Not so Clear Cut: The Lawfulness of Body Modifications

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This article discusses the decision of the Court of Appeal in R v BM[1] in which the Court had been asked to address whether consent could provide a defence to extreme body modification procedures, including tongue splitting. It considers the reasoning advanced by the Court in rejecting consent as a defence and questions whether our continuing reliance on Brown and the category-based exceptions provides a satisfactory method of delineating which activities can be lawfully consented to. It suggests that the decision has done little to clarify the legal position of body modifications which result in less serious harm and concludes that this area of the law is still ripe for reform.

Introduction

It is a quarter of a century since the House of Lords handed down their decision in *Brown*[2] and their approval of the principle that consensual acts causing bodily harm are, *prima facie*, unlawful unless they fall within an exception recognised at common law continues to cause consternation and confusion. The exceptional categories, discussed below, are less than clear and it is for the courts to decide when faced with any novel circumstance whether there is a good reason to allow consent to negate liability.

In *BM*[3] the Court of Appeal was asked to rule on whether consent was available as a defence to a novel activity, extreme body modification procedures - including tongue splitting and the removal of an ear. This was the first time the Court of Appeal had been asked to address the lawfulness of commercial body modifications.

The phrase 'body modification' has typically been used to describe a wide range of procedures, from cosmetic surgery and male circumcision to tattooing and piercing. The epithet of 'extreme' has typically been used to denote non-therapeutic aesthetic body modification procedures offered by tattooists and piercers. These include procedures such as scarification (the scratching or cutting of the skin to create a pattern), branding (the burning of the skin to create a pattern), dermal implants (materials placed beneath the

[1] *BM* [2018] EWCA Crim 560; [2018] 3 W.L.R. 883; [2018] Crim. L.R. 847. The appellant pleaded guilty at Wolverhampton Crown Court, 12 February 2019.
[2] *R v Brown* [1994] 1 AC 212 (HL).
[3] *BM* [2018] EWCA Crim 560; [2018] 3 W.L.R. 883. The appellant pleaded guilty at Wolverhampton Crown Court, 12 February 2019.

skin to create a pattern or to provide an anchor for jewellery) and ear pointing (the removal of the cartilage at the top of the ear to create a pointed pixie-like appearance). 'Body modification' will be used in the following discussion in place of 'extreme body modification' as this is the phrase the Court of Appeal has adopted.

As body modification procedures have become increasingly popular, many high street tattooing and piercing studios have begun to offer these additional services. The availability of these modification procedures has not been hidden from public view; the procedures and their prices are advertised on the premises of body modifiers, on their business websites[4] and have even been broadcast online.[5] These procedures are no longer marginalised, they are – although not mainstream – accepted practices amongst a subculture.[6]

Premises and practitioners offering ear-piercing or tattooing amongst their services must be registered under the Local Government (Miscellaneous Provisions) Act 1982[7] (as amended by s.120 and Sch 6 of the Local Government Act 2003) and the requisite standards of safety and hygiene must be maintained. Body modifications do not fall under the terms of this licencing regime as these are not procedures which are recognised or regulated by local authorities. Body modifications are, then, unregulated, and the legality of these procedures had, until *M* reached the Court of Appeal, gone largely unquestioned.[8] The few commentators who had addressed this area of the law had hypothesised that, if a prosecution was taken, the courts would follow the well-embedded principle in *Brown*, but would recognise body modification procedures as an exceptional category out of respect for personal autonomy.[9] Yet, in a decision which may have come as a surprise to both legal commentators and body modifiers, the Court of Appeal ruled that body

[4] For examples of the services offered at the time of writing see for example, *Bodycraft*, available at http://bodycrafttattoo.com/body-modifications/ (accessed 20 July 2018); *Origin Arts*, available at: www.theoriginarts.co.uk/body-modifications.html (accessed 20 July 2018); *Tattooed Lady*, available at: www.tattooed-lady.co.uk/body-mods. (accessed 20 July 2018); *Holier than Thou*, available at: www.holier-than-thou.co.uk/services/scarification/ (accessed 20 July 2018); *Skin Seamstress*, available at: skinseamstress.com/wp/price-list/ (accessed 20 July 2018).

[5] http://www.channel4.com/programmes/body-mods where the appellant in *M (B)* was featured in a series of online programmes detailing body modifications.

[6] The term 'subculture' is being used here to describe a group that differs from wider society and develops its own values and norms.

[7] Local authorities in London are subject to the London Local Authority Act 1991.

[8] The author had raised the issue previously. See S. Pegg, 'The new tattoo: is body branding legal?' *The Conversation* 28 July 2015. Available at: https://theconversation.com/the-new-tattoo-is-body-branding-legal-44690 (accessed 12 July 2018).

[9] See S. Oultram, "All hail the new flesh: some thoughts on scarification, children and adults" (2009) 35(10) Journal of Medical Ethics at 607; P. Lehane, "Assault, consent and body art: a review of the law relating to assault and consent in the UK and the practice of body art" (2005) 4 J Environ Health Res 41. The issue is also briefly considered in S. Cooper and M. James "Entertainment - the painful process of rethinking consent" (2012) 3 Crim LR 118.

modification procedures, outside of piercing and tattooing, are unlawful to perform when they result in bodily harm.

This article reviews that decision in light of the prevailing case law and asks if this area of the law has now been clarified, or whether body modification practitioners continue to operate in a legal grey area. It also considers whether self-regulation by the body modification industry could answer the concerns expressed by the Court of Appeal in *BM* and how the law could adapt to accommodate these procedures.

Consent and the public interest

Whether an individual should be immunised from the criminal law of offences against the person when consent had been given to an application of force has been a thorny issue for the law. The Offences Against the Person Act 1861 (OAPA), upon which we still rely when non-fatal bodily injury is caused, is silent on consent – leaving the common law to develop the necessary principles. The courts have consequently adopted a paternalistic approach, demonstrating a willingness to restrict personal autonomy in the interests of public policy and confirming that a person does not have the right to deal with his or her body entirely as they choose – the courts will draw a line where the public interest requires.

Consequently, the common law has established that an assault or a battery can be effectively consented to, but when bodily harm is intentionally inflicted an offence at ss.47, 20 or 18 OAPA 1861 will be committed regardless of whether consent has been given – unless injury has been caused in the course of an activity exempted from this general rule.[10]

Brown and the general statement of public policy

The limits on the validity of consent when non-fatal offences against the person are in question continues to be governed by the ever-contentious opinions of the majority (Lords Templeman, Jauncey and Lowry; Lords Mustill and Slynn dissenting) in the case of *Brown*. In *Brown*, a group of male sadomasochists had intentionally and consensually inflicted physical injuries upon one another for their mutual sexual pleasure and, having been convicted of offences contrary to ss.47 and 20 OAPA 1861, the men appealed. Their convictions were upheld by the Court of Appeal and, in answer to an appeal asking whether "the prosecution have to prove lack of consent on the part of B before they can establish

[10] For a review of the development of this general principle see M. Giles, "R v Brown: Consensual Harm and the Public Interest" (1994) 57(1) MLR 101.

A's guilt under section 20 and section 47 of the Offences Against the Person Act", the majority of the House of Lords answered in the negative. Affirming Lord Lane CJ's dictum in *Attorney-General's Reference (No. 6 of 1980*) that

> "it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused." [11]

As Ormerod and Laird have indicated, this statement of the law should now be considered as "overbroad" as it no longer correctly represents the approach taken in subsequent cases when bodily harm has not been foreseen, nor is it foreseeable.[12] However, when bodily harm is intended and caused, Lord Lane CJ's dictum is still authoritative.

Category-based exceptions

A corollary to this was the acknowledgment by Lord Lane CJ that actual bodily harm *may* be caused for a good reason. Thus, when harm is caused during a legitimate activity, liability may be negated by express or implied consent. His Lordship stated that these exempted activities include

> "properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases." [13]

As the Law Commission noted in its Consultation Paper *Consent in the Criminal Law*, this portion of the judgment is "merely a summary" of the position of the law which "does not set out at all the specific conditions for the legality of the various types of conduct referred to; and it does not purport to be exhaustive."[14] Indeed other activities have been added to this 'list' of exceptions. In *Jones* the Court of Appeal accepted that rough and undisciplined horseplay was an exceptional category.[15] This protection was extended to "robust games" in *Aitken* where it was held that injuries sustained in the course of a prank

[11] [1981] QB 715 (CA) 719.
[12] D. Ormerod and K. Laird, *Smith, Hogan, & Ormerod's Criminal Law*, 15th edition (OUP: Oxford, 2018) 676-677.
[13] *Attorney-General's Reference (No. 6 of 1980)* [1981] QB 715 (CA) at 719 (Lord Lane CJ).
[14] Law Commission of England and Wales, *Consent in the Criminal Law* Consultation Paper No.139 (HMSO 1995) at para 9.4.
[15] (1986) 83 Cr App R 375 (CA).

could fall under the exception.[16] In *Brown* the majority of the Court held that there was no justification for allowing sado-masochistic activities to be legitimised but recognised that the defence of consent could be extended to other lawful activities, with Lords Slynn and Templeman identifying tattooing and ear-piercing as procedures which are lawfully performed. Lord Mustill added that religious flagellation was also exempted from the general rule.[17]

These exceptions are created on an *ad hoc* basis and there are no clear legal principles expounded in *Brown* that can be used to explain why certain activities are exempted from the general rule, or which activities may be excused in the future. As Lord Woolf CJ has pragmatically stated in *Barnes* "the rule and the exceptions to the rule that a person cannot consent to his being caused actual harm, are based on public policy."[18]

Recognising category-based exceptions to the general rule allows the law to shift in response to social change. Acts resulting in bodily harm may fall under an existing exception or, when faced with a new situation, a court may decide to create a new exception – taking into consideration whether there is any good reason - more specifically any public interest - in allowing that activity to continue. Unfortunately, this approach offers little clarity for those who are engaged in activities that are neither wholly analogous to accepted practices or those that sit on the boundaries of public acceptability, as the appellants in *Brown* found to their considerable cost. It also means that the presumption of illegality may be difficult to displace when the activity in question is a subcultural one.

Body modifications fall on this boundary. In the absence of any lawful justification a modifier causing bodily harm to his or her client will be committing an offence. Thus, procedures including scarification, branding, tongue splitting, and ear pointing must fall to be decided on a case by case basis.

The legal grey area that these body modifications have occupied had not gone unnoticed prior to the decision in *M*. In its 1995 Consultation Paper *Consent in the Criminal Law* the Law Commission had pointed to the lack of statutory regulation for procedures such as scarification and branding which had left this area of the law unclear.[19] However, the concerns expressed by the Law Commission were not addressed by the legislature and the case of *BM* has been the first opportunity the courts have had to consider the lawfulness of these procedures.

[16] [1992] 1 WLR 1006 (CMAC).
[17] *R v Brown* [1994] 1 AC 212 (HL) at 231 and 267.
[18] [2004] EWCA Crim 3246, [2005] 1 WLR 910 at [9].
[19] Law Commission of England and Wales *Consent in the Criminal Law* at paras 9.7-9.29.

R v BM

In *BM*, the procedures in question had been consensually performed by a body modification practitioner for aesthetic purposes and had resulted in permanent and irreversible alterations to the bodies of those clients who had requested them. The appellant was registered with his local authority for the purposes of piercing and tattooing and held no medical qualifications. He had performed several modification procedures at his business premises and had been charged with three counts of wounding with intent to do grievous bodily harm contrary to s.18 of the OAPA 1861 and three alternative counts of inflicting grievous bodily harm contrary to s.20. The charges related to procedures performed on three separate individuals; a tongue splitting, the removal of an ear and the removal of a (male) client's nipple. At a preliminary hearing his Honour Judge Nawaz ruled that consent was not available as a defence to the offences charged. The appellant then took the unusual step of making an interlocutory application under s.35(1) of the Criminal Procedure and Investigations Act 1996 against the ruling that consent provided no defence.

The application heard by the Court of Appeal concerned the straightforward question of whether consent could provide a defence to the charges the defendant faced. There was no dispute regarding the reality of the consent given to the appellant by his clients; the appellant had obtained consent, it was voluntary and informed; and he had not exceeded that consent.

Counsel for the appellant accepted the binding authority of *Brown* but suggested that it could be distinguished as the facts at hand did not concern sado-masochistic activities, but rather, body modifications which do not seek to breed or glorify cruelty. Nor, he suggested, should the procedures be construed as medical or surgical; they were solely for the purposes of bodily adornment. The appellant relied heavily on the dictum of Lord Lane CJ in *Attorney-General's Reference (No. 6 of 1980)* submitting that there was a good reason for the infliction of harm in body modification procedures. As these modifications were undertaken for personal enhancement the Court, he argued, should give weight to personal autonomy and recognise an individual's right to adapt their own appearance.

Counsel for the respondent, on the other hand, argued that, as serious harm had been caused, the person injured simply could not consent in law as the conduct did not fall within one of the recognised exceptions. He described the procedures as essentially medical, as akin to cosmetic surgery and performed without any medical justification. He pointed out that while reasonable surgical interference is exempted from the general rule the assumption is that this is performed by those who are medically qualified and subject to regulation by the relevant governing bodies. Moreover, body modifications should not

be added to the list of recognised exceptions as public health considerations should prevail over personal autonomy in these circumstances.

Providing the judgment of the Court the Lord Chief Justice, Lord Burnett, dismissed the appeal taking the view that these procedures were medical in nature, had been undertaken by an individual who was not medically trained and had been performed for no good medical reason. Clients requesting these procedures may, suggested his Lordship, be mentally ill and modifiers are not equipped to make judgements about the mental state of their clients.

Lord Burnett CJ recognised that tattooing and piercing enjoys immunity from the criminal law as society has "long accepted tattooing and piercing (not just of ears) as acceptable."[20] However the Court was unwilling to accept that these body modification procedures were analogous to any recognised exception, nor was the Court willing to recognise a new category-based exception to the general rule that would accommodate body modifications. His Lordship acknowledged that there was "no easily articulated principle by which any novel situation may be judged"[21] but that activities were exempted from the general rule on the grounds they conferred some "discernible social benefit" or it would be unreasonable to criminalise the activity if it were consented to.[22] Body modifications were held to have neither of these features and Lord Burnett CJ concluded:

> "In short, we can see no good reason why body modification should be placed in a special category of exemption from the general rule that the consent of an individual to injury provides no defence to the person who inflicts that injury if the violence causes actual bodily harm or more serious injury."[23]

The Court further noted that a change in the law was a matter for Parliament.[24]

The terminology of 'body modification' was used throughout the judgment as a catch-all for the procedures the appellant had performed and, as the Court noted, "many more" procedures[25] – although, problematically, the Court gave no clear indication of what other procedures they were bringing under this broad umbrella.

[20] *BM* [2018] 3 W.L.R. 883 at [44].
[21] *BM* [2018] 3 W.L.R. 883 at [38].
[22] *BM* [2018] 3 W.L.R. 883 at [40].
[23] *BM* [2018] 3 W.L.R. 883 at [45].
[24] *BM* [2018] 3 W.L.R. 883 at [45].
[25] *BM* [2018] 3 W.L.R. 883 at [8].

"A natural extension of tattooing and piercing"

In *BM* there were two lines of argument the appellant could have realistically pursued to exempt the procedures from criminal liability; either (i) that body modifications fell within an established exception and were thus lawful, or (ii) that body modification should be recognised as a wholly new exception to which consent could negate liability.

The argument that body modifications fall within the established category-based exceptions of tattooing or ear-piercing is a tenuous one. Branding had previously been generously interpreted as akin to tattooing and thus lawful by the Court of Appeal in the case of *Wilson* (below).[26] Despite this judicial blip it was never likely that the Court would accept that the procedures undertaken in *BM* were akin to either tattooing or piercing, and the appellant did not attempt to suggest that they were analogous. Instead, counsel for the appellant sought to convince the Court that the procedures conducted should be accepted as a "natural extension of tattooing and piercing";[27] essentially that these procedures were merely contemporary forms of bodily adornment undertaken to enhance an individual's physical appearance.

This is not, however, an argument without merit. Many of the recognised exceptional categories provide a description of a 'type' of activity that will be immunised from the general rule. For example, new sports such as bossaball and kiteboarding undoubtedly enjoy immunity under the generic exemption of "properly conducted games and sports." Likewise, "dangerous exhibitions" establishes a category into which knife throwing or fire eating demonstrations may fall.[28] It could then be surmised that the terms "tattooing" and "ear-piercing" were merely being used by their Lordships in *Brown* as contemporary examples of bodily adornment and other modifications may fall within this exception. This is not without precedent. For example, despite the lack of direct authority on this point bodily piercing has long been accepted as lawful wounding, [29] (the Law Lords in *Brown* spoke only of the lawfulness of ear-piercing) and the caveat of 'ear' was dropped by Lord Burnett CJ in his discussion of the lawfulness of piercing in *BM*.[30]

However, when body modification procedures other than ear-piercing and tattooing have been treated as lawful this has only been where there has been some similarity between the procedure and the practices of tattooing and ear-piercing. It is difficult to draw any

[26] [1997] QB 47 (CA).
[27] *R v Wilson* [1997] QB 47 (CA) at [34].
[28] There is no case law in this area, so we are left to guess what may be included within this category.
[29] Body piercing was accepted as lawful in the first instance decision of *Oversby* unless the act of piercing is performed for sexual pleasure. (Unreported) December 1990, cited in the Law Commission of England and Wales *Consent in the Criminal Law* at para 9.7.
[30] *BM* [2018] 3 W.L.R. 883 at [39].

equivalence in either process or result between those procedures that had been performed in *M* - tongue splitting and the removal of body parts – and the modification procedures the law has, to date, seen fit to legitimise. As Lord Burnett CJ explained in *BM*, there is a distinction between procedures which seek to enhance or adorn the body and those which involve the removal or mutilation of a body part and amount to really serious harm. There was no "proper analogy"[31] in law between tattooing and piercing and these practices.

The second exceptional category under which body modifications could fall is that of "reasonable surgical interference". As a category "reasonable surgical interference" has attracted little academic or judicial attention. In fact, as Lord Mustill recognised in *Brown*, "proper medical treatment" may be subject to special rules that take it outside of the defence of consent.[32] In *BM* Lord Burnett CJ accepted the argument advanced by the respondent that body modification procedures were essentially surgical in nature, stating that there was an "implication that elective surgery would only be reasonable if carried out by someone qualified to perform it."[33] Consequently, the procedures could not be immunised from the criminal law when performed by unqualified practitioners who were not subject to professional oversight, as in *BM*.[34]

Lord Burnett CJ's comments in *BM* on surgical procedures being lawful only when undertaken by those qualified to perform them are perhaps weakened by a regime that permits non-therapeutic male circumcision.[35] Ritual circumcision, as a religious or cultural rite of initiation, can be performed by medically qualified and non-medically qualified practitioners alike, yet this practice continues to enjoy immunity from the criminal law. In light of *BM* it may become difficult to defend this unconditional exception; male circumcision may not amount to bodily mutilation,[36] but it certainly requires the removal of part of the body. There is a system of oversight for Jewish male circumcision, which is administered by the Initiation Society of Great Britain who train and supervise Mohelim. If such self-regulation is used to justify (at least in part) the toleration of ritual male

[31] *BM* 2018] 3 W.L.R. 883 at [42].
[32] *Brown* [1994] 1 A.C. 212 (HL) at 266. Also see the comments of Lord Mustill in *Airedale NHS Trust v Bland* [1993] A.C. 789 at 891.
[33] *BM* [2018] 3 W.L.R. 883 at [42]. This was essentially recognition of the fact that here we are looking for proper medical treatment.
[34] For further discussion of this point see K. Laird "Defence: R. v BM" Crim LR (2018) 10, 847-850.
[35] Addressed in *Re J (Specific Issue Orders: Muslim upbringing and circumcision)* [2000] 1 F.L.R. 571 and in *Re B and G (children) (care proceedings)* [2015] 1 WLUK 163.
[36]The Law Commission accepted that male circumcision was not a mutilation although its reasoning on this point may be, as Gilbert has asserted, questionable. Law Commission Consultation Paper No.139, *Criminal Law, Consent in the Criminal Law* (1995) at para 9.2. H. Gilbert 'Time to reconsider the lawfulness of ritual male circumcision' E.H.R.L.R. (2007) 3, 279-294.

circumcision when performed by individuals who are not medically qualified, then consideration should be given to whether body modifications could be similarly regulated.

Creation of a new exception

The rejection of body modifications as contemporary forms of tattooing or piercing and the recognition that this was not "proper medical treatment" left the Court to address whether these procedures were deserving of protection through the creation of a new exception. Here, the Court was not only looking at the seriousness of the harm caused, but whether more extreme procedures could be exempted for a "good reason", or, as Lord Burnett CJ set out, allowing the continuation of the activity conferred some "social benefit"[37] or it would be unreasonable to criminalise it.[38]

Asking whether it is unreasonable to disallow consent suggests an approach akin to that adopted in *Wilson* (below) where lawfulness is assumed unless that presumption can be displaced in the public interest. However, Lord Burnett CJ was not sanctioning such a radical shift in approach, he was merely seeking to extract general principles to explain why certain activities have been exempted from the general rule.[39] This said, his Lordship's discussion of "social benefit" and "unreasonableness" may usefully loosen the shackles on the use of "good reason" as the prime justification for legitimising an activity.

Social Benefit and Unreasonableness

In *BM*, the appellant had submitted that to disallow consent would unnecessarily limit personal autonomy as clients who wished to have body modification procedures performed would have that choice unreasonably curtailed by the criminal law. This reasoning was roundly rejected by Lord Burnett CJ who took a resolutely paternalistic approach.

Significant weight was given to the evidence submitted by an ear, nose and throat consultant and, a consultant plastic surgeon regarding the nature of the procedures before the Court. This expert evidence, described as "uncontroversial"[40] and summarised at the

[37] This seems to be nothing more than a synonym for "public interest".
[38] *BM* [2018] 3 W.L.R. 883 at [40].
[39] *BM* [2018] 3 W.L.R. 883 at [40].
[40] *BM* [2018] 3 W.L.R. 883 at [12].

beginning of the judgment, established that the ear, nipple and tongue modifications would not be performed by medical professionals for purely aesthetic purposes and posed a significant risk of complications, of infection and – in the case of the ear removal – of hearing loss.[41] Lord Burnett CJ later noted that society deserves to be protected from the "risk of unwanted injury, disease or even death" which may flow from the consensual infliction of serious injury and "may impose on society as a whole substantial cost."[42] Here, Lord Burnett CJ appears to have been influenced by the expert evidence, viewing body modifications as posing a serious danger to physical health and echoing the speculative rhetoric of their Lordships in *Brown*, where the potential for serious harm was as relevant to the Courts estimation of the dangerousness of sado-masochism as the resultant harm.[43]

Speaking of the appellants working environment his Lordship recognised that the appellant had taken "some trouble to ensure a sterile environment when he operated" and conceded that "his work was in some respects tidy and clean" but emphasised that this was immaterial as "consent as a defence could not turn on the quality of the work then performed."[44] In light of the physical dangers posed his Lordship rejected the proposition that body modifications could be "placed in a special category of exemption" emphasising that there was a need to protect society from needless violence.[45]

Despite these concerns no consideration was given to the dangers that might flow were modification procedures carried out other than on licensed premises. As noted, tattooists and piercers are required to submit to regulation and monitoring to ensure that the requisite standards of hygiene and safety are maintained, and procedures performed in these premises benefit from this licensing regime. The Law Commission, considering this issue in its 1995 Consultation Paper, noted that the respondents to that consultation had warned that if procedures were to take place otherwise than in licenced premises they may be performed in unhygienic conditions, that inappropriate and dangerous equipment may be used and there would, resultantly, be a risk of HIV infection.[46] If the Court in *M* was seeking to protect putative victims of body modifications from injury, disease and death then declaring that these practices unlawful is likely to do little other than, as those same respondents to the Law Commission had advised, drive these practices underground. The physical dangers that so occupied the Court could perhaps be more effectively countered by following those models established for tattooing and piercing, where local governance provide a framework within which practitioners effectively self-regulate.

[41] *BM* [2018] 3 W.L.R. 883 at [13]-[20].
[42] *BM* [2018] 3 W.L.R. 883 at [39].
[43] *R v Brown* [1994] 1 AC 212 (HL) at 246 and 254.
[44] *BM* [2018] 3 W.L.R. 883 at [42].
[45] *BM* [2018] 3 W.L.R. 883 at [45].
[46] Law Commission of England and Wales, *Consent in the Criminal Law* at para 9.21.

Another key consideration for the court was that individuals who were vulnerable or mentally ill were particularly deserving of protection from the repercussions of body modifications as it was felt they may consent to procedures that risked life-long consequences. Characterising body modification procedures as surgical procedures also led Lord Burnett CJ to an *a priori* assumption that additional safeguards - not available to the clients of body modifiers - [47] should be in place to protect those seeking out body modifications as

> "a cosmetic surgeon would be on the look out for potential psychiatric or psychological problems and, if necessary, refer the patient for an assessment. The General Medical Council has also introduced rules which require a two week cooling off period before surgery is performed to enable a patient to change his or her mind." [48]

As part of pre-operative assessment, surgeons undertaking cosmetic procedures may require patients to undergo a psychological assessment to identify conditions such as body dysmorphic disorder[49] but, as the Court recognised, a psychiatric assessment is not mandated for all cosmetic procedures.[50] Adults who are mentally ill are also free to have tattoos and piercings without inquiries being made into their state of mind, however ill-advised those procedures may be. Many people may question the wisdom of having a large facial tattoo but, if a customer requests such, a tattooist is not obliged to refer that client for psychological assessment. There is no sound rationale for protecting individuals from the harm a tongue split may cause when the law tolerates the lawful application of a facial tattoo which poses a risk of not only physical harm, but social stigma.

Several references were made to mental illness in this relatively short decision.[51] In one portion, the Court appeared to equate the desire to undergo body modification procedures with – at least in some incidences - mental illness. As Lord Burnett CJ explained:

> "The fact that a desire to have an ear or nipple removed or tongue split is incomprehensible to most, may not be sufficient in itself to raise the question whether those who seek to do so might be in need of a mental health assessment. Yet the first response in almost every other context to those who seek to harm

[47] *BM* [2018] 3 W.L.R. 883 at [42].
[48] *BM* [2018] 3 W.L.R. 883 at [13].
[49] Royal College of Surgeons Professional Standards for Cosmetic Surgery (April, 2016). Available at: www.rcseng.ac.uk/-/media/files/rcs/standards-and-research/standards-and-policy/service-standards/cosmetic-surgery/professional-standards-for-cosmetic-surgery-web.pdf (accessed 1 September 2018). See T. Elliott for a discussion of psychological assessments and the reality of consent in 'Body dysmorphic disorder, radical surgery and the limits of consent' (2009) MLR, Volume 17, Issue 2, Summer, 149.
[50] *BM* [2018] 3 W.L.R. 883 at [13] and [20].
[51] *BM* [2018] 3 W.L.R. 883 at [8], [39] and [43].

themselves would be to suggest medical assistance. That is not to say that all who seek body modification are suffering from any identifiable mental illness but it is difficult to avoid the conclusion that some will be, and that within the cohort will be many who are vulnerable." [52]

Two objections can be made to this line of reasoning. First, his Lordship assumes that those seeking body modifications are looking to "harm themselves". This reasoning axiomatically distances body modification procedures from piercing and tattooing – procedures which are viewed, in law, as decorative rather than intrinsically harmful. On the face of it this is an odd distinction to make; tattoos and piercings cause bodily harm and are no more medically warranted than a tongue split or a nipple removal. The real crux of the Courts argument was that these modification procedures would be "incomprehensible to most" – that there were no strong public policy arguments for exempting them from the general rule.

Yet, there was no real consideration by Lord Burnett CJ of how prevalent or well-practised body modification procedures are; the Court took for granted that these were marginal activities. When *Brown* was decided body piercing was considered a subcultural practice, yet in 2008 Bone et al put the prevalence of body piercing at 10 per cent of the population. More specifically the proportion of 16 to 24-year-olds with a tongue piercing was 6.5 per cent and a lip piercing 2.7 per cent and it is likely these percentages have now increased.[53] It is of course difficult to say how widespread more extreme body modifications are in the current population, many modifications will be hidden from public view and there are no figures on their prevalence in England and Wales. It is reasonable to assume that modifiers offer these services as there is a market for them, and that they are more widespread than the Court had appreciated.

Secondly – and of more importance in any legal analysis - Lord Burnett CJ appeared to be putting the cart before the horse in his examination of capacity. The ability to give valid consent should not be a decisive matter in any consideration of whether an activity should be exempted from the general rule. Instead it should go to the quite separate question of whether a particular individual, on a particular day has the capacity to give consent. Mental illness may mean that an individual is not capable of giving valid consent, and their professed consent would not then negate liability. Inferring that those who seek out bodily modifications may be mentally ill is, however, not a sound rationale on which to exclude modifications from the class of activities to which one may consent. The law does not typically take such a broad-brush approach to limiting autonomy. Activities have not

[52] *BM* [2018] 3 W.L.R. 883 at [43].

[53] A. Bone, F. Ncube, T Nichols, N. D. Noah, 'Body piercing in England: a survey of piercing at sites other than the earlobe' (2008) 336 British Medical Journal 1426.

previously been excluded on the basis that, if we do not exclude them, then those who are mentally ill or otherwise vulnerable may participate in that activity. Dangerous sports and cosmetic surgery are activities that those who are mentally ill and/or vulnerable can engage in to their physical detriment, but we trust that their governing bodies will self-regulate.

The Problem of Wilson

As the above has illustrated, personal autonomy was given little weight in the judgment. Yet the law allows individuals to consent to potentially fatal injuries while boxing,[54] to the reckless transmission of serious sexual diseases,[55] to gender reassignment surgery and to the refusal of potentially lifesaving treatment. The pivotal role autonomy plays in our modern legal system – and this includes protection from unwarranted interference by the state – necessitates careful justification for constraining personal autonomy, yet Lord Burnett CJ's only reference to autonomy in *BM* was to state that consent did "not provide the appellant with a justification for removing body modification from the ambit of the law of assault."[56] A very different approach was taken in *Wilson* where consent was used to negate liability for a body modification procedure.

Wilson is typically cited as a case which presented a retreat from the harsh authority of *Brown*.[57] In *Wilson,*[58] Mrs Wilson had asked her husband to brand her buttocks with his initials for decoration and, using a hot knife, Mr Wilson had branded a capital letter 'A' on one buttock and a 'W' on the other. Convicted of actual bodily harm, contrary to s.47, Mr Wilson appealed to the Court of Appeal claiming that the trial judge had incorrectly considered himself bound by the dictum in *Donovan* that a criminal act cannot "be rendered lawful because the person to whose detriment it is done consents to it"[59] and had directed the jury to convict as there could be no lawful consent to the branding.

In *Wilson* the Court, led by Russell LJ, quashed the conviction stating that the injuries which had resulted from a practice (branding) that is no "more dangerous or painful than tattooing"[60] should not be matter for criminal prosecution. Distinguishing *Brown* and

[54] *R v Coney* (1882) 8 QBD 534 and Law Commission of England and Wales, *Consent and Offences Against the Person*, Consultation Paper No.134 (HMSO 1994) at para 10.21.
[55] *R v Dica* [2004] QB 1257.
[56] *BM* [2018] 3 W.L.R. 883 at [44].
[57] See D. W. Selfe, "Consent to harm: a retreat from Brown?" (1996) 65 Crim. Law 10; P. Roberts, "Consent to injury: how far can you go?" (1997) 113 LQR 27; P. Murphy, "Flogging live complainants and dead horses: we may no longer need to be in bondage to Brown" (2011) 10 Crim LR 758.
[58] *R v Wilson* [1997] QB 47 (CA).
[59] [1934] 2 KB 498 at 507.
[60] *R v Wilson* [1997] QB 47 (CA) at 50.

Donovan Russell LJ explained that consensual branding was lawful when the brand was applied with no aggressive intent and that the application of a brand was "no less understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative jewellery"[61] - a clear nod to the shift in cultural norms which had seen more extreme forms of piercing become mainstream. Turning the general rule on its head the Court approached the injury as lawful unless "public policy or the public interest" required that it should be criminal.[62] Accepting that Mrs Wilson had instigated the application of the brand and that her husband had not sought to injure his wife, Russell LJ ruled that the appellant was merely seeking to assist Mrs Wilson "in what she regarded as the acquisition of a desirable piece of personal adornment."[63]

Ostensibly, *Wilson* is barely distinguishable from *BM*. In both cases the putative victims had instigated procedures that were neither sexual nor violent, and the appellants had sought to assist in "the acquisition of a desirable piece of personal adornment." The injuries in *BM* may have been of a more significant degree than those suffered in *Wilson*, but this is a fine distinction. The injury incurred by Mrs Wilson was irreversible and she had – unlike the clients in *BM* - sought medical treatment.

The decision in *Wilson* was however couched in terms that suggest the decision of the Court had rested heavily upon the context, with Russell LJ stating:

"Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgement, normally a proper matter for criminal investigation, let alone criminal prosecution." [64]

It is suggested here that this is clearly *obiter*; in reaching its decision the Court of Appeal had focused on the similarity between tattooing and branding, both of which result in a patterning of the skin. It is here that the similarities between *Wilson* and *BM* fall away. The procedures in *BM* were more invasive than the application of the brand in *Wilson* and, as discussed, there is no equivalence in either process or result between, for example, tongue splitting and the lawful forms of personal adornment.

Moreover, the reasoning of the Court of Appeal in *Wilson* simply cannot be readily reconciled with the majority of the House of Lords in *Brown*. By favouring a presumption of legality in *Wilson*, the Court were able to give effect to the minority position in *Brown*. Yet, whether an injury is inflicted in public or private (or between those who are married) is irrelevant, nor should a laudable motive excuse the infliction of harm if harm was the

[61] *R v Wilson* [1997] QB 47 (CA) at 50.
[62] *R v Wilson* [1997] QB 47 (CA) at 50.
[63] *R v Wilson* [1997] QB 47 (CA) at 127.
[64] *R v Wilson* [1997] QB 47 (CA) at 50.

appellant's intent. For these reasons, the reasoning in *Wilson* is widely acknowledged as pragmatic but muddled[65] – it was certainly given short shrift in *BM* where it was only briefly mentioned "for completeness".[66]

M now certainly casts doubt on whether branding is lawful at all – whether practised "between husband and wife, in the privacy of the matrimonial home" or – a point not explored in *Wilson* - between a body modification practitioner and their client. The decision in *Wilson* must now be thrown into doubt by *BM* or, at least, restricted to its very particular facts.

Self-regulation

If the criminal courts are, as Lord Burnett CJ declared, "inapt to enable a wide-ranging inquiry into the underlying policy issues"[67] – and it is likely that this position will only be exacerbated as body modification procedures evolve – could self-regulation by modifiers then provide a more effective solution to effective regulation? In *BM* the Court did not explore whether a considered attempt at self-regulation by the body modification industry would ameliorate their concerns.

As noted, extreme body modification procedures currently fall outside of the regulatory regime which has been established to ensure piercing and tattooing is carried out safely. However, modifiers could adopt a similar – enhanced – regime to protect their clients. In order to reduce any serious risks to health, modifiers could be required to be licensed as tattooists and/or piercers and obliged to ensure that they maintained the requisite standards of safety and hygiene. In recognition of the seriousness of these procedures practitioners could adopt a similar regime to that instituted by the General Medical Council by making fuller assessments of their clients,[68] looking for known signs of body dysmorphic disorder and mandating a two-week cooling off period after an initial consultation. Clients

[65] For example, see comments by P. Roberts, "Consent to injury: how far can you go?" (1997) 113 LQ R 27 and D. Gurnham, "Legal authority and savagery in judicial rhetoric: sexual violence and the criminal courts" (2011) 7(2) Int JLC 117.
[66] *BM* [2018] 3 W.L.R. 883 at [33].
[67] *BM* [2018] 3 W.L.R. 883 at [41].

[68] The Court noted that *M* had obtained consent and required clients declare whether they suffered from particular diseases or were taking medication. *BM* [2018] 3 W.L.R. 883 at [9].

could be referred to experts in particular modification procedures if a database, similar to that maintained by of the British Association of Aesthetic Plastic Surgeons, were established. Enforcing this regime would, of course, necessitate the creation of a regulatory body to train and oversee body modifiers and enforce these standards. Piercers and tattooists have already sought to establish their own standards by founding the Tattoo and Piercing Industry Union[69] and this model could then be effectively utilised by body modifiers. Drafting this code of conduct would present an opportunity for views to be canvassed on which procedures are contemporarily reasonable, safe to perform and should attract regulation – an issue the Court of Appeal was not prepared to engage with. Self-regulation would go some way toward addressing the concerns expressed by the Court in *BM* who appear to have viewed body modifications as a rogue industry.

If a model of responsible regulation had been in place when the Court of Appeal was reaching its decision in *BM* a willingness to self-regulate may have weighed in the appellant's favour. Those who make money from activities which carry real levels of risk do typically take measures toward self-regulation and are left unmolested by the criminal law. Therapeutic acupuncture is not regulated by statute (nor is it explicitly mentioned in common law as an exempted activity) and, although there are then no nationally agreed standards, the industry self-regulates through its own codes of practice.[70] National sports governing bodies also provide their own procedures for enforcing standards and discipling those who breach their rules. For example, World Rugby and the Football Association establish and enforce rules that seek to protect participants within the game from injury and as Lord Woolf stated in *Barnes*

> "most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings."[71]

Lord Woolf concluded that only where "conduct is sufficiently grave to be properly categorised as criminal" should a prosecution be initiated[72] - a position which echoed the reasoning of the Court of Appeal in *Wilson*. If the Court in *BM* had been willing to

[69] Tattooing and Piercing Industry Union http://www.tpiu.org.uk/ (accessed 31 January 2019)
[70] British Acupuncture Council Professional Codes available at https://www.acupuncture.org.uk/public-content/effective-practice/bacc-professional-codes.html (accessed 27 February 2019)
[71] *R v Barnes (Mark)* [2005] 1 W.L.R. 910 at 911.
[72] *R v Barnes (Mark)* [2005] 1 W.L.R. 910 at 911. The *Barnes* principle has since been formalised by the CPS, see the Crown Prosecution Service 'Agreement on the Handling of incidents falling under both criminal and football regulatory jurisdiction' (September 2015). Available at https://www.cps.gov.uk/publication/agreement-handling-incidents-falling-under-both-criminal-football-regulatory (accessed 8 February 2018). For further discussion of the Agreement see B. Livings 'Sports violence, "concurrent jurisdiction" and the decision to bring a criminal prosecution' Crim. L.R. 2018, 6, 430-449.

countenance this approach a prosecution could still be brought where modifiers had failed to adhere to their established code of conduct or had exceeded the limits of consent.

The Future for Body Modifications

In *BM* the Court of Appeal has then rejected a defence of consent to body modifications that cause bodily injury. There are three guiding principles we can extract from Lord Burnett CJ's reasoning.

First, decorative body modification procedures that result in bodily harm, and are not performed by a medical practitioner, are unlawful. Although the Court infers that the status of the person performing the modification is central to whether its application is lawful as Laird has pointed out it is also by no means clear that these procedures would be lawful had they been performed by a medical professional as:

> "Even though the surgeon may have been qualified to perform the procedure, the Court of Appeal's reasoning does not reveal whether the patient's consent would be valid or whether such "body modification", by its very nature, cannot be consented to in the absence of legislative intervention."[73]

The Courts focus on an individual who was not qualified to perform surgical procedures allowed them to effectively side-step any further consideration of this issue.

Secondly, the Court confirmed that body modification procedures with a close analogy to tattooing and piercing *may* be exempted from the general rule that when bodily harm is intentionally inflicted an offence against the person will be committed regardless of whether consent has been given. However, we are left to guess what these procedures may be. In *Wilson*, Russell LJ had certainly seen a close analogy between branding and tattooing, but this equivalence is questionable. Scarification provides a similar aesthetic result to tattooing – a pattern in the skin – but was held to be unlawful in the pre-*Brown* and *Wilson* first instance case of *Adesanya.*[74]

Branding and scarification may fall within the established tattooing exception if we are required to look to whether the result is merely analogous to tattooing.[75] This is an

[73] K. Laird "Defence: R. v BM" Crim LR (2018) 10, 847-850.

[74] Where a mother was convicted of assault occasioning actual bodily harm for performing an act of – culturally motivated - scarification on the faces of her two sons. *R v Adesanya* The Times, 16-17 July 1974.

[75] Oultram makes an interesting argument – pre-*M (B)* – for scarification to be treated as akin to tattooing. S. Oultram, "All hail the new flesh" (2009) 35(10) Journal of Medical Ethics. Finding this practice lawful if

altogether unsatisfactory way of delineating the lawfulness of these procedures and raises the issue – which will not be addressed here – of whether the law is inconsistent with the requirement of certainty in Article 7 of the European Convention on Human Rights (ECHR).[76]

In light of the above, it is worth noting that had the modifications in *M* been undertaken purely for religious adherence, the Court would have had to consider whether they could be exempted by virtue of Article 9 of the ECHR, the right to religious freedom. While we would expect body modifications to be accommodated if there were some religious justification - similar to the religious flagellation exception noted in *Brown*[77] – there is no direct authority on this point. In *M*, Lord Burnett CJ conceded that it may be unreasonable to criminalise activities resulting in harm that have a "religious hue".[78]

Finally, it appears the courts are now less willing to take the bold step of creating new exceptions to the *Brown* approach. In *Wilson* and *Attorney-General's Reference (No. 6 of 1980)* the Court of Appeal had advocated the recognition of new exceptions as required in the public interest. Lord Burnett CJ has now moved the court away from this position, stating that it was inappropriate to recognise a new exception

> "save perhaps where there is a close analogy with an existing exception to the general rule established in the *Brown* case. The recognition of an entirely new exception would involve a value judgement which is policy laden, and on which there may be powerful conflicting views in society. The criminal trial process is inapt to enable a wide-ranging inquiry into the underlying policy issues, which are much better explored in the political environment."[79]

In *Brown*, Lord Templeman had similarly advocated leaving the question of whether consent should be available to Parliament who could "…call on the advice of doctors, psychiatrists, criminologists, sociologists and other experts and can also sound and take into account public opinion."[80] His Lordship had not however ruled out the possibility of creating new exceptions. Lord Burnett CJ has now considerably narrowed this approach

performed for cultural reasons would cause more ambiguity in the law as other cultural practices such as tooth filing, and neck stretching are unlikely to be similarly immunised from the criminal law.

[76] Other human rights issues are raised by the decision in *M (B)*, not least the right to respect for private and family life. These were glossed over in the judgment – Lord Burnett CJ merely noted the appeal by the appellants in *Brown* to the ECtHR where a violation of the right to respect for private life had been rejected on the ground that the prosecution and conviction was necessary in a democratic society for the protection of health. See *Laskey, Jaggard, and Brown v UK* (1997) 24 EHRR 39 (ECtHR) at [44].

[77] The Law Commission refer to this as religious mortification – although there is a practical difference between the specific act of flagellation and the more general practice of mortification these terms are being used interchangeably. See Law Commission of England and Wales *Consent in the Criminal Law*, above n.14.

[78] *BM* [2018] 3 W.L.R. 883 at [40].

[79] *BM* [2018] 3 W.L.R. 883 at [40].

[80] *R v Brown* [1994] 1 AC 212 (HL) at 234 (Lord Templeman).

and, moving forward, it seems that the apparent non-exhaustive 'list'[81] of exceptions are now to be treated as finite.

The judgment in *BM* also leaves a number of questions unanswered. The Court was tasked with addressing whether consent provided a defence against charges of causing grievous bodily harm with intent, yet it gave no indication that it was restricting its comments solely to procedures intended to cause serious harm. Due to the nature of the procedures performed by the appellant the court's discussion was necessarily focussed on injuries which were serious and irreversible, those which involved the removal or mutilation of body parts[82] and, in light of that analysis, it is unsurprising Lord Burnett CJ concluded "body modification causes really serious harm".[83] However, this is a sweeping generalisation which does not take into account that several popular modification procedures - including transdermal and subdermal implants, scarification and branding – may result in less serious harm. Are these procedures then unlawful to perform even with client consent?

The severity and irreversibility of the injuries in *BM* may have prompted the decision to prosecute, but the majority of the House in *Brown* drew no distinction between how the defence of consent operates for injuries which amount to actual bodily harm and those which amount to grievous bodily harm, relying instead on the category-based exceptions to supply the necessary defence. In *BM*, Lord Burnett CJ gave thoughtful consideration to the opinions of the minority in *Brown*, noting that Lords Mustill and Slynn would have accepted a defence in *Brown* for actual bodily harm or wounding, but not for more serious injury.[84] His appraisal suggests that the courts may be more accommodating of those body modification procedures that result in less serious harm, but it fails to provide any definitive statement of the law.

There is also a lack of clarity regarding the lawfulness of several common body modification procedures which may – without stretching the nomenclature – be cast as analogous with tattooing and piercing. For example, transdermal and subdermal implants (where materials are inserted below the skin) may be analogous to piercing, but do not readily fit the recognised definition of piercing - as something that makes a hole through part of the body. The legality of these procedures is then not clear from the judgment.

[81] There is no definitive list of exceptions, examples are given in various cases and even these are debated.
[82] *BM* [2018] 3 W.L.R. 883 at [42] and [43].
[83] *BM* [2018] 3 W.L.R. 883 at [45].
[84] *BM* [2018] 3 W.L.R. 883 at [32].

The Court also did not consider the position of cumulate modifications, for example several tongue piercings which, together and over a period of time, split the tongue.[85] The individual piercings would fall under the piercing exemption – yet the overall result is an injury which is both serious and irreversible.

Finally, Lord Burnett CJ's remarks regarding the lawfulness of tattooing, piercing and "other body adornment"[86] suggests that his Lordship may be drawing a distinction between procedures that augment the body and those where parts of the body are removed or mutilated. For the former, consent would be valid, but invalid for the latter. This would be an odd distinction to make. Procedures augmenting the body may cause serious and lasting harm – the example of "inserting a piece of metal at the base of the penis" given in the judgment of the court may be such an example.[87]

Without informed consideration of the procedures which are offered by body modifiers, a clear and reasoned line between legality and illegality cannot be drawn. The courts are, as Lord Burnett CJ recognised, ill-equipped to understand the subtleties here.

Raising the Threshold?

Criticisms have been levelled at a regime that operates to restrict consent to violent acts causing bodily harm through category-based decision making. The exemptions have variously been described as "piecemeal and arbitrary",[88] created with "no real logic"[89] and leaving the law in a state of "considerable uncertainty".[90] The decision in *BM* suggests the courts are unwilling to challenge the supremacy of *Brown* and their decision has, as discussed, done little to clarify the "considerable uncertainty" caused by category-based decision making.

A fundamental overhaul of this area of the law would allow for a fresh approach. Tolmie has suggested that the New Zealand Court of Appeal's reasoning in the case of *Lee*[91] where we look firstly to the level of the harm caused and then – dependent upon the facts – allow or disallow a defence of consent offers a more practical alternative to our current regime.[92]

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[85] 'Joint Statement on Oral Piercing and Tongue Splitting' (30 August 2018). Available at: www.rcseng.ac.uk/dental-faculties/fds/faculty/news/archive/statement-on-oral-piercing-and-tongue-splitting/ (accessed 16 September 2018).
[86] *BM* [2018] 3 W.L.R. 883 at [42].
[87] *BM* [2018] 3 W.L.R. 883 at [18].
[88] J. Tolmie, 'Consent to harmful assaults: the case for moving away from category-based decision making' (2012) 9 Crim LR 656 at 656.
[89] J. Wadham, "Consent to assault" (1996) 146 NLJ 1812.
[90] P. Roberts, "Consent to injury: how far can you go?" (1997) 113 LQR 27 at 32.
[91] [2006] 22 CRNZ 568 (CA)
[92] J. Tolmie, "Consent to harmful assaults" (2012) 9 Crim LR 656.

In *Lee*, the Court rejected the results-based test in *Brown,* preferring an approach where a "high value" is placed on personal autonomy.[93] Under this more liberal regime where actual bodily harm is intended, or risked, consent is a defence, and for grievous bodily harm consent may be a defence, unless strong public policy considerations require the judge to withdraw the defence.[94] Although personal autonomy is given more weight here the critical question that must be asked still involves public policy considerations, albeit the question of whether these justify withdrawing consent. It is suggested here that had Lord Burnett CJ been asked to address this question the same conclusion would have been reached. This said, adopting this regime would provide more legal certainty for those who perform body modification procedures which result in less serious injury.

Consideration could instead be given to refreshing those categories which have been established in the common law. The decision in *Brown* was poorly received in 1993 and has since then become a bye-word for state interference with bodily autonomy. Overhauling the category-based exceptions and placing them on a statutory footing would bring clarity and an opportunity to hear from those experts and stakeholders spoken of in *Brown* and *BM* in order to craft appropriate and socially reflective category-based exceptions. Retaining category-based decision making would undoubtedly continue to restrict bodily autonomy - as a wholesale acceptance of body modifications for "good reason" would, itself, be extreme. Allowing unrestricted consent to modification procedures would be difficult to defend when the procedures range from the relatively moderate practices of body piercing and scarification through to more extreme procedures, such as the removal of body parts.[95] The difficulty with introducing certainty through codification is that flexibility will be lost, and the law may then be unable to keep up with social change and be unable adapt to novel circumstances. Consideration could instead be given to clearly articulating the principles governing the exceptions – to drawing up a clear set of justifications for exempting activities that are less reliant on the amorphous concepts of "public interest" and reasonableness.

The Law Commission certainly saw the dangers in failing to address the prevalence of body modifications in its 1995 Consultation Paper. As part of their suggestions for reform the Law Commission proposed raising the level of injury to which one could validly consent to

[93] [2006] 3 NZLR 42, at 300.

[94] This is a broad-brush summary of the position which is more nuanced and is discussed by Tolmie in J. Tolmie, "Consent to harmful assaults" (2012) 9 Crim LR 656.

[95] For further discussion concerning the limits of consent in relation to the amputation of healthy limbs see T. Elliott "Body Dysmorphic Disorder, Radical Surgery and the Limits of Consent" (2009) 17(2) Med LR 149.

"seriously disabling injury",[96] suggesting that injuries which did not reach this criminal threshold could then be subject to regulation through "effective statutory controls".[97]

The Commission recognised that this would clarify the legal position for those who perform body modifications and envisaged a regulatory regime similar to that in place for tattooing and piercing; one that relies, in part, on self-regulation but also allows for the effective regulation of premises[98] and the imposition of age restrictions.[99]

The Commission's recommendation would not necessarily exempt all the procedures performed in *BM* as consent would not negate liability where there was the

> "loss of a bodily member or organ or permanent bodily injury or permanent functional impairment, or serious or permanent disfigurement, or severe and prolonged pain, or serious impairment of mental health, or prolonged unconsciousness." [100]

Under this regime the only procedure in *BM w*hich could possibly be validly consented to would be the tongue splitting. Tongue splitting does not result in the loss of a bodily part, nor, it is submitted here, does it result in a permanent disfigurement - if disfigurement is given its ordinary meaning of something that spoils a person's outward appearance.

While it is clearly necessary that the law to places a limit on the degree of injury to which an individual may consent raising that level of harm would allow for personal autonomy to be more robustly protected and more accurately reflect how this area is being policed. The courts may be unwilling to find there is any public interest in allowing consent to negate liability for body modification procedures - but the Crown Prosecution Service must take the public interest into account when deciding whether to prosecute and it is unlikely procedures resulting in less serious bodily harm, such as transdermal implants, will be prosecuted.

Conclusion

Twenty-five years after *Brown*, the courts are still unwilling to favour an individual's claim to autonomy when the activity in question is a subcultural one. This flows from the stance adopted by the criminal law – that consensual acts causing bodily harm are, *prima facie*, unlawful - leaving the courts to grapple with the difficult questions of whether an activity

[96] Law Commission of England and Wales *Consent in the Criminal Law* at para 4.29 – 4.39.
[97] Law Commission of England and Wales *Consent in the Criminal Law* at para 9.22.
[98] Law Commission of England and Wales *Consent in the Criminal Law* at para 9.22.
[99] Law Commission of England and Wales *Consent in the Criminal Law* at para 9.24.
[100] Law Commission of England and Wales *Consent in the Criminal Law* at para 4.51.

fits within an existing category, or whether public policy considerations would support the continuation of that activity. Those exceptional categories are incoherent, and *Brown* offers no clear rationale for why particular activities are, or should be, excepted. The decision in *Brown*, and now in *BM*, also suggests that the presumption of illegality when bodily harm is caused weighs heavily against the recognition of any new exceptions.

This said, the judgment in *BM* was – allusions to mental illness aside – clearly reasoned and entirely predictable. Some procedures undertaken in *M* were surgical in nature and, as such, should not have been performed by an individual who is not licensed to perform surgery. That said, the decision was insufficiently nuanced. It is now clear that the procedures discussed in the judgment – the tongue splitting and the removal of body parts – result in injuries beyond that to which an individual can consent, yet there remains a lack of clarity in the legal position of procedures that cannot properly be described as either piercing or tattooing.

The Court failed to appreciate that there are a number of commonplace procedures that result in serious injuries yet are no more dangerous than tattooing or piercing. If these body modification procedures are moved outside of the tattooing and piercing studios in which they currently take place then it is likely they will be performed in private premises in far less hygienic conditions, be undertaken by amateurs or be self-administered. If the Court were seeking to protect public health, then this decision may have the opposite effect.

The legal position for body modification procedures that cause less serious harm is also entirely unclear. In *BM*, the Court may not have been tasked with clarifying the legality of less serious modifications, but this was a missed opportunity that places body modification practitioners in a difficult legal position.

Body modification is a fast-growing industry and the regulation of this industry is not assisted by criminalisation. The terms piercing, and tattooing may have accurately captured socially acceptable forms of body modifications in the early 1990s, but society has moved on considerably since then and we cannot wait for judicial scrutiny of each emergent body modification procedure to reveal whether it is lawful. Allowing the body modification industry to self-regulate would address the principle concerns raised by the Court in *M* and would provide the necessary flexibility required to ensure these procedures are performed safely.