

## WHY HER BEHAVIOUR IS STILL ON TRIAL: THE ABSENCE OF CONTEXT IN THE MODERNISATION OF THE SUBSTANTIVE LAW ON CONSENT

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*Two cases studies illustrate the paradox at the heart of the substantive law of sexual assault – that it is possible (i) for a woman who does not communicate her consent to be deemed to consent; and (ii) for a defendant to have a reasonable belief about a woman’s consent even though it is accepted that she did not consent, both of which undermine the concept of her sexual autonomy. In light of the research on rape myth acceptance (‘RMA’) which shows that RMA is one of the most consistent predictors of victim blame in sexual assault scenarios, this article discusses how sexual assault law reform in New South Wales in 2007, which introduced a ‘communicative’ model of consent, has been subsequently undermined by the decisions in two recent judge-alone trials. Options for reform are discussed in light of the community standards expected under a ‘communicative’ model of consent.*

### I INTRODUCTION

A criminal trial is a public spectacle, a place where we can see justice at work. But for many victims, the sexual assault trial is an ordeal, sometimes described as bad or worse than the original abuse,<sup>1</sup> a place where the complainant’s behaviour is on trial. In Australia, we have limited ways of preventing a sexual assault trial from turning into a stone-throwing exercise by defence counsel while complainants, with no legal representation, have no control over the trial process.

Since we also have no methods for vetting jurors to discover the rape myths they subscribe to, jurors are free to use rape myths to decide the key legal issues: did she consent and what was his state of mind?<sup>2</sup> Without eyewitnesses and other

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1 See SBS Television, ‘Rape on Trial’, *Insight*, 27 February 2018.

2 The male pronoun is used for defendants and the female pronoun is used for complainants which reflects the empirical data that the majority of sex offenders are male and the majority of sexual assault complainants are female (Australian Bureau of Statistics, *4510.0 Recorded Crime – Victims, Australia* (6 July 2017)

supporting evidence, the defendant's denial will generally be measured by reference to the complainant's behaviour.

As a result, she becomes an object – a sexed body<sup>3</sup> that is public property and whose behaviour is subject to idiosyncratic standards of female behaviour. Numerous studies reveal the extent to which laypeople endorse rape myth acceptance beliefs ('RMA').<sup>4</sup> The higher an individual's level of RMA, the more likely s/he will blame the victim, and the less likely s/he will perceive the victim to be credible and the defendant to be culpable,<sup>5</sup> with a positive correlation between relatively high levels of RMA and a tendency to acquit in sexual assault trials.<sup>6</sup>

The sexual assault trial is one of the last arenas in which law reformers have been unsuccessful in preventing the sexual assault trial from descending into a character assassination of the complainant. The authority of the state justifies her second violation with a variety of defence allegations about her character and past still permitted, including drug and alcohol use, psychiatric history and past criminal offences.<sup>7</sup>

Thus, there is a huge risk for complainants who choose to participate in a sexual assault trial – re-traumatisation is a documented phenomenon and one reason that women and children do not proceed with their complaints.<sup>8</sup>

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<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4510.02016?OpenDocument>> although it is recognised that males can also be victims of sexual assault and females can be perpetrators.

- 3 Annie Cossins, 'Saints, Sluts and Sexual Assault: Rethinking the Relationship between Sex, Race and Gender' (2003) 12 *Social and Legal Studies* 77.
- 4 Amy Grubb and Emily Turner, 'Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming' (2012) 17 *Aggression and Violent Behavior* 443; Peter A Newcombe et al, 'Attributions of Responsibility for Rape: Differences across Familiarity of Situation, Gender, and Acceptance of Rape Myths' (2008) 38 *Journal of Applied Social Psychology* 1736; Eliana Suarez and Tahany M Gadalla, 'Stop Blaming the Victim: A Meta-Analysis on Rape Myths' (2010) 25 *Journal of Interpersonal Violence* 2010; Jennifer Temkin and Barbra Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008); VicHealth, 'Australians' Attitudes to Violence against Women: Findings from the 2013 National Community Attitudes towards Violence against Women Survey (NCAS)' (Report, Victorian Health Promotion Foundation, 2014).
- 5 Destin N Stewart and Kristine M Jacquin, 'Juror Perceptions in a Rape Trial: Examining the Complainant's Ingestion of Chemical Substances Prior to Sexual Assault' (2010) 19 *Journal of Aggression, Maltreatment & Trauma* 853.
- 6 Sokratis Dinos, Nina Burrowes, Karen Hammond and Christina Cunliffe, 'A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?' (2015) 43 *International Journal of Law, Crime and Justice* 36.
- 7 In NSW, the *Criminal Procedure Act 1986* (NSW) is silent about a complainant's drug and alcohol history and about a complainant's past criminal history (see ch 6 pt 5). Re a complainant's counselling/psychiatric history, if a court gives leave under section 299D of the *Criminal Procedure Act 1986* (NSW), it is possible for 'protected confidence[s]' (defined under section 296) to counsellors/psychiatrists to be used in evidence against a complainant despite the existence of the protection known as the sexual assault communications privilege. There may be other sources of evidence of a complainant's past or present psychiatric history which are *not* subject to the sexual assault communications privilege and which could be used to impugn her character.
- 8 See, eg, the story of 14-year-old Amy in SBS Television, above n 1; Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017).

Beginning in the United States in the 1970s,<sup>9</sup> there have been several important reforms to the substantive laws governing sex offences in various countries, including all Australian states and territories.<sup>10</sup> The concept of consent has been central to reforms since it has driven the development of rape law into the arena of sexual autonomy, as discussed below.

Two case studies discussed in this article illustrate the paradox at the heart of the substantive law of rape – that it is possible for (i) a woman who does not communicate her consent to be deemed to consent; and (ii) a defendant to have a reasonable belief about a woman’s consent even though it is accepted she did not consent, both of which undermine the concept of sexual autonomy.

In light of the research that shows that RMA is one of the most consistent predictors of victim blame in sexual assault scenarios, this article discusses how sexual assault law reform in New South Wales (‘NSW’) in 2007, which introduced a ‘communicative’ model of consent, has been subsequently undermined by the decisions in two recent judge-alone trials. Options for reform are discussed in light of the community standards expected under a ‘communicative’ model of consent.

The relevant law from NSW is relied upon since that jurisdiction underwent the most recent changes to its sexual assault provisions in order to deal with, amongst other things, the difficulties with proving lack of consent,<sup>11</sup> and the problems associated with the mental element – the defendant’s state of mind. It is also the jurisdiction that was used as a model by the Australian Law Reform Commission (‘ALRC’) in 2010 when recommending amendments to the mental element in other Australian jurisdictions.<sup>12</sup> As well, in May 2018, the NSW Attorney-General asked the NSW Law Reform Commission (‘NSWLRC’) to review sexual assault law in NSW after a complainant in a controversial rape case (the *Lazarus* case) told her story on national television.<sup>13</sup> This case will be discussed in the second case study.

Since the reference to the NSWLRC, the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) was enacted with several amendments to Division 10 (Sexual Offences Against Adults and Children) of the *Crimes Act 1900* (NSW) (‘*Crimes Act*’) in October 2018. In particular, section 61HA has been replaced by new sections 61HA–61HE, although substantial changes have not yet been made to deal with the problems raised by the *Lazarus* case, as discussed in this article.

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9 Richard Klein, ‘An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness’ (2008) 41 *Akron Law Review* 981, 982, 984–5.

10 See Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) 1129–76.

11 Criminal Justice Sexual Offences Taskforce (NSW), ‘Responding to Sexual Assault: The Way Forward’ (Report, December 2005) (‘Responding to Sexual Assault’).

12 *Family Violence – A National Legal Response*, above n 10, 1163–5.

13 See ABC Television, ‘I Am That Girl’, *4Corners*, 7 May 2018; New South Wales Law Reform Commission, *Consultation in Relation to Sexual Offences*, Consultation Paper No 21 (2018), 3 [1.11].

## II MODERNISATION OF THE SUBSTANTIVE LAW OF CONSENT

The type of sexual conduct commonly known as rape has evolved from a requirement to prove the use of force or violence to mere proof of lack of consent even in circumstances with no overt threats, evidence of violence or physical resistance by the complainant.<sup>14</sup>

Many countries modernised their substantive laws on sex offences in light of low rates of reporting sexual assault, high attrition rates and low conviction rates,<sup>15</sup> or because the substantive law was outdated, reflecting the attitudes of former centuries where ‘the laws were designed to protect [the] property interests’ of men:<sup>16</sup>

the focus on (forced) penile-vaginal penetration ... reflect[ed] a historic conceptualisation of rape as ... [theft] whereby rape provisions were ... intended to protect a father from the loss of a virgin daughter’s value as a transferable asset, or to protect a husband from his loss of exclusive conjugal rights, rather than to protect the physical and sexual integrity of the victim.<sup>17</sup>

Forster summarises three significant ‘waves of reform’ of the substantive law on sexual assault which began in the 1970s in the United States, followed by reform in the 1980s in NSW, Canada and New Zealand and then in the 2000s in England and Wales, Scotland, South Africa, NSW, Victoria and South Australia.<sup>18</sup> In many jurisdictions, this modernisation involved three key reforms:<sup>19</sup>

- (i) a statutory definition of consent;
- (ii) an objective test for determining the defendant’s state of mind or knowledge; and

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14 Sharon Cowan, ‘Choosing Freely: Theoretically Reframing the Concept of Consent’ in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish, 2007) 91; Julia Quilter, ‘From *Raptus* to Rape: A History of the “Requirements” of Resistance and Injury’ (2015) 2 *Law & History* 89.

15 See, eg, Criminal Justice Sexual Offences Taskforce, above n 11; Home Office (UK), ‘Setting the Boundaries: Reforming the Law on Sex Offences’ (Report, July 2000); Her Majesty’s Inspectorate of Constabulary and Her Majesty’s Crown Prosecution Service Inspectorate (UK), ‘Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape’ (April 2002).

16 Quilter, ‘From *Raptus* to Rape’, above n 14, 101.

17 Christine Forster, ‘Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practices Standards’ (2009) 33 *Melbourne University Law Review* 833, 836 (footnotes omitted); see also Home Office (UK), ‘Setting the Boundaries’, above n 15; Home Office (UK), *Protecting the Public: Strengthening Protections against Sex Offenders and Reforming the Law on Sexual Offences*, Cm 5668 (2002); Law Commission, ‘Consent in Sexual Offences’ (Report to the Home Office Sex Offences Review, 2000); Scottish Law Commission, ‘Report on Rape and Other Sexual Offences’ (December 2007).

18 Forster, above n 17, 837.

19 United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, UN Doc ST/ESA/329 (2010) 27.

- (iii) a list of evidential and conclusive presumptions about consent, or of circumstances vitiating consent.<sup>20</sup>

Modernisation has seen the concept of consent develop into a communicative model where the *capacity* to freely agree is the measure for assessing lack of consent. For example, in NSW in 2007, the then Attorney-General observed that:

Modernisation ... is aimed at bringing about both a cultural shift in the response to victims of sexual assault by the community and by key participants within the criminal justice system.<sup>21</sup>

Despite these aims, the fact remains that the prosecution must prove beyond reasonable doubt that a complainant did not consent and that the defendant had no knowledge, or, in some jurisdictions, was reckless about informing himself, of her lack of consent. There is no legislative restriction that prevents rape myths and victim-blaming attitudes from being used by fact-finders when considering whether the prosecution has satisfied their burden of proof.

What do I mean by rape myths? Several rape myths have been documented in the literature (Table 1). The well-documented Illinois Rape Myth Acceptance Scale ('IRMAS')<sup>22</sup> contains seven categories of rape myth statements.<sup>23</sup>

Table 1 – The Seven IRMAS Categories

1. 'She asked for it' <sup>24</sup>
2. 'It wasn't really rape' <sup>25</sup>
3. 'He didn't mean to' <sup>26</sup>
4. 'She wanted it' <sup>27</sup>
5. 'She lied' <sup>28</sup>
6. 'Rape is a trivial event' <sup>29</sup>
7. 'Rape is a deviant event' <sup>30</sup>

20 In England and Wales, a presumptions method is used – that is, an evidential presumption of non-consent is raised where certain circumstances exist: *Sexual Offences Act 2003* (UK) ss 75–6, which may be rebutted by evidence to the contrary from the defendant compared to the approach in NSW, Scotland and Canada where a list of vitiating circumstances has been enacted which mean there is no consent in those circumstances: *Crimes Act* s 61HA(4)–(5); *Canadian Criminal Code*, RSC 1985, c C-46, s 273.1(2); *Sexual Offences (Scotland) Act 2009* (Scot) ss 13–14. However, the evidential presumptions 'very rarely arise in practice': Peter Rook and Robert Ward, *Rook & Ward on Sexual Offences: Law & Practice* (Sweet & Maxwell, 5<sup>th</sup> ed, 2016) 5.

21 New South Wales, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584 (John Hatzistergos).

22 Diana L Payne, Kimberley A Lonsway and Louise F Fitzgerald, 'Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the *Illinois Rape Myth Acceptance Scale*' (1999) 33 *Journal of Research in Personality* 27.

23 *Ibid.* The higher the score on the IRMAS, the greater the degree of RMA by an individual.

24 *Ibid.* For example, if a woman is raped while she is drunk, she is at least somewhat responsible for letting things get out of control.

25 *Ibid.* For example, if a woman does not physically fight back, you can't really say that it was rape.

26 *Ibid.* For example, rape happens when a man's sex drive gets out of control.

27 *Ibid.* For example, many women secretly desire to be raped.

28 *Ibid.* For example, many so-called rape victims are actually women who had sex and 'changed their minds' afterwards.

29 *Ibid.* For example, women tend to exaggerate how much rape affects them.

30 *Ibid.* For example, rape is unlikely to happen in the woman's own familiar neighbourhood.

### III THE FACT-FINDER'S TASK IN AN ERA OF MODERNISATION

An example of the modernisation of rape law can be seen in NSW where the common law term, 'rape', is no longer used in relation to sexual offences.<sup>31</sup> Instead, section 61I of the *Crimes Act* criminalises sexual intercourse without consent (now called 'sexual assault'):

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

The fact-finder must be satisfied that the prosecution has proved the following three elements beyond reasonable doubt:

- (i) that the defendant had sexual intercourse with the complainant at the time and place alleged;
- (ii) without the complainant's consent; and
- (iii) the defendant did so knowing that the complainant did not consent.<sup>32</sup>

Under section 61HA of the *Crimes Act*, sexual intercourse is defined more broadly and uses gender-neutral terms compared to other jurisdictions such as England and Wales:

- (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by: (i) any part of the body of another person, or (ii) any object manipulated by another person ... or
- (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
- (c) cunnilingus, or
- (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

In NSW, a statutory definition of consent was enacted in 2007,<sup>33</sup> as a result of a year-long review of the prosecution of sexual offences by the Criminal Justice Sexual Offences Taskforce ('the Taskforce').<sup>34</sup> The Taskforce recommended a

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31 *Crimes Act* s 80AD. Penetration is still described as rape in other Australian jurisdictions: *Criminal Code Act 1899* (Qld) s 349; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1924* (Tas) s 185; *Crimes Act 1958* (Vic) s 38. It is described as 'sexual intercourse without consent' in Australia's two territories: *Crimes Act 1900* (ACT) s 54; *Criminal Code Act 1983* (NT) s 192. While in Western Australia it is described as 'sexual penetration without consent': *Criminal Code Act 1913* (WA) s 325.

32 In 2013, a review of the modernisation of the law on sex offences found that 'since the introduction of a statutory definition of consent, the number of people charged and appearing before the courts for sexual assault offences has remained relatively stable': NSW Department of Attorney-General and Justice, 'Review of the Consent Provision for Sexual Assault Offences in the *Crimes Act 1900*' (October 2013) 8. There have been a limited number of appeals since the introduction of a statutory definition of consent: at 16.

33 *Crimes Amendment (Consent – Sexual Offences) Act 2007* (NSW).

34 Responding to Sexual Assault, above n 11. The author was involved in lobbying the then Attorney-General, Mr Bob Debus, to set up this taskforce in December 2004. As a member of the Taskforce and because I was subsequently involved in drafting the legislation which introduced a statutory definition of

statutory definition of consent that was based on section 74 of the *Sexual Offences Act 2003* (UK):<sup>35</sup> ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’.

Although the United Kingdom (‘UK’) definition ‘is not a model of tight drafting’ since ‘the parameters of “freedom” are not clear’,<sup>36</sup> it was premised on the understanding that ‘free agreement would assist in making it clear that absence of protest, resistance or injury does not necessarily mean the complainant consented’.<sup>37</sup>

However, the UK courts have given a ‘wide interpretation to the definition of consent’ which has resulted in ‘a focus on the autonomy of the complainant’<sup>38</sup> and appears to cover the situation where a complainant freezes, ‘utters no protest and offers no physical resistance’.<sup>39</sup> Overall, English and Welsh case law reveals a number of important principles so that there is no requirement for the prosecution to prove (i) verbal or physical resistance by the complainant to indicate lack of consent; (ii) that ‘absence of consent was communicated to the defendant’; or (iii) that the complainant ‘was incapable of saying “no”’.<sup>40</sup>

Based on the statutory definition in the UK, section 61HA<sup>41</sup> of the *Crimes Act* set out the definition of consent in NSW:

A person ‘consents’ to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.<sup>42</sup>

This definition was accompanied by an expanded list of circumstances in which consent is deemed to be vitiated or negated, although such circumstances presume consent unless the vitiating circumstance is proved beyond reasonable doubt.<sup>43</sup>

All Australian jurisdictions except the Australian Capital Territory (‘ACT’) have enacted a statutory definition of consent using either ‘free agreement’,<sup>44</sup> ‘free and voluntary agreement’,<sup>45</sup> or ‘consent freely and voluntarily given’,<sup>46</sup> while Scotland and Canada use the words ‘free agreement’ and ‘voluntary

consent in NSW, the discussion in this article allows me to reflect on the impact of this particular definition and other reforms that resulted from the work of the Taskforce.

35 For the background to the *Sexual Offences Act 2003* (UK), see Rook and Ward, above n 20, 3–9.

36 Rook and Ward, above n 20, 79.

37 Ibid 4.

38 Ibid.

39 Ibid 77.

40 Ibid 115.

41 Consent was first defined under s 61HA of the *Crimes Act*. That provision has since been amended by *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW).

42 Consent is now defined under s 61HE of the *Crimes Act*, with the words, ‘sexual intercourse’, replaced by the words, ‘sexual activity’. In NSW, those under the age of 16 years do not have the capacity to give consent, compared to the situation in England and Wales where, if a complainant is aged 13 years or over, the prosecution must prove lack of consent: see *Sexual Offences Act 2003* (UK) s 5.

43 In NSW, consent was negated if any of the circumstances under s 61HA(4) and (5) were satisfied; since amended under the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW): see s 61HE(5) and (6).

44 *Criminal Code 1924 Act* (Tas) s 2A(1); *Crimes Act 1958* (Vic) s 36.

45 *Criminal Code 1983 Act* (NT) s 192(1); *Criminal Law Consolidation Act 1935* (SA) s 46(2).

46 *Criminal Code Act 1899* (Qld) s 348(1); *Criminal Code Act 1913* (WA) s 319(2)(a).

agreement', respectively.<sup>47</sup> These jurisdictions also recognise that certain circumstances, such as the use of force, intimidation or complainant incapacity, negate consent.<sup>48</sup>

A NSW government review of the statutory definition of consent in 2013 concluded that since over 2500 people

appeared before the higher courts for sexual assault and aggravated sexual assault offences in the years 2008 to 2012, the limited number of appeals identified leads the Review to conclude that the statutory definition is understood and is working in NSW's courts.<sup>49</sup>

However, this review had no way of considering the impact of the definition of consent in cases of acquittals so that it is impossible to measure the extent to which subjective decision-making by fact-finders is involved in deciding whether the elements of the offence under section 61I of the *Crimes Act* have been satisfied.

In a word-against-word case, the credibility of the complainant is crucial. However, because detecting deception is a complex task – complicated by limited time in which to make an assessment of a witness – observers typically 'rely on heuristics',<sup>50</sup> that is, mental shortcuts about human behaviour including unconscious biases, such as rape myths. What we know about jury decision-making is that (i) individuals, generally, hold particular beliefs and attitudes that affect their reasoning processes and 'bias reasoning performance'; and (ii) when jurors are 'faced with complicated cognitive tasks' and lack the motivation or ability to understand and interpret the evidence, they rely on heuristic cues to determine guilt.<sup>51</sup>

Heuristic processing, sometimes referred to as the conflict between the head and the heart,<sup>52</sup> involves little or no scrutiny of the evidence and low cognitive effort because the individual uses (persuasive) heuristic cues (generalisations and stereotypes) about human behaviour to make a decision. This is an inherently unreliable method since heuristics are derived from individual beliefs and experience which may not accurately reflect the human behaviour that is the subject of a criminal trial.

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47 *Sexual Offences (Scotland) Act 2009* (Scot) s 12; *Canadian Criminal Code*, RSC 1985, c C-46, s 273.1(1).

48 See *Crimes Act 1900* (ACT) s 67; *Criminal Code 1983* (NT) s 192(2); *Criminal Code 1899* (Qld) s 348(2); *Criminal Code 1924* (Tas) s 2A(2); *Crimes Act 1958* (Vic) s 36(2); *Criminal Code Compilation Act 1913* (WA) s 319(2); *Canadian Criminal Code*, RSC 1985, c C-46, s 273.1(2); *Sexual Offences (Scotland) Act 2009* (Scot) ss 13(2), 14(2). Under the *Sexual Offences Act 2003* (UK) ss 75(2) and 76(2) provide for evidential and conclusive presumptions about consent, respectively.

49 NSW Department of Attorney-General and Justice, above n 32, 18.

50 Aldert Vrij, Pär Anders Granhag, and Stephen Porter, 'Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection' (2010) 11 *Psychological Science in the Public Interest* 89, 98.

51 Serena Chen and Shelly Chaiken, 'The Heuristic-Systematic Model in Its Broader Context' in Shelly Chaiken and Yaacov Trope (eds), *Dual-Process Theories in Social Psychology* (Guilford Press, 1999) 73, 73; see also Ryan J Winter and Edith Greene, 'Juror Decision-Making' in Francis T Durso et al (eds), *Handbook of Applied Cognition* (Wiley, 2<sup>nd</sup> ed, 2007) 739.

52 Betram Gawronski and Galen V Bodenhausen, 'Implicit and Explicit Evaluation: A Brief Review of the Associative-Propositional Evaluation Model' (2014) 8 *Social and Personality Psychology Compass* 448.



In a sexual assault trial, heuristics are magnified because of the cultural context in which sexual relations are judged<sup>53</sup> – consent is a vessel that will be filled by the moral and cultural values of the fact-finder.<sup>54</sup>

#### IV THE PROBLEMS WITH A STATUTORY DEFINITION OF CONSENT

A statutory definition has the effect, supposedly, of introducing a communicative model of consent which, as a minimum standard of sexual behaviour,<sup>55</sup> emphasises the sexual autonomy of the parties in the absence of force or coercion,<sup>56</sup> rather than a model in which the complainant is ‘a passive recipient [which] reinforce[s] stereotyped binaries such as active/passive and possessing/possessed’.<sup>57</sup>

However, the sexual autonomy of women is a relational concept that has been historically dependent on women’s economic and legal dependence on men and cultural expectations associated with regulating women’s moral propriety. The sexual autonomy of men has a different historical meaning so that men’s and women’s sexual autonomy cannot be equated:

The meaningful consent assumed as possible by rape law is associated with the traditional liberal notions of free will, contractualism, free negotiation, formal equality, assertiveness, competitiveness, and so on.<sup>58</sup>

Thus, ‘the dividing line between real consent and mere submission may be difficult to draw’<sup>59</sup> since the definition is broad enough to encompass states of mind from intense desire to ‘reluctant acquiescence’<sup>60</sup> in a context of unequal power relations. While a definition of consent based on free agreement in theory allows a fact-finder to consider ‘the power dynamics and cultural pressures that ... constrain a person’s freedom and capacity to make sexual choices’, such a broad scope is a two-edged sword since ‘freedom, choice and capacity can be interpreted in radically divergent and often minimalist ways’<sup>61</sup> with little or no recognition of the economic, cultural, or religious context in which a complainant’s consent appeared to be given.

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- 53 See Cossins, above n 3; Melanie Randall, ‘Sexual Assault Law, Credibility, and “Ideal Victims”’: Consent, Resistance, and Victim Blaming’ (2010) 22 *Canadian Journal of Women and the Law* 397; I Bennett Capers, ‘Real Women, Real Rape’ (2013) 60 *University of California Los Angeles Law Review* 826.
- 54 See, eg, Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, 2005).
- 55 Lois Pineau, ‘Date Rape: A Feminist Analysis’ (1989) 8 *Law and Philosophy* 217, 221.
- 56 P N S Rumney, ‘The Review of Sexual Offences and Rape: Another False Dawn’ (2001) 64 *Modern Law Review* 890, 898.
- 57 Responding to Sexual Assault, above n 11, 33; see also *Family Violence – A National Legal Response*, above n 10, 1169; Gavey, above n 54, 11–12.
- 58 Louise du Toit, ‘The Conditions of Consent’ in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish, 2007) 58, 58.
- 59 *Family Violence – A National Legal Response*, above n 10, 1147.
- 60 Rook and Ward, above n 20, 74.
- 61 Vanessa E Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 944; see also Vanessa E Munro, ‘Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales’ (2017) 26 *Social & Legal Studies* 417.

For an offence which involves interpretation of sexual behaviour, there are many points where subjective and heuristic reasoning is possible, if not encouraged by the substantive law on sexual assault. In a culture where rape myths are promoted by pornographic depictions of ‘consensual’ sex (eg, her provocative behaviour and submission to his natural, coercive desires) and where pornography is viewed by millions, a communicative model of consent may seem rather passé to defendants and fact-finders, as illustrated in the second case study below.

Thus, the sexual assault trial does not operate in a cultural vacuum but in a context imbued with a ‘profound suspicion of female sexuality’<sup>62</sup> so that the consent threshold will be a floating standard, dependent on the facts of each case and the subjective interpretation of those facts by fact-finders (judge or jurors). The effect of a communicative model of consent is easily counteracted by beliefs (see Table 1) that a complainant has behaved in culturally unacceptable ways.

The model presumes that men and women communicate about, and engage in, sexual behaviour from positions of social and economic equality when, in reality, many sexual interactions are characterised by inequality, control and/or exploitation.<sup>63</sup> For example, those who have been sexually assaulted as children or adults are more susceptible to repeated sexual victimisation,<sup>64</sup> which gives pause to the communicative model of consent since many perpetrators target those vulnerable to re-victimisation. However, social messages and advertising campaigns position women’s vulnerability to sexual assault as the problem,<sup>65</sup> rather than men’s predatory behaviour, suggesting that the communicative model of consent is premised on the legitimacy of men’s predation and women’s need to protect themselves.

Because the prosecution must prove beyond reasonable doubt that the complainant did not ‘freely and voluntarily agree to the sexual intercourse’ in NSW, the fact-finder must consider the behaviour and words of the complainant at the relevant time. A communicative model may have no effect in changing fact-finders’ pre-existing attitudes about women’s appropriate sexual behaviour since the fact-finder is invited to subjectively assess whether a complainant’s verbal and/or physical lack of agreement was sufficient. In NSW, juries will be told that ‘[a] person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity’.<sup>66</sup> Since there is no formula for deciding how much verbal or physical behaviour amounts to a *lack* of free and voluntary consent, how will

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62 Munro, ‘Constructing Consent’, above n 61, 936.

63 Munro, ‘Shifting Sands? Consent, Context and Vulnerability’, above n 61; see Sharon Cowan, ‘“Freedom and Capacity to Make a Choice”: A Feminist Analysis of Consent in the Criminal Law of Rape’ in Vanessa Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge, 2007) 51.

64 Elisabeth Stanko and Emma Williams, ‘Reviewing Rape and Rape Allegations in London: What Are the Vulnerabilities of the Victims Who Report to the Police?’ in Miranda Horvath and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Willan Publishing, 2009) 207.

65 Munro, ‘Constructing Consent’, above n 61, 938.

66 *Crimes Act* s 61HE(9). Sexual activity includes sexual intercourse: *Crimes Act* s 61HE(11).

fact-finders deal with little or no physical resistance, particularly since some studies show that laypeople expect some degree of physical resistance to be convinced that a complainant was not consenting?<sup>67</sup>

Does submission in relation to a verbal command from a defendant amount to free and voluntary agreement? Does acquiescence gained by any means short of actual violence amount to free and voluntary agreement? These questions highlight the fact that consent is an empty concept whose meaning arises from context and, crucially, from interpretation of that context.

In order to ameliorate some of the myths surrounding sexual assault, further assistance is provided to fact-finders under section 61HE(8) (formerly section 61HA(6)) of the *Crimes Act* about the grounds ‘on which it may be established that a person does not consent to a sexual activity’.<sup>68</sup>

Section 61HE(8) is only relevant where there is ‘apparent consent ... but the consent is negated’ because one of the grounds under that section is made out.<sup>69</sup> In relation to ‘substantially intoxicated’, for example, section 61HE(8)(a) contains no definition of ‘substantially’. Because it is not a medical term, it is hard to know what level of intoxication it refers to. Since section 61HE(8)(a) envisages that alcohol intoxication can make a person vulnerable to sexual predation, the provision needs to address that problem more clearly. For example, someone could be significantly but not substantially affected by alcohol and still be vulnerable to predation. Without evidence of blood alcohol levels or drug testing or other medical assessment of the complainant’s state at the time in question, laypeople are not qualified to determine how much alcohol consumption amounts to substantial intoxication and are unlikely to know that alcohol affects different people differently depending on factors such as gender, weight and age which are related to a person’s ability to breakdown alcohol.

Arguably, it is insufficient to leave a complainant’s level of intoxication to guesswork by laypeople on a case by case basis. The problem with determining intoxication from a laypersons’ point of view is discussed in the second case study below.

## V PROVING THE MENTAL ELEMENT OF THE OFFENCE

The third element (or mental element) to be satisfied by the prosecution beyond reasonable doubt under section 61I of the *Crimes Act* is that the defendant had sexual intercourse *knowing* that the complainant did not consent. Prior to the 2007 amendments in NSW, the so-called *Morgan* defence<sup>70</sup> was available to a defendant which meant that a defendant’s honest belief, even if

67 See, eg, Regina A Schuller et al, ‘Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender and Victim Stereotypes’ (2010) 13 *New Criminal Law Review* 759, 776, 779.

68 Note that these grounds (‘substantially intoxicated’, ‘intimidatory or coercive conduct, or other threat, that does not involve a threat of force’ and ‘abuse of a position of authority or trust’) do not automatically negate consent. Section 61HE(10) (formerly s 61HA(8)) states that ‘this section does not limit the grounds on which it may be established that a person does not consent to a sexual activity’.

69 *R v XHR* [2012] NSWCCA 247, [69] (Beazley JA).

70 *DPP v Morgan* [1976] AC 182.

based on unreasonable grounds, constituted a sufficient rebuttal to the prosecution's argument that the defendant knew the complainant was not consenting. This honest belief is known as the subjective standard, a measure that did little to protect the vulnerability of women to sexual assault and preserved men's sexual access to non-consenting women in a context where women in the 1970s were still regarded as unreliable witnesses. In particular, 'the existence of the defence ... privileged particular ... social beliefs and sent out a message about the power relationships in society'.<sup>71</sup>

In NSW, the Taskforce had stated that reform was needed for several reasons, including the fact that an assertion of an honest belief is almost impossible to refute, 'regardless of how unreasonable' and to ensure 'that a reasonable standard of care is taken to ascertain whether a person is consenting'.<sup>72</sup>

The Taskforce recommended consideration of the Canadian reform<sup>73</sup> which abolished belief in consent as a defence unless based on reasonable grounds, thus allowing for an objective assessment of the circumstances by the fact-finder. Various jurisdictions have introduced an objective standard (with a focus on the reasonableness of the defendant's belief) although the tests are not wholly objective.<sup>74</sup>

For example, England and Wales did 'not adopt a test based on what a reasonable man would have believed'; rather the jury is able to take into account the defendant's 'personal characteristics' in considering the reasonableness of his belief. This is but a short step from *Morgan* since, as Rook and Ward ask, '[w]hich characteristics are properly relevant to the defendant's ability to appreciate the risk that the complainant was not consenting?'<sup>75</sup>

Although self-induced intoxication is not a permissible factor in NSW,<sup>76</sup> nor in England and Wales,<sup>77</sup> what about a psychiatric condition<sup>78</sup> or autism? Or delusional and/or cultural beliefs about women's availability for sex? Or a sex addiction? In the absence of clear guidance in the legislation, fact-finders are able to consider any characteristics they think are relevant. It is one thing for lawmakers to intentionally overturn a *Morgan*-type defence and another for fact-finders to understand and follow that intention, as illustrated in the two case studies below.

In relation to overturning the *Morgan* defence, the NSW Government was not prepared to go as far as Canada by enacting a purely objective test.<sup>79</sup> Instead,

71 Stephen Banks, 'An Honest but Mistaken Belief in London Legislation? Consent, Controversy and Sexual Offence Reform in New South Wales' (2008) 42 *The Law Teacher* 228, 235.

72 Responding to Sexual Assault, above n 11, 45. In *DPP v Morgan* [1975] AC 182, the defendants were convicted of rape despite arguing that they had an honest but mistaken belief in consent.

73 *Canadian Criminal Code*, RSC 1985, c C-46, s 273.2.

74 England and Wales: *Sexual Offences Act 2003* (UK) s 1; Scotland: *Sexual Offences (Scotland) Act 2009* (Scot) s 1; New Zealand: *Crimes Act 1961* (NZ) s 128(2).

75 Rook and Ward, above n 20, 166.

76 See *Crimes Act* s 61HE(4)(b) (formerly s 61HA(3)(e)).

77 See further Rook and Ward, above n 20, 173.

78 See *R v MM* [2011] EWCA Crim 1291; *B v R* [2013] EWCA Crim 3.

79 It is debatable whether there is much difference, in practice, between '(1) an honest belief held by a defendant which may have been reasonable in the circumstances and (2) a belief which a reasonable man,

it enacted section 61HA(3) of the *Crimes Act* (recently amended and now known as section 61HE(3)) (a further qualification on section 61I) which sets out the knowledge requirement to be proved by the prosecution and creates an additional fault element in addition to what already existed at common law.<sup>80</sup>

Thus, the fact-finder must decide whether the prosecution has proved beyond reasonable doubt that the defendant actually knew the complainant did not consent, or was reckless as to whether she was not consenting,<sup>81</sup> or had no reasonable grounds for believing that the complainant was consenting; that is, that (i) the defendant did not honestly believe that the complainant was consenting; or (ii) if he did have an honest belief in consent, that he had no reasonable grounds for that belief.<sup>82</sup> Similar to the position in England and Wales, section 61HE(3) requires the jury to determine whether the defendant's subjective belief was reasonable.

There are several trigger points for the use of heuristics by a fact-finder under section 61HE(3) because '[s]ubjective fault elements, such as recklessness, knowledge and honest belief, emphasise the perspective of a particular defendant'.<sup>83</sup> Although the requirement for the jury to consider 'all the circumstances', including any steps taken by the defendant, is considered to endorse the communicative model of consent,<sup>84</sup> the jury is actually being invited 'to scrutinise the complainant's behaviour'<sup>85</sup> in the absence of legislative guidance about what would or would not amount to a belief based on reasonable grounds.

While the communicative model of consent seeks to rectify this, it is a contractual model which denies the conditions of inequality that defines many sexual encounters so that the idea of 'free choice' and 'bargaining power' denies the existence of economic, social and religious contexts in which women and

placed in the defendant's circumstances, may have held': *R v MM* [2011] EWCA Crim 1291, [54] (Pitchford LJ).

- 80 Section 61HE(3)(a) and (b) represent a codification of the common law while s 61HE(3)(c) eliminates a *Morgan*-type defence. Proof of the mental element (the defendant's 'guilty mind') differs around Australia. Three of the code states, Queensland, Tasmania and Western Australia, make it an offence if a person intends to have sexual intercourse without consent: *Criminal Code 1899* (Qld) s 349; *Criminal Code Act 1924* (Tas) ss 13, 185; *Criminal Code Compilation Act 1913* (WA) s 325. In the Australian Capital Territory, the Northern Territory, South Australia and Victoria, the fault element for sexual intercourse without consent is knowledge or recklessness: *Crimes Act 1900* (ACT) s 54; *Criminal Code Act* (NT) s 192(3); *Criminal Law Consolidation Act 1935* (SA) s 48(1); *Crimes Act 1958* (Vic) s 38.
- 81 If the prosecution cannot prove that the defendant knew the complainant was not consenting under s 61HE(3)(a), recklessness may be established in two ways; see *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017) 11. In reality, recklessness embodies the notion of reasonableness in the circumstances so that if a defendant did not advert to the possibility that the complainant was consenting 'then it is illogical that the accused could have also taken reasonable steps to ascertain consent': Ian Dobinson and Lesley Townsley, 'Sexual Assault Law Reform in New South Wales: Issues of Consent and Objective Fault' (2008) 32 *Criminal Law Journal* 152, 161.
- 82 *AM v The Queen* [2011] NSWCCA 237, [22] (Harrison J); *O'Sullivan v The Queen* [2012] NSWCCA 45, [114] (Davies and Garling JJ); *R v Lazarus* [2016] NSWCCA 52, [120]–[121], [125], [152]–[154] (Fullerton J); *R v Lazarus* [2017] NSWCCA 279, [103] (Bellew J).
- 83 *Family Violence – A National Legal Response*, above n 10, 1163.
- 84 NSW Department of Attorney-General and Justice, above n 32, 22.
- 85 Jennifer Temkin and Andrew Ashworth, 'The *Sexual Offences Act 2003*: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Criminal Law Review* 328, 342.

girls are groomed, coerced and/or subject to threats to submit, that is, entrapped by prevailing culture norms.<sup>86</sup>

Thus, a legal definition of consent that includes a defence for an accused who ‘reasonably believed’ or ‘believed on reasonable grounds’ in the complainant’s consent requires the fact-finder to interpret belief in consent by focusing on the complainant’s words and actions. This is an inherently subjective process since ‘reasonableness’ is a relative concept. Indeed, the apparent objective standard under section 61HE(3)(c) fits like a perfect jigsaw piece into the traditional conduct of the sexual assault trial, the structure of which has, historically, encouraged the jury to focus on the complainant’s behaviour, in order to determine what ‘signals’ she was sending to the defendant and invites the jury to blame the victim for the defendant’s belief. Thus, the inquiry remains the same whether the standard is subjective (an honest belief) or objective (a reasonable belief).

While ‘the law *demand*s full-blown sexual agency in women’,<sup>87</sup> fact-finders have the power to erase ‘women’s sexual freedom’, turning her into a passive subject, ‘at the same time ... [as] demand[ing] a very high level of sexual *responsibility*’.<sup>88</sup> It is also this paradox that defence counsel exploit during cross-examination since they can easily tap into entrenched myths about women’s and rape victims’ behaviours, thus providing jurors with ‘reasonable doubts’.

Even if a reasonable belief standard can be justified on the grounds that there has to be some measure for protecting bodily integrity and sexual autonomy, Munro considers that it is unclear whether a reasonable belief ‘will operate in practice to hold defendants to a higher level of accountability’.<sup>89</sup> A wide range of rape myths associated with female intoxication, sexually enticing behaviour and standards of morality allow fact-finders to formulate their own criteria of reasonableness in all the circumstances since the empirical literature shows that juries and laypeople interpret lack of resistance, lack of medical injuries, lack of force, and complainant intoxication as indicative of consent.<sup>90</sup> A meta-analysis found that progression through the criminal justice system was affected by perceptions of the complainant’s character and behaviour, for example

whether her character or reputation were perceived as being negative ... and her behaviours before (e.g., ... ‘risk-taking’ activities such as walking alone at night),

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86 See also Gavey, above n 54.

87 du Toit, above n 58, 62 (emphasis in original).

88 Ibid (emphasis in original).

89 Munro, ‘Constructing Consent’, above n 61, 945.

90 Janice du Mont and Deborah White, ‘The Uses and Impacts of Medico-Legal Evidence in Sexual Assault Cases: A Global Review’ (Sexual Violence Research Initiative Report, World Health Organization, 2007); Louise Ellison and Vanessa E Munro, ‘Of “Normal Sex” and “Real Rape”: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation’ (2009) 18 *Social and Legal Studies* 291; Antonia Quadara, Bianca Fileborn and Deb Parkinson, ‘The Role of Forensic Medical Evidence in the Prosecution of Adult Sexual Assault’ (Report, Australian Institute of Family Studies, 2013); Natalie Taylor and Jacqueline Joudo, ‘The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study’ (Research and Public Policy Series No 68, Australian Institute of Criminology, 2005).

during (e.g., she did not resist the assailant) and following an assault (e.g., she did not report the assault promptly ... ).<sup>91</sup>

Similarly, a more recent review of the literature concluded that

stereotypical beliefs around what constitutes ‘real’ rape ... and who is a ‘deserving’ victim ... rather than the availability of forensic or medical evidence availability, continue to have a profound and significant [e]ffect on decision-making processes and case outcome[s] for sexual offences.<sup>92</sup>

Thus, the use of heuristics can render an actual lack of consent by a complainant ineffective because of cultural beliefs about ‘real rape’. Snap judgments based on heuristics may blind the fact-finder to the applicable law, as discussed in the two case studies below:

People typically react to ethical dilemmas by first forming snap judgments and then rationalising or modifying [them] through further reflection ... These snap judgments are not arbitrary, but are generally based on rough rules of thumb or heuristics ... The *soundness of the judgments will then depend on the reliability of the heuristics involved*.<sup>93</sup>

## VI LOOKING AT ‘ALL THE CIRCUMSTANCES’ UNDER SECTION 61HE(4)

In considering whether a defendant had an honest belief and whether there were reasonable grounds for that belief, the fact-finder must ‘have regard to all the circumstances of the case’ as per section 61HE(4):

- (d) including any steps taken by the person to ascertain whether the alleged victim consents to the sexual activity, but
- (e) not including any self-induced intoxication of the person.

Thus, ‘a person can no longer rely on a mistaken belief in consent, however honest that belief may have been’<sup>94</sup> and must show evidence of the positive steps they took to ascertain the complainant’s consent. In practice, this is not how the law has been interpreted in two key judge-only trials (see case studies below).

A finding that no steps or inadequate steps were taken amounts to constructive knowledge of lack of consent,<sup>95</sup> although ‘it is misleading to describe the test in section 61HA(3)(c)’ (now section 61HE(3)(c)) as objective since it contains both subjective and objective elements.<sup>96</sup> But because ‘reasonable grounds’ is not a mathematical formula with no objective standard to refer to, the test relies entirely on how fact-finders interpret all the circumstances

91 du Mont and White, above n 90, 49. For a discussion of the factors that make up the ‘rape schema’, see Julia Quilter, ‘Reframing the Rape Trial: Insights from Critical Theory about the Limitations of Legal Reform’ (2011) 35 *Australian Feminist Law Journal* 23.

92 Quadara, Fileborn and Parkinson, above n 90, 13.

93 Jonathan Crowe and Lara Sveinsson, ‘Intimidation, Consent and the Role of Holistic Judgments in Australian Rape Law’ (2017) 42(1) *University of Western Australia Law Review* 136, 149 (emphasis added).

94 NSW Department of Attorney-General and Justice, above n 32, 13.

95 James Monaghan and Gail Mason, ‘Reasonable Reform: Understanding the Knowledge of Consent Provision in Section 61HA(3)(c) of the *Crimes Act 1900* (NSW)’ (2016) 40 *Criminal Law Journal* 246, 249.

96 Ibid 259.

in a particular case which is subject to their own heuristics, misconceptions and beliefs about human sexual behaviour. Even less objective is the fact that, in a judge-alone trial, a judge will not deliberate with another fact-finder, while, in a jury trial, every jury verdict is idiosyncratic since those twelve laypeople are unlikely to sit again as a jury on a sexual assault case.

Before the enactment of the NSW reforms, the draft Bill attempted to address rape myths by stating that ‘all the circumstances of the case’ did not include ‘the personal opinions, values and general social and educational development’ of the defendant in order to remind the fact-finder that the defendant’s belief had to be based on objectively reasonable grounds.<sup>97</sup> That particular qualification was subsequently omitted from the amending legislation. Despite its attempt to challenge cultural stereotypes, the draft Bill did not address the source of rape myths, that is, the fact-finder.

Perhaps the biggest problem with section 61HE(3)(c) is that it *assumes* that the fact-finder will not make unreasonable inferences about the complainant’s behaviour in deciding whether reasonable grounds existed for the defendant’s belief. From one fact-finder to the next, it is impossible to know the community standards each of them will consider to be reasonable. With no criteria specified in the NSW legislation as to what community standards are allowed or prohibited, it is an entirely subjective process. The second case study shows that judges are also susceptible to making unreasonable inferences.

By comparison, Victoria originally imposed an irrebuttable presumption under section 37(1)(a) of its *Crimes Act 1958*:

The fact that a person did not say or do anything to indicate free agreement to a sexual act ... is enough to show that the act took place without that person’s free agreement.

As Banks observes, the above provision ‘neatly avoids the dilemma of having to decide whether a defendant had acted like a reasonable person and ... what characteristics this reasonable person might be endowed with’.<sup>98</sup> As an irrebuttable presumption, it might have sent a strong message to fact-finders about the matters they could not take into account but has since been repealed.<sup>99</sup>

Despite the fact that the aim of the law on rape is to preserve ‘human dignity’,<sup>100</sup> as the case studies in this article demonstrate,<sup>101</sup> it is possible for a fact-finder to decide that sexual intercourse with a non-consenting person is not a criminal offence, thus permitting the physical and mental traumatising of a non-consenting person. The rest of this article will explain why ‘[o]ur law *is* ... unprincipled [and] inadequate in this regard’.<sup>102</sup>

97 Crimes Amendment (Consent–Sexual Assault Offences) Bill 2007 (Consultation Draft) s 61R(3)(b).

98 Banks, above n 71, 233.

99 Section 36(2)(l) of the *Crimes Act 1958* (Vic) was subsequently enacted to make the fact that a person who does not say or do anything to indicate consent a ‘circumstance’ that merely vitiates consent.

100 *R v Kuchener* (1993) 29 NSWLR 696, 697 (Kirby P).

101 *R v XHR* [2012] NSWCCA 247 (‘XHR’); *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017).

102 *R v Kuchener* (1993) 29 NSWLR 696, 697 (Kirby P) (emphasis added). Kirby P’s actual quote was: ‘[o]ur law is not unprincipled or inadequate in this regard’.



## VII CASE STUDY ONE: SEXUAL ASSAULT IN THE CONTEXT OF A PROFESSIONAL RELATIONSHIP

When the NSW Court of Criminal Appeal ('CCA') in *R v XHR* [2012] NSWCCA 247 interpreted the knowledge requirement set out in section 61HE, it revealed the faulty reasoning that fact-finders can fall into when dealing with the subjective notion of consent. The defendant was a massage therapist who digitally penetrated the complainant during a massage on 28 April 2011. He was charged under section 61I with committing sexual intercourse without consent, although he denied the charge.<sup>103</sup>

The prosecution argued that the defendant had not taken any steps to determine whether the complainant consented to digital penetration while being massaged. At the conclusion of the Crown case, the defendant asked the trial judge to direct a verdict of acquittal because there was 'no case to answer'. The judge agreed on the grounds that the evidence was not capable of proving 'the requisite guilty knowledge on the part of the accused'.<sup>104</sup>

But how had the trial judge arrived at this decision?

On appeal, the prosecution argued that the judge, as fact-finder, had found that, in order to establish the mental element for the offence, the prosecution had to prove that the complainant *communicated* her lack of consent to the defendant *prior* to the act of sexual intercourse. The trial judge had said that:

It is abundantly clear from the complainant's evidence that at no stage did she say or indicate ... in any way that she did not consent to the various things he did to her, and in particular the touching or massaging of her vagina and clitoris.<sup>105</sup>

In other words, the judge looked to the complainant's behaviour in order to determine if the defendant knew that she did not consent,<sup>106</sup> rather than looking for any steps the defendant had taken to ascertain whether the complainant consented, as required under section 61HE(4) (formerly section 61HA(3)(d)). The CCA agreed with the prosecution's interpretation that the trial judge must have made his decision

on the basis that the Crown was required to establish communication of absence of consent prior to the acts of sexual intercourse occurring. Otherwise, his Honour's reference to there being no communication of absence of consent would have been entirely irrelevant.<sup>107</sup>

This decision means that prosecutors do not have to prove that the complainant somehow communicated her lack of consent *before* a sexual act in order to prove that the defendant knew she did not consent. Indeed, to expect a person who is the recipient of medical or alternative therapies to announce beforehand that they do not consent to sexual intercourse would be nonsensical.

However, the trial judge did what fact-finders are encouraged to do as a result of the substantive law on consent – to focus on the complainant's behaviour

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103 *XHR* [2012] NSWCCA 247, [97] (Beazley JA).

104 *Ibid* [10] (Beazley JA).

105 *Ibid* [32] (Beazley JA).

106 *Crimes Act* s 61HA(3)(a), now s 61HE(3)(a).

107 *XHR* [2012] NSWCCA 247, [47] (Beazley JA; Hall and Campbell JJ agreeing).

rather than any steps taken by the defendant to determine if the complainant was consenting as per section 61HE(4). The CCA noted that because of the defendant's denial,

His Honour may have considered that ... there was no issue that no steps were taken by the [defendant] to ascertain whether the complainant was consenting ... However, ... if the evidence discloses that the accused person took no steps to ascertain whether the person consented, any further consideration of that matter cannot merely be put to one side.<sup>108</sup>

If an experienced trial judge gets it wrong, can we be confident that juries get it right? Clearly, section 61HE(4) is not a failsafe provision, because, unlike trial judges, juries do not have to provide reasons for their decisions. Thus, juries would still be able to reason, for example, that it was not necessary for a defendant to take any steps to ascertain that a complainant was consenting since her particular behaviour (flirtatious behaviour, drinking habits, etc) was enough, on its own, to signal her consent.

In fact, the CCA alluded to the possibility of a jury ignoring the requirement under section 61HE(4) when it recognised the 'ordinary human' interpretation of the situation when a complainant and defendant have been in a relationship:

whether an accused person took any steps to ascertain consent is inextricably bound up with all the other factors in the case. The words of the section expressly indicate this is so, but it must follow as a matter of ordinary human experience. Thus, if the accused and complainant are in an ongoing relationship, the failure to take steps to ascertain consent *may not be surprising* and so *may not be of any or much assistance* in the fact finding task posited by section 61HA(3) [now section 61HE(3)].<sup>109</sup>

However, the facts in *XHR* were quite different since the defendant and complainant were 'in a relationship of service provider and client' for massage, not sex, so that 'the failure to take steps to ascertain consent ... would likely be very relevant to' the defendant's state of mind regarding consent.<sup>110</sup> Thus, the fact-finder *was* required to consider the steps taken by the defendant before deciding if there was sufficient evidence to prove the third element of the offence (the defendant's knowledge) beyond reasonable doubt.<sup>111</sup>

## VIII CASE STUDY TWO: SEXUAL ASSAULT IN THE CONTEXT OF A 'ONE NIGHT STAND' – PROVING THE IMPOSSIBLE?

The controversial *Lazarus* case<sup>112</sup> is the most recent NSW case to consider the problem of proving the defendant's knowledge about consent. The case attracted a huge amount of commentary from the traditional and social media, possibly because Luke Lazarus was from a wealthy family who was assumed to have

108 Ibid [61] (Beazley JA).

109 Ibid [62] (Beazley JA) (emphasis added).

110 Ibid.

111 Ibid [63] (Beazley JA).

112 *Lazarus v The Queen* [2016] NSWCCA 52; *R v Lazarus* [2017] NSWCCA 279; *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017).

taken advantage of a naïve 18-year-old virgin.<sup>113</sup> He underwent two trials, two appeals and was eventually acquitted. Even though, on appeal, the error made by the trial judge may have led to his wrongful acquittal, the prosecution was not permitted to try him for a third time.

In 2013, Lazarus was charged under section 61I of the *Crimes Act* that in the early morning of 12 May 2013 he had sexual intercourse without consent with Saxon Mullins in a laneway behind the Soho nightclub in Sydney's Kings Cross.<sup>114</sup> At his first trial, the prosecution had argued that Lazarus knew that Mullins was not consenting 'or was at least reckless as to whether or not she was consenting'.<sup>115</sup>

The jury found Lazarus guilty on 19 February 2015. After serving 10 months of a five-year sentence, Lazarus' conviction was quashed on appeal by the CCA which also ordered a retrial.<sup>116</sup> The retrial on 3 April 2017 was a judge-alone trial in which Judge Tupman found Lazarus not guilty, a decision that attracted considerable controversy.<sup>117</sup>

It is instructive to look at the facts of the case to understand why Lazarus was successful in his first appeal, and why, after a retrial he was found not guilty, as well as why a second appeal overturned Judge Tupman's verdict since the retrial and appeals turned on the issue of proof of the defendant's knowledge of lack of consent.

On the night of 11 May and in the early hours of 12 May 2013, Mullins thought she had consumed approximately sixteen standard drinks, including the

113 See most recently, ABC Television, 'I Am That Girl', above n 13.

114 A non-publication order protected the identity of the complainant: *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017), although this order was subsequently overturned which allowed Saxon Mullins to tell her story on national television.

115 *Lazarus v The Queen* [2016] NSWCCA 52, [25] (Fullerton J).

116 *Ibid* [159] (Fullerton J).

117 See, eg, Kathleen Calderwood, 'Luke Lazarus Case Highlights the Need to Change Our Conversation about Sexual Consent', *ABC News* (online), 8 June 2017 <<http://www.abc.net.au/news/2017-05-06/luke-lazarus-case-should-make-us-reconsider-consent/8502144>>; Clementine Ford, 'Why the Acquittal of Luke Lazarus Goes to the Heart of Rape Culture in Australia', *The Sydney Morning Herald* (online), 27 July 2017 <[www.smh.com.au/lifestyle/news-and-views/opinion/why-the-acquittal-of-luke-lazarus-goes-to-the-heart-of-rape-culture-in-australia-20170727-gxjvvp.html](http://www.smh.com.au/lifestyle/news-and-views/opinion/why-the-acquittal-of-luke-lazarus-goes-to-the-heart-of-rape-culture-in-australia-20170727-gxjvvp.html)>; Richard Ackland, "'This Doesn't Get to Be Over for Me": The Rape Case that Put Consent on Trial', *The Guardian* (online), 21 July 2017 <[www.theguardian.com/society/2017/jul/21/this-doesnt-get-to-be-over-for-me-the-case-that-put-consent-on-trial](http://www.theguardian.com/society/2017/jul/21/this-doesnt-get-to-be-over-for-me-the-case-that-put-consent-on-trial)>; Ian Paterson, 'Speaking Out over Rape Case', *The Daily Telegraph* (online), 6 May 2017 <[www.dailytelegraph.com.au/news/nsw/luke-lazarus-case-womans-facebook-post-thanks-friends-for-support/news-story/efd325368f4ea5bd0766db5df659a93b](http://www.dailytelegraph.com.au/news/nsw/luke-lazarus-case-womans-facebook-post-thanks-friends-for-support/news-story/efd325368f4ea5bd0766db5df659a93b)>; Belinda Cleary and Stephen Gibbs, 'What Are You All Celebrating? Luke Lazarus and His Friends Party the Night Away at His Pub Baron Father's \$8M Vaucluse Mansion Just Hours after He Was Found Not Guilty of Raping 18-Year-Old Virgin in a Kings Cross Alley', *Daily Mail* (online), 6 May 2017 <<http://www.dailymail.co.uk/news/article-4475860/Luke-Lazarus-parties-Vaucluse-rape-charge-dropped.html>>; Belinda Jepsen, 'Woman Pens Emotional Post after Luke Lazarus, the Man She Says Raped Her, Walks Free', *Mamamia* (online), 6 May 2017 <[www.mamamia.com.au/woman-luke-lazarus-case/](http://www.mamamia.com.au/woman-luke-lazarus-case/)>; ABC Television, 'I Am That Girl', above n 13; Max Margan and Nicole Pierre, "'It Wasn't All for Nothing": Tragic Story of Teenage Girl Who Lost Her Virginity to a Stranger Outside a Kings Cross Nightclub Sparks Review of Sexual Consent Laws after Rape Trial that Shocked the Nation', *Daily Mail* (online), 8 May 2018 <<http://www.dailymail.co.uk/news/article-5701341/Saxon-Mullins-case-sparks-sexual-consent-laws-review-losing-virginity-outside-Kings-Cross-club.html>>.

consumption of most of a 600 mL Coke bottle half-filled with bourbon, before ending up in a laneway with Lazarus.<sup>118</sup> In the retrial, Judge Tupman accepted that Mullins' Coke bottle contained 10 standard drinks but that Mullins did not finish the bottle and only consumed seven standard drinks.<sup>119</sup> The contrary assumption, based on the evidence that Mullins and her friends were trying to save money by mixing their own drinks, is that Mullins consumed the whole bottle of 10 standard drinks. After doing so, Mullins described herself as: 'quite tipsy. I was jelly I guess. Yes, pretty tipsy I would say'.<sup>120</sup>

Judge Tupman accepted that Mullins had consumed another three standard drinks during the rest of the night, taking judicial notice of the amount of alcohol in the types of drinks consumed.<sup>121</sup> Despite the NSW provision that states a person cannot be taken to have consented if they are substantially intoxicated by alcohol or drugs (section 61HA(6)(a)), Mullins was not considered to have been substantially affected by alcohol.<sup>122</sup>

The lack of a context informed by alcohol intoxication meant that it was possible for the defence to attack Mullins' credibility by obtaining concessions from her about the amount of physical contact she had had before the sexual intercourse and her lack of resistance. No counter evidence was offered by the prosecution to show that a person whose mental and physical capacities are substantially impaired by alcohol cannot be expected to offer resistance.

Unfortunately, Judge Tupman's decision about Mullins' alcohol consumption was hampered by a lack of expert evidence, as she recognised:

There is no evidence of an expert nature ... about the levels of alcohol which might have been present in the complainant's blood and the likely impact it would have had on her levels of functioning, physical and cognitive. The Court is well aware that this sort of expert evidence is readily available and is called frequently in this Court. It was not called in this trial.<sup>123</sup>

The issue of complainant intoxication is controversial not least because of the view that the negation of consent in circumstances of substantial intoxication extends 'the criminal law to catch people who might not otherwise be regarded as criminals'.<sup>124</sup> Arguably, proof by the prosecution of the knowledge requirement beyond reasonable doubt is sufficient protection. Possibly the bigger problem is that even with expert evidence about the effects of alcohol, inexpert laypeople must determine the physiological effects of alcohol on a complainant's capacity to consent. There is no way of knowing how many cases involving intoxicated complainants result in acquittals, rather than intoxication being taken into account as evidence of negation of consent. Similarly, there is no way of

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118 *Lazarus v The Queen* [2016] NSWCCA 52, [40] (Fullerton J).

119 *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017) 16–18.

120 *R v Lazarus* [2017] NSWCCA 279, [13] (Bellew J).

121 *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017) 18.

122 *Ibid* 52–3.

123 *Ibid* 52.

124 Dobinson and Townsley, above n 81, 158–9.

knowing whether jury directions about the law on intoxication have an effect on negating rape myths about intoxicated complainants.<sup>125</sup>

Without the benefit of expert evidence, Judge Tupman based her findings on the evidence of Mullins, her friends, her observations of the complainant's behaviour on CCTV footage and 'the application of common sense and [her] experience of the world', including as a trial judge of 21 years.<sup>126</sup> Using that experience, Judge Tupman was satisfied that Mullins was 'able to perform some physical and cognitive tasks, including walking ... to get some food' with no signs of stumbling or falling on the street or in the Soho nightclub, concluding that '[t]his evidence does not support [Mullins'] own assessment of her level of intoxication'.<sup>127</sup> Thus, Judge Tupman did not take into account Mullins' intoxication when deciding whether or not she had consented to anal intercourse or whether or not Lazarus had a belief in consent based on reasonable grounds.

However, the use of common sense and experience of the world is an unreliable method for determining the effect of alcohol on a particular individual, unless that experience of the world involves regular, reliable assessments of the behaviour of people affected by different levels of alcohol.

### A Alcohol Intoxication

In Australia, a standard drink contains 10 grams of alcohol which is, on average, how much the human body can breakdown in one hour.<sup>128</sup> However, age, gender and weight determine how quickly a person processes alcohol, with women's bodies less able to do so compared to men's because they are composed of more fat tissue and contain less water.<sup>129</sup> In her six hours of drinking, Mullins consumed between 100 and 130g of alcohol. If a person on average can only process 10g per hour, at 4am when she was allegedly raped by Lazarus, Mullins would still have had between 40 to 70g of alcohol in her body.

Generally, two standard drinks per hour raises a person's blood alcohol level ('BAC') to 0.05 per cent, the legal limit of blood alcohol for drivers in Australia. If a person continues to drink, one standard drink per hour thereafter will maintain their BAC at 0.05 per cent. Since Mullins began her drinking by consuming seven to 10 standard drinks within an hour, she would have been four to five times over the legal limit.

In a sexual assault trial where intoxication is an issue, fact-finders need to be aware of the stages of alcohol intoxication, as set out in Table 2 below. This table shows that as the concentration of alcohol in the blood increases, a person experiences decreased inhibitions and loss of judgement and control, their

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125 Carl M Sims, Nora E Noel and Stephen A Maisto, 'Rape Blame as a Function of Alcohol Presence and Resistant Type' (2007) 32 *Addictive Behaviors* 2766, 2773.

126 *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017) 52.

127 *Ibid* 52–3.

128 Drinkwise Australia, *Standard Drinks Calculator* (30 November 2017) <[drinkwise.org.au/standard-drinks-calculator/#>](http://drinkwise.org.au/standard-drinks-calculator/#>); see also Andatech Resource Centre, *How Many Standard Drinks to .05?* (12 February 2016) <<http://www.andatech.com.au/resource/how-many-standard-drinks-to-05/>>.

129 See Andatch Resource Centre, *What Factors Affect our Blood Alcohol Level?* (22 January 2016) <<http://www.andatech.com.au/resource/factors-affecting-blood-alcohol-level/>>.

response to external stimuli decreases as does their ability to make quick decisions due to increased reaction time, they become disoriented and mentally confused, their speech becomes slurred and their balance is impaired. Many of these symptoms were described by Mullins.

Table 2 – Dubowski's Stages of Acute Alcohol Intoxication<sup>130</sup>

Blood Alcohol Concentration (%W/V; mg/100 mL of blood)	Stage of Alcoholic Influence	Clinical Signs/Symptoms
0.01–0.05	Sobriety	<ul style="list-style-type: none"> <li>No apparent influence</li> <li>Behaviour nearly normal by ordinary observation</li> <li>Slight changes detectable by special tests</li> </ul>
0.03–0.12	Euphoria	<ul style="list-style-type: none"> <li>Mild euphoria, sociability, talkativeness</li> <li>Increased self-confidence; decreased inhibitions</li> <li>Diminution of attention, judgment and control</li> <li>Loss of efficiency in finer performance tests</li> </ul>
0.09–0.25	Excitement	<ul style="list-style-type: none"> <li>Emotional instability, decreased inhibitions</li> <li>Loss of critical judgment</li> <li>Impairment of memory and comprehension</li> <li>Decreased sensory response; increased reaction time</li> <li>Some muscular incoordination</li> </ul>
0.18–0.30	Confusion	<ul style="list-style-type: none"> <li>Disorientation, mental confusion; dizziness</li> <li>Exaggerated emotional states (fear, anger, grief, etc)</li> <li>Disturbances of sensation (diplopia, etc) and of perception of colour, form, motion, dimensions</li> <li>Decreased pain sense</li> <li>Impaired balance; muscular incoordination; staggering gait, slurred speech</li> </ul>
0.27–0.40	Stupor	<ul style="list-style-type: none"> <li>Apathy; general inertia, approaching paralysis</li> <li>Markedly decreased response to stimuli</li> <li>Marked muscular incoordination; inability to stand or walk</li> <li>Vomiting; incontinence of urine and faeces</li> <li>Impaired consciousness; sleep or stupor</li> </ul>
0.35–0.50	Coma	<ul style="list-style-type: none"> <li>Complete unconsciousness; coma; anaesthesia</li> <li>Depressed or abolished reflexes</li> <li>Subnormal temperature</li> <li>Incontinence of urine and faeces</li> <li>[Impairment] of circulation and respiration</li> <li>Possible death</li> </ul>
0.45 +	Death	<ul style="list-style-type: none"> <li>Death from respiratory paralysis</li> </ul>

130 Table taken from Kurt M Dubowski, 'Manual for Analysis of Ethanol in Biological Liquids: Final Report' (Final Report, Department of Transportation, National Highway Traffic Safety Administration, January 1977) 94. This table is still in current use in the literature: see Mary Connell, 'Expert Testimony in Sexual Assault Cases: Alcohol Intoxication and Memory' (2015) 42–3 *International Journal of Law and Psychiatry* 98, 99; Jessica McKee et al, 'A Ten Year Review of Alcohol Use and Major Trauma in a Canadian Province: Still a Major Problem' (2016) 10 *Journal of Trauma Management & Outcomes* 1, 6.

Rather than expert evidence about the effects of alcohol on Mullins' mental and physical state, both trials relied on Mullins' evidence and that of other prosecution witnesses about Mullins' degree of intoxication, as well as CCTV footage of Mullins and her friends on the street and in Soho. For example, Mullins said that when she went to Soho: 'I was I guess a bit drunker than what I had been when we got there and I was, yeah a bit drunker I guess how you would describe it ... I was kind of out of it'.<sup>131</sup>

After more drinks at Soho, Mullins testified that she was 'slurring my words and I was kind of a bit uneasy on my feet',<sup>132</sup> suggesting that she was between the stages of 'excitement' and 'confusion' in Table 2, with an approximate blood alcohol content of 0.20. After further drinks were consumed at the World Bar, Mullins testified that she was 'drunk yes and more I guess just amplified the affect [sic] that was already there. So just slurring words and dancing funny and that kind of thing'.<sup>133</sup>

Mullins and her friends continued to go back and forth between the World Bar and Soho. She testified that around 3.30am when she first met Lazarus, 'I was drunk yeah, and I was pretty out of it I guess and just very I don't know, drunk is the only way I can really think to describe it'.<sup>134</sup>

Her descriptions of slurred words, 'dancing funny' and 'pretty out of it' also suggest that Mullins was in the stage of 'excitement' or 'confusion' which, as Table 2 shows, includes disorientation ('out of it'), disturbances of motion and impaired balance ('dancing funny') and slurred speech.

As a result of her BAC, Mullins may have also experienced a loss of critical judgement, impairment of comprehension and mental confusion, the more so in a dimly lit nightclub with which she was unfamiliar, making her vulnerable to sexual predation. With exaggerated emotional states (such as fear which she later described was the reason for obeying Lazarus' commands), Mullins' perceptions may have been disturbed, interfering with her ability to orient herself once she was in the laneway, while slowed reaction times and muscular incoordination may have impeded her ability to resist Lazarus' sexual overtures. If she experienced an exaggerated fear response, then her brain may have induced the freeze response as discussed below.

In two UK cases, *R v Bree*<sup>135</sup> and *R v Hysa*,<sup>136</sup> the Court of Appeal recognised that an intoxicated complainant may lack the capacity to freely consent even though she is not unconscious: 'as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious'.<sup>137</sup> While NSW requires a complainant to be substantially intoxicated (a term that is undefined), in *R v Hysa* the Court held that the prosecution is not required to prove that the complainant was so intoxicated that she was incapable of physical

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131 *Lazarus v The Queen* [2017] NSWCCA 279, [14] (Bellew J).

132 *Ibid* [15] (Bellew J).

133 *Ibid* [16] (Bellew J).

134 *Ibid* [18] (Bellew J).

135 [2007] EWCA Crim 804.

136 [2007] EWCA Crim 2056.

137 *R v Bree* [2007] EWCA Crim 804, [34] (Sir Igor Judge P).

resistance or communication. Thus, a person who is walking and talking may still lack the capacity to consent. UK case law is also clear that even though a complainant may have no memory of having said no, perhaps because of alcohol intoxication, lack of memory cannot be used to conclude that sexual intercourse was consensual.<sup>138</sup>

Thus, it is possible that Mullins was substantially intoxicated by alcohol, one of the grounds upon which it may be established a person does not consent to sexual intercourse and for determining Lazarus' state of mind. Because Mullins' vulnerability is likely to have been noticeable to someone in Lazarus' position, can it be said that his honest belief as to consent was based on reasonable grounds?

## B Honest Belief and Reasonable Grounds

In light of Judge Tupman's decision to acquit Lazarus in his second trial, the following discussion considers the scope and meaning of section 61HE(3)(c) (formerly section 61HA(3)(c)), that is, whether a defendant 'has no reasonable grounds for believing' that the complainant has consented.

While section 61HE(3)(c) 'does impose an objective test, in the sense that ... the grounds which might lead to a belief of consent must be objectively reasonable',<sup>139</sup> this test may be confusing for a jury which cannot consider whether the defendant's belief was a reasonable belief by asking what a reasonable person might have believed about the complainant's consent. Instead, fact-finders must consider what the defendant, himself, actually believed in all the circumstances and decide whether the accused had reasonable grounds for his belief.<sup>140</sup> As stated previously, the test is partly subjective and partly objective because fact-finders must put themselves in the shoes of the defendant and decide whether the complainant's lack of consent would have been obvious to someone with the mental capacity of the defendant in those circumstances.<sup>141</sup>

These circumstances include the complainant and defendant's relationship, their actions and words, the nature of the sexual act and the 'condition' of the complainant at the time of the sexual act.<sup>142</sup>

Discovering the subjective belief of the defendant and testing it from an objective standpoint to determine its reasonableness is a difficult task without an actual admission by the defendant. However, fact-finders can *infer* from the evidence that the defendant must have known and that he did indeed know that the complainant was not consenting,<sup>143</sup> which supposedly involves an objective standpoint, although it is actually the subjective interpretation of the fact-finder.

138 *R v Hysa* [2007] EWCA Crim 2056; *R v Tamedou* [2014] EWCA Crim 954.

139 *Lazarus v The Queen* [2016] NSWCCA 52, [156] (Fullerton J).

140 *Ibid.* It is clear from all the case law that 'it is the belief of the accused, and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable': *Re Conlon* (1993) 69 A Crim R 92, 98 (Hunt CJ at CL).

141 *O'Sullivan v The Queen* [2012] NSWCCA 45, [125] (Davies and Garling JJ).

142 *Lazarus v The Queen* [2016] NSWCCA 52, [144] (Fullerton J; quoting the trial judge).

143 *Ibid.*



A matter that received little coverage in Lazarus' second trial was the fact that Mullins was a virgin with little or no experience of sexual matters.<sup>144</sup> When she met Lazarus,<sup>145</sup> he told her that he was a part-owner of Soho and invited her to a VIP area of the club. Instead, Lazarus led her into a deserted laneway, thus deliberately misleading her about his intentions, which were to take her to an isolated area for sex. In the 50 metre lane, he walked her to the end where they were out of sight of CCTV cameras in order to add her to his 'trophy list' of women as he stated in evidence. Here they kissed, although the complainant was unsure for how long, which would accord with her state of alcohol intoxication. She then decided she wanted to leave, telling Lazarus:

I need to go back to my friend. I have to meet my friend.

No, stay here with me.

No, I really need to go.

At this stage, Lazarus' tone of voice was 'conversational' and Mullins communicated that she wanted to leave and did not want to have sex. When she turned away, Lazarus pulled her underwear down about three inches, a gesture that made his sexual intentions clear.<sup>146</sup> When Mullins pulled them up and told him that she had to leave, Lazarus ordered her to 'Put your fucking hands on the wall'. His aggressive tone of voice and swearing indicates that he was aware that Mullins was not consenting to his overture of pulling down her pants:

The complainant described the respondent's tone of voice at that point as frustrated and impatient, and more aggressive than it had been during the previous conversation. She put her hands on a nearby wooden fence. She explained why she did so, saying: I was just scared I guess, I didn't know what to do so I just did what he said.<sup>147</sup>

With her relatively high BAC possibly causing confusion and disorientation, perhaps Mullins quite simply did not 'know what to do'. The physiological process, known as the 'freeze response' or tonic immobility, is an involuntary, reflexive component of the fear response that is characterised by freezing in situations involving extreme fear 'when the options of flight or fight are unavailable as a coping/defense mechanism'.<sup>148</sup> A significant minority or a majority of victims will display tonic immobility during a sexual assault.<sup>149</sup>

It is doubtful that Lazarus could have had an honest belief on reasonable grounds that Mullins was consenting when he unsuccessfully attempted sexual intercourse up against the fence since when Mullins complied with Lazarus' order to put her hands against a fence. In fact, this looks like an act of submission, rather than free and voluntary agreement. Crucially, after her

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144 *Lazarus v The Queen* [2017] NSWCCA 279, [26] (Bellew J).

145 Facts taken from *ibid* [19]–[31] (Bellew J).

146 *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017) 31.

147 *Lazarus v The Queen* [2017] NSWCCA 279, [24] (Bellew J).

148 Yochai Ataria, 'Trauma from an Enactive Perspective: The Collapse of the *Knowing-How* Structure' (2015) 23(3) *Adaptive Behavior* 143, 143.

149 Jennifer M Heidt, Brian P Marx and John P Forsyth, 'Tonic Immobility and Childhood Sexual Abuse: A Preliminary Report Evaluating the Sequela of Rape-Induced Paralysis' (2005) 43 *Behaviour Research and Therapy* 1157; Grace Galliano et al, 'Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates' (1993) 8 *Journal of Interpersonal Violence* 109.

submission he took no steps to ascertain whether Mullins was consenting. This raises a key question for both the concept of consent and knowledge by the defendant – what degree of coercion is ‘incompatible with the freedom to exercise genuine sexual choice’<sup>150</sup> and incompatible with reasonable grounds for the defendant’s belief in consent?

After attempting vaginal intercourse unsuccessfully (when Mullins revealed that she was a virgin), Lazarus then pulled her stockings and underwear down to her ankles and ordered her to: ‘Just get on your hands and knees and arch your back’. But, with no experience in sexual matters, to what was Mullins consenting? And how would Lazarus be able to form a reasonable belief in Mullins’ consent to *anal* intercourse without taking steps to ascertain whether she was consenting to vaginal intercourse, or anal intercourse, or merely doing what she was told? When Mullins obeyed, Lazarus penetrated her anus, which she found to be painful. Despite the fact that Mullins told him to stop and kept saying throughout the alleged assault that ‘I have to go back to my friend’, he continued.

Mullins’ level of intoxication and the freeze response explains her obedience to his commands, and her helplessness in the face of a sexual act she did not consent to. Her demeaning position, on the ground, on her hands and knees quite clearly demonstrates the power dynamic between them.

After she made her way to Kings Cross Railway station, Mullins called a friend who found her in a great deal of distress. She reported the incident to the police and later underwent a medical examination at a nearby hospital, the results of which were consistent with penile-anal intercourse.

During cross-examination, Mullins ‘specifically denied the suggestion that she did not, at any stage, tell [Lazarus] to stop whilst penile/anal intercourse was occurring’.<sup>151</sup>

### C The First Appeal

After being convicted at his first trial, Lazarus successfully appealed on the grounds that the trial judge’s directions were in error.<sup>152</sup> He argued that the following direction implied that the trial judge had directed the jury that the defendant had to prove the complainant was consenting:

If you consider that [the complainant’s] actions *caused a belief in the mind of the accused* that she was consenting to penile-anal intercourse with him *and* you consider that such a belief was a reasonable one, then the third element would not have been proven.<sup>153</sup>

Fullerton J accepted that ‘one way’ of interpreting the words that the complainant’s actions ‘caused the appellant to have a belief that she was consenting’ ‘was to remind the jury that it was the appellant’s case ... that he

150 Susan Leahy, ‘Reform of Irish Rape Law: The Need for a Legislative Definition of Consent’ (2014) 43 *Common Law World Review* 231, 245.

151 *Lazarus v The Queen* [2017] NSWCCA 279, [31] (Bellew J).

152 *Lazarus v The Queen* [2016] NSWCCA 52, [21] (Fullerton J, with whom Hoeben CJ at CL and Adams J agreed).

153 *Ibid* [145] (Fullerton J) (emphasis altered).

believed she was consenting, not that she was directing them that it was for the appellant to prove' the fact of lack of consent.<sup>154</sup> Although it is difficult to read the latter interpretation into the above directions, the CCA concluded that the trial judge's directions about how the jury should 'approach their consideration of the appellant's state of mind' were in error.<sup>155</sup> Lazarus' conviction was quashed and a retrial was ordered.

### D Was the Jury's Verdict Unreasonable?

Lazarus had also appealed on the grounds that the jury's verdict was unreasonable because there was insufficient evidence upon which the jury could have been satisfied beyond reasonable doubt that Lazarus knew the complainant was not consenting.<sup>156</sup>

The CCA disagreed, deciding that the jury's verdict was reasonable because of the circumstances in which the sexual intercourse occurred:

although she willingly went into the laneway at his invitation (... [because] she was being ushered to a VIP area) and willingly kissed the appellant ... she did not consent to anal intercourse (or sexual intercourse at all) but unwillingly submitted to it, and the pain that it entailed, out of fear.<sup>157</sup>

Mullins' intoxication was considered to be relevant to proving the defendant's knowledge of that fact, including whether the prosecution had established that Lazarus had no reasonable grounds for believing that Mullins was consenting.<sup>158</sup> Whether the evidence was sufficient to prove that Lazarus had actual knowledge of lack of consent, or was reckless about consent or did not have a belief in consent turned on 'any steps taken by the appellant to ascertain whether the complainant was consenting', as required by section 61HA(3)(d) (now section 61HE(4)).<sup>159</sup> However, Lazarus had:

made no enquiry of the complainant before or during intercourse as to whether she was willing to have anal intercourse (or intercourse at all), or whether she was willing for him to proceed to try to achieve penetration when, even on his evidence, she expressed pain and declared that she was 'a virgin'.<sup>160</sup>

Thus, it was 'not open ... for the appellant to invite this Court to find as a fact that it was the conduct of the complainant preparatory to the anal intercourse that followed'.<sup>161</sup> After reviewing all the evidence, the CCA was satisfied that it allowed

the jury to have concluded that the appellant was at least reckless as to whether the complainant was consenting to anal intercourse and to have concluded that was his state of mind when he had anal intercourse with her.<sup>162</sup>

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154 Ibid [155] (Fullerton J).

155 Ibid [158] (Fullerton J).

156 Ibid [118] (Fullerton J).

157 Ibid [107] (Fullerton J).

158 Ibid [115] (Fullerton J).

159 Ibid [130] (Fullerton J).

160 Ibid.

161 Ibid [135] (Fullerton J).

162 Ibid [136] (Fullerton J).

As a result, it was open to the jury to find the defendant guilty. Thus, a jury and three judges of the CCA considered that there was sufficient evidence to prove that Lazarus either knew that Mullins was not consenting to anal intercourse or was reckless as to consent or had no reasonable grounds for his belief as to consent.

### E The Retrial

After his successful appeal against conviction, Lazarus was re-tried in a judge-alone trial on 3 April 2017. Mullins' pre-recorded evidence from the first trial was used as her evidence-in-chief.<sup>163</sup> There were several types of evidence that Judge Tupman took into account in deciding whether or not Mullins had consented to anal intercourse, including, as per section 61HA(6)(a), whether Mullins was substantially intoxicated by alcohol or any drug.

As discussed above, in deciding whether Mullins had freely and voluntarily consented to sexual intercourse, Judge Tupman decided that Mullins was not substantially intoxicated.<sup>164</sup> However, because of Mullins' immediate complaint to a friend and subsequent complaints to her sister and the police a few hours later, Judge Tupman found that 'the evidence does establish, beyond reasonable doubt that the complainant, in her own mind, did not consent to the anal sexual intercourse that occurred'.<sup>165</sup>

The key issue in the retrial was Lazarus' knowledge about Mullins' lack of consent. Central to this issue was Mullins' lack of physical resistance from the time Lazarus ordered her to put her hands on the fence to the end of penile-anal intercourse. Even though section 61HE(9) (formerly section 61HA(7)) states that 'a person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse', Mullins' lack of physical resistance was considered to have informed Lazarus' state of mind:

the evidence of both ... is that whilst ever this ... anal intercourse was occurring, the complainant did nothing physical to prevent the sexual intercourse from continuing.<sup>166</sup>

However, it appears that Judge Tupman was unaware of the freeze response, its relative frequency amongst rape victims,<sup>167</sup> and the fact that it can be mistaken for consent. Crucially, she preferred the evidence of Lazarus over Mullins, finding that Mullins' obedience to Lazarus' command to get on the ground had

a bearing on what his state of mind was about her consent ... When ... the complainant ... moved backwards and forwards when he successfully then

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163 *Criminal Procedure Act 1986* (NSW) s 306B. Judge Tupman granted leave for further oral evidence-in-chief to be given by the complainant in order to clarify certain evidence.

164 *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017) 10.

165 *Ibid* 70.

166 *Ibid* 37.

167 Heidt, Marx and Forsyth, above n 149, reported that over 52 per cent of child sexual abuse survivors in their study had experienced tonic immobility while Galliano et al, above n 149, reported that 37 per cent of rape survivors had experienced tonic immobility.

penetrated her anus, that too is relevant in assessing his state of mind about her consent to a continuation of ... anal intercourse, even if ... in her own mind, the complainant was not consenting to this.<sup>168</sup>

Thus, Judge Tupman looked to Mullins' behaviour in order to determine if the defendant knew that she did not consent,<sup>169</sup> rather than looking for any steps taken by the defendant to ascertain whether Mullins had consented, as required under section 61HE(4) (formerly section 61HA(3)(d)). This failure by the trial judge was a key issue in the second appeal.

Overall, Judge Tupman found that Lazarus was a witness of credibility and that Mullins' evidence was unreliable in many respects, so her Honour rejected Mullins' evidence that she had asked Lazarus to stop during the anal intercourse. In fact, Mullins' failure to say the word, 'stop', was central to the judge's conclusion that there was no evidence to support the proposition that Lazarus 'knew that the complainant was not consenting' or was reckless about whether or not Mullins consented.<sup>170</sup>

Instead, 'the evidence establishe[d] that the accused had a genuine and honest belief that the complainant was consenting'.<sup>171</sup> In addition, the prosecution had not proved that Lazarus' belief was not based on reasonable grounds because of evidence from one female defence witness about 'contemporary morality':

I do not accept ... [the Crown's argument about the unlikelihood of a virgin consenting to anal intercourse as her first sexual experience] ... when looking at the event together with the evidence of the young people who gave character evidence [for Lazarus] and especially the young woman to whose evidence I have just recently referred. Their evidence allowed some insight into the contemporary morality of that group of young people.<sup>172</sup>

This 'contemporary morality' included anecdotal evidence from one female friend of Lazarus' that anal intercourse during a one-night stand was not uncommon among her age group. As an easy short cut or heuristic, 'contemporary morality' appears to have been used by Judge Tupman as a justification for Lazarus' behaviour despite the obvious questions that arise: how is one woman's sexual experiences representative of 18-year-old virgins? Was this young woman an expert in contemporary sexual morés? Had she carried out a survey of her age group? Are there no other 'contemporary moralities'?

The use of anecdotal evidence combined with an ill-defined term such as 'contemporary morality' appears to preclude the possibility that anal sex could be based on unreasonable grounds and, like many other heuristics, nullifies the important attempt at law reform under section 61HE(3)(c). By justifying sexual intercourse with a non-consenting woman, the term 'contemporary morality' could be used to excuse any sexual act in any circumstances, a step not that far from the *Morgan* defence without any consideration of any steps taken by the defendant, as required under a communicative model of consent.

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168 *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017) 41.

169 *Crimes Act* s 61HE(3)(a) (formerly s 61HA(3)(a)).

170 *R v Lazarus* (Unreported, District Court of New South Wales, Judge Tupman, 4 May 2017) 71.

171 *Ibid.*

172 *Ibid* 72.

Judge Tupman's rationale for finding that Mullins did not consent to sexual intercourse but that Lazarus had reasonable grounds for his belief that she was consenting makes no sense:

when she was told to get down ... on all fours and arch her back, she did so as requested and *participated* in a further attempt to penetrate her vagina by moving back and forward ... When that did not work and [the accused] started to insert his penis into her anus she pushed back towards him and then back and forwards as the anal intercourse took place.<sup>173</sup>

How is it possible to make a finding that a woman who is not consenting actively participated in sexual intercourse by facilitating it? Although physical resistance is not a requirement for establishing lack of consent, it appears that Mullins' lack of physical resistance was fatal to the prosecution's case:

she did not say 'stop' or 'no'. She did not take any physical action to move away from the intercourse or attempted intercourse ... I accept that this ... amounts to reasonable grounds, in the circumstances for the accused to have formed the ... genuine belief, that in fact the complainant was consenting ... even though it was quick, unromantic, ... and ... may not [have] occurred if each had been sober.<sup>174</sup>

Judge Tupman did not turn her mind to the possibility that Mullins submitted to sex because of the implied threat in Lazarus' aggressive order and that 'her real intention [was] not to have sex but to avoid the harm threatened'.<sup>175</sup> Thus, like the *XHR* case above, Judge Tupman decided that Mullins was required to communicate her lack of consent through physical resistance during an intimate encounter with a stranger. In essence, the use of the heuristic, 'contemporary morality', blinded Judge Tupman to the applicable law which in NSW had overturned the *Morgan* defence. Irrespective of 'contemporary morality' and the lack of physical resistance, the fact-finder in *Lazarus* could not have been satisfied that the defendant had reasonable grounds for his belief as to consent unless she had investigated the steps taken by Lazarus to form his belief.

## F The Second Appeal

After Judge Tupman found Lazarus not guilty, on 31 May 2017 the prosecution appealed<sup>176</sup> against that finding on two grounds.<sup>177</sup> Only the second is relevant to this discussion, that is, whether her Honour had erred in failing to take into account any steps taken by Lazarus to ascertain whether the complainant was consenting when making a finding about his knowledge of consent,<sup>178</sup> with the Crown arguing that, under section 61HE(4) (formerly section 61HA(3)(d)), 'a

173 Ibid 73 (emphasis added).

174 Ibid 73–4.

175 Cowan, 'Choosing Freely', above n 14, 98.

176 Under the *Crimes (Appeal and Review) Act 2001* (NSW) s 107.

177 The first ground was whether the trial judge had erred in taking into account Lazarus' self-induced intoxication for the purpose of determining whether he had no reasonable grounds for believing that the complainant consented to the sexual intercourse contrary to s 61HA(3)(e) (now s 61HE(4)(b)). This ground was dismissed.

178 *R v Lazarus* [2017] NSWCCA 279, [9] (Bellew J).

“step” must be something more than just a state of mind’.<sup>179</sup> Although this second ground of appeal was upheld and Lazarus’ acquittal was quashed, the CCA refused to order a retrial.

Like the trial judge in *XHR*, Judge Tupman had failed to properly apply the law regarding the defendant’s state of mind even though the decision of the CCA in *XHR* had been clear that (i) a fact-finder must consider the reasonable steps taken by a defendant to ascertain whether the complainant was consenting, and, (ii) in a judge-alone trial, the judge’s reasons must ‘demonstrate, either expressly or by implication, that such a principle has been applied’.<sup>180</sup>

Instead, the CCA found that when Judge Tupman delivered her verdict, she had failed to consider the steps taken by Lazarus:

nowhere in her Honour’s reasons is there any reference, express or implied, to s 61HA(3)(d) [now s 61HE(4)], and thus no express or implied statement of the relevant principle. Those factors alone support a conclusion that the principle was not applied, and that error is established.<sup>181</sup>

The CCA said the word ‘step’ should take ‘its natural and ordinary meaning’, that is, ‘doing something positive’ according to the dictionary meaning: ‘to undertake measures to do something with a view to the attainment of some end’.<sup>182</sup> Thus

a ‘step’ ... must involve the taking of some positive act. However ... a positive act does not necessarily have to be a physical one. A positive act ... extends to include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.<sup>183</sup>

Even though the CCA upheld the appeal on this ground, the Court refused to order a retrial since it would be ‘oppressive to put [Lazarus] to the expense and worry of a third trial’<sup>184</sup> so that such an order would ‘give rise to oppression and unfairness’.<sup>185</sup> While referring to the fact that it was not the fault of Lazarus that both judges in his two trials had made errors, the CCA did not consider the unfairness to Mullins and the community in general who also were not at fault for these judicial errors.

## IX DISCUSSION AND CONCLUSION

The above discussion shows that the historical shift to defining rape with reference to a lack of consent was accompanied by inquiries into a defendant’s perception of consent, that is, what he himself believed, a notion that has the potential to undermine a complainant’s experience.

In order to prevent this, the defendant’s perception became subject to an objective test of reasonableness so as to prevent the *Morgan*-type situation where

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179 Ibid [137] (Bellew J).

180 Ibid [142] (Bellew J).

181 Ibid [144] (Bellew J).

182 Ibid [146] (Bellew J).

183 Ibid [147] (Bellew J).

184 Ibid [163] (Bellew J).

185 Ibid [168] (Bellew J).

an unreasonable belief in consent could trump a complainant's lack of consent, as recognised in the Second Reading speech to the amending legislation in NSW:

The subjective [*Morgan*] test is outdated. It reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards.<sup>186</sup>

In particular, the aim of recent reforms was to focus the trial on the defendant's actions by requiring the fact-finder to investigate any steps taken by the defendant in order to determine the reasonableness of his belief in consent. While consent is, generally, inferred from a woman's verbal and non-verbal behaviour, because of the commonality of the freeze response, and the unequal power relations in which sexual assault frequently occurs, the notion of consent must be reconfigured to take into account physiological as well as cultural responses to fear, intimidation and coercion.

Because it is not possible to analyse the reasons of juries, the reasons in two judge-alone trials reveal the ease with which the requirements for establishing the reasonableness of a defendant's belief in consent can be misunderstood or misapplied. If experienced judges get it wrong, how can we expect juries with no legal experience to apply the law correctly?

Both *Lazarus* and *XHR* reveal that the law reform enacted in NSW in 2007 in the form of (i) a definition of consent ('free and voluntary agreement') and (ii) a third option for satisfying the knowledge requirement, namely that a defendant's belief about consent is based on reasonable grounds,<sup>187</sup> has not necessarily achieved its aims. The errors made by the trial judges in *XHR* and *Lazarus* raise a number of questions:

- (i) How does the law capture non-verbal sexual negotiation?
- (ii) Is it possible for the law to deal with submission in the face of persuasion, coercion or fear?
- (iii) Should the definition of consent and reasonable grounds include a reference to body language (such as the freeze response)?
- (iv) Should there be a rebuttable presumption against consent if there is no verbal or physical communication of consent by the complainant?

The legal definition of consent assumes that clear, verbal communication is the norm within a sexual context. The dilemma from a legal point of view is how to capture the reality of sexual negotiation which often occurs in the presence of alcohol, late at night and between young people for whom assertive legal language such as, 'do you freely and voluntarily agree to have sexual intercourse?' is antithetical to the vernacular of that age group.

While the provisions governing consent and reasonable belief attempt to provide guidance on the circumstances in which consent will be negated, they

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186 New South Wales, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584 (John Hatzistergos).

187 *Crimes Act* s 61HA(3)(c) (now s 61HE(3)(c)).



provide little guidance for the grey area of human behaviour where forms of persuasion, coercion and/or abuse of power are commonly used to gain someone's consent, as the #MeToo phenomenon demonstrates.<sup>188</sup>

Although the 'introduction of an objective fault element discourages the assumption of consent',<sup>189</sup> any standard of reasonableness is subject to perceived community standards or 'contemporary morality' about sexual behaviour which filters fact-finders' interpretations of the evidence. For example, an objective test has 'frequently resulted in the defence counsel drawing on information about the complainant's sexual history, or to appeal to rape myths in order to show that the defendant could have held that belief'.<sup>190</sup>

Thus, law reform is limited in its ability to bring about a desired cultural change in relation to community standards<sup>191</sup> if standards of sexual behaviour remain nebulous and undefined. Without explicit legislative guidance, standards of consent and reasonableness will vary from fact-finder to fact-finder since the idea of free and voluntary agreement is entirely contextual. Recent focus groups of sexual assault workers, legal professionals and community members perceived the objective standard to be 'biased in favour of the defendant and created an onus on the victim to resist or protest'; one that 'enables jury members to apply outdated assumptions about inferred or continuing consent', and 'to believe that consent was present when a former sexual partner does not protest or resist'.<sup>192</sup>

In 2007, the NSW government missed an important opportunity to convey a message about community standards and 'to impose affirmative duties that would have recognised true sexual autonomy',<sup>193</sup> rather than the unsatisfactory situation in *Lazarus* where sexual intercourse with a non-consenting woman was found not to be a criminal offence (even if the verdict was overturned on appeal).

*XHR* and *Lazarus* both illustrate Munro's observation that modernising legislation contains:

legal standards that at first sight appear to be exacting [but] will often fail to translate into demanding thresholds when removed from the lofty isolation of abstract theorizing and transposed into the messy realities of everyday socio-sexual life.<sup>194</sup>

While the judges in *XHR* and *Lazarus* were not ignorant of the applicable law, research on the use of heuristics to deal with complex fact situations allows us to understand the judicial errors made since the focus on a complainant's behaviour appears to be deeply rooted in both legal and social cultures. In *XHR*, the trial judge expected the complainant to have communicated her lack of

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188 See Me Too, *You Are Not Alone* (30 January 2018) <<https://metoomvmt.org/>>; Wikipedia, *Me Too Movement* (30 January 2018) <[https://en.wikipedia.org/wiki/Me\\_Too\\_movement](https://en.wikipedia.org/wiki/Me_Too_movement)>.

189 *Family Violence – A National Legal Response*, above n 10, 1169 [25.165].

190 *Ibid* 1166, quoting Australian Institute of Family Studies, Submission No FV 222 to Australian Law Reform Commission, *Family Violence – A National Legal Response*, 2 July 2010.

191 *Family Violence – A National Legal Response*, above n 10, 1125–6.

192 Wendy Larcombe et al, "I Think It's Rape and I Think He Would Be Found Not Guilty": Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law' (2016) 25 *Social & Legal Studies* 611, 617.

193 Banks, above n 71, 235.

194 Munro, 'Constructing Consent', above n 61, 947.

consent to digital penetration while being massaged even though she had not sought sexual services from the defendant. His Honour relied on the age-old notion that a complainant is responsible for protecting herself and doing something physical to stop a sexual assault, rather than the defendant having to take steps to obtain consent, as if women need to be perpetually prepared for men's sexual desires.

In *Lazarus*, the trial judge also focused on the complainant's behaviour, interpreting what she did not say or do as signalling her consent with reference to the heuristic 'contemporary morality'. Thus, the judge decided that Mullins' lack of verbal and physical resistance formed the reasonable grounds for Lazarus' belief as to consent, ignoring the reality that Mullins' behaviour was governed by where Lazarus had taken her (a deserted laneway), what Lazarus ordered her to do and her fear or freeze response. This produced the contradictory situation where the complainant had not consented to anal intercourse but the defendant's belief about consent was based on reasonable grounds. In accepting Lazarus' evidence, her Honour failed to examine any steps he had taken to form his belief, concluding that Lazarus had no knowledge of Mullins' lack of consent, a position similar to the common law position under *Morgan*. Arguably, submission to a defendant's commands in a deserted laneway is not the behaviour envisaged by free and voluntary agreement and not the basis upon which any reasonable belief could be formed.

In neither appeal was there 'comprehensive judicial consideration of the level of coercion that is incompatible'<sup>195</sup> with 'free and voluntary agreement' and with an honest belief based on reasonable grounds. In order to institute real change and provide consistency on 'what constitutes genuine sexual choice',<sup>196</sup> it is necessary for legislation to not only provide the parameters around free and voluntary agreement beyond various vitiating factors, but also guidance on what does and does not amount to reasonable grounds for a belief in consent. In other words, the terms, 'freely', 'voluntarily' and 'reasonable' give fact-finders a large degree of flexibility because they are subject to individual interpretation. Thus, clear parameters are necessary to restrict interpretations that are based on underlying biases or prejudices.

If the law allows the defendant's subjective state of mind to be taken into account by fact-finders, it should also ask whether the defendant took into account the complainant's subjective state of mind and the options available to her (rather than his assumptions about her state of mind) when fact-finders are deciding consent and reasonable grounds for belief in consent.

This means that reasonable grounds for belief should be made with reference to the complainant's actual circumstances, such as age, inebriation, and access to help. For example, Mullins was a sexually inexperienced, inebriated, 18-year-old alone with Lazarus in a dark alleyway with no access to help and in a state of fear.

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195 Leahy, above n 150, 246.

196 Ibid 247.

Because there are no objective criteria set out in the legislation for determining what amounts to an honest belief on reasonable grounds, heuristics such as ‘contemporary morality’ fill the gap. I am reminded of MacKinnon’s insight that ‘rape law takes women’s usual response to coercion – acquiescence, the despairing response to hopelessness to unequal odds – and calls that consent’.<sup>197</sup> With the smokescreen of ‘contemporary morality’, rape becomes indistinguishable from normative sexual relations.

While consent is a vessel that will be filled by the moral values of the fact-finder, the solution

is not to abandon consent as the transformative channel between the permissible and the condemnable, but to reformulate it in a way that enables it to take greater account of the peculiarities of context, constraint, and construction.<sup>198</sup>

The concept of free and voluntary agreement only gets us so far since it does not solve the fundamental problem of heuristic reasoning in sexual assault trials. Indeed, in any sexual assault trial, there will be a hierarchy of experiences which are in competition with each other. But whose experience of the world will triumph when there is no expert evidence to assist the fact-finder? In *Lazarus* there was the:

- (i) actual belief of Lazarus who had had numerous sexual experiences, and had intimate knowledge of the nightclub owned by his family where he appears to have sought out young women to create a ‘trophy list’;
- (ii) experiences of a judge in a privileged position with 21 years as a judicial officer who relied on the heuristic of ‘contemporary sexual morality’ in 2017 (in other cases it will be the combined experiences of 12 laypeople from various backgrounds); and
- (iii) actual belief of a sexually inexperienced, 18-year-old complainant who was possibly substantially affected by alcohol.

Without legislative guidance, fact-finders can only use their subjective ‘experiences of the world’ which are unlikely to include information about human physiology, such as the freeze response, and exaggerated emotional responses (such as fear) of those affected by alcohol.

It is unsatisfactory for a fact-finder’s ‘experiences of the world’ to mean that she failed to ask: why a sexually experienced Lazarus needed to aggressively order Mullins to do his bidding if he believed she was consenting; was Lazarus’ desire for anal sex with a woman on all fours an act of power and subjugation to secure Mullins’ compliance; and did Mullins’ lack of physical resistance amount to fearful submission rather than free and voluntary agreement?

Although reforms aimed at introducing a communicative model of consent may have won the battle in terms of a definition of consent that endorses autonomy, the war is lost by a model that permits ‘contemporary morality’ to justify the subjective state of mind of a defendant in relation to the offence of sexual intercourse without consent.

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<sup>197</sup> Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) 168.

<sup>198</sup> Munro, ‘Constructing Consent’, above n 61, 941.

As per Figure 1 below, solutions need to recognise that consent and reasonable belief are relational concepts, dependent on the parties' understandings but also influenced by the internalised cultural norms and beliefs of the fact-finder. How does one legislate in relation to such emotionally and psychologically complex issues? In particular, how does the law make the defendant's belief referable to the complainant's lack of consent?

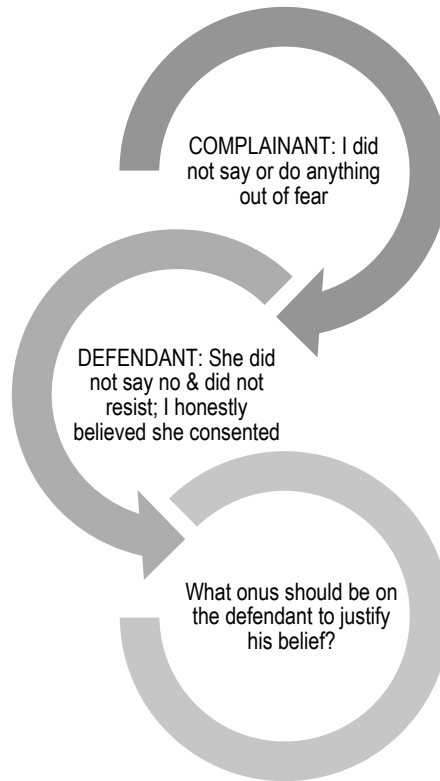


Figure 1: The relational concepts of consent and belief as to consent

As discussed above, many jurisdictions have imposed a requirement on the defendant to take reasonable steps to ascertain consent. But this article reveals that experienced fact-finders failed to focus on the defendant's behaviour as required under section 61HA(3)(d) of the *Crimes Act*. Further guidance is necessary to inform fact-finders that consent and reasonableness are related concepts, such that the sole focus of a trial cannot be on the complainant's words and behaviours but must encompass the corresponding overtures responses and/or of the defendant.

One way to ensure a broader focus on the defendant's behaviour is the following rebuttable presumption – if a fact-finder decides beyond reasonable

doubt that the complainant did not consent, the defendant is guilty of the offence of sexual intercourse without consent *unless* the fact-finder is satisfied that the defendant had a belief in consent, based on reasonable grounds, as a result of the steps he took to ascertain the complainant's state of mind. This would impose an evidentiary threshold before a decision could be made that a defendant's belief was based on reasonable grounds which, in turn, may require the defendant to satisfy an evidential onus about the steps he took to ascertain consent, as recommended by the Victorian Law Reform Commission.<sup>199</sup> This approach would ensure that a fact-finder could not ignore the requirements under section 61HA(3)(d), as happened in *Lazarus* and *XHR*, before delivering a verdict.

The law on consent should also prevent the use of particular heuristics about the sexual availability of women from the fact-finder's inquiry into reasonable grounds in order to prevent fact-finders using heuristics to avoid considering steps taken by the defendant. Thus, further qualifications should be added to qualify section 61HA(3)(c) as set out in italics below:

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

- (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (e) not including any self-induced intoxication of the person.
- (f) *The following matters are insufficient to amount to reasonable grounds for a defendant's belief in consent, either on their own or together:*
  - (i) the complainant's state and/or style of dress;
  - (ii) the complainant's consumption of alcohol or drugs;
  - (iii) the complainant's silence;
  - (iv) the complainant's lack of physical resistance.

Relevant judicial directions would need to be drafted to warn fact-finders about the physiological response known as the freeze response to explain that there may be good reasons why a complainant remained silent or offered no physical resistance. This would assist in preventing fact-finders from using silence/lack of resistance as reasonable grounds for a defendant's belief in consent, as happened in *Lazarus*.

The above reform takes into account Cowan's view that the 'law should look to the substantive question of whether or not the acts were mutual ... and how they were *negotiated*'<sup>200</sup> rather than the binary of a passive victim saying yes or no to an active protagonist.

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199 Victorian Law Reform Commission, *Sexual Offences: Final Report*, Final Report (2004) lxxii. Recommendation 174 stated:

The accused must produce some evidence that he had an honest belief that the complainant consented before this matter can be left to the jury. The mere assertion by an accused that he believed the complainant was consenting shall not constitute sufficient evidence of an honest belief as to consent.

This is also a recommendation of the United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, UN Doc ST/ESA/329 (2010) 26.

200 Cowan, 'Choosing Freely', above n 14, 101 (emphasis in original).

In this way, a defendant's belief would become referable to the complainant's state of mind in order to prevent the situation where a fact-finder can decide that a defendant is not guilty of an offence for having sex with a non-consenting person. This approach may also prevent the use of heuristics like 'contemporary morality' to reason that because a complainant was silent or did not resist, the defendant's belief was reasonable in the circumstances.

Since fact-finders are not educated about the freeze response and the effect of inebriation on behaviour, guidance is also needed on what does not amount to free and voluntary consent. Thus, an extension of the matters that negate consent is warranted under section 61HA(4):

The fact that a person froze, or was unable to respond to a sexual act, or did not say or do anything to indicate free agreement in response to a sexual act is enough to show that the act took place without that person's consent.<sup>201</sup>

Because free and voluntary agreement is unlikely in circumstances of coercion even without physical violence, amendments to section 61HA(6) are also needed. While section 61HA(6)(b) and (c) state that 'the grounds on which it may be established that a person does not consent to sexual intercourse' include 'intimidatory or coercive conduct, or other threat' and 'the abuse of a position of authority or trust', respectively, these sub-sections do not take into account the range of unequal relationships in which a person may submit to sexual intercourse rather than freely and voluntarily agreeing. Thus, section 61HA(6) should also include

the fact that a person was in a position of inequality with respect to another person, as a result of economic, social, cultural and/or religious reasons, or as a result of being groomed for sex.

In order to deal with the problem in *Lazarus*, where no expert evidence was adduced by the prosecution to assist the fact-finder in determining whether Mullins was substantially intoxicated, the word 'substantially' should be removed from section 61HA(6)(a) since this word has no medical meaning. It should be replaced with medically accurate terminology which explains the relationship between specific blood alcohol levels and particular behaviours (see Table 2).

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201 This suggested reform includes the wording of the former *Crimes Act 1958* (Vic) s 37(1)(a).