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## Painful TV

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### ABSTRACT

*There is a new and profitable market for the infliction of real pain on television, most notably in the British reality television shows ‘Balls of Steel’ and ‘Dirty Sanchez’, which involve two men, known as the ‘Pain Men’, who deliberately inflict consensual pain on each other in order to entertain their television audience. The law says that the consent of the ‘victim’ to an infliction of actual bodily harm does not usually prevent criminal liability of the ‘perpetrator’. The leading case authority is R v Brown where bodily harm was inflicted for sadomasochistic pleasure. In the words of Lord Templeman, ‘[The] violence of sadomasochistic encounters involves the indulgence of cruelty... Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing’. Have the ‘Pain Men’ committed crimes? It could be argued that consensual infliction of bodily harm ‘for entertainment’ should be exempted from prosecution as a ‘lawful activity’ (like boxing, horseplay or bravado). Channel 4 argued that the ‘Pain Men’ were exercising their right to freedom of expression which is protected under Article 10 of the European Convention on Human Rights. One must therefore consider the impact of the Pain Men’s activities on public health and public morals with reference to the trend towards liberalism in the UK television culture.*

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### KEYWORDS

Bodily, harm, television, Brown, Pain Men

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### INTRODUCTION

The 21<sup>st</sup> century has witnessed the dawn of the television reality TV show; a genre of 1 television programming that presents unscripted situations and features ordinary people instead of professional actors. The genre has existed since the early years of television but became a global phenomenon around 1999-2000 when the reality television show *Big Brother* became a world-wide sensation and prime-time hit in almost 70 countries. Nobody could have anticipated the enormous success of reality television or the vast number of such shows which are broadcasted nowadays including (to only name a few) *The Apprentice*, *I’m a celebrity...Get me out of here* and *The X-Factor*. This article, however, is concerned with television shows where one person, the ‘perpetrator’, deliberately inflicts pain on another, the ‘victim’. Such pain is inflicted for the purpose of entertaining the television audience whereby the ‘victim’ enthusiastically consents to the infliction of the pain. This article will assess whether such pain infliction may amount to a criminal offence, namely infliction of actual bodily harm (ABH) and, if so, whether the intended entertainment of the television audience provides justification for the infliction of such injuries. It will be necessary to make reference to cases in which ABH was inflicted, often in the context of sadomasochistic practices, and to consider the likely effects of such television shows on public health and morals.

### ‘THERE, YOU FIND THAT FUNNY?’

*Schadenfreude*, from the German words, ‘Schaden’ (damage) and ‘Freude’ (joy), means to 2 take spiteful, malicious delight in the misfortune of others. *Schadenfreude* is, no doubt, an ugly side of human nature and it might seem strange that anyone should take pleasure in another person’s misfortune. However, the longer one thinks about this concept the more examples come to mind where we find the misfortune of others, in particular the infliction of pain and bodily harm, amusing.

An example of this phenomenon is the use by many well-known comic actors and comedians 3

of 'slapstick' which is a type of comedy involving exaggerated violence. Examples, to only name a few, include Laurel and Hardy (one of the most popular comedy teams of the early to mid-Classical Hollywood era of American cinema), Charlie Chaplin (one of the best-known film stars in the world before the end of the First World War) and Benny Hill in his long-running television programme *the Benny Hill Show*. The British *Blackadder* comedy series mocked Chaplin's slapstick comedy with the *Blackadder* character Captain Blackadder saying, 'Well, if that's your idea of comedy, we can provide our own without paying for the privilege whilst kicking the character Baldrick's buttocks; 'There, you find that funny?' Despite Captain Blackadder's criticism, the enormous success of the slapstick comedy genre demonstrates that a large proportion of people take pleasure in watching the extreme and exaggerated (albeit unreal) violence which takes place on the above television shows.

Cartoon violence has also been used for comic effect by various animated characters, including (again, only naming a few) such notable examples as Bugs Bunny (who commonly inflicts personal injury on his opponents after uttering his catchphrase, 'Of course you realize this means war...') , Wile E. Coyote (who, in his attempts to catch the Roadrunner, usually ends up burnt, squashed or falling to the bottom of a canyon) and Tom and Jerry (whose violence was parodied and intensified by their spoof characters Itchy & Scratchy in *The Simpsons* ). Again, the above television characters are highly popular, which demonstrates that people enjoy watching the various misfortunes and pain which the above animated characters suffer in their respective shows. 4

The principle idea is that the television audience is laughing at the pain of the character, be it Charlie Chaplin or Daffy Duck, on whom violence has been inflicted, even though the pain is obviously not real; the audience takes pleasure, or, as one would say in German, *Schadenfreude*. 5

#### THE DAWN OF THE REALITY TELEVISION SHOW

The above examples are obviously fictional in that nobody really gets hurt and the pain that the audience sees is not real. However, the audience's ability to be entertained by watching people in pain has moved to the next level with the dawn of the reality television show and other media which allow the audience to see real pain. There is no lack of examples; in fact, anyone who has access to the internet can experience it immediately. Simply typing the words 'pain' and 'funny' into the search box at the popular video sharing website *YouTube* at the time of writing (December 2010) brings up several videos; first there is a video called 'pain but funny' (viewed 45,378 times) and second a video called 'pain is funny' (viewed 9,647 times). Both videos feature people injuring themselves in everyday situations, for example while doing sports. Third, the video 'Funny Clips - Pain and Fear' (viewed 49,403 times) with the description, ' Sounds quite mean, but you laugh at people [in] pain...Enjoy it...' and fourth, the video 'funny videos of people getting pain [sic]' (viewed 145,459 times). 6

Scrolling down, it seems that *Youtube* offers an apparently unlimited supply of videos which allow the online audience to see real pain. For example, the video '100 Funny Falls' has been viewed 8,093,096 times. Another example is the regularly occurring 'Don't Look Special' of the popular magazine *Nuts* , where photographs of several serious injuries are displayed and the most shocking one is awarded a prize. For example, the December 2007 'Don't Look Special' stated, 'Good Grief!...He's lost his fingers... Blood spurted from my fingers...The pain was so unbearable, I nearly threw up!'(*Nuts*, 2007: pp.44-49). The most obvious example, however, appears to be the highly popular American film and television series *JackAss* where the performers (amongst other things) deliberately inflict pain on each other and on themselves for entertainment. The show came into being following its founder's idea to test various self-defence devices on himself which resulted in him being tasered, maced and shot. The vast success of this television show speaks for itself. There is a real demand for real pain...and for *Schadenfreude*. Interesting as it may be, this article will not explore why people take pleasure in the pain of others; not least because little purpose would be served. The fact of the matter is that people, for better or worse, do take such pleasure, as it is demonstrated by the above examples. People will continue to take such pleasure and there will continue to be a market in which people provide images and videos of real pain. 7

#### REALITY TELEVISION IN BRITAIN

There have been British series where pain is inflicted in a manner similar to the American television show *Jackass*. *Balls of Steel* is a popular Channel 4 comedy series. It features 8

guests who perform 'stunts', including two men, the '*Pain Men*', who deliberately inflict extreme pain on each other (Balls of Steel, 2009), an act similar to their previous popular British television and film series *Dirty Sanchez*. According to the television show's web page, 'The *Dirty Sanchez* boys...love to suffer!...They perform various **dangerous, crude, ridiculous**, and **self-injuring stunts** and **pranks** for entertainment...' (Dirty Sanchez, 2009).

*Balls of Steel* and *Dirty Sanchez* have involved the following inflictions of pain: 9

- The 'perpetrator' stapling a piece of paper to the tongue of the 'victim' in the episode 'Stapler Diet' ;
- The 'perpetrator' pressing onions into the opened eyes of the 'victim' in the episode 'Kitchen Nightmares';
- The 'perpetrator' hitting the buttocks of the 'victim' with a cane and with a foil in the episodes 'School Discipline' and 'Fools with Tools'; (Balls of Steel, 2010)
- The 'perpetrator' hitting the 'victim' on the head with a toilet seat, breaking the toilet seat in the process, in the episode 105. (Dirty Sanchez, 2010)

Channel 4's Head of Comedy Shane Allen, in a letter to the national campaign group 10  
Mediawatch-UK dated 18 December 2009, explained the attraction of the audience to the *Pain Men* as follows:

While [the *Pain Men* ] have a 'look away now' factor, it is precisely that quality and the two performers' comic reaction to their plight that made the item amusing to the audience.

This description seems to correspond with the above analysis of *Schadenfreude* in that the 11  
audience seems to take pleasure in watching the pain of the *Pain Men* and thus contributes to the vast success of the television show.

### CONCERNING THE LAW

Popular as the above television shows may be, one is forced to wonder whether they violate 12  
the law. Section 47 of the Offences against the Person Act 1861 (OAPA 1861) specifies, 'Whosoever shall be convicted upon an indictment of any assault occasioning [ABH] shall be liable ... to be kept in penal servitude...' whilst section 20 OAPA 1861 contains the wording of the more serious offence of grievous bodily harm ['GBH'] , 'Whosoever shall unlawfully and maliciously wound or inflict any [GBH] upon any other person... shall be guilty of a misdemeanor.'

It is relevant to note that sections 47 20 OAPA 1861 do not apply where the activity which 13  
causes the bodily harm is lawful or the injury is an accident as, for example, in *R v Slingsby* [1995] Crim LR 570 where the defendant, with the deceased's consent, penetrated her vagina and rectum with his hand and the deceased suffered cuts from his ring which later caused her death. The infliction of injury was not deliberate and, but for the ring, no injury would have been caused or could have been contemplated. Therefore, the defendant's act was not considered to be unlawful.

An altogether different legal outcome may arise where the 'perpetrator' intends to cause 14  
harm to the 'victim'. It should be noted that the law in this area is not free from confusion. However, in *R v Brown* [1994] 1 AC 212, the leading authority on consent, the 'victims' were participating in private homosexual sadomasochistic activities. The charges were based on:

[Genital] torture and violence to the buttocks, anus, penis, testicles and nipples. The 'victims' were degraded and humiliated sometimes beaten, sometimes wounded with instruments and sometimes branded (p.236).

The 'perpetrators' were convicted and the case was appealed to the House of Lords. In 1993, 15  
the appeal was dismissed by a 3-2 majority with Lord Templeman declaring:

The violence of sadomasochistic encounters involves the indulgence of cruelty by 16  
sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous...Society is entitled and bound to protect itself against a

cult of violence. Pleasure derived from the infliction of pain is an evil thing (p. 237).

The case was brought before the European Court of Human Rights (ECtHR) in *Laskey, Jaggard, and Brown v U.K* (1997) 24 Eur HR Rep 39 but the Court refused to accept the defendants' submissions (the ECtHR's reasons will be explored in detail below). 17

The approach adopted in *Brown* is consistent with earlier decisions of the Court of Appeal and Court of Criminal Appeal. Thus, in *R v Donovan* [1934] All ER Rep 207, it was stated that a 17 year-old girl could not give valid consent to a sadomasochistic caning and in *A-G's Reference (No 6 of 1980)* [1981] QB 715, Lord Lane CJ held that it would not be in the public interest to allow a defence of consent in the context of a fist-fight. In *R v Emmett* [1999] EWCA Crim 1710, during sexual play, with her consent, the defendant covered the head of the 'victim' with a plastic bag causing her eyes to become bloodshot. On a separate occasion (also during sexual play), the defendant caused the 'victim' a burn when using lighter fuel on her. The appellant was convicted of assault occasioning ABH and the Court of Appeal dismissed the defendant's appeal against his conviction. There are several other important cases which are relevant to the issue of the consent of the 'victim' and they will be analysed in detail below. 18

In *Brown*, counsel for the defence argued that in relation to harm inflicted with consent, the law should draw a line between GBH and ABH but the majority of the House of Lords did not agree. Thus, a person's consent does not usually prevent criminal liability for either ABH (section 47) or for GBH (section 20). In *Brown*, however, the Lords did draw a line between assaults involving no injury and assault occasioning ABH. Lord Templeman noted, 'When no [ABH] is caused, the consent of the person affected precludes him from complaining' (*Brown* at p.230). One can therefore validly consent to an application of force which does not cause ABH. 19

What amounts to ABH? Swift J noted, "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of [the 'victim']. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling' (*Donovan* at p. 212). This would include bruises and sores (*R v Reigate Justices ex parte Counsell* (1984) 148 JP 193). Hobhouse LJ explained further: 20

No doubt what is intended...is... that some injury which otherwise might be regarded as wholly trivial is not to be so regarded because it has caused the victim pain. Similarly an injury can be caused to someone by injuring their health... A blow may leave no external mark but may cause the victim to lose consciousness (*R v Chan-Fook* [1994] 2 All ER 552, 557).

How does this relate to the *Pain Men*? It should first be said that, arguably, it only makes sense to show an act of pain infliction on television if it is more than 'transient and trifling.' Assuming that the audience wishes to experience *Schadenfreude* (as explored above), the viewers would presumably not be interested in watching a television show where the only harm inflicted is 'transient and trifling'. Some of the acts of the *Pain Men* would most certainly leave bruises, tenderness and/or sores, for example the acts of the 'perpetrator' hitting the buttocks of the 'victim' with a cane. The beating in *Donovan* was also done with a cane and left seven or eight red marks on the body of the 'victim'. This was described as a 'fairly severe beating'. Swift J noted, 'when such an act is proved, consent is immaterial' (*Donovan* at p.210). The harm in *Donovan* seems strikingly similar to the harm inflicted by the *Pain Men* in the above *Balls of Steel* episode where the perpetrator hit the 'victim' with a cane which also left red marks. 21

From the above, it would seem that the *Pain Men* have been inflicting ABH on each other and generally the infliction of ABH (on television or otherwise) will amount to a crime; a consensual crime, but still a crime. In February 2010, Mediawatch-UK wrote to the Metropolitan Police Service, calling for an investigation into the above matters (Mediawatch-UK, 2010). However, on 12 March 2010, the Police, in a statement to the media, responded that a criminal investigation was 'not appropriate' (Mail on Sunday, 2010). 22

## JUSTIFICATION

It would be absurd to suggest that the infliction of bodily injury should be unlawful in all circumstances with perhaps the most obvious example being surgery. Surgery will almost 23

inevitably result in bodily injury but most people would agree that a surgeon who operates with the consent of the patient is not, and should not be, liable to criminal sanctions. In *AG's Reference (No 6 of 1980)*, Lord Lane CJ held that it would not be in the public interest to allow a defence of consent in the context of a fist-fight where ABH was intended and/or caused 'for no good reason'. The wording 'for no good reason' is a reference to the acceptance of the courts that in some situations, individuals can validly consent to the infliction of harm. Lord Templeman noted, 'Other activities carried on with consent... have been accepted as lawful notwithstanding that they involve [ABH]... tattooing, ear-piercing and violent sports including boxing are lawful activities...(*Brown* at p.231). More specifically, Swift J referred to, 'the case of persons who in perfect friendship engage by mutual consent in contests, such as 'cudgels, foils, or wrestling' which are capable of causing bodily harm'(*Donovan* at p.212). In other words, 'in principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty' (*Brown* at p.237).

The above case *Emmett* and the case *R v Wilson* (1996) 2 Cr App Rep 241 demonstrate this 24 distinction more clearly. In *Wilson*, at his wife's instigation, the appellant branded his initials on her buttocks with a hot knife. Per Russell LJ:

For our part, we cannot detect any logical difference between what the appellant did and what he might have done in the way of tattooing... We do not think that we are entitled to assume that the method adopted by the appellant and his wife was any more dangerous or painful than tattooing [tattooing being a lawful activity]' (*Wilson* at p.50).

The cases *Emmett* and *Wilson* are similar in that they both involved activities between 25 couples and one may therefore be tempted to assume that they should have resulted in the same outcome. However, the Court of Appeal in *Emmett* referred to *Wilson* but refused to apply the same judgment saying:

[In *Wilson*] there was no aggressive intent on the part of the appellant... far from wishing to cause injury to [the 'victim'], the appellant's desire was to assist her in what she regarded as the acquisition of a desirable personal adornment'

By contrast, in *Wilson* where bodily harm was inflicted during the couple's sexual play, the 26 Court noted, 'This was not tattooing...and...there was a very considerable degree of danger to life [and]...a degree of injury to the body.' The appeal in *Emmett* was thus dismissed, but the appeal in *Wilson* was upheld.

Herring (2004) explained that in some situations, the defendant does not intend to cause the 27 harm but rather play a sport, perform a stunt or give a tattoo. By contrast, in *Brown*, the defendants inflicted pain because without pain, their activities would have been a 'flop' for all concerned. It has been established that the law does not usually provide a defence to ABH inflicted during the course of consensual sadomasochistic activities, i.e. to 'perpetrators' who inflict pain for pleasure of both themselves and the 'victim'. The *Pain Men*, much like the defendants in *Brown*, also inflict pain because without pain, their activities would have been 'a flop for all concerned'. The audience's desire for *Schadenfreude* would not be satisfied without pain. One is forced to wonder what exactly the purpose of the pain infliction by the *Pain Men* is. The *Pain Men* are not involved in any contest, sport or game. In fact, MTV advertises that the *Pain Men* 'love to suffer' (Dirty Sanchez, 2010). Channel 4 referred to a 'comic reaction' by the *Pain Men* to the pain infliction. In short, without pain, there would be no act. The pain infliction is not 'incidental' to the act; it is the act.

## HORSE PLAY AND BRAVADO

On the other hand, one may argue that if given the chance, the Law Lords in *Brown* would 28 have recognised the acts of the *Pain Men* as falling into one, or both, of the recognised exceptions of horseplay and bravado. If their acts would fall into either of these categories, then their acts could be performed without criminal liability due to their being lawful activities.

Per Swift J, 'Another exception to the general rule...is to be found in cases of rough and 29 undisciplined sport or play...where there is no anger and no intention to cause bodily harm' (*Donovan* at p.211). In *R v Aitken* [1992] 1 WLP 1006, during an evening of boisterous

activities, members of the Royal Air Force set their respective fireproof flying suits on fire as a joke and, as a result, serious but unintentional injury occurred. The Courts-Martial Appeal Court ruled that the Judge Advocate should have directed the court as to the necessity of considering whether the 'victim' gave his consent as a willing participant to the activities in question. In *R v Jones* (1986) 83 Cr App R 375, the young defendants, in an act of playground roughness, tossed other youths into the air and let them fall to the ground. One of the victims suffered a ruptured spleen and another suffered a broken arm. The defendants account was that the whole escapade was a joke and that they had had no intention of causing their 'victims' any harm. The Court of Appeal held that the defence of consent should have been left to the jury.

The acts in *Dirty Sanchez* in particular show a group of friends performing their acts in a cheerful manner generally giving the impression of a group of friends who are having a good time. There is a temptation therefore to suggest that one is dealing with horseplay with the group playing rough jokes on each other. However, the proper limits of the horseplay exception must be understood. Individuals may lawfully engage in rough horseplay only where no injury is intended. Arguably, the *Pain Men* (unlike the defendants in *Jones* and *Aitken*) do intend to inflict ABH on each other, for example by the 'perpetrator' caning the 'victim' and piercing the tongue of the 'victim' (as detailed above). 30

In *A-G's Reference (No 6 of 1980)*, Lord Lane CJ identified the 'dangerous exhibitions' exception, although the extent of that exception has never been explored in court (Blackstone's Criminal Practice, 2009, at p.14). Lord Mustill referred to 'dangerous pastimes [and] bravado (as where a boastful man challenges another to try to hurt him with a blow)' (*Brown* at p.267). Herring speculated that 'being a human cannonball' may fall within this category (2004: p.358). The Oxford Dictionary defines 'bravado' as 'a show of boldness intended to impress or intimidate.' 31

One can only speculate whether the acts of the *Pain Men* can be classed as bravado. However, one may observe that the *Pain Men* seemingly do not wish to display their boldness or strength, nor do they seem boastful about their ability to endure the pain inflicted upon them. To the contrary, their act is perceived by the audience as amusing because the *Pain Men* do react to the pain, for example by shouting out loud and tightening their facial muscles in an expression of pain, thus allowing the audience to laugh and experience *Schadenfreude*. It thus seems that the *Pain Men's* act does not fit comfortably into either the category of horseplay or bravado. 32

### A NEW CATEGORY?

It has become clear that there are similarities between the pain inflicted by the *Pain Men* and the pain inflicted in *Brown*. In short, harm was inflicted in *Brown* to achieve sexual pleasure and it has been suggested in their marketing materials that the *Pain Men* also take enjoyment (or 'love to suffer') from the infliction of pain. However, there are also significant differences. Whether or not the *Pain Men* truly enjoy suffering, pain (presumably) is not inflicted by the *Pain Men* to achieve sexual (or, perhaps, any) pleasure but to entertain their audience. The 'perpetrator' and the 'victim' (presumably) are doing the act to make a living, to improve the success of the television show and to advance their respective careers, thereby achieving celebrity status. Moreover, taking into account the *Pain Men's* apparent friendship, they would prefer to achieve the above objectives without inflicting ABH on each other (unless they truly 'love to suffer'). Would it be in the interest of the public to allow them a defence of consent in the circumstances? The *Pain Men* would be free to argue that the infliction of pain for television entertainment should be a new recognised category of 'lawful activity'; 'new' because it was not considered in *Brown*, or any subsequent case, as the judgment was delivered in 1993 which was approximately seven years before the dawn of the television reality show as detailed above. 33

### PRIVACY AND ARTICLE 8 ECHR

The courts have often raised concerns about privacy issues, saying that it was not the place of the courts to interfere in what people do in the privacy of their own homes, although this did not prevent the courts in *Brown*, *Emmett* and *Donovan* from interfering in this manner. Russell LJ stated, 'Consensual activity between husband and wife, in the privacy of the matrimonial home, is not ... normally a proper matter for criminal investigation' (*Wilson* at p.50). Lord Mustill (dissenting in *Brown*) considered whether 'the public interest 34

requires...penalising an infliction of harm', saying, 'these are questions of private morality...not those of the criminal law' (*Brown* at p.273). When the defendants in *Brown* brought their case before the ECtHR, they sought to rely on Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR) but the ECtHR rejected their submissions (see further below).

The activities of the *Pain Men* are not conducted in private but, to the contrary, broadcasted 35 on national television. Thus, the *Pain Men* could neither rely on the views expressed in *Wilson*, nor on Article 8 ECHR.

### FREEDOM OF EXPRESSION AND ARTICLE 10 ECHR

Following initial complaints to Channel 4 by Mediawatch-UK, Shane Allen, Head of Comedy at 36 Channel 4 by way of letter dated 18 December 2009, defended the programme saying there was 'a need' to push comedy boundaries:

Channel 4 has a statutory remit to make fresh and innovative programmes and the comedy genre is no exception to this. The Channel has a long tradition of investing in comedy that is both a showcase for new talent and is also often irreverent and provocative...There is a genuine need for challenging material that pushes the boundaries in comedy to keep it relevant and pioneering...[T]he performers' fundamental right to express themselves freely is protected by Article 10 [ECHR].

Article 10 ECHR states that everyone has the right of expression which includes freedom to 37 impart information and ideas without interference by public authority. It should be noted that a defence under Article 10 has not previously been raised in comparable cases where ABH was inflicted with consent. In the context of sadomasochistic activities, such incidents would usually occur in private and are more likely to raise issues of the defendant's right to privacy than any issue involving freedom of expression. It has been said above that in *Brown v. UK*, the ECtHR considered the right to privacy of the defendants in respect of Article 8 ECHR. The principles in Article 8 ECHR and Article 10 ECHR are similar in that both articles do not convey absolute rights. Both state, under their respective subsections (2) that the exercise of these freedoms may be restricted as prescribed by law and as necessary in a democratic society with reference to (amongst other things) protection of health or morals.

When the defendants in *Brown* brought their case before the ECtHR, it was noted that one of 38 the roles which the state is unquestioningly entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm, in the course of sexual conduct or otherwise. (*Brown v UK* at para.44). In *Shayler* [2002] UKHL Lord Bingham stated:

It is plain from the language of [Article 10(2)] and the [ECtHR] has repeatedly held, that any national restriction on freedom of expression be consistent with [Article 10(2)] only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society. "Necessary" has been strongly interpreted: it is not synonymous with "indispensable", neither has it the flexibility of "admissible", "ordinary", "useful" or "desirable": *Handyside v UK* (1976) 1 EHRR 737, 754, para.48. One must consider whether the interference complained of correspond to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under [Article 10(2)]: *Sunday Times v UK* (1979) 2 EHRR 245, 277-78, para 62. (para.23).

The defendants in *Brown* sought to rely on Article 8 ECHR but the ECtHR found that the 39 national authorities were entitled to consider that the prosecution and conviction of the defendants were necessary in a democratic society for the protection of health within the meaning of Article 8(2) ECHR (*Brown v UK* at para.50). The ECtHR further noted:

In view of [the above conclusion] the [ECtHR]...does not find it necessary to determine whether the interference with the applicant's right [under Article 8] could also be justified on the ground of the protection of public morals. This finding, however, should not be understood as calling into question the prerogative of the State on moral grounds to seek to deter acts of the kind in question (*Brown v U.K.* at

para.51).

It is therefore essential at this stage to consider two aspects of the pain infliction by the *Pain Men*, namely their effect on the protection of health and their effect on the protection of public morals. Herne Hill, Pannick and Herberg (2009) noted that the case law of the ECtHR and the ECHR in the area of protection of health and morals has recognised that, because of the wide range of domestic standards, states must enjoy a wide margin of appreciation as to appropriate restrictions in freedom of expression when compared to restrictions on political speech or other matters of political interest. For example, in *Handyside* the ECtHR observed that Article 10 is intended to protect material which is likely to offend, shock or disturb but went on to hold that a ban on a book for children containing a chapter on sex was a proportionate and justifiable interference with freedom of expression within the state's margin of appreciation as being necessary for the protection of public morals. Similarly in *Müller v Switzerland* (1988) 13 EHRR 212, ECtHR, the punishment of an artist for exhibiting obscene paintings was held to be within the state's margin of appreciation. It is primarily for a state to assess the contents of morals.

### HEALTH OF THE PAIN MEN

It should be obvious that the repeated infliction of bodily harm may endanger the health of the *Pain Men*. Although in *Brown* the majority of the Lords rejected the notion that GBH must be caused for the crime to be committed (ABH is sufficient for criminal liability), they did take the health and safety of the defendants into account. Lord Templeman noted, 'There were obvious dangers of serious personal injury...The assertion that the instruments employed by the sadists were clean and sterilised could not have removed the danger of infection, and the assertion that care was taken demonstrates the possibility of infection' (*Brown* at p.236) and, per Lord Jauncey of Tullichettle, '... so it would appear to be good luck rather than good judgment which has prevented serious injury from occurring' (*Brown* at p.238). However, Channel 4 stated in their above letter, 'the *Pain Men* ...were subject to strict health and safety checks. Although clearly painful, as the name suggested, none of the stunts carried out were likely to cause serious or long term physical damage.' It would follow that the safer the process of pain infliction is, the less likely is the possibility of criminal liability. Thus, if the safety of the *Pain Men* can be ensured then (presumably) there is a lesser need for the state to outlaw their activities.

One should also consider the possibility that people, particularly children, watching the television program may copy the acts of the *Pain Men* and thereby injure themselves. In *Brown*, Lord Jauncey was concerned about the potential corruption of young people who took part in the activities of the defendants and the danger of proselytisation noting that this, 'is a real danger even in the case of these appellants and the taking of video-recordings of such activities suggests that secrecy may not be as strict as the appellants claimed' (*Brown* at p.238). However, Channel 4 stated in their above letter:

[*Balls of Steel*] is...aimed at a young adult late night audience, is scheduled in a late night slot and warnings are broadcast to flag the show's content, both at the beginning of the programme and at the relevant points within it, so that viewers can make an informed choice about whether or not to watch it. In addition, the *Pain Men* segments contain multiple verbal and visual warnings during each item...Concerning the availability of the series on [the Channel's] 4OD service, the Channel stands by its careful efforts to provide parents with sufficient facilities to control their children's viewing, notably the PIN feature.

Thus, if steps can be taken to prevent young people from watching the *Pain Men's* acts and to give warnings as to their nature to prevent copying of such acts, then (presumably) there is a lesser need for the state to outlaw their activities.

### MORALS

Should the activities of the *Pain Men* be outlawed to protect public morals? The words of Lord Templeman come back to mind: 'The violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims...Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing' (*Brown* at p.237). Edwards (1993) helpfully quoted Judge Rant at the Old Bailey on this issue: 'Much has been said about individual liberty and the rights people have to do what they



want with their own bodies but the courts must draw the line between what is acceptable in a civilised society and what is not.' Devlin advanced the argument, in the context of homosexuality and prostitution, that without shared ideas on politics, morals and ethics, no society can exist saying, 'The reason why a man may not consent to the commission of an offence against himself...is because it is an offence against society' (1965: p.178). Wilson explained these issues further saying, 'Wrongdoing is about doing wrong not simply causing harm as the majority in *Brown* concluded' (2002: p.34).

Against the above view, however, there stands the liberal notion that people should be able 45 to control what they do to their own bodies without interference. Wilson notes:

Using morality as our yardstick for intervention, it is easy to see why such crimes as murder, rape and theft...are crimes. It is also fairly easy to see why other morally dubious activities, such as trading while insolvent, fox hunting [and], pornography...should not be criminalised...Although many consider such practices immoral, others do not, or at least do not feel sufficiently disturbed by it to support a plausible case for punishment...The lack of consensus reflects an economically, and therefore morally, differentiated society which supposedly gains strength from such a differentiated outlook (2002: p.37).

The *Pain Men's* wish to rely on Article 10 should perhaps be seen in the context of the UK's 46 television culture because the right enjoyed under Article 10 is not an absolute one and television may be censored by the state in certain circumstances. In 1984, a list of films (known as the 'Video Nasty List') was created to protect against obscenity in films. Films on this list were banned (74 films at one stage in the mid-1980s) and distributors of those films were liable to be prosecuted. However, in an apparent trend towards liberalism, there has been considerable relaxation of the list from 1999 onwards. The list was eventually trimmed down and most of the films have now been approved for broadcasting in the UK. Devlin noted that the limits of tolerance may shift (although moral standards do not) and that the extent to which society tolerates departures from moral standards varies from generation to generation (1965: p.187). The attitude towards homosexuality, which used to be a crime in English law, is a notable example of a change in society's perception of morals. Other activities which used to be lawful are not lawful anymore; in *Brown*, Lord Templeman thought back to a time when fighting (meaning unregulated fighting unlike boxing) used to be a lawful activity and infliction of ABH during a fight was lawful (*Brown* at p.231). Today, such infliction of ABH during a fight would be unlawful. It is difficult to imagine how the 1993 House of Lords in *Brown* would have responded to the *Pain Men's* activities because times have changed since then. The Law Lords in 1993 may have believed that the *Pain Men's* acts are criminal but, undeniably, since then television has become more liberal. Arguably, the *Pain Men's* wish to express themselves by inflicting pain forms part of today's liberal television.

Another consideration in determining the effect of the *Pain Men* on public morals is the profit 47 derived from the activities of the *Pain Men*. The defendants in *Brown* did not perform their activities for profit but for pleasure. The fact that the *Pain Men* engage into their acts with a view to making a profit from a paying audience, and achieving celebrity status in the process, perhaps makes their conduct less acceptable from a moral point of view. In relation to the profit element in *Brown*, Duff (2001) developed an argument that society would not be happy to permit a gladiatorial contest, in which the gladiator would consent to the infliction of harm, which spectators paid to witness, saying (inter alia), 'What motivates promoters... is the prospect of making money...' Duff clearly criticised the profit element of the contest. Lord Mustill, dissenting in *Brown*, argued on similar lines, noting that the activities of the defendants in *Brown* were 'not engaged in for profit' (*Brown* at p.273). Duff raises moral issues and he is presumably correct in suggesting that society would not accept a public fight of gladiators. In fact, it has been established above that unregulated fighting is not a lawful activity. However, with respect to Duff, society seems most happy to engage into the activity of boxing where paid boxers on public television compete against each other with the clear objective of inflicting ABH on each other (knocking each other unconscious, which, pursuant to the above definition of ABH offered in *Chan-Fook*, amounts to the infliction of ABH). In *Brown*, Lord Templeman seemed to express displeasure when he noted that boxing is a lawful activity saying, 'Rightly or wrongly the courts accepted that boxing is a lawful activity' (*Brown* at p.231). It therefore appears that more is required than an intention to make a profit to render an activity immoral.

## CONCLUSION

'No Pain, No Gain'. The *Pain Men* have given Jane Fonda's catchphrase its literal meaning in 48 that the success of their television programs, which have made them well-known celebrities, is dependent on the infliction of pain and bodily harm. Their programs are part of the relatively recent development of the television reality show in which real pain is inflicted in order to entertain an audience. *Schadenfreude* plays a vital part here in that the audience finds the infliction of pain and bodily harm amusing. Reference has been made to the House of Lords decision in *Brown* where the defendants were engaged in sadomasochistic encounters and ABH was inflicted on them. Unlike the defendants in *Brown*, the *Pain Men* may have a case under Article 10 ECHR with Channel 4 referring to a 'genuine need for challenging material' which pushes the boundaries in comedy. The rights under Article 10, however, may be restricted by the state in certain circumstances with a view to protecting public health and morality. Whilst the defendants in *Brown* were convicted, we will never know what the 1993 House of Lords would have thought of the *Pain Men*. Would they have considered them to be engaging in lawful horseplay or bravado activities or would they have condemned their acts as unlawful? Unfortunately, one can only speculate because pain infliction on reality television only became popular years after the 1993 judgment. Today, we find ourselves in a world which is altogether different. Rightly or wrongly, a liberal trend has changed the television culture of the UK. Movies which were forbidden in 1993 are now freely available, reality television programs from overseas (such as *Jackass*) can be viewed in the UK, the *Pain Men* were allowed to be televised without any significant public outcry and when the Police became aware of the contents of the *Pain Men's* act, they considered it 'inappropriate' to investigate. Arguably the fact that the television show is made for profit (derived from a paying audience) renders the pain infliction immoral but the same could be said about paid boxers, who, like the *Pain Men*, often achieve celebrity status, and boxing has been accepted by the courts to be a lawful activity. Perhaps the *Pain Men* are but a product of today's liberal television and perhaps that is sufficient reason for their act to be protected from criminal sanction, so long as their and the audience's health can be protected. Even though their act may have been considered immoral in 1993, it seems that society has changed what it considers to be immoral and is now prepared to take pleasure (or *Schadenfreude*) in watching the *Pain Men* on television.

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