COMMENTARY: R V BROWN

After more than two decades of considerable academic debate, legal reform and social change following the infamous case of *R v Brown*[1], there still seems to be no clear consensus as to which non-fatal harms competent adults can consent to. The current legislation allows consenting to only recognised categories of harm. The *harm principle* entitles the law to restrict the liberty of an individual to prevent actions harming others, but the emergence of personal autonomy in recent years can hardly be overlooked. There can be differing views regarding when judicial intervention should take place and impose limits on the participants, but after considering a broad range of arguments it shall be concluded in the subsequent text that the law must not interfere in the private lives of consenting competent adults unless the degree of inflicted harm is grievous.

Brown[2] involved homosexual sadomasochistic (SM) activities by the defendants for sexual gratification and the central debate was that of individual autonomy versus integrity. The majority addressed it using a social utility-based approach where the burden was upon the defence to prove that the conduct in question and the inflicted harm served a useful social function, so as to allow consent and permit the said activities.[3] They concluded that unlike recognised exceptions like sports or horseplay[4], SM sex did not serve any such purpose, and was "depraved", "perverted" and "violent rather than sexual".[5]

[1] [1994] 1 AC 212.

[2] ibid.

[3] Tolmie, 'Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making' [2012] Crim LR 656.

[4] *Brown* (n 1) [245].

[5] ibid (Lord Templeman) in Nicholas Bamforth, 'Sado-masochism and consent' [1994] Crim LR 661.

As outdated, heteronormative and paternalistic as the dicta might appear, it is argued by Dempsey that the judgment was not so flawed after all. While the activities carried out during the SM encounters in *Brown*[6] were consensual, consent alone was not capable of transforming the moral quality of that conduct. The sadist performs violent acts for the very reason of causing pain and suffering to the masochist, declining the "exclusionary option" and making the masochist a victim despite full consent.[7] Although the ruling has been criticised for being prejudicial against homosexuals, its principles have been applied to similar cases regardless of sexual orientation[8] – affirmed in *Emmett*[9] which involved SM activities by a heterosexual couple. The court held that pouring fuel on the victim's breasts and setting it alight gave rise to a harm for which consent could not be a defence, in contrast to *Wilson*[10], where the activities were deemed analogous to tattooing and therefore permissible.

Further, SM can include such a broad range of harm that a victim could not provide informed consent. The law may be justified in intervening and placing a limit somewhere to protect them. A recent case involved bondage and SM sex between a couple, inspired by a popular movie.[11] The woman consented beforehand but later expressed that the pain inflicted on her was beyond what she was prepared for. For all these reasons, SM for the purpose of sexual gratification

---

[6] *Brown* (n 1).

[7] Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 Crim LPhil 1 3038.

[8] *Brown* (n 1) (Lord Templeman) in Wilson, 'Consenting to Personal Injury: How far can you go?' (1995) 1(1) CIL 45.

[9] [1999] EWCA Crim 1710 CA.

[10] R v Wilson [1996] Crim LR 573.

[11] T. Farmery, 'Fifty Shades of Grey 'Master' is cleared of assault' The Times (2013). <https://www.thetimes.co.uk/article/fifty-shades-of-grey-master-is-cleared-of-assault-90v22xg5fpk> accessed 20 December 2019.

was not allowed to be added as an exceptional category for which consent is a defence in *Brown*[12], as a matter of public interest.

However, this social utility model fails to define 'public interest' and when judicial intervention is justified. It seems to impose an order on the vast diversities of human lives which they do not possess.[13] On the contrary, Lord Mustill recommended a social disutility approach in his dissent[14], which involves proving such a limited social utility and a high potential for further unintended harm, so as to prohibit the conduct in question.[15] This model is better suited to modern democratic society as it puts significant weight upon individual autonomy.

If the law recognises sports to be permissible because it is fun, sex for many is beyond that: it is a form of self-expression. A sexual act is a thing of love and not violence when consensual; so is SM, with the practitioners as likely to be responsible and careful as in the other legally recognised categories.[16]

As SM is all about consent, there is no victim. Although the activity involves the commission of violence of the sadist towards the masochist, it is a necessary element in the participants' sexual experience. Their aim is not pain, but a pleasurable excitation linked to sexual pleasure. For the masochist, the beating and whipping on the back, buttocks and hands is associated with an 'endorphin high' – heightened arousal and feelings of exaltation, rapture, spiritual release,

[12] *Brown* (n 1).

[13] Kell, 'Social Disutility and Consent' (1994) 14 OJLS 121.

[14] *Brown* (n 1) (Lord Mustill).

[15] Bansal, 'Bodily Modifications and the Criminal Law' (2018) 82 JCL 496.

[16] Law Commission, Consent in Criminal Law (Consultation 139, 1995) Part 10.

and profound gratitude, leading to lasting emotional well-being and uplift – similar to what is reportedly experienced in other physically stressful activities such as sky-diving.[17]

SM activity typically requires extensive planning and negotiation, the absence of which makes it rape or abuse, which is already punishable under the law. The prosecution of these activities forces sadomasochists underground, weakening their regulation and preventing younger participants from learning what is safe. The lack of freely available safety advice has led to several deaths. Illegality drives a wedge between the community and police, making them less willing to give information in the fear of prosecution. This leads to exploitative characters getting away with their conduct, which is unacceptable for everyone.[18] Arguably, the current law endangers people rather than protecting them.

There is another challenge involved in determining when a sexual experience such as nibbling, biting or fisting crosses a line and becomes SM, i.e. unlawful. It is also questionable if an aggressive penal penetration causing pain or hurt, which by definition is sex, can never be unlawful.[19] Human sexuality cannot be classified into compartments, as the current law requires. This category-based approach, as employed in *Brown,*[20] comes from an arbitrary and piecemeal process of reasoning. It prevents freewill and considerations of harm to have any practical relevance in the ultimate decision.[21]

[17] ibid.

[18] ibid.

[19] *Tolmie* (n 3).

[20] *Brown* (n 1).

[21] *Tolmie* (n 3).

Accordingly, it would be more reasonable to directly assess the facts of the case to determine if consent could be allowed or withdrawn, rather than trying to ascertain what generic category the behaviour falls into.[22] This assessment would involve freewill and autonomy among several competing values such as potential harm, victim vulnerability, and social utility. Applying this method, the New Zealand Court of Appeal held in *Lee*[23] that ritual exorcism was a manifestation of religious beliefs and thereby lawful. Tolmie recommends this approach for English courts as it expresses social tolerance - an increasingly necessary value in an era of global mobility. Legal rules need to accommodate the cultural diversity caused by the rapid pace of technology.[24] It is contended that if *Lee*[25] were applied to *Brown*, the risked harm would have been more accurately characterised based on the facts of the case.

Nevertheless, this approach can also give rise to decisions that are potentially indeterminate and retroactive, as a person intending or risking harm on another would have to wait for the case to go to the judge to weigh the public policy considerations and decide whether the instant case could allow the defence of consent. It follows that there is a need for a jurisprudence that guides the judges regarding exploitative circumstances or abuse to determine whether consent could be allowed. Tolmie concludes her article by suggesting that this approach should only be reserved for the cases where the facts point towards intending or risking GBH to avoid indeterminacy.[26]

---

[22] ibid.

[23] (2006) 22 CRNZ 568 CA.

[24] *Tolmie* (n 3).

[25] *Lee* (n 22).

[26] *Tolmie* (n 3).

It can be argued that the target of the current category-based legislation is not the SM community, but the general public. The best protection against potential abuse and exploitation is accurate information regarding safe practices. The aim should be to have consensual sane SM sex and be able to prevent accidents.[27] Prosecution of the people expressing their sexuality simply cannot be the answer for preventing the exploitation of victims.

The law entitles adults to their share of autonomy and privacy; and must, therefore, recognise their autonomy to consent to non-fatal harms within their private lives, until it reaches the level of GBH. When the harm is serious, the *Lee*[28] approach should be employed to assess the facts of the case rather than a category-based approach.

[27] Law Commission, Consent in Criminal Law (Consultation 139, 1995) Part 10.

[28] *Lee* (n 22).

Bibliography

Giles, 'Consensual Harm and Public Interest' (1994) 57 MLR 101

Horder J, *Ashworth's Principles of Criminal Law* (8th edn, OUP 2016)

John Child, David Ormerod, *Smith, Hogan, & Ormerod's Essentials of Criminal Law* (3rd edn, OUP 2019)

Leigh LH, 'Sado-Masochism, Consent and the Reform of the Criminal Law' (1976) 39 MLR 130

Shute, 'Something old, Something New, Something Borrowed: Three Aspects of the Project' [1996] Crim LR 684

Primary Sources

UK Cases

R v Brown [1994] 1 AC 212

R v Emmett [1999] EWCA Crim 1710 CA

R v Wilson [1996] Crim LR 573

Other Cases

R v Lee (2006) 22 CRNZ 568 CA

Secondary Sources

Books

Law Commission, *Consent in Criminal Law* (Consultation 139, 1995)

Journals

Bamforth N, 'Sado-masochism and consent' [1994] Crim LR 661

Bansal D, ‘Bodily Modifications and the Criminal Law’ (2018) 82 JCL 496

Dempsey M, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 Crim LPhil 1 3038

Kell, 'Social Disutility and Consent' (1994) 14 OJLS 121

Tolmie J, 'Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making' [2012] Crim LR 656

Wilson W, ‘Consenting to Personal Injury: How far can you go?’ (1995) 1(1) CIL 45

Web Resources

T. Farmery, ‘Fifty Shades of Grey ‘Master’ is cleared of assault’ The Times (2013). <www.thetimes.co.uk/article/fifty-shades-of-grey-master-is-cleared-of-assault-90v22xg5fpk> accessed 20 December 2019