

# Entertainment—The Painful Process of Rethinking Consent

By

**Simon Cooper and Mark James**

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# Entertainment—The Painful Process of Rethinking Consent

**Simon Cooper**

*Senior Lecturer, Salford Law School, University of Salford*

**Mark James**

*Reader in Law, Salford Law School, University of Salford*

☞ Consent; Criminal liability; Entertainment; Offences against the person; Pain

## Introduction

Much has been written on the application of the law of consent to sexual offences,<sup>1</sup> the deliberate or reckless transmission of HIV,<sup>2</sup> violent or vigorous sexual practices<sup>3</sup> and the sport of boxing.<sup>4</sup> In attempting to provide a rational or generalised approach to the law of consent, most of the discussions that focus on the perceived need for harmonisation marginalise how the law applies to more unusual, and therefore more conceptually difficult, activities for which consent could be raised as a defence. As long ago as 1957, Prof Glanville Williams highlighted the root of this problem when he added his gloss to the aphorism that hard cases make bad law when he stated that, “cases in which the moral indignation of the judge is aroused frequently make bad law.”<sup>5</sup> With this warning in mind, an analysis of the conceptually difficult ought to contribute to our understanding of how and why the law of consent should apply to a wide variety of novel and unusual situations.

The principal focus of this article will be upon an area of activity that has over the past decade seen a significant amount of growth in popularity, namely, the infliction of pain and/or injury for the purposes of entertainment, as pioneered by the US TV series and spin-off films *Jackass* and widely copied in the United Kingdom by, for example, *Dirty Sanchez* and the double act “The Pain Men” on Channel 4’s programme, *Balls of Steel*. Until recently, and despite its popularity, this type of entertainment has attracted minimal comment from academics or practitioners on the legality of such conduct.<sup>6</sup> However, a campaign begun by

<sup>1</sup> C. Elliot and C. de Than, “A Case for Rational Reconstruction of Consent in Criminal Law” (2007) 70(2) M.L.R. 225.

<sup>2</sup> M. Weait, “Criminal Law and the Sexual Transmission of HIV: R v Dica”, (2005) 68(1) M.L.R. 121 and “Knowledge, Autonomy and Consent: R v Konzani” [2005] Crim. L.R. 763; J. Spencer, “Liability for Reckless Infection” (2004) 154 N.L.J. 384.

<sup>3</sup> P. Roberts, “Consent to Injury: How far can you go?” (1997) 113 L.Q.R. 27.

<sup>4</sup> D. Ormerod and M. Gunn, “The Legality of Boxing” (1995) 15(2) L.S. 181.

<sup>5</sup> G. Williams, *The Sanctity of Life and the Criminal Law* (New York: Knopf, 1957), p.105.

<sup>6</sup> For a general discussion on the legality of the issues raised, see K. von Pahlen, “Painful TV” (2011) 9(1) E.S.L.J. online, available at: <http://www2.warwick.ac.uk/fac/soc/law/elj/esj/issues/volume9/number1/grafvonpahlen> [Accessed January 8, 2012] and K. von Pahlen and K. Oldfield, “No Pain No Gain” Solicitors Journal Online, February 9, 2010 available at: [http://www.solicitorsjournal.com/story.asp?sectioncode=3&storycode=15637&c=3&eclipse\\_action=getsession](http://www.solicitorsjournal.com/story.asp?sectioncode=3&storycode=15637&c=3&eclipse_action=getsession) [Accessed January 8, 2012].

Mediawatch<sup>7</sup> in 2010 has brought to prominence some interesting and potentially difficult questions about the ability of a person to consent to injuries caused in the name of entertainment.

As the parameters of legally valid consent are both unstable and contested,<sup>8</sup> it is unclear whether the types of conduct under discussion here are capable of being consented to and whether the associated reasons for inflicting the pain and sometimes injury provide any justification for what might otherwise be criminal behaviour. In analysing the application of the criminal law to instances of what is referred to here as “painful entertainment” this article challenges traditional approaches to the categorisation of consensual activities and proposes a rethinking of how the law of offences against the person could be applied to novel situations.

## The infliction of pain and injury as entertainment

*Jackass* and *Balls of Steel* provide two high profile examples of the broadcasting phenomenon that is “painful entertainment”. An illustration of the kind of conduct engaged in by painful entertainers, the legality of which might fall within the unstable and contested part of the law, is “The Human Dartboard” as demonstrated by “The Pain Men” in *Balls of Steel*.<sup>9</sup> In this example, the two participants agree that one will throw darts at the other’s bared buttocks; the darts thrown are of the kind used in the more conventional version of the game with which we are all familiar. The dart is thrown, hits its target and the “victim” is then asked to rate the amount of pain caused to them on a scale of 1 to 10. It is apparent that both participants, and in particular the victim, are giving full, free and informed consent to the activity; what is about to happen to them is fully explained in advance and followed by a warning that that the viewers at home should not copy the activity. The comedic and entertainment purpose of the activity is, perhaps, reinforced by the “victim” shouting out, “180” when one of the darts hits its target and remains stuck in his flesh. In another example, the two participants take turns to strike each other over the head with planks of wood, causing pain and injury, until one of them concedes defeat.<sup>10</sup>

Whether or not this is properly regarded as entertainment, the reality is that we have here one human being stabbing or beating another for the amusement of the viewers in the live studio audience and at home. Of course, there may be no intention to cause really serious harm<sup>11</sup> and the context and circumstances might minimise the risk that serious injury will actually result, but the fact remains that one person is deliberately stabbing or beating another in the certain knowledge that pain, wounding and some degree of injury will be caused. The question then is whether it is lawful to deliberately stab or beat another person where the person stabbed or beaten gives de facto consent and is a willing participant in the activity

<sup>7</sup> [http://www.mediawatchuk.org.uk/images/stories/newsletter\\_spring2010.pdf](http://www.mediawatchuk.org.uk/images/stories/newsletter_spring2010.pdf) [Accessed January 8, 2012].

<sup>8</sup> A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 4th edn (Oxford: Hart, 2010), p.749.

<sup>9</sup> <http://www.youtube.com/watch?v=WFMEBu4bMIY> [Accessed January 8, 2012].

<sup>10</sup> Other examples include: stapling a piece of paper to the tongue; each holding the head of the other over the spout of a boiling kettle of water until the pain becomes so intense one is forced to give up; firing an electric shock into the bared testicles of the other; rubbing raw onion into the eyes and whipping each other with thin metal rods. These examples, along with many others, are easily accessible on YouTube and reruns of *Balls of Steel* are currently being broadcast on Channel 4. See: <http://www.youtube.com/watch?v=QjMOqOzAq4Q> [Accessed January 8, 2012]

<sup>11</sup> At least not in the sense that intention means desire or purpose.

and where the stabbing or beating is performed for the purpose of public entertainment?

### **The current law: how could it apply to painful entertainment?**

In the examples given above, it is evident that we have injury and its associated pain being deliberately and intentionally inflicted. In the “The Human Dartboard” example, the circumstances reveal potential criminal liability for an offence of unlawful wounding contrary to s.20 Offences Against the Person Act 1861.<sup>12</sup> In the second example, the circumstances reveal potential liability for an offence of assault occasioning actual bodily harm contrary to s.47 Offences Against the Person Act 1861.<sup>13</sup> As the participants in both cases were clearly consenting in fact, it must now be determined whether that fully, freely given and informed consent is valid in law.

A crucial feature of any potential offence against the person lies in the requirement that the injury, whatever level it might be, is unlawful. This, of course, reveals the essence of the defence of consent. If the conduct said to constitute the alleged offence is consented to, then the element of unlawfulness is negated and no criminal liability ensues. But it is well-established that the law will not always endorse consent as being effective, even if it is fully informed and freely given. Put another way, a victim’s informed and freely given consent may be ruled inoperative notwithstanding its genuineness, thus enabling criminal liability to be imposed on one or more of the parties to the conduct.

In the celebrated case of *Brown*,<sup>14</sup> the majority concluded that consent could not be used as a defence where actual bodily harm, or more serious injury, had been intended or caused unless one of a limited number of recognised exceptions applied. Prior to the decision in *Brown*, the common law provided piecemeal guidance on what could or could not be consented to. The courts had expressed the view that where the activity under scrutiny was not in the public interest, any consent given could be rendered void. An alternative way of expressing this would be to say that public policy considerations might render any consent given as ineffective in law. In *Attorney General’s Reference (No.6 of 1980)* the Court of Appeal expressed the view that, “it is not in the public interest that people should try to cause or should cause to each other actual bodily harm for no good reason”.<sup>15</sup> It would, therefore, seem essential that we have a rational and clear framework for determining what is a good reason for inflicting harm and which recognises the activity as being in the public interest. If public policy or public interest considerations might transform what the participants assume to be a lawful activity into one which is unlawful, then clear principles need to be articulated so that we have certainty and clarity in how the law will operate in such situations. Unfortunately, this is not the case. As Allen puts it:

<sup>12</sup> Assuming that all layers of the skin are pierced as the dart is embedded in the flesh of the victim (*Moriarty v Brooks* (1834) 6 Car. & P. 684).

<sup>13</sup> Bodily harm is any hurt or injury calculated to interfere with the health or comfort of the victim (*Miller* [1954] 2 Q.B. 282) and the bruising caused by this conduct would clearly satisfy this definition.

<sup>14</sup> *Brown* [1993] 2 All E.R. 75.

<sup>15</sup> *Attorney General’s Reference (No.6 of 1980)* [1981] Q.B. 715, per Lord Lane C.J. at 719.

“There is no clear and coherent articulation of fundamental principles which might govern decisions in new situations nor is there any clear identification of the public policy considerations which resulted in each decision.”<sup>16</sup>

Equally unclear is the meaning of the phrase “no good reason”. How and by whom should the meaning of “good reason” be determined? If, as the courts have suggested, a good reason can negate criminal liability, then it is not unreasonable to expect a clear and coherent explanation of what actually constitutes a “good” reason as opposed to one that will be ignored by the court.

In many cases over the years, the courts have recognised and referred to numerous activities that may be carried out lawfully without any threat of criminal liability being incurred. The extent to which these identified activities have been analysed and referred to varies considerably. It is, however, possible to identify with some degree of certainty the activities that the courts have determined may be consented to because they are permitted on the grounds of good reasons and are therefore lawful, and activities which may not be consented to, have no good reasons to support them and which are, therefore, criminal.<sup>17</sup>

As Wilson puts it:

“Clearly there is room, within a reasonably civilised society, for people to consent to the infliction of injury. Sometimes personal autonomy may be enhanced by the suffering of injury. Cosmetic surgery is a topical example...But there is also room for criminalising harm-causing activities, for example euthanasia, or duelling, or fighting in public, which may harm public as well as private interests.”<sup>18</sup>

In striking an appropriate balance between personal autonomy and issues of public welfare, the authorities are somewhat confused, often vague and certainly devoid of any consistent and coherent reasoning. This is due, in part at least, to a tenuous distinction between certain types of activity and their intended and/or anticipated outcome.

The distinction between injury that is caused intentionally and injury that has been caused unintentionally seems to have emerged in the decided cases. As Wilson explains:

“[I]t appears that the public interest test varies according to whether the injury consented to is inflicted intentionally or unintentionally. If it is inflicted intentionally, the *Attorney-General’s Reference*, supported by *Brown*, tells us that ‘good reasons’ in support of the activity which produced the injury must be adduced — a challenging burden. If it is inflicted unintentionally, *Slingsby*, *Meachen* and *Dica* indicate that the public interest test requires no good reasons in support of the activity. Rather, it is satisfied as long as no weighty public policy reasons count against the activity — a less challenging burden.”<sup>19</sup>

<sup>16</sup> M. Allen, *Textbook on Criminal Law*, 11th edn (Oxford: OUP, 2011), p.367.

<sup>17</sup> Although the exempted activity might be identified with some measure of certainty, the reasoning underpinning the exemption is often vague.

<sup>18</sup> W. Wilson, *Criminal Law*, 4th edn (London: Pearson, 2011), p.303.

<sup>19</sup> W. Wilson, *Criminal Law*, 4th edn (London: Pearson, 2011), p.304.

Injury caused by activities engaged in purely for entertainment purposes have not yet been considered by the courts. Despite there being clear evidence that consent is present, the initial assumption must be that the general rule from *Brown* applies and that as there is no specific exception covering “painful entertainment” it is unlawful unless a convincing analogy can be drawn with one of the existing exempted activities. At present, the exemptions fall into two categories. First, where the harm is inflicted intentionally and there are “good reasons” or public policy justifications for allowing it in certain circumstances; this group is limited to surgery, body adornment and boxing. Secondly, where the initial contact is intentionally inflicted and the risk of being caused harm is subjectively run<sup>20</sup>; this group includes contact sports, horseplay and dangerous exhibitions. For this latter group, it is not necessary that “good reasons” must exist in order to give effect to the consent that is clearly present; instead, the absence of any intention to injure would suggest that the appropriate approach is to ask whether or not there are sufficiently strong reasons grounded in public policy to render the consent otiose.

### *Surgical procedures*

It is accepted that surgical procedures are exempted from the narrow rule as formulated in *Brown*. The intentional harm or wounding that is inflicted on the patient by the medical practitioner is exempted on the grounds that its therapeutic purposes are in the patient’s best interests and are therefore a good reason for allowing harm to be caused, provided that the patient has provided full, free and informed consent in advance of the procedure or it was performed out of necessity in emergency circumstances. Not all surgical, or pseudo-surgical, procedures are exempted from the normal operation of the law of consent; there must always be a good reason for inflicting the harm. Thus, Parliament has determined, by its enactment of the Female Genital Mutilation Act 2003, that female circumcision should be unlawful as the cultural reasons for carrying out the procedure are outweighed by the unnecessary and often lasting physical and mental suffering caused to the victim. The lack of any obvious health benefits would seem to indicate that painful entertainment would not be able to benefit from or draw an analogy with the exemption granted to surgery.

### *Boxing*

Boxing has long been considered to occupy an anomalous position as far as the law of consent is concerned as it requires the deliberate infliction of harm on another person in the name of sport and entertainment.<sup>21</sup> Rather than engaging in the mental gymnastics thought to be necessary to provide an intellectually satisfying justification for the legality of boxing,<sup>22</sup> in the context of this article it is perhaps better simply to state the accepted reasons for the exemption granted to combat sports. The more detailed explanation is that where boxing and other combat sports are properly regulated in that they have governing bodies administering the playing

<sup>20</sup> Parental chastisement is not included here as it cannot be said that the child victim is consenting to its own chastisement and is now covered by s.1 Children and Young Persons Act 1933 and s.58 Children Act 2004.

<sup>21</sup> D. Ormerod and M. Gunn, “The Legality of Boxing” (1995) 15(2) L.S. 181.

<sup>22</sup> *Brown* [1994] 1 A.C. 212 at 265, per Lord Mustill.

and safety rules of a sport that is overseen by a referee and in which the protagonists are adequately trained and necessary medical assistance is on hand, then injury can be inflicted deliberately in the name of sport because the risks of harm have been reduced as much as it is possible to do whilst maintaining the essence of the test of skill and strength. Alternatively, it is an activity so deeply entrenched in our sporting and cultural heritage that it is an integral part of our social fabric that should be tolerated for the time being. Thus, brawling and prize fighting are unlawful because they lack the appropriate levels of organisation and/or regulation that can ensure that the level of harm inflicted is kept to the minimum possible. Whichever of the two justifications is accepted as valid, it is impossible to say that painful entertainment is either a properly organised, regulated and healthy sporting activity or so socially and culturally entrenched that it should be exempted from the normal operation of the law.

### *Body adornment*

The body adornment exemption is wide enough to cover the expected types of behaviour, such as tattooing and piercing, commonly occurring practices such as the various forms of cosmetic surgery, as well as conduct at the very extremes of acceptability, such as the branding of another person.<sup>23</sup> The justifications for exempting these activities are that they protect personal autonomy, by enabling body adornment or modification where it is desired, and are practices that are to varying degrees entrenched in and accepted by British culture. Some public policy limits are placed on tattooing by Parliament, with the Tattooing of Minors Act 1969 ensuring that young people do not get tattooed without understanding fully the consequences of their behaviour, and analogous activities engaged in for sexual pleasure are unlawful after *Brown*. Despite the wide variety of activities covered by this exemption, painful entertainment cannot be said to be analogous to any of them; the purpose of painful entertainment is not to adorn or modify one's body but to inflict pain or injury for the purposes of amusing the watching public.

### *Contact sports*

The scope and definition of the exemption extended to contact sports is often misconstrued, leading to confusion about what is consented to and what is merely risked. This in turn has left the law in a state where the exemption granted to contact sports does not map on to the offences contained in the Offences Against the Person Act 1861.<sup>24</sup> Where contact sports are concerned, the injury caused to the participant is usually incidental to the playing of the game, even where the injury-causing contact is made deliberately, for example, by a tackle in either code of rugby. Following the clarification of the law in *Barnes*,<sup>25</sup> participants consent to the contacts expected from and accepted as necessary for the playing of that particular sport. Where injury is caused, participants voluntarily run the risk that injury may result from the expected and accepted contacts and from the inherent

<sup>23</sup> *Wilson* [1997] Q.B. 47.

<sup>24</sup> Law Commission Consultation Paper No.139, *Consent in the Criminal Law*, (London: HMSO, 1995), Pts XII and XIII.

<sup>25</sup> *Barnes* [2004] EWCA Crim 3246.

dangers of participation in the sport.<sup>26</sup> The justification for this exemption is that sport is socially beneficial because it promotes health, exercise and principles, such as teamwork and fair play, which are valued by society. Participants do not consent to injury-causing contacts that are unconnected with the accepted way of playing the game, such as being punched off-the-ball,<sup>27</sup> nor do they consent to deliberately inflicted harm above and beyond what is necessary for the normal playing of the game, such as being bitten during the course of a rugby tackle.<sup>28</sup> It is impossible to draw an analogy between painful entertainment and the exemption for contact sports as the underlying contact, for example being stabbed with a dart or hit on the head with a piece of wood, does not promote health or exercise, nor does it promote associated values of sporting conduct. This leaves the initial contact illegal and the participants lawfully unable to run the risk of injury being caused to them.

### *Horseplay*

The exception labelled “rough horseplay” is one of the most controversial areas in the consent debate. It has been severely criticised by many eminent writers<sup>29</sup> and yet it is commonly referred to in the cases as an activity where consent is effective. The exemption has the potential to cover a wide variety of activities including rough play and initiation activities or dares.<sup>30</sup> The question that remains unanswered by all the authorities, however, is why the law should permit consent based on participation in “rough horseplay” in the face of what may be life-threatening injuries and where the genuineness of the victim’s consent may be somewhat less than apparent. At best, it appears that this category of activity is exempted because one must expect a bit of rough play in life and that this is a normal and healthy part of growing up, provided that the injury is not inflicted intentionally.

Notwithstanding the answer to this difficult question, the continued existence of this exception is at least partially explicable by recognising that the participants in “rough horseplay” are, as is the case with participants in contact sports, generally absent of any intention to cause injury. The participants are instead running the risk that injury might occur, but that outcome is neither their aim nor their desire. As Wilson has identified, it appears that as a consequence of this lack of intention, the public interest approach does not actually require “good reasons” to be present, but rather requires that there are no weighty public policy reasons that count against the activity.<sup>31</sup> Whether or not such policy reasons exist in respect of “rough horseplay” may be a matter of continuing debate, but in the case of painful entertainment, the presence of an intention to injure renders the “rough horseplay” exception, as currently understood, inappropriate; injury is not being risked from intentional contacts but is being inflicted deliberately for the purpose of entertaining others.

<sup>26</sup> See further, M. James, *Sports Law* (Basingstoke: Palgrave, 2010), Ch.6 and J. Anderson, “No Licence for Thuggery: Violence, Sport and the Criminal Law” [2008] Crim. L.R. 751.

<sup>27</sup> *Billingham* [1978] Crim. L.R. 553.

<sup>28</sup> *Johnson* (1986) 8 Cr. App. R. (S) 343.

<sup>29</sup> See for example, M. Allen, *Textbook on Criminal Law*, 11th edn (Oxford: OUP, 2011), p.375.

<sup>30</sup> *Jones* (1986) 83 Cr. App. R. 375, *Aitken* [1992] 1 W.L.R. 1006 and accepted in *Brown* [1994] 1 A.C. 212.

<sup>31</sup> *Billingham* [1978] Crim. L.R. 553.



*Dangerous exhibitions*

The exemption granted to dangerous exhibitions is another frequently cited example of where consent is considered to be effective and yet it is rarely relied upon before the courts. Further, there appears to be little understanding of its full meaning and the potential extent of its application. Its validity is referred to in cases and textbooks with an almost unspoken assumption that the scope of its coverage is, or at least ought to be, clear. The authorities mention examples of circus acts, like knife throwing and the human cannonball, as falling within this exemption. But again, as with contact sports and rough horseplay, the participants in this type of activity, whatever it might be, are characterised by the common feature that they are not acting with an intention to cause each other injury. The circus knife-thrower does not have as his or her purpose the causing of injury, although the risk of such is obvious to all. The assistant who lights the fuse that fires the cannon that projects the human cannonball into the air does not aim to cause harm, though there is a risk that injury may be caused. The limited discussion of the scope of this exemption also means that there is no clear justification for its existence. Presumably, activities of this nature are justified on the grounds that they are exhibitions of skill, in the case of the knife thrower, and daring, in respect of the human cannon ball, provided that injury was not inflicted intentionally. For the same reasons identified in relation to the previous two exemptions, the participants in painful entertainment are distinguishable from the participants in the activities thought to be covered by the “dangerous exhibition” exemption on the grounds that the harm caused to them is inflicted deliberately and without discernable good reason.

*Painful entertainment*

In the present examples, a certain degree of injury is clearly intended. It follows, according to the current authorities, that the consent of the participants, in order to be effective, must be one that is supported by “good reasons”. In general, the currently identified exempted activities are defined narrowly and appear inapplicable to the “entertainment” injuries under consideration. Further, this new category of harm is sufficiently distinct to mean that there are no clear and obvious analogies that can be drawn with activities that are exempted. Where harm is intentionally inflicted in the course of surgery (health), tattooing/piercing (culture) and boxing (sport), “good reasons” have been advanced as a justification. Where harm is unintentionally inflicted during contact sports (sport/health) or vigorous sexual activity (choice), there appears to be no significant public policy reasons operating against their legality.

Thus, it is clear that reasonable surgical interference is permissible,<sup>32</sup> as is injury which arises during the course of properly conducted sporting activities such as wrestling, judo and rugby football.<sup>33</sup> A number of authorities specifically identify tattooing, body piercing and some forms of ritual circumcision as activities which might well be receptive to a defence of consent.<sup>34</sup> Although something of an anomaly in terms of logical analysis, properly regulated boxing is also considered

<sup>32</sup> *Attorney-General's Reference (No. 6 of 1980)* [1981] 2 All E.R. 1057.

<sup>33</sup> *Barnes* [2004] EWCA Crim 3246.

<sup>34</sup> See *Brown* [1993] 2 All E.R. 75, where all these activities are recognised as exemptions.

to be a lawful activity to which consent operates as a defence.<sup>35</sup> Conversely, a person cannot consent to being killed or run the risk of being killed whilst duelling,<sup>36</sup> bare-knuckle prize fighting does not admit consent as a defence,<sup>37</sup> nor is consent a permissible defence to acts of sado-masochistic sexual activity which result in one or more of the participants suffering actual bodily harm or some greater degree of injury.<sup>38</sup>

It seems that painful entertainment is not readily analogous to any of the existing lawful exemptions. Indeed, painful entertainment appears to have more in common with activities like sado-masochism and duelling, which are unlawful. It might be that if an exemption is to be found at all, it could only be explained in the same way as the anomalous boxing exemption; because society, at present, chooses to tolerate this kind of activity.

### A new approach?

The participants in “The Pain Men” present a somewhat unusual situation that has not yet presented itself for judicial consideration. The participants are in the entertainment business; the reason why they do what they do is commercially driven. The injuries and pain they inflict are integral and central to the “entertainment”. As we have seen, where injury is intentionally inflicted, there appears to be two clearly recognised but narrowly defined exemptions. The first is the sport of boxing which, has itself, been recognised as an anomaly.<sup>39</sup> The second is surgery, be it therapeutic or medicinal, and the related activities that come under the heading of body adornment. The remaining exemptions identified by the authorities seem to be confined to activities that carry only the risk or possibility of injury. The only rational conclusion that can possibly follow, given the current state of the authorities, is that the intentional infliction of pain and injury for public entertainment purposes cannot be regarded as lawful.

At present, the restrictive approach determined by *Brown*, requires that the activity falls within one of a limited number of narrowly defined specified exemptions in order that the consent of the participant(s) can be deemed effective. Would a different approach better reflect and explain the current position and better enable us to determine in advance whether or not this particular activity (or any other novel category of activity) would be capable of admitting consent and therefore of being deemed lawful?

An alternative approach would be to consider whether the activity falls into one of three broadly defined categories:

#### *Tolerated activities that involve the intentional infliction of harm*

This exemption would extend to a consensual activity where harm is *intentionally* inflicted for a purpose, or in circumstances that are tolerated by society. The currently exempted activities of surgery, boxing and body adornment would therefore remain lawful on the premise that harm intentionally inflicted in these

<sup>35</sup> See generally D. Ormerod and M. Gunn, “The Legality of Boxing” (1995) 15 L.S. 181.

<sup>36</sup> *Rice* (1803) 3 East 581; *Young and Webber* (1838) 8 Car. & P. 644.

<sup>37</sup> *Coney* (1882) 8 Q.B.D. 534.

<sup>38</sup> *Brown* [1993] 2 All E.R. 75.

<sup>39</sup> *Brown* [1993] 2 All E.R. 75.

contexts is tolerated by society because of the inherent benefits associated with these categories of conduct.

### *Tolerated activities that carry a risk of the infliction of harm*

The second exemption would extend to an activity where consensual participation carries with it a *significant risk of unintended injury*, but the activity and circumstances in which it occurs are tolerated by society. The currently exempted activities of contact sports and dangerous exhibitions would therefore be lawful but on the premise that such activities are tolerated by society because of the inherent benefits associated with these categories of conduct, notwithstanding the risk of harm associated with participation in them. Rough horseplay could also fall into this category, however, whether or not the types of conduct that this exemption has been thought to cover in the past are still considered to be socially beneficial might be considered to be open to question.

### *Unlawful activities*

It would remain unlawful to inflict harm intentionally, or to take a significant risk of inflicting harm, where that harm arises in the course of an activity and/or in circumstances not tolerated by society. Thus, currently identified unlawful activities such as female circumcision, bare knuckle prize fighting and duelling, would remain unlawful for as long as society determines that they should not be tolerated because of the general harm caused to society by participation in them.

This typology has the advantage of relaxing the strictures of the narrow and rigidly construed categories identified in *Brown*.<sup>40</sup> It would be much more fluid than has previously been possible, enabling an activity to move between the categories depending upon society's attitudes towards it. For example, in 1993 *Brown* declared that privately conducted consensual acts of homosexual sado-masochism should be within category 3 and therefore unlawful; however, should society's tolerance of such activities change then the flexibility of the categorisation would permit that activity to be regarded as lawful once society chooses to tolerate it.

This rebranding of activities based on societal tolerance still carries with it some difficulties and it is true that this suggested approach remains descriptive of the outcome; however, it does better enable participants engaging in a novel form of conduct that has not previously come before the courts to determine in advance whether or not they are acting unlawfully. In order to achieve this, the definition of societal tolerance must be clear enough to enable objective decisions to be made rather than allowing moral outrage to be determinative of the category in which an activity is placed. This requires a clear understanding of what society, or a section thereof, means in order for a decision on lawfulness to be genuinely representative.

An examination of some of these activities reveals that a multiplicity of agencies currently contributes to the legal outcome. For example, Parliament has decided that female circumcision should not be tolerated by society and has legislated to

<sup>40</sup> For a discussion of this relaxing of attitudes towards *Brown*, see P. Murphy, "Flogging Live Complainants and Dead Horses: We May no Longer be in Bondage to *Brown*" [2011] Crim. L.R. 758.

render the activity unlawful (category 3). Further, the judiciary have determined that prize fighting and homosexual sado-masochism are injurious to society, are not tolerated by it and should be unlawful (category 3). Conversely, the same agency has decided that regulated combat sports and medicinal surgery are beneficial to society and should be tolerated (category 1), whilst body adornment and rough horseplay are not injurious to society and should be lawful (category 2). In the context of the activity under discussion here, the Metropolitan Police Service, having taken advice from the Crown Prosecution Service, decided that the legality of painful entertainment was not worthy of further investigation and, presumably, did not feel that society would regard this kind of activity as intolerable; therefore, the participants in *Balls of Steel* were not, in its opinion, acting unlawfully (category 1), despite there being no good reasons identified in defence of this position. In each of these examples, the agency concerned is involved in making a value judgement about the acceptability to society of the activity under scrutiny.

It is impossible to divorce the effectiveness of consent in criminal law from the making of a value judgement about the activity concerned, but recognising that inevitability does not render the proposed approach unworkable. A key difficulty with the current legal test lies with the wide range of agencies that are involved in making value judgements about the activities that are being undertaken.<sup>41</sup> In order for this proposal to have any chance of succeeding, one of these agencies must be given principal control to determine whether or not the injuries were inflicted during the course of a tolerated activity. This would replace the current approach where a wide range of interested parties, operating according to different criteria and for different practical or procedural purposes, apply their own values on an ad hoc basis when deciding the lawfulness or otherwise of the participants' conduct. If the criminalisation of consensual risk-taking is an interference with personal autonomy whose regulation is properly left to Parliament, as was discussed in *Dica*,<sup>42</sup> then to ensure consistency of approach, Parliament should also take the lead in defining the circumstances in which society chooses to tolerate the deliberate infliction of injury, the methodology to be employed in making such determinations and provide guidelines for those who must take these decisions at the various stages of the criminal justice process.

## Conclusion

Rethinking the application of consent in the manner suggested may not solve the most difficult problem of all, that of the determination of standards of tolerance in respect of given activities; it may have to be accepted that this problem is insoluble. This alternative approach focuses on the true nature of consent as a defence; the matter is one of policy and it clearly highlights the public interest issues by asking what it is that society is prepared to tolerate and what it is not. It is submitted that this proposal does offer a more structured, rational and coherent approach to consent than does the current ad hoc nature of the law.

<sup>41</sup> See, for example, M. Weait, "Dica: knowledge, consent and the transmission of HIV" (2004) 154 N.L.J. 826.

<sup>42</sup> *Dica* [2004] EWCA Crim 1103, where the Court of Appeal stated that the criminalisation of the activity under scrutiny was properly a matter for Parliament.

On a strict legal analysis of the present law, the intentional infliction of pain and bodily injury for purposes of public entertainment is unlawful<sup>43</sup>; however, by adopting the approach suggested above, the outcome might be different. The current popularity of painful entertainment suggests that the activities engaged in as a part of these programmes are tolerated by at least a section of society.<sup>44</sup> Whether this is sufficient to declare that the activity is tolerated by society at large, or as a whole, and that the consent of the parties should operate as an effective defence remains unanswered.

If the law as it stands cannot deal with new or novel cases, let alone hard ones, or ones that arouse moral indignation, then it is time to rethink the law in this area to reflect what society chooses to tolerate, how it reaches that decision and who is representative of society and therefore in the position to make that decision.

<sup>43</sup> The anomalous exception of boxing remains.

<sup>44</sup> Only 43 members of the public complained to OFCOM.