. First, the medium used by the caller is the telephone: arguably it differs qualitatively from a face-to-face offer of violence to a sufficient extent to make a difference. Secondly, ex hypothesi the caller remains silent: arguably a caller may avoid the reach of the criminal law by remaining silent however menacing the context may be. Thirdly, it is arguable that the criminal law does not take into account "mere" psychiatric illnesses.

At first glance it may seem that the legislature has satisfactorily dealt with such objections by section 43(1) of the Telecommunications Act 1984 which makes it an offence persistently to make use of a public telecommunications system for the purpose of causing annoyance, inconvenience or needless anxiety to another. The

maximum custodial penalty is six months imprisonment. This penalty may be inadequate to reflect a culpability of a persistent offender who causes serious psychiatric illness to another. For the future there will be for consideration the provisions of sections 1 and 2 of the Protection from the Harassment Act 1997, not yet in force, which creates the offence of pursuing a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of the other. The maximum custodial penalty is six months imprisonment. This penalty may also be inadequate to deal with persistent offenders who cause serious psychiatric injury to victims. Section 4(1) of the Act of 1997 which creates the offence of putting people in fear of violence seems more appropriate. It provides for maximum custodial penalty upon conviction on indictment of five years imprisonment. On the other hand, section 4 only applies when as a result of a course of conduct the victim has cause to fear, on at least two occasions, that violence *will* be used against her. It may be difficult to secure a conviction in respect of a silent caller: the victim in such cases may have cause to fear that violence *may* be used against her but no more. In my view, therefore, the provisions of these two statutes are not ideally suited to deal with the significant problem which I have described. One must therefore look elsewhere.

It is to the provisions of the Offences against the Person Act 1861 that one must turn to examine whether our law provides effective criminal sanctions for this type of case. In descending order of seriousness the familiar trilogy of sections (as amended) provide as follows:

> "18. Whosoever shall unlawfully and maliciously by any means whatsoever . . . cause any grievous bodily harm to any person . . . with intent . . . to do some grievous bodily harm to any person, . . . shall be guilty of felony and being convicted thereof shall be liable . . . to [imprisonment] for life . . . .
> "20. Whosoever shall unlawfully and maliciously . . . inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilt of a misdemeanour, and being convicted therefore shall be liable [to imprisonment . . . for not more than five years.]
> "47. Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . [to imprisonment for not more than five years]."

Making due allowance for the incongruities in these provisions, the sections can be described as "a ladder of offences graded in terms of relative seriousness": *Ashworth, Principles of Criminal Law*, 2nd ed. (1995), at p. 313. An ingredient of each of the offences is "bodily harm" to a person. In respect of each section the threshold question is therefore whether a psychiatric illness, as testified to by a psychiatrist, can amount to "bodily harm." If the answer to this question is no, it will follow that the Act of 1861 cannot be used to prosecute in the class of cases which I have described. On the other hand, if the answer to the question is yes, it will be necessary to consider whether the persistent silent caller, who

terrifies his victim and causes her to suffer a psychiatric illness, can be criminally liable under any of these sections. Given that the caller uses the medium of the telephone and silence to terrify his victim, is he beyond the reach of these sections?

Similar problems arise in the case of the so called stalker, who pursues a campaign of harassment by more diffuse means. He may intend to terrify the woman and succeed in doing so, by relentlessly following her, by unnecessarily appearing at her home and place of work, photographing her, and so forth. Is he beyond the reach of the trilogy of sections in the Act of 1861?

The two appeals before the House

There are two appeals before the House. In *Ireland* the appellant was convicted on his plea of guilty of three offences of assault occasioning actual bodily harm, contrary to section 47 of the Act of 1861. The judgment of the Court of Appeal dismissing his appeal is reported: *Reg. v. Ireland* [1997] Q.B. 114. The case against Ireland was that during a period of three months in 1994 covered by the indictment he harassed three women by making repeated telephone calls to them during which he remain silent. Sometimes, he resorted to heavy breathing. The calls were mostly made at night. The case against him, which was accepted by the judge and the Court of Appeal, was that he caused his victim to suffer psychiatric illness. Ireland had a substantial record of making offensive telephone calls to women. The judge sentenced him to a total of three years imprisonment.

Before the Court of Appeal there were two principal issues. The first was whether psychiatric illness may amount to bodily harm within the meaning of section 47 of the Act of 1861. Relying on a decision of the Court of Appeal in *Reg. v. Chan-Fook*[1994] 1 WLR 689 the Court of Appeal in *Ireland's* case concluded that psychiatric injury may amount to bodily harm under section 47 of the Act of 1861. The second issue was whether Ireland's conduct was capable of amounting to an assault. In giving the judgment of the court in Ireland's case Swinton Thomas L.J. said (at p. 119):

> "It has been recognised for many centuries that putting a person in fear may amount to an assault. The early cases predate the invention of the telephone. We must apply the law to conditions as they are in the 20th century."

The court concluded that repeated telephone calls of a menacing nature may cause victims to apprehend immediate and unlawful violence. Given these conclusions of law, and Ireland's guilty plea, the Court of Appeal dismissed the appeal. The Court of Appeal certified the following question as being of general public importance, namely "As to whether the making of a series of silent telephone calls can amount in law to an assault." But it will also be necessary to consider the question whether

psychiatric illness may in law amount to bodily harm under section 47 of the Act of 1861. Those are the issues of law before the House in the appeal of *Ireland*.

In *Reg. v. Burstow* the appellant was indicted on one count of unlawfully and maliciously inflicting grievous bodily harm, contrary to section 20 of the Act of 1861. The facts are fully set out in the reported judgment of the Court of Appeal: *Reg. v. Burstow* [1997] 1 Cr.App.R. 144. I can therefore describe the facts shortly. Burstow had a social relationship with a woman. She broke it off. He could not accept her decision. He proceeded to harass her in various ways over a lengthy period. His conduct led to several convictions and periods of imprisonment. During an eight month period in 1995 covered by the indictment he continued his campaign of harassment. He made some silent telephone calls to her. He also made abusive calls to her. He distributed offensive cards in the street where she lived. He was frequently, and unnecessarily, at her home and place of work. He surreptitiously took photographs of the victim and her family. He sent her a note which was intended to be menacing, and was so understood. The victim was badly affected by this campaign of harassment. It preyed on her mind. She was fearful of personal violence. A consultant psychiatrist stated that she was suffering from a severe depressive illness. In the Crown Court counsel asked for a ruling whether an offence of unlawfully and maliciously inflicting grievous bodily harm contrary to section 20 may be committed where no physical violence has been applied directly or indirectly to the body of the victim. The judge answered this question in the affirmative. Burstow thereupon changed his plea to guilty. The judge sentenced him to three year's imprisonment. Burstow applied for leave to appeal against conviction. The Court of Appeal heard full oral argument on the application, and granted the application for leave to appeal but dismissed the appeal. Two questions of law were canvassed before the Court of Appeal. First, there was the question whether psychiatric injury may amount to bodily harm under section 20. The Court of Appeal regarded itself as bound by the affirmative decision in *Reg. v. Chan-Fook* [1994] 1 WLR 689. The second issue was whether in the absence of physical violence applied directly or indirectly to the body of the victim an offence under section 20 may be committed. The Court of Appeal concluded that this question must be answered in the affirmative. The concluding observations of Lord Bingham of Cornhill C.J. were as follows, at p. 149:

> "It is not straining language to speak of one person inflicting psychiatric injury on another. It would in our judgment be an affront to common sense to distinguish between section 18 and section 20 in the way contended for by the applicant. It would also, we think, introduce extreme and undesirable artificiality into what should be a very practical area of the law if we were to hold that, although grievous bodily harm includes psychiatric injury, no offence against section 20 is committed unless such psychiatric injury is the result of physical violence applied directly or indirectly to the body of the victim. The decision in *Chan-Fook* is in our view fatal to the applicant's submission."

In the result the Court of Appeal dismissed the appeal against conviction. The court certified the following point as of general importance, namely:

> "Whether an offence of inflicting grievous bodily harm under section 20 of the Offences against the Person Act 1861 can be committed where no physical violence is applied directly or indirectly to the body of the victim."

It will be noted that in neither appeal is there an issue on mens rea: the appeals focus on questions of law regarding the actus reus.

The common question: Can psychiatric illness amount to bodily harm?

It will now be convenient to consider the question which is common to the two appeals, namely, whether psychiatric illness is capable of amounting to bodily harm in terms of sections 18, 20 and 47 of the Act of 1861. The answer must be the same for the three sections.

The only abiding thing about the processes of the human mind, and the causes of its disorders and disturbances, is that there will never be a complete explanation. Psychiatry is and will always remain an imperfectly understood branch of medical science. This idea is explained by Vallar's psychiatrist in *Iris Murdoch's The Message to the Planet*:

> "Our knowledge of the soul, if I may use that unclinical but essential word, encounters certain seemingly impassable limits, set there perhaps by the gods, if I may refer to them, in order to preserve their privacy, and beyond which it may be not only futile but lethal to attempt to pass and though it is our duty to seek for knowledge, it is also incumbent on us to realise when it is denied us, and not to prefer a fake solution to no solution at all."

But there has been progress since 1861. And courts of law can only act on the best scientific understanding of the day. Some elementary distinctions can be made. The appeals under consideration do not involve structural injuries to the brain such as might require the intervention of a neurologist. One is also not considering either psychotic illness or personality disorders. The victims in the two appeals suffered from no such conditions. As a result of the behaviour of the appellants they did not develop psychotic or psychoneurotic conditions. The case was that they developed mental disturbances of a lesser order, namely neurotic disorders. For present purposes the relevant forms of neurosis are anxiety disorders and depressive disorders. Neuroses must be distinguished from simple states of fear, or problems in coping with every day life. Where the line is to be drawn must be a matter of psychiatric judgment. But for present purposes it is important to note that modern psychiatry treats neuroses as recognisable psychiatric illnesses: see *Liability for Psychiatric Injury,* Law Commission Consultation paper No. 137 (1995) Part III (*The Medical Background)*; *Mullany and Hanford, Tort Liability for*

Psychiatric Damages, (1993), discussion on "The Medical Perspective," at pp. 24-42, and particular at 30, footnote 88. Moreover, it is essential to bear in mind that neurotic illnesses affect the central nervous system of the body, because emotions such as fear and anxiety are brain functions.

The civil law has for a long time taken account of the fact that there is no rigid distinction between body and mind. In *Bourhill v. Young* [1943] AC 92, 103 Lord Macmillan said:

> "The crude view that the law should take cognisance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct physical contact. The distinction between mental shock and bodily injury was never a scientific one. . . ."

This idea underlies the subsequent decisions of the House of Lords regarding post-traumatic stress disorder in *McLoughlin v. O'Brian* [1983] 1 AC 410, 418, *per* Lord Wilberforce; and *Page v. Smith* [1996] AC 155, 181A-D, *per* Lord Browne-Wilkinson. So far as such cases are concerned with the precise boundaries of tort liability they are not relevant. But so far as those decisions are based on the principle that the claimant must be able to prove that he suffered a recognisable psychiatric illness or condition they are by analogy relevant. The decisions of the House of Lords on post-traumatic stress disorder hold that where the line is to be drawn is a matter for expert psychiatric evidence. By analogy those decisions suggest a possible principled approach to the question whether psychiatric injury may amount to bodily harm in terms of the Act of 1861.

The criminal law has been slow to follow this path. But in *Reg. v. Chan-Fook* [1994] 1 WLR 689 the Court of Appeal squarely addressed the question whether psychiatric injury may amount to bodily harm under section 47 of the Act of 1861. The issue arose in a case where the defendant had aggressively questioned and locked in a suspected thief. There was a dispute as to whether the defendant had physically assaulted the victim. But the prosecution also alleged that even if the victim had suffered no physical injury, he had been reduced to a mental state which amounted to actual bodily harm under section 47. No psychiatric evidence was given. The judge directed the jury that an assault which caused an hysterical and nervous condition was an assault occasioning actual bodily harm. The defendant was convicted. Upon appeal the conviction was quashed on the ground of misdirections in the summing up and the absence of psychiatric evidence to support the prosecution's alternative case. The interest of the decision lies in the reasoning on psychiatric injury in the context of section 47. In a detailed and careful judgment given on behalf of the court Hobhouse L.J. said (at p. 695G-H)):

> "The first question on the present appeal is whether the inclusion of the word 'bodily' in the phrase 'actual bodily harm' limits harm to harm to the

> skin, flesh and bones of the victim. . . . The body of the victim includes all parts of his body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties."

In concluding that "actual bodily harm" is capable of including psychiatric injury Hobhouse L.J. emphasised (at p. 696C) that "it does not include mere emotions such as fear or distress nor panic nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition." He observed that in the absence of psychiatric evidence a question whether or not an assault occasioned psychiatric injury should not be left to the jury.

The Court of Appeal, as differently constituted in *Ireland* and *Burstow*, was bound by the decision in *Chan-Fook*. The House is not so bound. Counsel for the appellants in both appeals submitted that bodily harm in Victorian legislation cannot include psychiatric injury. For this reason they argued that *Chan-Fook* was wrongly decided. They relied on the following observation of Lord Bingham of Cornhill C.J. in *Burstow* [1997] 1 Cr.App.R. 144, 148:

> "Were the question free from authority, we should entertain some doubt whether the Victorian draftsman of the 1861 Act intended to embrace psychiatric injury within the expressions 'grievous bodily harm' and 'actual bodily harm'."

Nevertheless, the Lord Chief Justice observed that it is now accepted that in the relevant context the distinction between physical and mental injury is by no means clear cut. He welcomed the ruling in *Chan-Fook*: at p. 149B. I respectfully agree. But I would go further and point out that, although out of considerations of piety we frequently refer to the actual intention of the draftsman, the correct approach is simply to consider whether the words of the Act of 1861 considered in the light of contemporary knowledge cover a recognisable psychiatric injury. It is undoubtedly true that there are statutes where the correct approach is to construe the legislation "as if one were interpreting it the day after it was passed:" *The Longford* (1889) 14 P.D. 34. Thus in *The Longford* the word "action" in a statute was held not to be apt to cover an Admiralty action in rem since when it was passed the Admiralty Court "was not one of His Majesty's Courts of Law:" (see pp. 37, 38.) Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that "An Act of Parliament should be deemed to be always speaking": *Practical Legislation* (1902), p. 83; see also *Cross, Statutory Interpretation*, 3rd ed. (1995), p. 51; *Pearce and Geddes, Statutory Interpretation in Australia,* 4th ed. (1996), pp. 90-93. In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to

apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord *Thring* and his successors have brought about the situation that statutes will generally be found to be of the "always speaking" variety: see *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security* [1981] AC 800 for an example of an "always speaking" construction in the House of Lords.

The proposition that the Victorian legislator when enacting sections 18, 20 and 47 of the Act 1861, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant enquiry is as to the sense of the words in the context in which they are used. Moreover the Act of 1861 is a statute of the "always speaking" type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury.

For these reasons I would, therefore, reject the challenge to the correctness of *Chan-Fook* [1994] 1 WLR 689. In my view the ruling in that case was based on principled and cogent reasoning and it marked a sound and essential clarification of the law. I would hold that "bodily harm" in sections 18, 20 and 47 must be interpreted so as to include recognizable psychiatric illness.

Reg. v. Burstow: the meaning of "inflict" in section 20

The decision in *Chan-Fook* opened up the possibility of applying sections 18, 20 and 47 in new circumstances. The appeal of Burstow lies in respect of his conviction under section 20. It was conceded that in principle the wording of section 18, and in particular the words "cause any grievous bodily harm to any person" do not preclude a prosecution in cases where the actus reus is the causing of psychiatric injury. But counsel laid stress on the difference between "causing" grievous bodily harm in section 18 and "inflicting" grievous bodily harm in section 20. Counsel argued that the difference in wording reveals a difference in legislative intent: inflict is a narrower concept than cause. This argument loses sight of the genesis of sections 18 and 20. In his commentary on the Act of 1861 Greaves, the draftsman, explained the position: *The Criminal Law Consolidation and Amendment Acts*, 2nd ed. (1862). He said (at pp. 3-4):

> "If any question should arise in which any comparison may be instituted between different sections of any one or several of these Acts, it must be carefully borne in mind in what manner these Acts were framed. None of them was re-written; on the contrary, each contains enactments taken from different Acts passed at different times and with different views, and

> frequently varying from each other in phraseology, and . . . these enactments, for the most part, stand in these Acts with little or no variation in their phraseology, and, consequently, their differences in that respect will be found generally to remain in these Acts. It follows, therefore, from hence, that any argument as to a difference in the intention of the legislature, which may be drawn from a difference in the terms of one clause from those in another, will be entitled to no weight in the construction of such clauses; for that argument can only apply with force where an Act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout."

The difference in language is therefore not a significant factor.

Counsel for Burstow then advanced a sustained argument that an assault is an ingredient of an offence under section 20. He referred your Lordships to cases which in my judgment simply do not yield what he sought to extract from them. In any event, the tour of the cases revealed conflicting *dicta*, no authority binding on the House of Lords, and no settled practice holding expressly that assault was an ingredient of section 20. And, needless to say, none of the cases focused on the infliction of psychiatric injury. In these circumstances I do not propose to embark on a general review of the cases cited: compare the review in *Smith and Hogan, Criminal Law*, 8th ed. (1996), pp. 440-441. Instead I turn to the words of the section. Counsel's argument can only prevail if one may supplement the section by reading it as providing "inflict *by assault* any grievous bodily harm." Such an implication is, however, not necessary. On the contrary, section 20, like section 18, works perfectly satisfactorily without such an implication. I would reject this part of counsel's argument.

But counsel had a stronger argument when he submitted that it is inherent in the word "inflict" that there must be a direct or indirect application of force to the body. Counsel cited the speech of Lord Roskill in *Reg. v. Wilson (Clarence)* [1984] A.C. 942, 259E-260H, in which Lord Roskill quoted with approval from the judgment of the full court of the Supreme Court of Victoria in *Reg. v. Salisbury* [1976] V.R. 452. There are passages that give assistance to counsel's argument. But Lord Roskill expressly stated (at p. 260H) that he was "content to accept, as did the [court in *Salisbury*] that there can be the infliction of grievous bodily harm contrary to section 20 without an assault being committed." In the result the effect of the decisions in *Wilson* and *Salisbury* is neutral in respect of the issue as to the meaning of "inflict." Moreover, in *Burstow* [1997] 1 Cr.App.R. 144, 149, the Lord Chief Justice pointed out that in *Reg. v. Mandair* [1995] 1 A.C. 208, 215, Lord Mackay of Clashfern L.C. observed with the agreement of the majority of the House of Lords: "In my opinion . . . the word 'cause' is wider or at least not narrower than the word 'inflict'". Like the Lord Chief Justice I regard this observation as making clear that in the context of the Act of 1861 there is no radical divergence between the meaning of the two words.

That leaves the troublesome authority of the decision Court for Crown Cases Reserved in *Reg. v. Clarence* (1888) 22 Q.B.D. 23. At a time when the defendant knew that he was suffering from a venereal disease, and his wife was ignorant of his condition, he had sexual intercourse with her. He communicated the disease to her. The defendant was charged and convicted of inflicting grievous bodily harm under section 20. There was an appeal. By a majority of nine to four the court quashed the conviction. The case was complicated by an issue of consent. But it must be accepted that in a case where there was direct physical contact the majority ruled that the requirement of infliction was not satisfied. This decision has never been overruled. It assists counsel's argument. But it seems to me that what detracts from the weight to be given to the dicta in *Clarence* is that none of the judges in that case had before them the possibility of the inflicting, or causing, of psychiatric injury. The criminal law has moved on in the light of a developing understanding of the link between the body and psychiatric injury. In my judgment *Clarence* no longer assists.

The problem is one of construction. The question is whether as a matter of current usage the contextual interpretation of "inflict" can embrace the idea of one person inflicting psychiatric injury on another. One can without straining the language in any way answer that question in the affirmative. I am not saying that the words cause and inflict are exactly synonymous. They are not. What I am saying is that in the context of the Act of 1861 one can nowadays quite naturally speak of inflicting psychiatric injury. Moreover, there is internal contextual support in the statute for this view. It would be absurd to differentiate between sections 18 and 20 in the way argued on behalf of Burstow. As the Lord Chief Justice observed in *Burstow* [1997] 1 Cr.App.R. 144, 149F, this should be a very practical area of the law. The interpretation and approach should so far as possible be adopted which treats the ladder of offences as a coherent body of law. Once the decision in *Chan-Fook* [1994] 1 WLR 689is accepted the realistic possibility is opened up of prosecuting under section 20 in cases of the type which I described in the introduction to this judgment.

For the reasons I have given I would answer the certified question in *Burstow* in the affirmative.

Reg. v. Ireland: Was there an assault?

It is now necessary to consider whether the making of silent telephone calls causing psychiatric injury is capable of constituting an assault under section 47. The Court of Appeal, as constituted in *Ireland* case, answered that question in the affirmative. There has been substantial academic criticism of the conclusion and reasoning in *Ireland*: see *Archbold News*, Issue 6, 12 July 1996; *Archbold's Criminal Pleading, Evidence & Practice*, (1995), Supplement No. 4 (1996), pp. 345-347; *Smith and Hogan, Criminal Law*, 8th ed., 413; Herring, "Assault by Telephone" by Jonathan Herring [1997] C.L.J. 11; "Assault" [1997] Crim.L.R.

434, 435-436. Counsel's arguments, broadly speaking, challenged the decision in *Ireland* on very similar lines. Having carefully considered the literature and counsel's arguments, I have come to the conclusion that the appeal ought to be dismissed.

The starting point must be that an assault is an ingredient of the offence under section 47. It is necessary to consider the two forms which an assault may take. The first is battery, which involves the unlawful application of force by the defendant upon the victim. Usually, section 47 is used to prosecute in cases of this kind. The second form of assault is an act causing the victim to apprehend an imminent application of force upon her: see *Fagan v. Metropolitan Police Commissioner* [1969] 1 Q.B. 439, 444D-E.

One point can be disposed of, quite briefly. The Court of Appeal was not asked to consider whether silent telephone calls resulting in psychiatric injury is capable of constituting a battery. But encouraged by some academic comment it was raised before your Lordships' House. Counsel for Ireland was most economical in his argument on the point. I will try to match his economy of words. In my view it is not feasible to enlarge the generally accepted legal meaning of what is a battery to include the circumstances of a silent caller who causes psychiatric injury.

It is to assault in the form of an act causing the victim to fear an immediate application of force to her that I must turn. Counsel argued that as a matter of law an assault can never be committed by words alone and therefore it cannot be committed by silence. The premise depends on the slenderest authority, namely, an observation by Holroyd J. to a jury that "no words or singing are equivalent to an assault": *Meade's and Belt's* case 1 (1823) 1 Lew. C.C. 184. The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence, e.g. a man accosting a woman in a dark alley saying "come with me or I will stab you." I would, therefore, reject the proposition that an assault can never be committed by words.

That brings me to the critical question whether a silent caller may be guilty of an assault. The answer to this question seems to me to be "yes, depending on the facts." It involves questions of fact within the province of the jury. After all, there is no reason why a telephone caller who says to a woman in a menacing way "I will be at your door in a minute or two" may not be guilty of an assault if he causes his victim to apprehend immediate personal violence. Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, 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: whether he is or not will depend on

the circumstance and in particular on the impact of the caller's potentially menacing call or calls on the victim. Such a prosecution case under section 47 may be fit to leave to the jury. And a trial judge may, depending on the circumstances, put a common sense consideration before jury, namely what, if not the possibility of imminent personal violence, was the victim terrified about? I conclude that an assault may be committed in the particular factual circumstances which I have envisaged. For this reason I reject the submission that as a matter of law a silent telephone caller cannot ever be guilty of an offence under section 47. In these circumstances no useful purpose would be served by answering the vague certified question in *Ireland*.

Having concluded that the legal arguments advanced on behalf of *Ireland* on section 47 must fail, I nevertheless accept that the concept of an assault involving immediate personal violence as an ingredient of the section 47 offence is a considerable complicating factor in bringing prosecutions under it in respect of silent telephone callers and stalkers. That the least serious of the ladder of offences is difficult to apply in such cases is unfortunate. At the hearing of the appeal of *Ireland* attention was drawn to the Bill which is annexed to Law Commission report, *Legislating the Criminal Code: Offences Against the Person and General Principles*, Consultation Paper (Law Com. No. 218) (1993) (Cmnd 2370). Clause 4 of that Bill is intended to replace section 47. Clause 4 provides that "A person is guilty of an offence if he intentionally or recklessly causes injury to another." This simple and readily comprehensible provision would eliminate the problems inherent in section 47. In expressing this view I do not, however, wish to comment on the appropriateness of the definition of "injury" in clause 18 of the Bill, and in particular the provision that "injury" means "impairment of a person's mental health."

The disposal of the appeals

The legal arguments advanced on behalf of Burstow have failed. The appeal must be dismissed.

The legal arguments advanced on behalf of Ireland have also failed. But counsel for the appellant submitted that the appeal should be allowed because on an examination of the statements there was no prima facie case against him. I reject this submission. The prosecution case was never fully deployed because Ireland pleaded guilty. The fact of his plea demonstrated his mens rea. It was said, however, that the ingredient of psychiatric injury was not established on the statements. It is true that the statement from the psychiatrist is vague. But I would not accept that read in context it was insufficient to allow the case to go before a jury. It would be an exceptional course, in the face of an unequivocal and deliberate plea of guilty, to entertain an appeal directed exclusively to the sufficiency of evidence. Such a course is not warranted in the present case. I would therefore dismiss the appeal of Ireland.

LORD HOPE OF CRAIGHEAD

My Lords,

I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Steyn. I agree with it, and for the reasons which he gives I also would dismiss both appeals. I should like however to add a few words on the point which arises in *Reg. v. Burstow* as to the meaning of the word "inflict" in section 20 of the Offences against the Person Act 1861, and on the point which arises in *Reg. v. Ireland* as to whether the making of a series of silent telephone calls can amount in law to an assault within the meaning of section of section 47 of that Act.

Reg. v. Burstow: "inflict"

In this case the appellant changed his plea to guilty after a ruling by the trial judge that the offence of unlawfully and maliciously inflicting grievous bodily harm contrary to section 20 of the Act of 1861 may be committed where no physical violence has been applied directly or indirectly to the body of the victim. Counsel for the appellant accepted that if *Reg. v. Chan-Fook* [1994] 1 WLR 689 was correctly decided, with the result that "actual bodily harm" in section 47 is capable of including psychiatric injury, the victim in this case had suffered grievous bodily harm within the meaning of section 20. But he submitted that no offence against section 20 had been committed in this case because, although the appellant might be said to have "caused" the victim to sustain grievous bodily harm, he had not "inflicted" that harm on her because he had not used any personal violence against her.

Counsel based his submission on the decision in *Reg. v. Clarence* (1888) 22 Q.B.D. 23. In that case it was held that some form of direct personal violence was required for a conviction under section 20. The use of the word "inflict" in the section was said to imply that some form of battery was involved in the assault. The conviction was quashed because, although the venereal infection from which the victim was suffering was the result of direct physical contact, there had been no violence used and thus there was no element of battery. It seems to me however that there are three reasons for regarding that case as an uncertain guide to the question which arises where the bodily harm which has resulted from the defendant's conduct consists of psychiatric injury.

The first is that the judges in *Clarence* were concerned with a case of physical, not psychiatric, injury. They did not have to consider the problem which arises

where the grievous bodily harm is of a kind which may result without any form of physical contact. The second is that the intercourse had taken place with consent, as the defendant's wife was ignorant of his venereal disease. So there was no question in that case of an assault having been committed, if there was no element of violence or battery. Also, as Lord Roskill pointed out in *Reg. v. Wilson (Clarence)* [1984] A.C. 242, 260C the judgments of the judges who formed the majority are not wholly consistent with each other. This casts some doubt on the weight which should be attached to the judgment when the facts are entirely different, as they are in the present case.

In *Reg. v. Wilson,* Lord Roskill referred at pp. 259E-260B, with approval to the judgment of the Supreme Court of Victoria in *Reg. v. Salisbury* [1976] V.R. 452, in which the following passage appears, at p. 461:

> " . . . although the word 'inflicts' . . . does not have as wide a meaning as the word 'causes' . . . the word 'inflicts' does have a wider meaning than it would have if it were construed so that inflicting grievous bodily harm always involved assaulting the victim."

At p. 260H Lord Roskill said that he was content to accept, as was the full court in *Salisbury*, that there can be an infliction of grievous bodily harm contrary to section 20 without an assault being committed. But these observations do not wholly resolve the issue which arises in this case, in the context of grievous bodily harm which consists only of psychiatric injury.

The question is whether there is any difference in meaning, in this context, between the word "cause" and the word "inflict". The fact that the word "caused" is used in section 18, whereas the word used in section 20 is "inflict," might be taken at first sight to indicate that there is a difference. But for all practical purposes there is, in my opinion, no difference between these two words. In *Reg. v. Mandair* [1995] 1 A.C. 208, 215B Lord Mackay of Clashfern L.C., said that the word "cause" is wider or at least not narrower than the word "inflict." I respectfully agree with that observation. But I would add that there is this difference, that the word "inflict" implies that the consequence of the act is something which the victim is likely to find unpleasant or harmful. The relationship between cause and effect, when the word "cause" is used, is neutral. It may embrace pleasure as well as pain. The relationship when the word "inflict" is used is more precise, because it invariably implies detriment to the victim of some kind.

In the context of a criminal act therefore the words "cause" and "inflict" may be taken to be interchangeable. As the Supreme Court of Victoria held in *Salisbury* [1976] V.R. 452, it is not a necessary ingredient of the word "inflict" that whatever causes the harm must be applied directly to the victim. It may be applied indirectly, so long as the result is that the harm is caused by what has been done. In my opinion it is entirely consistent with the ordinary use of the word

"inflict" in the English language to say that the appellant's actions "inflicted" the psychiatric harm from which the victim has admittedly suffered in this case. The issues which remain are issues of fact and, as the appellant pled guilty to the offence, I would dismiss his appeal.

Reg. v. Ireland: "assault"

In this case the appellant pled guilty to three contraventions of section 47 of the Act of 1861. He admitted to having made numerous telephone calls to three women, during which he remained silent when the women answered the telephone. These calls lasted sometimes for a minute or so, and sometimes for several minutes. On some occasions they were repeated over a relatively short period. There is no doubt that this conduct was intended to distress the victims, each of whom suffered as a result from symptoms of such a kind as to amount to psychiatric injury. But, for the appellant to be guilty of an offence contrary to section 47 of the Act of 1861, he must be held to have committed an act which amounts to an assault.

Plainly there was no element of battery --although counsel for the respondent made brief submissions to the contrary--as at no time was there any kind of physical contact between the appellant and his victims. As Swinton Thomas L.J. observed in the Court of Appeal [1997] Q.B. 114, 119D, that is a fact of importance in this case. But it is not an end of the matter, because as he went on to say it has been recognised for many centuries that putting a person in fear may amount to what in law is an assault. This is reflected in the meaning which is given to the word "assault" in *Archbold Criminal Pleading, Evidence and Practice* (1997), p. 1594 para. 19-66, namely that an assault is any act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful violence. This meaning is well vouched by authority: see *Reg. v. Venna* [1976] QB 421; *Reg. v. Savage* [1992] 1 AC 699, 740F, *per* Lord Ackner.

The question is whether such an act can include the making of a series of silent telephone calls. Counsel for the appellant said that such an act could not amount to an assault under any circumstances, just as words alone could not amount to an assault. He also submitted that, in order for there to be an assault, it had to be proved that what the victim apprehended was immediate and unlawful violence, not just a repetition of the telephone calls. It was not enough to show that merely that the victim was inconvenienced or afraid. He said that the Court of Appeal had fallen into error on this point, because they had proceeded on the basis that it was sufficient that when the victims lifted the telephone they were placed in immediate fear and suffered the consequences which resulted in psychiatric injury. The court had not sufficiently addressed the question whether the victims were apprehensive of immediate and unlawful violence and, if so, whether it was that apprehension which had caused them to sustain the bodily injury.

I agree that a passage in the judgment of the Court of Appeal [1997] Q.B. 114, 122C-G suggests that they had equated the apprehension of immediate and unlawful violence with the actual psychiatric injury which was suffered by the victims. I also agree that, if this was so, it was an incorrect basis from which to proceed. But in the penultimate sentence in this passage Swinton Thomas L.J. said that in the court's judgment repetitive telephone calls of this nature were likely to cause the victim to apprehend immediate and unlawful violence. Furthermore, as the appellant pled guilty to these offences, the question whether that apprehension caused the psychiatric injury did not need to be explored in evidence. The important question therefore is whether the making of a series of silent telephone calls can amount in law to an assault.

There is no clear guidance on this point either in the statute or in the authorities. On the one hand in *Meade's and Belt's* case (1823) I Lew C.C. 184 Holroyd J. said that no words or singing can amount to an assault. On the other hand in *Reg. v. Wilson*[1955] 1 W.L.R. 493, 494 Lord Goddard C.J. said that the appellant's words, "Get out knives" would itself be an assault. The word "assault" as used in section 47 of the Act of 1861 is not defined anywhere in that Act. The legislation appears to have been framed on the basis that the words which it used were words which everyone would understand without further explanation. In this regard the fact that the statute was enacted in the middle of the last century is of no significance. The public interest, for whose benefit it was enacted, would not be served by construing the words in a narrow or technical way. The words used are ordinary English words, which can be given their ordinary meaning in the usage of the present day. They can take account of changing circumstances both as regards medical knowledge and the means by which one person can cause bodily harm to another.

The fact is that the means by which a person of evil disposition may intentionally or recklessly cause another to apprehend immediate and unlawful violence will vary according to the circumstances. Just as it is not true to say that every blow which is struck is an assault--some blows, which would otherwise amount to battery, may be struck by accident or in jest or may otherwise be entirely justified--so also it is not true to say that mere words or gestures can never constitute an assault. It all depends on the circumstances. If the words or gestures are accompanied in their turn by gestures or by words which threaten immediate and unlawful violence, that will be sufficient for an assault. The words or gestures must be seen in their whole context.

In this case the means which the appellant used to communicate with his victims was the telephone. While he remained silent, there can be no doubt that he was intentionally communicating with them as directly as if he was present with them in the same room. But whereas for him merely to remain silent with them in the same room, where they could see him and assess his demeanour, would have been unlikely to give rise to any feelings of apprehension on their part, his silence when using the telephone in calls made to them repeatedly was an act of an entirely

different character. He was using his silence as a means of conveying a message to his victims. This was that he knew who and where they were, and that his purpose in making contact with them was as malicious as it was deliberate. In my opinion silent telephone calls of this nature are just as capable as words or gestures, said or made in the presence of the victim, of causing an apprehension of immediate and unlawful violence.

LORD HUTTON

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Steyn. For the reasons which he gives I would dismiss the appeals.

Whether this requirement, and in particular that of immediacy, is in fact satisfied will depend on the circumstances. This will need in each case, if it is disputed, to be explored in evidence. But that step was not necessary in this case as the appellant was prepared to plead guilty to having committed the offence. I would therefore answer the certified question in the affirmative and dismiss this appeal also.