

Assault, Consent and Body Art: A review of the law relating to assault and consent in the UK and the practice of body art

Paul Lehane¹ FCIEH MSc

¹Manager Food, Safety and Licensing, Environmental Health and Trading Standards
London Borough of Bromley

Correspondence: Stockwell Close Bromley BR1 3UH, Tel. +44 (0)208 313 4216
E-mail: Paul.Lehane@bromley.gov.uk

Abstract

The act of piercing another person's body in the guise of fashion, beauty or for ritual purposes can give rise to a range of physical injuries that could constitute a serious offence under UK law. This paper examines and interprets the basic elements of common and statute law relating to physical and sexual assault in the context of the practice of body art.

In the main it is quite clear that the law recognises certain practices as being acceptable when undertaken by consent that in other circumstances would lead to prosecution – cosmetic piercing, electrolysis, acupuncture, tattooing and semi-permanent skin colouring are all subject to specific legislative controls or are referred to in court judgements.

Whether nipple or genital piercing is an offence under the Sexual Offences Act 2003 depends on whether it is considered to be sexual. If it is, a person over 13 can consent to it, but a child under 13 cannot. If it is not sexual then it could still be an assault at common law or under the Offences Against the Person Act 1861. This issue is explored.

Branding, beading, braiding, amputation and tongue splitting lie at the extreme end of the scale of body art activities. The courts have not as yet been asked to rule on these as commercial activities but they are so extreme that such levels of violence and harm could well be classified as unacceptable to public policy and the courts could adopt the same approach as in the case of Brown (1994) which is explored in the paper. Whilst these 'extreme' activities do not fall to local authorities to control as they go beyond 'cosmetic piercing', given their association with body art they are likely to be undertaken from premises used for licensed cosmetic piercing activities.

Relevant case law is examined and the potential of the Human Rights Act 1998 to influence the interpretation of existing law is explored.

Key Words: Assault, body art, consent, cosmetic piercing, tattooing.

Introduction

In 2003 The Local Government, Sexual Offences and Female Genital Mutilation Acts received Royal Assent. These had a direct relevance to Environmental Health Practitioners (EHPs) and the regulation of body art.

The Local Government Act 2003 (s120 and schedule 6) was the most significant because it extended the range of licensable activities under the Local Government (Miscellaneous Provisions) Act 1982 to include 'cosmetic piercing' and 'semi-permanent skin colouring' in addition to acupuncture, tattooing, ear piercing and electrolysis.

EHPs working in London and a few other large conurbations have been licensing such activities for some time under local Acts of Parliament. In London cosmetic piercing has been controlled since 1981 (Greater London Council (General Powers) Act) and semi-permanent skin colouring since 1991 (London Local Authorities Act).

Experience in the administration of these provisions has raised a number of questions; for example, does the practice of body art constitute an assault; can a person consent to all forms of body art; when piercing children is there a legal duty to obtain consent from a parent; at what age can nipple or genital piercing be undertaken; is there a point at which certain activities become illegal?

This paper discusses these questions and suggests some possible answers based on relevant common, statute and case law.

Paul Lehane

What is Body Art?

Body art is a form of human expression that has existed in various cultures of the world for thousands of years. Denton (2001) lists a range of activities and most people will be familiar with tattooing and the common piercings associated with the face (ear, nose, mouth, eyebrow), nipple and navel but the more unusual or extreme activities may benefit from a brief explanation.

Genital Piercing. In the male this involves piercing the glans, foreskin, frenum and scrotum, while female piercings involve the clitoris, clitoral hood, and labia (majora and minora).

Scarification. Cutting of the skin to encourage scar tissue to form and produce deep and clearly visible marks. It is usually carried out on the back and chest. The scars may be enhanced by using ash or tattooing ink in the wound.

Beading. Involves the insertion of inert beads under the surface of the skin, often of the penis.

Tongue Splitting. Cutting the free end of the tongue vertically to form two ends (like a snake's tongue).

Branding. The permanent marking of the skin by burning with hot or cold instruments.

Braiding. The practice of cutting adjacent strips of skin, keeping one end attached then plaiting the strips and reattaching the free ends, so that the skin heals in a plaited or braided form.

Amputation, usually of the fingers. Historically certain cultures practiced amputation to mark the death of a loved one or to show a serious personal failing.

Clitoridectomy and labia removal. The cutting away of the visible parts of the clitoris and/or labia. It may also involve the sewing together of the cut edges of the labia to prevent sexual activity.

Law of Assault

The practice of body art gives rise to various types of bodily injury, which are subject to legal restrictions by common and statute law. The general term "assault" covers a wide range of activities including: Common Law – Common Assault (assault by threats), Battery (assault by beating) and Maiming, Statutory Law – Assault causing actual bodily harm, Wounding, Grievous bodily harm (GBH) and Wounding with intent to cause GBH.

Assault at Common Law

Assault and battery are distinct offences at common law. An assault is any act which intentionally or recklessly causes a person to apprehend immediate unlawful force or personal violence (Card 2001). It is not necessary to

have actual contact or any physical injury (Mansfield Justices Ex p Sharkey (1985)). The offence of battery is the intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile, rude or aggressive" (Smith 2002).

A battery often (but not always) includes an assault and consequently the term "assault" is often used to cover both types of offence. A helpful starting point for considering the law of assault was given in the judgement of Lord Justice Goff in *Collins v Wilcock* (1984):

"... the fundamental principle, plain and incontestable is that every person's body is inviolate. It has long been established that any touching of another person, however slight may amount to a battery... the law cannot draw the line between different degrees of violence and therefore totally prohibits the first and lowest stage of it, every man's person being sacred and no other having the right to meddle with it in the slightest manner...but so widely drawn a principle must inevitably be subject to exceptions... Generally speaking consent is a defence to battery and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in... a supermarket, an underground station or a busy street."

Assault and battery are among a small number of offences that only exist at common law and their definition is found in the rulings of Judges. Unless statute law has set limits on punishments these are also found in common law (Card 2001). Section 39 of the Criminal Justice Act 1988 established common assault and battery as being only triable in the Magistrates' Court and set a maximum punishment of a level 5 fine or 6 months imprisonment.

Assault in Statutory Law

Statutory offences were introduced by the Offences Against the Person Act 1861 (as amended) to deal with the more serious harms that people inflict on each other.

An assault occasioning actual bodily harm (s47) arises where an injury is the natural result of what was done. (Notman, 1994; Roberts, 1971). Typical examples of injuries at this level are – a lost or broken tooth or minor cuts and bruises.

More serious injuries fall within Sections 18 & 20 of the Act. The difference between the two being the element of "intent" necessary under section 18 which is reflected in the more severe potential sentence of life imprisonment.

Section 20 established the offence of malicious wounding where the injuries (wounding or GBH) are inflicted which are a consequence of an action but were

not intended e.g. a fight where a person receives a deep cut or a broken arm.

Section 18 deals with wounding with intent to do grievous bodily harm. Injuries such as stabbing, shooting or beating with a weapon would fall into this category. The meaning of "grievous" was addressed in *Metharam* (1961) and means that (really) serious bodily harm needs to result from the action.

There are a number of other specific statutes that are relevant to the practice of body art – the Sexual Offences Act 2003 and Female Genital Mutilation Act 2003 which will be considered with respect to genital and nipple piercing, and the Tattooing of Minors Act 1969 which prohibits the tattooing of persons under 18 years of age.

Case law has provided definitions to some key concepts which are of relevance to EHPs involved in the regulation of body art, viz:

Wounding: This was defined in the case of *JJC (a minor) v Eisenhower* (1983) as a break in the continuity of the whole skin. This is an important definition as the practice of body art can result in a break in the continuity of the whole of the skin. A wound from a piercing is less serious than from scarification, but both are capable of being prosecuted under s20 Offences Against the Person Act 1861.

Unlawfully: The judgement of Chief Justice Lord Lane in the Attorney Generals Reference (No 6 of 1980) to the Court of Appeal is authority on the extent of the lawful use of violence. The case related to a fight between two youths and considered the issue of consent:

"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 public; it is an assault if actual bodily harm is intended and/or caused... nothing we have said is intended to cast doubt on the accepted legality of 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 other cases... the participants would have been guilty of an assault (subject to self defence) if ... they intended to and/or did cause actual bodily harm."

The Law Lords also made reference to what was "lawful" in deciding the case of *Brown* (1994) and extended this to include tattooing and ear piercing.

Intent: It was argued in *Brown* (1994) that without a hostile intent no offence of assault is committed. This could also be applied to body art where there is no hostile intent. Lord Mustil commented on this, although he dissented from the majority decision on the appeal as a whole:

"Hostility is present in the great majority of offences dealt with by the Courts under the Act of 1861. Nevertheless I cannot accept it as a statement of the existing law." Later he said "The Doctor who hastens the end of a patient to terminate his agony acts with the best intentions and quite without hostility to him in any ordinary sense of the word, yet there is no doubt that notwithstanding the patient's consent, he is guilty of murder. Hostility cannot, it seems to me, be a crucial factor which in itself determines guilt or innocence."

Prosecuting cases of assault

The Crown Prosecution Service (CPS) applies a two-stage test to all cases before deciding whether or not to take a prosecution. The first test is that of "evidential sufficiency" – is there enough evidence against the defendant? There must be a "realistic prospect of conviction".

If the first stage is passed the second stage is that of public interest. "Is it in the public interest to bring the case to court"? The Crown Prosecutor must consider the public interest in going on with a prosecution and balance the factors for and against prosecution carefully and fairly before coming to a decision.

A prosecution will usually take place unless the public interest factors against prosecution clearly outweigh those in favour of prosecution. Broadly speaking, the more serious the offence, the more likely it will go ahead. A prosecution is less likely to proceed where a court would impose a nominal penalty or the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement (CPS 2004).

In most cases of assault the victim's lack of consent is an important element of the case. However in a number of the decided cases (*Brown* (1994), *Slingsby* (1995) and *Wilson* (1997)) the victims did not make any complaint to the police and were willing participants in the activity causing the injury but the prosecutions took place nevertheless.

Consent to acts of violence

Under certain circumstances the courts have ruled that it is not in the public interest for people to give consent to acts of force against their own body.

To establish an offence of common law assault or battery it is usually necessary for the prosecution to prove that the victim did not consent to the defendant's actions but this may not be necessary if the public interest requires otherwise or in circumstances where a "breach of the peace" exists (*Coney* (1882)). There is a "breach of the peace" whenever harm is actually done or is likely to be done to a person or in their presence to their property, or a person is in fear of being harmed (*Pritchard* 2001).

Beyond consent to common law assault or battery the issue is somewhat confusing as the appeal cases of

Paul Lehane

Brown (1994) and Wilson (1997) illustrate. It was held by the House of Lords in Brown that consent was not a defence to offences of actual bodily harm, wounding or GBH, whilst in Wilson the Court of Appeal decided that it was a defence to actual bodily harm.

Brown (1994)

Brown and five co-defendants were convicted of offences of wounding and actual bodily harm under the Offences Against the Person Act 1861 (as amended). They willingly and enthusiastically participated in acts of sado-masochistic violence. No complaint had been made to the Police about the acts, which were identified whilst investigating other matters. No serious or permanent injury resulted from the activities. The Crown Court trial Judge ruled that the consent of the victim afforded no defence to the charges. They pleaded guilty and received custodial sentences. Their convictions were upheld by both the Court of Appeal and the House of Lords. Some of the injuries inflicted by Brown and his co-defendants were similar to those associated with body art, though the circumstances in which they were inflicted were very different. For example one man had his foreskin nailed to a piece of wood, resulting in a puncture wound similar to a cosmetic piercing, whilst another had his scrotum cut with a knife resulting in injuries similar to scarification. All parties accepted that consent was available as a defence to a common law assault or battery in circumstances where there was no breach of the peace and that grievous bodily harm could not be consented to. They argued that the line where consent was not available as a defence needed to be drawn at some point above common assault and below maiming. Maiming has been unlawful in common law since the Reign of Henry IV as it deprived the King of fit men to serve in the army or navy (Brown (1994)). It was suggested that consent could be given to actual bodily harm and wounding, but not to grievous bodily harm. The Lords rejected these arguments. Lord Jauncey of Tullichettle summarised the broad position stating:

“The basic argument propounded by all the appellants was that the receivers having in every case consented to what was inflicted upon them no offence had been committed under Sections 20 or 47 of the Offences Against the Person Act 1861. All the appellants recognised however that so broad a proposition could not stand up and that there must be some limitation upon the harm which an individual could consent to receive at the hand of another. The line between injuries to the infliction of which an individual could consent and injuries to whose infliction he could not consent must be drawn ... where the public interest required.”

The House of Lords upheld the convictions and decided that as a matter of public policy the violence associated with sado-masochistic homosexual practices was not something that fell within the exempt categories of violence. Laskey, one of the co-defendants appealed to the European Court of Human Rights in Strasbourg, where the conviction was held not to contravene Article 8 of the European Convention on Human Rights (right to respect for private life) as being necessary in a

democratic society for the protection of health and morals (Laskey, Jaggard and Brown v UK 1997).

Wilson (1997)

Wilson was convicted of actual bodily harm for branding his initials on his wife's buttocks at her request. He appealed to the Court of Appeal who criticised the decision to bring the case to trial at all and drew an important distinction between the case and that of Brown. Lord Justice Russell said:

“Mrs Wilson not only consented to that which the appellant did, she insisted on it. There was no aggressive intent on the part of the appellant. On the contrary far from wishing to cause injury to his wife, the appellants desire was to assist her in what she regarded as the acquisition of a piece of personal adornment, perhaps in this day and age no less understandable than the piercing of nostrils or even tongues for the purpose of inserting decorative jewellery. In our judgement Brown is not authority for the proposition that consent is no defence to a charge under section 47 of the Act of 1862 in all circumstances where actual bodily harm is deliberately inflicted. The Lords referred to tattooing as being an activity which, if carried out with the consent of an adult, does not involve an offence under section 47 albeit that actual bodily harm is deliberately inflicted. For our part we cannot detect any logical differences between what the appellant did and what he might have done in the way of tattooing. Does public policy or the public interest demand that the appellant should be visited by the sanctions of the criminal law? The majority in Brown clearly took the view that such considerations were relevant. If that is so, then we are firmly of the opinion that it is not in the public interest that activities such as the appellant's... should amount to criminal behaviour. 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.”

Wilson's conviction was quashed by the Court of Appeal. The Court took quite a different view to the House of Lords in Brown (1994) as to the nature of the injury and the situation and circumstances in which it was performed. It is significant that the Court expressed a view that to seek a piece of personal adornment (branding) was no less surprising than to have a piercing. This clearly indicates that the Court of Appeal drew a distinction between the violence and injuries associated with sado-masochistic sexual behaviour and loving non-sexual behaviour.

The commercial practice of body art probably falls somewhere between the two, being neither overtly sexual in nature, but it is not undertaken as part of a loving relationship.

The quality of consent

When considering consent the Courts will have regard to the circumstances of the person as there are situations where it might be invalid. In Brown (1994)

Lord Slynn of Hadley set out general principles relating to consent:

“Three propositions seem to me to be clear. It is inherent in the conception of assault and battery that the victim does not consent. Secondly, consent must be full and free and must be as to the actual level of force used or pain inflicted. Thirdly there exist areas where the law disregards the victim’s consent even where that consent is freely and fully given. These areas may relate to the person (e.g. a child); they may relate to the place (e.g. public); or they may relate to the nature of the harm done.”

In the case of *F v West Berkshire Authority* (1989) Lord Goff made reference to those who:

“by reason of their youth or mental disorder are unable to give consent.”

Subject to any overriding public policy objections there is a two-limb test for consent: the person giving consent must be capable of giving it in terms of their age and mental state, and, it is given fully and freely with the knowledge of the actual level of force used or pain inflicted.

Consent and age

Many parents expect to have a say in what their children do and rely on the law to support this, but this is not necessarily the view of the Courts as the case of *Gillick v West Norfolk and Wisbech Area Health Authority* (1985) demonstrates. Following the publication of advice on the legality of doctors prescribing contraceptives to girls under 16 (the legal age for consent to sexual intercourse without parental consent), Mrs Gillick sought an assurance from her local area health authority that her daughters would not be given advice or prescribed contraceptives without her prior knowledge and consent. The health authority refused and Mrs Gillick took action against them and the matter was appealed to the House of Lords.

The case provided some useful guidance on the consideration of age and consent. The Lords held that a child became increasingly independent as it grew older, and that parental authority dwindled correspondingly. Parental rights were recognised by the law only as long as they were needed for the protection of the child and such rights yielded to the child’s right to make his own decisions when he reached a sufficient understanding and intelligence to be capable of making up his own mind.

Based on this judgement it would appear that if a piercer is satisfied that a young person requesting a piercing had reached sufficient intelligence and understanding to be capable of making up his/her own mind the piercing could be undertaken without authority from a parent or guardian. However the younger the person the more difficult it must be to reach the necessary threshold of intelligence and understanding.

Sexual Offences and Body Art

Nipple and genital piercing could be offences under either The Sexual Offences Act 2003 or the Female Genital Mutilation Act 2003. The Sexual Offences Act 2003 largely repealed the Sexual Offences Act 1956 and lowered the age at which a young person can consent to a sexual assault from 16 to 13. Under s3 a person (A) commits an offence of sexual assault if:

- (a) he (A) intentionally touches another person (B),
- (b) the touching is sexual,
- (c) (B) does not consent to the touching, and,
- (d) A does not reasonably believe that B consents.

Whether a belief is reasonable is determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents (s3(2)). Section 78 defines touching as “sexual” if a reasonable person would consider that ‘whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual’, or, ‘because of its nature it may be sexual and because of its circumstances or the purpose if any person in relation to it (or both) it is sexual’.

The s7 offence of Sexual Assault of a child under 13 is similar to that under s3 but there is no provision for the child to give consent.

Whether nipple or genital piercing is “sexual touching” will depend on how a “reasonable person” views the activity. If it is not considered “sexual” it would allow a person under 13 to give consent within the context of the Sexual Offences 2003 Act. If however it was considered to be “sexual touching” a person over 13 could consent to it.

The only activity that is clearly prohibited by the Sexual Offences Act 2003 is the sexual touching of a person under 13. Non-sexual touching of a person of any age is not an offence under the Act but could still be an assault under common law or statutory law if it was undertaken without consent, or if the level of injury was sufficiently serious. Two further decided cases are worthy of mention in relation to consent and sexual assault. In *Boyea* (1992) the defendant caused injury to a female during willing vigorous sexual activity. His conviction under the Sexual Offences Act 1956 was upheld by the Court of Appeal on the grounds that his conduct was likely to cause harm. He was guilty of an indecent assault even if he did not intend or foresee that harm was likely to be caused. *Slingsby* (Slingsby (1995)) was charged with manslaughter by an unlawful and dangerous act after causing the death of a woman from an injury with his cygnet ring during consensual sexual activity which led to a fatal septicaemia. It was ruled by Justice Judge that it would be contrary to principle to treat as criminal an activity which would not otherwise amount to an offence, merely because an injury was caused (Smith 2002). These two cases lead to different conclusions. Based on *Boyea* a piercer undertaking nipple or genital piercings might be liable to prosecution for a sexual assault as the resultant

Paul Lehane

injuries of piercing are both intended and foreseeable. The case of Slingsby suggests that as long as the activity of nipple or genital piercing is legally carried out the infliction of an injury would not be an offence.

If there is no sexual element involved in the practices of body art the provision of the Sexual Offences Act 2003 will not apply and the fundamental question posed by the cases Brown (1994) and Wilson (1997) remain – can a person give consent to the level of injury inflicted by body art if it exceeds common assault?

The other statute of relevance to genital piercing is the Female Genital Mutilation Act 2003 Section 1. This makes it an offence for any person to infibulate or otherwise mutilate the whole or any part of a girl's labia majora, labia minora or clitoris. Having regard to the meaning of "infibulate" and "mutilate" in the Concise Oxford Dictionary (1988), it is suggested that piercing does not fall within the ambit of the Act.

Where does this leave the practices involved in Body Art?

Consent is a defence to common law assault and battery in the course of every day contacts or in situations where a breach of the peace does not occur. Following the case of Brown (1994) however, it is not a defence to claim consent to the infliction of actual bodily harm or wounding or grievous bodily harm, unless that injury arises from a lawful activity or some other category recognised by the Courts as being of a right e.g. self defence or reasonable chastisement of a child or in the public interest.

The Court of Appeal in Wilson (1997) allowed consent as a defence to actual bodily harm in the context of an ongoing loving relationship carried out in private. The Wilson case did not address consent to wounding or GBH and no cases have yet considered consent to assault in the context of the commercial practice of body art.

Unless body art is recognised as being lawful a practitioner commits an offence under either s47 or s20 of the Offences Against the Person Act 1861 each time they perform a piercing.

Is Body Art Lawful?

Table 1.0 sets out a hierarchical view of body art based on the level of injury.

A distinction can be made between the various categories of body art based on the level of statutory control.

Activities expressly permitted by statute

In England and Wales the main control of cosmetic piercing falls under the Local Government

(Miscellaneous Provisions) Act 1982 (as amended), and a number of local Acts. Cosmetic piercing is not defined but a common factor across the activities typically involves the use of a needle or other pointed implement to pierce the skin. Using this as a definition of cosmetic piercing it would appear that some of the more extreme practices associated with body art such as scarification, branding and tongue splitting would not be subject to any legal control via registration or licensing, as they do not involve piercing of the skin. As the law stands cosmetic piercing, tattooing, acupuncture and electrolysis are lawful (but see below) and would fall within the list of activities that the Courts would recognise as such.

Activities expressly prohibited by statute or limited by direct implication

Relatively few activities are specifically prohibited by statute or limited by implication but female genital mutilation, sexual assault and tattooing a person under 18 years of age do fit into this category.

The Female Genital Mutilation Act 2003 and Sexual Offences Act 2003 have already been considered. The Tattooing of Minors Act 1969 prohibits under 18's from being tattooed and defines a tattoo as "the insertion into the skin of any colouring material designed to leave a permanent mark."

The inclusion of 'semi-permanent skin colouring' in the amended Local Government (Miscellaneous Provisions) Act 1982 prompts the question of whether this activity falls within the provisions of the Tattooing of Minors Act 1969. When properly applied to the epidermal layers of skin the colouring is not intended to be permanent and therefore falls outside the definition of tattooing and so could be applied to a person of any age.

Activities not specifically legislated for

Many of the more extreme activities of body art fall in to a category that is neither specifically permitted nor prohibited by statute (see Table 1.0 level 5).

Based on the judgements of the Higher Courts, particularly Brown (1994), and the AG Reference No 6 (1980), it is suggested that the more extreme body art practices (branding, braiding, beading, scarification, tongue splitting and amputation) do not fall within the recognised exemptions to violence and would be illegal despite the consent of the victim. This is based on a public policy consideration that such levels of violence and injury are not something that society should endorse. Although the decision in Wilson (1997) established that consent may be a defence to actual bodily harm (branding) in certain circumstances, the commercial application of practices leading to actual bodily harm are different and some of the more extreme practices result in wounding or grievous bodily harm.

Table 1.0: Hierarchical view of body art based on the level of injury

Level of injury	Category of activity	Level of injury based on Offences Against the Person Act 1861
1	Acupuncture Electrolysis Ear piercing and cosmetic piercing (facial and naval) Controlled by Local Government (Miscellaneous Provisions) Act 1982 as amended and London Local Authorities Act 1991	Piercing – Section 20 wounding as the continuity of the skin is broken Actual bodily harm (s47) if the insertion of a needle in acupuncture or electrolysis is not considered to be a wound
2	Tattooing Subject to Tattooing of Minors Act 1969	Actual bodily harm (s47) if the insertion of a needle is not considered to be a wound, otherwise Section 20 wounding as the continuity of the skin is broken
3	Nipple piercing (consider Sexual assault for under 13 – Sexual Offences Act 2003)	Piercing – Section 20 wounding as the continuity of the skin is broken
4	Genital piercing (consider sexual assault for under 13 – Sexual Offences Act 2003 and Female Genital Mutilation Act 2003)	Piercing – Section 20 wounding as the continuity of the skin is broken
5	Other body modification such as scarification, branding, braiding, beading, amputation, tongue splitting, clitoridectomy and labia removal. (Offences Against the Person Act 1861, Sexual Offences Act 2003, Female Genital Mutilation Act 2003)	Branding – ABH if it does not break the skin otherwise all result in wounding and some in GHB

The Human Rights Act 1998

All the decided cases referred to pre-date the Human Rights Act 1998. There are two possible ways in which this Act could impact on the practice of body art. One of the Rights is the Freedom of Expression (Schedule 1, Article 10 of the Convention). This Right may be interfered with by the UK Government where it is judged necessary in a democratic society and is prescribed by law for a legitimate purpose. If it could be argued that to alter your body through body art is an expression of oneself within the meaning of the Human Rights Act then the courts could decide that there should be no interference with the right to free expression other than on the grounds of health or safety. If this were the case all forms of body art could be legal, but could still be subject to some form of control or regulation, through licensing, to ensure standards of training knowledge and competence of practitioners and premises.

The second way in which the Human Rights Act 1998 could affect body art is in the way that existing statutes and case law is interpreted. Section 3 requires, so far as is reasonably practicable, that primary and subordinate law must be read and given effect in a way which is compatible with the convention rights. The White Paper

which preceded the Act (HM Government 1997) said that the Courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention.

Previously decisions by the higher courts (House of Lords and Court of Appeal) were binding on the lower Courts (Magistrates Courts and Crown Courts) under the doctrine of precedent. To give effect to the Human Rights Act a lower court may now ignore a decision of a superior court on the meaning of a statute (Card 2001).

Conclusions

- The act of piercing another person's body in the guise of fashion, beauty or for ritual purposes is a potentially serious offence under a variety of statutes.
- In the main it is quite clear that the law recognises certain practices as being acceptable and, although causing harm that in other circumstances would lead to conviction, are not subject to punishment when undertaken by consent. Such activities include cosmetic piercing (ear, nose, lip, tongue, eyebrow and navel) electrolysis, acupuncture,

tattooing and semi-permanent skin colouring. All are subject to specific legislative controls or are referred to in legal judgements.

- Cosmetic piercing is legal per se as it is regulated by statute and this includes nipple and genital piercing in the absence of any specific exclusion in either the Local Government (Miscellaneous Provisions) Act 1982 or the London Local Authorities Act 1991.
- Whether nipple or genital piercing is an offence under the Sexual Offences Act 2003 depends on whether it is considered to be sexual. If it is, a person over 13 can consent to it, but a child under 13 cannot. If it is not sexual then it could still be an assault at common law or under the Offences Against the Person Act 1861.
- At the extreme end of the scale of body art activities lies branding, beading, braiding, amputation and tongue splitting. The Courts have not been asked to rule on these as commercial activities but as they are extreme the courts could well classify such levels of violence and harm to be unacceptable to public policy and adopt the same approach as in *Brown* (1994). These activities do not fall to local authorities to control as they go beyond "cosmetic piercing". Given their association with body art, however, they are likely to be undertaken from premises used for licensed activities controlled by local authorities. Although not licensable the fact that these extreme practices are likely to be undertaken from commercial premises where cosmetic piercing is undertaken in a regulated environment could be a factor that the courts find persuasive if they were to considering their legality.
- Clitoridectomy and labia removal are unlawful under the Female Genital Mutilation Act 2003.

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