

(Serious) Sadomasochism: A Protected Right of Privacy?

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Several adult male members of a sadomasochistic sex club were arrested for violating a U.K. statute passed in 1861 – The Offences Against the Person Act. The sex acts spanned a 10-year period and were videotaped. They involved manipulation of the genitalia with hot wax, sand paper, fish hooks, and needles. The sexual interactions were consensual. This analysis tracks the case from trial, to the Court of Appeal, to the House of Lords, and on to the European Court of Human Rights. It examines whether or not these sexual behaviors should be protected under a right to privacy. It contrasts state concerns of bodily harm, albeit consented to, in sex with those incurred in sport.

KEY WORDS: sadomasochism; homosexuality; sexual privacy; privacy.

INTRODUCTION

In 1987 in the course of investigations into other matters, English police came into possession of video films of sadomasochist encounters made over a 10-year period involving 50 men. Sex consisted mainly of maltreatment of the genitalia, sometimes with hot wax, sandpaper, fish hooks, and needles plus ritualistic beatings, either with bare hands or implements including stinging nettles, spiked belts, and a cat-o'-nine tails. There was branding and infliction of injuries which bled. Activities were consensual. Administration of pain was subject to rules, including the provision of a code word to be used by any recipient to stop an act. Acts did not lead to infection or permanent injury. Video cameras recorded events and the tapes were copied and distributed among members of the group.

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In 1990 several participants were prosecuted and convicted at London's Old Bailey of violating the Offences Against the Person Act 1861. That Act states, "whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm on any other person, either with or without any weapon or instrument, shall be liable to imprisonment."

The case became popularly known as "The Spanner Case" reportedly because a police detective remarked after watching one video that he felt as though "someone had tightened a spanner (wrench) around his nuts."

This analysis focuses on whether or not these sexual behaviors should be protected, either under a general umbrella of a right to sexual privacy in the United Kingdom (as in the 1957 Wolfenden Report's well-known pronouncement regarding homosexual behavior, because this is simply "not the law's business") or by extension of other rights protecting capacity to consent to actual bodily harm, as in professional boxing.

PRIOR UK CASE LAW

In 1882, prize fighting was held to be an unlawful assault because it led to a breach of peace from the gathering of a rowdy crowd (*R v. Coney*, 1882).

In 1934, a man liaised in London with a 17-year-old female after previous telephone conversations had made it clear that he wanted to cane her for his sexual gratification. They then went to his garage for the caning. According to the physician who examined her 2 days later, she had marks indicative of a "fairly severe beating." At trial, she denied having consented to the caning. Conviction followed. At appeal, Justice Swift wrote, "it is an unlawful act to beat another person with such a degree of violence that the infliction of actual bodily harm is a probable consequence and when such an act is proved, consent is immaterial." However, his conviction was reversed because of errors by the trial judge (*R v. Donovan*, 1934).

In 1980, two men quarrelled and decided to settle the disagreement with a fight. One suffered a bleeding nose and bruised face. Upholding conviction, the Court of Appeal held "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. 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" (Attorney-General's Reference, 1980).

In 1992, a military man used nipple clamps and nipple piercing during bondage with his female partner. At trial, his partner testified that she had consented. The judge directed the jury to acquit (Thompson, 1994, p. 242).

In a more recent post-Spanner case, in 1996 a husband branded his initials with a knife on his wife's buttocks with her consent. He was convicted but on appeal his conviction was overturned with the Court noting that the wife not only consented to the act, but she instigated it, and that there was no aggressive intent on his part. To

the Court, the branding was “not any more dangerous than tattooing.” Consensual activity between husband and wife in the privacy of a matrimonial home was declared not a proper matter for criminal investigation (*R v. Wilson*, 1996)

THE “SPANNER” OR (PROPERLY) BROWN CASE

At trial, the men pleaded guilty to assault charges after the judge ruled they could not rely on consent of the participants as an answer to the prosecution case. On 19 December 1990, they were convicted and sentenced to terms of imprisonment of between 2 and 4 years.

The trial judge disclaimed a biasing influence from the sexual orientation of the members of this sadomasochistic (SM) club, declaring “the unlawful conduct now before the Court would be dealt with equally in the prosecution of heterosexuals or bisexuals if carried out by them.”

On 19 February 1992, the Court of Appeal, Criminal Division, dismissed the appeal, but certified a further appeal to the House of Lords, in that a point of law of general public importance was involved. It asked “where A wounds or assaults B, causing him actual bodily harm in the course of sado-masochistic encounter, does the Prosecution have to prove lack of consent on the part of B before they can establish A’s guilt (under the 1861 Act)?”

The Law Lords majority acknowledged that some other consensual activities that involved actual bodily harm are lawful, for example, ritual circumcision, tattooing, ear-piercing, and sports like boxing. However, they observed that duelling is unlawful and consent by the protagonists affords no defence against prosecution. They also observed that although suicide was no longer an offence, a person who assisted another to commit suicide was guilty of homicide.

To the majority, the evidence disclosed that the practices of the appellants were unpredictably dangerous and degrading to body and mind, were developed with increasing barbarity, and were taught to persons whose consents were dubious or worthless; (this because) drink and drugs were employed to obtain consent and increase enthusiasm.

The Lords pointed out that “it was not surprising that a victim (the Court’s designation of the participant) did not complain to the police when the complaint would involve giving details of acts in which he had participated.” With regard to the “absence” of medical treatment, they pointed to doctors being subject to a code of confidentiality (thus insulating medical treatment for injuries from public scrutiny).

Lord Jauncey offered to Parliament the option (to date unaccepted) of legalising these SM acts with this graphic suggestion:

if it was to be decided that such activities as the nailing by A of B’s foreskin or scrotum to a board or the insertion of hot wax into C’s urethra followed by the burning of his penis with a candle, or the incising of D’s scrotum with a scalpel to the effusion of blood were injurious to neither B, C and D, nor to the public interest, it was for Parliament with its accumulated wisdom . . . to declare them lawful.

In dissent, Lord Slynn argued that there was no doubt there was consent here, “. . . indeed there was more than mere consent. Astonishing though it might seem,” he wrote, “the persons involved positively wanted and asked for the acts to be done to them. [Further] the accused were old enough to know what they were doing, [and] the acts were done in private.”

In dissent, Lord Mustill held up boxing as an example of one person seriously injuring another with legal impunity.

Each boxer aims to end the contest prematurely by infliction of brain injury serious enough to make the opponent unconscious or temporarily by impairing his central nervous system through a blow to the midriff, or cutting his skin to a degree which would ordinarily be well within the scope of the Act of 1861.

Lord Mustill argued against the appropriateness of prosecution under the 1861 Act, pointing to its title, “Offences Against The Person.” There was no animosity, aggression, or personal rancour from the assailant and no protest by the victim.

On 11 March 1993, the appeal was dismissed 3–2.

Following this narrow defeat in the House of Lords, the case was appealed to the European Commission of Human Rights. Although a majority there rejected the argument of the appellants 11–7, the case was referred by the Commission to the European Court of Human Rights on 11 December 1995.

The Commission’s remit to the Court was to determine if the United Kingdom was in violation of Article 8 of the European Convention: “Everyone has the right to respect for his private and family life. . . . There shall be no interference. . . . except. . . (as) is necessary in a democratic society in the interests of. . . protection of health or morals. . . .”

The men submitted that their case should be viewed as one involved in matters of sexual expression, rather than violence, and the line beyond which consent is no defence for physical injury should only be drawn at the level of intentional or reckless causing of serious disabling injury.

The U.K. government conceded that the men’s prosecution was an interference by a public authority in their private life but argued that the interference pursued the legitimate aim of protection of health.

The government argued that the State was entitled to punish acts of violence that could not be considered of a trifling or transient nature, irrespective of consent. In fact, in the present case, some of these acts could well be compared to “genital torture” and the Contracting-State could not be said to have an obligation to tolerate acts of torture because they are committed in the context of a consenting sexual relationship.

The government further contended that the criminal law should seek to deter certain forms of behavior not only on public health grounds but also for broader moral reasons. In this respect, acts of torture may be banned on the ground that they undermine the respect human beings should confer upon each other.

The European Court, reviewing the judgment of the House of Lords, concluded that the opinions of the majority were based on the extreme nature of the practices and not the sexual orientation of the participants.

The Court accepted that sexual orientation and activity concern an intimate aspect of private life. However, a considerable number of people were involved in the activities in question, which included, *inter alia*, recruitment of new “members,” the provision of several specially equipped “chambers,” and the shooting of many video tapes that were distributed among the members. It was thus an open question to the Court if these sexual activities fell entirely within the notion of private life. However, since the privacy point had not been disputed by the State or the appellants, the Court saw no reason to examine it. Assuming therefore that the prosecution and conviction of the applicants did amount to interference with their private life, the question was if the interference was “necessary in a democratic society.”

The European Court did not find it necessary to determine if the interference with the applicants’ right to respect for private life would also be justified for protection of morals. But this finding, the Court pointed out, should not be understood as calling into question the prerogative of the State to deter acts of this kind on moral grounds.

There was no evidence to support the men’s assertion, according to the Court, that the SM activities were essential to their happiness but the argument would be accepted if sadomasochism were only concerned with sex (and not violence) as the men contended. The Court considered that one of the roles the State is entitled to undertake is to regulate activities that involve the infliction of physical harm. This is so whether the activities occur in the course of sexual conduct or otherwise.

Nor did the Court accept the argument that no prosecution should have been brought since injuries were not severe and no medical treatment had been required. In deciding whether or not to prosecute, State authorities were entitled to have regard not only for the actual seriousness of the harm but also for the potential for harm inherent in the acts in question.

The European Court rejected the appeal 9–0.

DISCUSSION

John Stuart Mill set the standard for the contemporary libertarian argument for privacy in 1859. Society only has jurisdiction over a person’s conduct when it prejudicially affects the interests of others. No one has the right to say to another adult that “he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being” (Mill, 1859).

Mill’s contemporary critic, Sir James Stephen, objected: “How can the State or the public be competent to determine any question whatever if it is not competent to decide that gross vice is a bad thing.” To enforce moral behavior, “society has at its disposal two great instruments . . . law and public opinion” (Stephen, 1873).

A century later (1959) Mill's philosophy was attacked by Lord Devlin. Society has the right to legislate against immorality, there being no area of private immorality that is not the law's business. But law makers are not to ascertain the moral judgments of society by majority vote. It is the judgment of the "man in the street." It is not nearly enough to say that a majority dislike a practice. The threshold is reached when the behavior invokes intolerance, indignation, and disgust (Devlin, 1965).

Hart (1961) countered that the risk of democratic rule by the majority lay in telling the man in the street that if "he feels sick enough about what other persons do in private to demand its suppression by law, no theoretical criticism can be made of his demand."

Paradoxically it was Mill's critic, Stephen, whose legal reasoning might have sustained the *Brown* (*Laskey, Jaggard, and Brown v. the United Kingdom*, 1995/1997) appeal. In his *Digest of the Criminal Law* (Stephen, 1883) and in a court decision (*R v. Coney*, 1882), he stated that consent was a defence to a charge of occasioning actual bodily harm and "... everyone has a right to consent to the infliction upon himself of bodily harm not amounting to a maim." This high threshold for legally tolerable acts was later disapproved in *R v. Donovan* (1934).

Did these acts constitute "private life"? Was the SM club private? A definition of a private club is that it is open to members only, not the general public. These questions were rendered moot as the government conceded the intrusion on private life. Perhaps the Court would have ruled against this threshold issue. But the decision makes it irrelevant whether or not the acts constituted sexual privacy as the State was granted authority to intervene, nevertheless.

Privacy and sexual orientation are intertwined under U.K. law. Until overturned on privacy grounds by the European Court of Human Rights in 2000 (*ADT v. United Kingdom*, 2000) sexual behavior involving more than two men at a time was illegal. This prohibition was included 33 years ago when male homosexual acts between consenting 21-year-olds were first permitted (Sexual Offences Act 1967). It was to prevent gay orgies. But sex between a male and more than one female was permitted, as was group sex by lesbians.

Was the Spanner ruling heterosexist? Why was a husband branding his initials on his wife's buttocks, with her consent, distinguished from the *Brown* case? Branding was one of the acts of the SM club. How many additional acts would this couple have had to engage in, anatomical constraints notwithstanding, before they fell under the Act of 1861?

Although the Lords disclaimed prejudice based on the sexual orientation of the participants, and were unfaulted in this regard by the European Court, Lord Jauncey explained, "the House of Lords had to consider the possibility that *homosexual* sado-masochistic activities were practised by others who might not be so controlled and responsible as the appellants were claimed to be." In another reference, Lord Jauncey "had no doubt that it would not be in the public interest

that deliberate infliction of actual bodily harm during the course of *homosexual* sado-masochistic activity should be held to be lawful.” Lord Lowry commented that “sado-masochistic *homosexual* activities could not be regarded as conducive to the enhancement or enjoyment of family life” (reference to a European Convention right for protection) and “A relaxation of the prohibitions . . . could only encourage the practice of *homosexual* sado-masochism”. (emphases added). Finally, Lord Jauncey, referring to an under-21-year-old participant in the SM activities, exuded relief in announcing, “It is some comfort at least to be told, as we were, that (he) is now it seems settled into a normal heterosexual relationship.”

The Court held that the State can regulate infliction of physical harm “albeit consenting” and that the determination of a tolerable level of harm via consent is for the discretion of the State. However, this grants to the State an essentially unworkable authority. It provides no guidelines for regulating SM activities that in the seminal words of the U.S. Food and Drug Administration are “both safe and effective.”

Other skin-penetrating—arguably masochistic or sadistic acts—are permitted. These include nipple rings, clitoral rings, and tongue-studs. Ritual circumcision of Jewish males is not consented to but permitted.

Were the acts genuinely consented to? The House of Lords deemed the participants’ consent to the sexual acts dubious or worthless because drink and drugs were employed to obtain consent and increase enthusiasm. But this disqualification could criminalize much adult sexual experience.

The Court was concerned with the smearing of faeces during some of the sex acts and the risk of infection. Yet for over three decades anal intercourse between two men had been legal (the prime source of HIV contagion) (Sexual Offences Act 1967).

Some risk of infection does exist in these acts, with a potentially fatal disease such as hepatitis or HIV, or from a sadist overestimating tolerance by a masochist, and short-circuiting the safe switch-off word. Whereas governmental control of public risk is common, such as requiring motorcycle helmets, automobile seatbelts, and vaccinations, with SM activities, State regulation is less easily effected. These are not public acts. But licensing and inspection could be attempted.

The Spanner Case triggered a Law Commission Consultation Paper in 1995. It recommended a change in the law under which these men were convicted. The Commission provisionally proposed that either intentional or reckless causing of injury, other than that which is seriously disabling, even if amounting to “grievous bodily harm” within the meaning of the 1861 Act, not be criminal, if the other person consented. In place of criminal prosecution, the Commission recommended licensing arrangements aimed at ensuring safe and hygienic practices. No action has been taken since these proposals were submitted.

A slippery legal slope could result from this successful prosecution. There is a substantial UK prostitution economy based on dominance and discipline as anyone who has ever been in a London phone kiosk reading the card adverts knows. The

Brown decision could be extended to prosecuting SM prostitution (prostitution is generally legal) and to prosecution of SM films such that State control bypasses the more complex legal definition of obscenity and invokes a statutory violation of the Act of 1861.

What is a “good reason” for people to try cause each other actual bodily harm? In the legal precedent, Attorney-General’s Reference (1980), settling an argument by fist fight was deemed not a “good reason.” Why is experiencing sexual arousal not a “good reason”? Why is sport a “good reason”?

In boxing most injuries are consequent to head trauma. Muhammad Ali can barely speak and he was usually the winner. Yet professional boxing does not require the wearing of head guards. There is no paternalistic response to sport, so why to sex?

The legal precedent of barring fist fighting (*Coney*) primarily to prevent breach of peace by unruly spectators fails to support the legality of professional English football. There, hordes of police are required at each match in an effort (sometimes unsuccessful) to prevent deadly violence.

In treating sex and sport on a legal par neither would be permitted in consequence of health risks. Or, both would be permitted with consent outweighing the State interest in harm avoidance.

REFERENCES

- ADT v United Kingdom (Application No 35765/97). European Court of Human Rights.
 Attorney-General’s Reference (No. 6 of 1980) (1981) 2 All ER 1057 (1981). Queen’s Bench 715 (1981) 3WLR.
 Laskey, Jaggard, and *Brown v the United Kingdom* (109/1995/615/703-705). European Court of Human Rights, 19 February 1997.
 Devlin, P. (1965). *Morals and the criminal law*. In *The Enforcement of Morals*, Oxford University Press, Oxford.
 Hart, H. L. A. (1961). Immorality and treason. In Blom-Cooper, L. (ed.), *The Law as Literature*, The Bodley Head, London.
 Law Commission Consultation Paper No. 139 (1995).
 Mill, J. S. (1859/1978). *On Liberty*. Rapaport, E. (ed.), Indianapolis, Hackett.
 R v. *Brown* and other appeals, 2 All England Law Reports 75 (1993).
 R v. *Coney*, 51LJM C66, 8QBD 534, CCR (1882).
 R v. *Donovan*, 2 King’s Bench Reports, 498, All ER Rep. 207, 25. Cr App R1, CCA (1934).
 R v. *Wilson*, 3 Weekly Law Reports, 125 (1996).
 (Wolfenden) Report of the Committee on Homosexual Offences and Prostitution (1957) (Cmd 247).
 Sexual Offences Act (1967).
 Stephen, J. (1873). *Liberty, Equality, Fraternity*. pp. 125, 148. London, Smith Elder,
 Stephen, J. (1883). *Digest of the Criminal Law*.
 Thompson, B. (1994). *Sadomasochism: Painful Perversion or Pleasurable Play?* Cassell, London.