Check for updates

Article

The Journal of Criminal Law

The Journal of Criminal Law
2020, Vol. 84(4) 293–311
© The Author(s) 2020
Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/0022018320943056
journals.sagepub.com/home/clj
SAGE

Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence

Susan SM Edwards
University of Buckingham, UK

Abstract

When women die at the hands of men, a not infrequent defence is that she consented to, or initiated, the beating, strangulation and penetration which contributed to her death. While strangulation has been a typical method of killing in male on female intimate partner homicide[1] for many decades ('thou little recognised), what has changed is men's excuses for their violence. Excuses such as 'She made me lose my self-control in an argument' or 'She was unfaithful to me' are being supplanted by 'She consented to rough sex'.[2] Since the dead cannot speak, nor is there any property in the dead, the defendant's tactic of impugning the deceased's character cannot be easily rebutted, and he, while maligning her in this way, may profit from a lighter sentence. Law reformers, politicians, academics and activists[3] are pressing for legal reform to shut down this misogyny. On 16 June 2020, during the Public Committee stage of the Domestic Abuse Bill,[4] cls 4 and 5 were approved. Clause 4, 'No defence for consent to death', provides '(1) If a person ("A") wounds, assaults or asphyxiates another person ("B") to whom they are personally connected as defined in section 2 of this Act causing death, it is not a defence to a

勒殺

1. SSM Edwards, 'The Strangulation of Female Partners' [2015] Crim LR 949–966.
2. SSM Edwards, 'Assault, Strangulation and Murder—Challenging the Sexual Libido Consent Defence Narrative' in A Reed and M Bohlander (with N Wake and E Smith) (eds), Consent: Domestic and Comparative Perspectives (Routledge, Abingdon 2016), ch. 6, 88-103. See also H Bows and J Herring (2020) Getting Away with Murder? A review of the 'Rough Sex' Defence, J Crim L, Epub ahead of print 29 June 2020.
3. 'We Can't Consent to This' (WCCTH). See <https://wecantconsenttothis.uk/> accessed 30 March 2020. see also *What can be consented to? Briefing on the use of "rough sex" defences to violence.* August 2019. See <https://static1.squarespace.com/static/5c49b798e749409bfb9b6ef2/t/5d4710cd6a811c0001ff01c0/1564938448659/WCCTT+briefing+Consent+Defences+-+2019+09.pdf> accessed 30 March 2020.
4. Public Bill Committees, Domestic Abuse Bill, Ninth Session, 16 June 2020. See <https://hansard.parliament.uk/Commons/2020-06-16/debates/131971c0-0952-4c24-8f6c-3147495a3d8d/DomesticAbuseBill(NinthSitting)> accessed 17 June 2020. Cols 312–313.

Corresponding author:
Susan SM Edwards, Professor Emeritus, School of Law, University of Buckingham, Buckingham MK18 1EG, UK.
E-mail: susan.edwards@buckingham.ac.uk

This article was updated to correct a footnote marked on page 300.

(2) 第(1) 款適用於死亡是否發生在施虐受虐狂遭遇過程中

prosecution that B consented to the infliction of injury. (2) Subsection (1) applies whether or not the death occurred in the course of a sadomasochistic encounter'. Clause 5, 'No defence for consent to injury', provides '(1) If a person ("A") wounds, assaults or asphyxiates another person ("B") to whom they are personally connected as defined in section 2 of this Act causing actual bodily harm or more serious injury, it is not a defence to a prosecution that B consented to the infliction of injury or asphyxiation. (2) Subsection (1) applies whether or not the actual bodily harm, non-fatal strangulation, or more serious injury occurred in the course of a sadomasochistic encounter'. These two new clauses would prevent the alleged consent of the victim from being used as a defence to a prosecution in intimate partner homicides and non-fatal assault which result in s 47 assault occasioning actual bodily harm, Offences Against the Person Act 1861, or more serious injury. Additional new clauses including, proposing that consent of the Director of Public Prosecutions would be required, in the case of death, to accept a charge to anything less than murder (cl 6); the requirement to consult with the family of the deceased regarding charges (cl 7); the prohibition of reference to sexual history of the deceased in domestic homicide trials (cl 10); anonymity of victims of domestic homicide (cl 11); and anonymity of domestic violence survivors (cl 14); the Parliamentary Under-Secretary of State for Justice (Alex Chalk), while sympathetic, said there were difficulties with the clauses in their present form.[5] Of the proposal to make non-fatal strangulation[6] (cl 8) a standalone offence, he considered that 'creating a new offence could limit the circumstances covered, and create additional evidential burdens'.[7] These motions reflect the several debates since October 2019, when MPs, Harriet Harman and Mark Garnier, introduced the 'No defence for consent' amendment to the second reading of the Domestic Abuse Bill.[8] Since men also plead the 'sexual consent defence' on 'first dates', which may fall outside the definition of 'domestic abuse' as set out in the Bill,[9] a loophole also recognised by Alex Chalk at the Public Committee stage, 16 June 2020, this too will be addressed.[10] The murder of Grace Millane, in New Zealand[11] in 2018, murdered on a 'first date' provides such an example.

Keywords
Murder, sadomasochism, rough sex, consent, character evidence, rape

5. See Ibid, Col 313.
6. Public Bill Committees, Domestic Abuse Bill, Tenth Session 16 June 2020, Col 339. See <https://hansard.parliament.uk/Commons/2020-06-16/debates/3fa90c32-4bc5-4477-ab1e-aaf665da56e6/DomesticAbuseBill(TenthSitting)> accessed 17 June 2020. (First introduced by MPs Harriet Harman and Laura Farris <https://publications.parliament.uk/pa/bills/cbill/58-01/0096/amend/domestic_rm_pbc_0428.1-7.html> accessed 30 March 2020.
7. Ibid, Col 339.
8. See < https://publications.parliament.uk/pa/bills/cbill/2019-2019/0002/amend/domestic_daily_pbc_1030.1-4.html> accessed 18 June 2020.
9. Domestic Abuse Bill no 141. Ordered, by The House of Commons, to be Printed, 17 June 2020. The government definition of domestic abuse is 'any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality'.
10. See (n 4) Col 321.
11. See <https://news.sky.com/story/grace-millane-murdered-by-man-seeking-total-domination-court-hears-11866017> accessed 30 March 2020. See Louise Perry 'Women Are Being Strangled, Choked, Slapped and Spat on During Sex—We Need to Stop Pretending This Is Normal' *The Telegraph* (3 March 2020) https://www.telegraph.co.uk/women/life/women-strangledchoked-slapped-spat-sex-need-stop-pretending/ accessed 11 July 2020. Louise Perry 'A Fifty Shades of Grey Area Over Violent Sex' *Standpoint* (25 April 2019) see <https://standpointmag.co.uk/issues/may-2019/a-fifty-shades-of-grey-area-over-violent-sex/> accessed 30 March 2020.

Introduction

In this article, I explore some of those cases where women have been killed or injured by intimate partners and 'first dates' following strangulation, beating, penetration with objects and rape, and where the defendant alleges that the victim consented to 'rough sex'. I consider the current law on consent, first, within the context of the common law as it relates to criminal assault, following *R v Brown*,[12] (which the Domestic Abuse Act 2020, cls 4 and 5, when passed into law, proposes to limit) and, second, as laid down in statute as it pertains to sexual offences. I am also concerned to explore the conundrum which arises where admissibility of character evidence, of the victim, where when the index offence is deemed a 'sexual offence' (Sexual Offences Act (SOA), 2003, s 78) is governed by the Youth Justice and Criminal Evidence Act (YJCEA), 1999, s 41, yet where there is violent assault, strangulation and death otherwise deemed 'non sexual' offences (though the motive is sexual), the Criminal Justice Act (CJA), 2003, s 100, applies. It is suggested that the CJA, s 100, allows a greater latitude to the defence to engage in so-called 'kite flying' and sexual innuendo[13] about the victim and her 'sexual history' than when an offence is defined as 'sexual' and thereby governed by YJCEA, s 41. I am also concerned that where women are abused in this way the sadism inherent in the violence is rarely considered in an assessment of dangerousness or seriousness for sentencing purposes. Sadism is only expressly recognised in statute when considering minimum terms for mandatory life sentences (child cruelty excepted)[14] (CJA, s 269, sch 21(5)(2)(e)) and even here where defendants are convicted of murder, arising from intimate partner violence, a perusal of cases suggests that the 'sadistic' element is infrequently adduced as part of legal submissions at the sentencing stage.[15] Furthermore, where the verdict is 'unlawful act manslaughter' and 'rough sex' and consent arguments have been appropriated by the defence, sentencing disparities are considerable. There is further injustice regarding the final plea since when the defence alleges consent to 'rough sex', when the defence contests the unlawfulness of the act(s) and when the defence contests the proximate cause of death, the prosecution, in some cases, has accepted a plea bargain to gross negligence manslaughter (GNM) (see the death of Natalie Connolly below). The inappropriateness of GNM is obvious since such a finding refutes complicity, intention and recklessness, the only wrong committed by the defendant is a failure of a duty to act, to seek help and to protect. Sentencing here is bound by statutory guidelines,[16] and as illustrated in *R v Bowler*[17] and *R v Broadhurst*,[18] (the Connolly case), the sentences are often derisory. It was the 'plea negotiation' in *Broadhurst* which prompted Harriet Harman MP and Mark Garnier MP, during the Second Reading of the Domestic Abuse Bill, to table the amendment for a 'no drop' murder policy (cl 6) where a consent to 'rough sex' defence is adduced. (At this point of writing, it has not been accepted into legislation.)

What is clear is that legal reform on its own is not enough since defendant's neutralisations of responsibility for sexual violence that blame women are echoes of the cultural representations of women's insatiable desire for sexual violence redolent in misogynist film, advertising, fiction[19] and

12. [1994] 1AC 212.
13. See *R v Miller* [2010] Cr App R 19 [138]. See also *R v Brewster* [2011] 1 WLR 601.
14. It is to be noted that 'sadism' as an aggravating factor is absent as a sentencing consideration from all other offences. However, 'Gratuitous degradation of victim and/or sadistic behaviour' is a factor under Sentencing Council guidelines for Child Cruelty and 'Causing or allowing a child to suffer serious physical harm' or 'to die'. See <https://www.sentencingcouncil.org.uk/wp-content/uploads/Child-Cruelty-definitive-guideline-Web-1.pdf> [10], accessed 30 March 2020. I am grateful to Rudi Fortson QC for this point.
15. *R v Mustafa* [2019] EWCA Crim 1926 [15] acknowledged as 'sadistic' the killing of a wife. *R v Aziz* [2019] EWCA Crim 1568 [26] acknowledged as 'sadistic' the rape and murder of a 14-year-old girl.
16. Manslaughter Definitive Guideline Sentencing Council see <https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-definitive-guideline-Web.pdf> accessed 30 March 2020.
17. [2015] EWCA Crim 849.
18. [2019] EWCA Crim 2026.
19. EL James, *Fifty Shades of Grey* (Vintage Books, London 2011).

journalism.[20] Andrea Dworkin[21] and Catherine MacKinnon[22] have long argued that such representations provide the scripts for men's sexual violence against women. These narratives are culturally determined, and a male-dominated society produces scenarios of female acquiescence. Such sexually coded tropes are transcribed into defences of domestic violence, rape and death and inform and shape the legal narrative which has, until now, resisted the feminist challenge. The courtroom has been transformed into a theatre of pornography where pain is rearranged as pleasure and where the tropes of pornography reverberate with the message that no matter what you do to a woman she will like it. Such thinking impinges on judicial reasoning and on legal method, such that this is not only a feminist issue, it is a justice issue and those who have a role in whatever form including in the cultural representation of women must take responsibility for this crisis and resist and silence this narrative. Dworkin's prophetic warning, when speaking of pornography, in 1991, resonates even more poignantly at this moment. She said

> And if you want to continue to believe that this is a matter for debate instead of an emergency and a time for action, I want to tell you, how many women will die during the course of the debate you would like to have.[23]

The increasing prevalence of this 'rough sex' defence marks a shift in male excuses for killing intimate partners. Hitherto, men alleged 'her' infidelity, or that 'she' had ended the relationship,[24] or held other aspects of 'her' conduct, responsible. In truth, where men have killed or injured women, violence and intimidation is a part of an ongoing strategy of coercion and control, strangulation and choking being the ultimate form of control. Recent law reform, in restricting legal opportunities for men's excuses for violence, may have contributed, albeit unintentionally, to this increased use by men of 'sexual consent/rough sex' as part of a defence strategy. Let me set out this supposition. First, the Coroners and Justice Act (CandJA) 2009, s 55(6)(c), expressly excludes from the partial defence of loss of control manslaughter 'the fact that a thing done or said constituted sexual infidelity'. Second, s 54(4) CandJA limits the defendant's excuses for killing, where loss of control may only be conceded in circumstances of an 'extremely grave character', and where there is a 'justifiable sense of being seriously wronged'. Third, a diminished responsibility defence (s 52(1)(1)(a)) is restricted to an abnormality of mind arising from a 'recognised medical condition', which is, as Fortson[25] points out, a tighter definition than its predecessor. Diminished responsibility manslaughter accounts for only 10 cases in 2018[26] while convictions for murder have increased, constituting (250) 71 per cent of all convictions in 2018.[27] My point is that since traditional

20. See *Cosmopolitan* 'Behold: Cosmo's 85 Best Sex Tips Ever', 13 March 2020, see <https://www.cosmopolitan.com/sex-love/a47073/cosmos-50-best-sex-tips-ever/> accessed 20 June 2020 and its continual nadir of construction of women's sexuality to serve men. Nb. Gagging appears as tip no 74. See also <https://gaggedher.blogspot.com/2011/05/gagged-in-movie-collection-19.html> accessed 20 June 2020.
21. A Dworkin, *Pornography: Men Possessing Women* (Putnum, New York 1981).
22. C MacKinnon, *Only Words* (Harvard University Press, Harvard 1996).
23. *Against Pornography: The Feminism of Andrea Dworkin*, 25 October 1991, Omnibus, Producer David Evans, see <https://www.youtube.com/watch?v=L9j7-zZks08> accessed 12 June 2020.
24. *R v Tyler* [2011] EWCA Crim 543. The defendant strangled his wife following, as he said, the deceased's suggestion that he was not the children's father. In *R v Turner* [2013] EWCA Crim 642, the defendant strangled his girlfriend, as he said, because he believed that she may have been unfaithful to him. In *R v Jones* [2013] EWCA Crim 2839, the defendant strangled the girlfriend to frighten, terrify and to demonstrate control over her. In *R v Cope* [2014] EWCA Crim 1552, the defendant with a previous history of violence against women, strangled his girlfriend and accused her of flirting.
25. R Fortson, 'Diminished Responsibility a Limited Partial Defence to Murder' in A Reed and M Bohlander (with N Wake, E Engleby and V Adams) (eds), *Homicide in Criminal Law* (Routledge, London 2019) 102.
26. *Appendix Tables: Homicide in England and Wales* Year ending March 2019 Table 21, see <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/appendixtableshomicideinenglandandwales> accessed 30 March 2020. See also *R v Adrian Rodi* [2020] EWCA Crim 330, 'where the defendant was controlling and coercive with occasional acts of violence; and had admitted . . . that he had used violence and asphyxiation against Angela Ryder on three occasions prior to the fatal incident'.
27. Ibid, Table 21.

legal 'opportunities' for excusing male violence have been restricted, and where popular culture increasingly pornographises women, without limit or responsibility, violent men are exploiting potentially new defence avenues, again, blaming women for their own demise. 'Rough sex' excuses, once consigned to the annals of sexual psychopathy,[28] are now becoming the defence norm in trials for murder and non-fatal assault in this context.

Consent as Construed in Sexual Offences Versus Consent as Construed in Violence Against the Person

Where the law defines the violence as a sexual offence, as for example, rape, assault by penetration and indecent assault, consent is statutorily defined (SOA ss 74–76), and as stated earlier, special rules apply regarding the admissibility of character evidence of a victim/complainant (YJCEA s 41). However, where the offence is defined in law as non-sexual, that is, criminal assault and death, then 'consent' derives from the common law, and as stated earlier, admissibility of character evidence of the victim/complainant or deceased is governed by CJA s 100. A different approach to admissibility of evidence is adopted here merely because the index offence is contrived as non-sexual thereby potentially allowing sexual history to be adduced without s 41 limitation.

Concerning sexual offences, that is, rape (s 1), assault by penetration (s 2) and sexual assault (s 3), consent is set out in SOA s 74, 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'. 'Capacity' requires mental and physical wholeness and autonomy; and freedom requires free will. The rebuttable evidential presumptions in s 75 assume capacity is vitiated particularly where there is violence, threats of violence and imprisonment. With regard to the interpretation of s 74 and especially s 75(2)(a) violence or threats of violence, and (c) unlawful detention, the new statutory provision in the Serious Crime Act 2015 s 76, which criminalises coercive control of a family member, is also relevant in construing the predicament of a victim of rape or sexual assault who submits or assents and whose free will is compromised.[29] With this in mind, the 2019 specimen direction guidance for judges in directing juries,[30] which distinguishes between 'reluctant acquiescence' and 'unwilling submission', may need revisiting.[31]

Concerning criminal assault, while the state of mind inimical to a consent is not defined, the conduct considered unlawful vitiating any presumed consent is clarified following the dictum in *R v Brown*.[32] Here, the House of Lords held that consent cannot provide a defence to an assault that is more than trifling, invalidating a consent to Offences Against the Person Act (OAPA) s 47 and more serious offences, including when done or caused for the purpose of 'sexual gratification'. In this case, a group of men engaged in sadomasochistic practices involving torture, wounding and branding to the buttocks, anus, penis, testicles and nipples. Following legal advice, they pleaded guilty to s 47 and s 20 assault. On appeal, against conviction, they contended that consent afforded a defence. The Court of Appeal did not agree and upheld the convictions, as did the House of Lords and the European Court of Human Rights.[33] Lord Templeman said the court was not prepared to invent a defence of consent for the 'indulgence of

28. D Cameron and E Frazer, *The Lust to Kill* (Polity, London 1987). J Caputi, *The Age of Sex Crime* (The University of Wisconsin Press, Wisconsin 1987).
29. It is also relevant, following *R v Challen* [2019] EWCA Crim 916, that coercion is now considered part of the factual matrix in a partial defence of loss of control manslaughter triggered by fear, CJA s 55(3).
30. See the *Crown Court Compendium* December 2019, Judicial College, Part 1, 20-9. *Example 12: Fear, without threat or use of force*. nb 1067. See https://www.judiciary.uk/publications/crown-court-compendium-published/ accessed 11 July 2020.
31. This distinction follows *R v Doyle* [2010] EWCA Crim 119 where the Court of Appeal reiterated Pill J's distinction in *R v Zafar* between '(i) reluctant but free exercise of choice, especially in a long-term loving relationship, and (ii) unwilling submission due to fear of worse consequences'.
32. [1994] 1AC 212.
33. *R v Laskey, Jaggard and Brown* [1997] ECHR 21627/93.

cruelty'.[34] Lord Slynn said, 'consent cannot be said simply to be a defence to any act which one person does to another. A line has to be drawn . . . '.[35] The ruling has been criticised as paternalistic, discriminatory and homophobic.[36] Concern over the homophobic bias resurfaced again following the decision in *R v Wilson*[37] when the Court of Appeal quashed a conviction where a husband branded his initials on his wife's buttocks with a hot knife (with her agreement). The court said,

> In our judgment *Reg. v. Brown* is not authority for the proposition that consent is no defence to a charge under section 47 of the Act of 1861, in all circumstances where actual bodily harm is deliberately inflicted. . . . In this field, in our judgment, the law should develop upon a case by case basis rather than upon general propositions to which, in the changing times in which we live[38], exceptions may arise from time to time not expressly covered by authority.

Nicholas Bamforth, criticising the decision in *R v Brown*, at the time, as 'moral popularism', argued 'If a presumption in favour of respecting a person as a sexual agent is adopted, given the misery caused by regulation of consenting sexual activity, it becomes clear that consenting sado-masochistic activity should be protected'.[39] This concern will certainly constitute a vigorous human rights challenge to the current reform proposed on consent in cls 4 and 5 in the Domestic Abuse Bill (above). However, provided that the harm inflicted falls below s 47 assault, it will not be unlawful. Jonathan Herring, speaking today, from a feminist perspective, recognises the need for regulation 'I would not support the reversal of Brown and a straight-forward legislation of sado-masochism . . . all the leading cases on sado-masochism . . . demonstrate how easily domestic violence can be portrayed as consensual sex'.[40]

Reconstructing Sexual Offences as Consensual 'Rough Sex' and 'Rape Games'

Male violence against female intimate partners and 'first dates' is frequently presented as consensual by defendants facing charges of rape, assault and homicide. It was once acceded that acts of violence accompanying rape provided incontrovertible and corroborative proof that consent was vitiated.[41] In *DPP v Morgan*,[42] the trial judge said:

> The crime of rape consists in having unlawful sexual intercourse with a woman without her consent and by force. By force. Those words mean exactly what they say. It does not mean there has to be a fight or blows have to be inflicted. It means that there has to be some violence used against the woman to overbear her will or that there has to be a threat of violence as a result of which her will is overborne . . . .

In this case, a wife was gang raped by three men and her husband. The men claimed that when she cried out 'No!', tried to fight them off, even calling to her 11-year-old son for assistance, they said they

34. See (n 32) [236]g.
35. Ibid 279c.
36. '*R v Brown* Commentary: Matthew Weait and Rosemary Hunter. Judgment: Robin Mackenzie' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart, Oxford 2010) 241.
37. [1996] 3 WLR 125.
38. Ibid.
39. Cited in C de Than and J Elvin, 'The Relationship Between Capacity and Consent' in A Reed and M Bohlander (with N Wake, and E Smith) (eds), *Consent: Domestic and Comparative Perspectives. Substantive Issues in Criminal Law* (Routledge, Oxford 2016) 41.
40. Cited in W Wilson 'Consenting to Personal Injury' in A Reed and M Bohlander (with N Wake and E Smith) (eds), *Consent: Domestic and Comparative Perspectives. Substantive Issues in Criminal Law* (Routledge, Oxford 2016) 78.
41. SSM Edwards, *Sex and Gender in the Legal Process* (Blackstone Press, London 1996) 337.
42. [1975] 2 All ER 347.

believed that she liked the additional thrill of a struggle[43] having been told by her husband that she was 'kinky'.

Such fallacious presumptions about 'her' consent are increasingly relied upon, self-servingly, by men in defence submissions in criminal trials. How has this come about and would feminist judgments in these cases have resisted this brooding development?[44] The disturbing picture I set out is incomplete as I cite, in the main, only those cases reported in the UK law reports, presenting a glimpse of this world. In *R v Boyea*,[45] the victim

> . . . was trying to put her key in the front door lock, [and] was gripped from behind by the appellant (she had met in the pub earlier that evening). He pushed his way into the house . . . followed her into the bedroom . . . pushed her onto the bed . . . ripped off her underclothes . . . put his hand round her throat . . . lay on top of her and subjected her to an indecent assault . . . put his hand into her vagina and twisted it round inside.[46]

He alleged that she had consented. The jury did not believe his account and he was convicted of indecent assault (SOA 1956 s 14(1)). The Court of Appeal added its own *ad hominem* remarks,

> We would, however, say this. The court must take into account that social attitudes have changed over the years, particularly in the field of sexual relations between adults. . . . . we have no doubt that the extent of the violence inflicted on Miss Collins went far beyond the risk of minor injury to which, if she did consent, her consent would have been a defence. Moreover, it was inconceivable that she would have consented to the injuries which were in fact inflicted on her.[47]

This was followed by the case of *R v Emmett*[48] where the defendant (who was cohabiting with the victim) covered her head with a plastic bag, tied it at the neck with a ligature and then engaged in oral sex with her. She was deprived of oxygen to the brain and sustained sub-conjunctival haemorrhages in both eyes and petechial bruising to the neck. On another occasion, he poured lighter fuel on her breasts and set the fuel alight. He was convicted of two counts of assault (s 47 OAPA), one on direction, the other to which he pleaded. On appeal, he alleged she had consented and that they both engaged in and enjoyed 'energetic sex'. The Court of Appeal held that consent was no defence and reaffirmed the ruling of the trial judge, who said:

> In this case, the degree of actual and potential harm was such and also the degree of unpredictability as to injury was such as to make it a proper cause from the criminal law to intervene. This was not tattooing, it was not something which absented pain or dangerousness and the agreed medical evidence is in each case, certainly on the first occasion, there was a very considerable degree of danger to life; on the second, there was a degree of injury to the body.

Later in *R v Meachen*,[49] the defendant, who was charged with rape, indecent assault (SOA s 1 and s 3) and grievous bodily harm (OAPA s 18 and in the alternative s 20), pleaded guilty to both indecent assault and s 20 (the rape charge was dropped). Following a trial on the s 18 charge, he was convicted, which was upheld on appeal, though he continued to maintain that the 'sexual activity' was consensual. The victim met the defendant that evening. He drugged her with a rape date drug Gamma Hydroxybutyrate (C4H8O3) (GHB) and inserted a large object into her rectum when she was unconscious. The colorectal

43. Ibid.
44. See R. Hunter, C McGlynn & E Rackley (eds) *Feminist Judgments: from Theory to Practice*, (Hart, Oxford 2010).
45. [1992] Crim LR 574. [1992] 156 JP 505.
46. (1992) 156 JP 505.
47. [1992] Crim LR 574.
48. [1999] Lexis Citation 2421. [1999] WL 477810, *The Times* (15 October 1999).
49. [2006] EWCA Crim 2414.

surgeon said a colostomy was necessary as '. . . these were very unusual injuries, the most severe he had ever seen'.[50] The defendant, in his police statement, alleged that the victim consented (albeit she was unconscious at the time). Text evidence the following day, between them, incriminated him, when the victim in trying to ascertain how she had sustained such injuries asked him what had happened the previous evening. He replied, 'What do you mean? You enjoyed yourself'.[51]

Male perpetrators, in neutralising accounts,[52] frequently reconstruct their violence and control as 'play fighting' or a 'rape game'. In *DPP v Morgan* (above), defending counsel said the defendants believed that the victim's resistance was 'play acting'.[53] In *R v Coull*,[54] the defendant, who was convicted of a series of rapes on several victims, spat into the mouth of one during what he said was 'sexual intercourse', because 'she might like it since he had done that on previous occasions with other girlfriends'. In *R v H(A)*,[55] the victim suffered bruising to the neck, thighs, loss of hair and rape. The defendant said he thought rape, choking and hair pulling was just 'rough sex'. In texts sent between them, after the rape, and submitted by him as evidence, he hoped would minimise his conduct he said, 'It was all a blur, you have got to laugh about it really'. In attempting to flatter and manipulate the victim and to imply that only a weak-minded woman would report the violence as rape, his texts read, 'You are a strongminded woman . . . You're a top girl'. In *R v R (S)*,[56] the defendant taped the hands and mouth of the victim with duct tape and raped her. He too said it was 'play fighting'. In *R v Latimer*[57] (see below), the appellant slapped the victim, punched her, choked her and repeatedly raped her. He said it was 'rough sex'. In *R v Lovell*,[58] the defendant grabbed the victim by her throat, pushed, choked, slapped, dragged her by her hair, kicked and raped her. He said it was 'rough sex'.[59] While s 21 OAPA applies where there is an 'attempt to choke, suffocate, or strangle any other person . . . Thereby to enable himself or any other person to commit, . . . any indictable offence', prosecutors rarely add this count to an indictment where strangulation or choking is committed in the course of rape.

Turning to an unreported case, on 11 March 2020, Andy Anokye[60] was convicted of 21 counts of rape (s 1(1) SOA), 5 counts of false imprisonment, 2 counts of assault by penetration (s 2(1) SOA) and 2 counts of assault (s 47 OAPA), in relation to four victims whom he imprisoned, coerced and subjected to rape and violence. He waterboarded his victims, used weapons, threatened and subjected them to other forms of sadism, including putting bleach on one victim's face, telling another she would be shot and to another put her hand in water, and, bringing an electric toaster nearby, threatened her with electrocution. He said such acts were all 'rape games' and that it was just part of 'the sex I have' and blaming his victims, he said of one, 'she was a willing and enthusiastic participant in my sex games/role play'. His counsel presented the defence case as 'consensual sexual activity operating on a level playing field' and said his victims were 'independent, adult women'.[61]

50. Ibid [7].
51. *R v Meachen* [2006] EWCA Crim 2414 [21]. See also W Wilson (n 40).
52. L Taylor, 'The Significance and Interpretation of Replies to Motivational Questions: The Case of Sex Offenders' (1972) Sociology 23–39.
53. [1975] 2 All ER 347.
54. [2012] EWCA 2 Crim 893 [25]. See also *Johnson v McArdle and another* [2020] EWHC 644 (QB) [27] s 1.
55. [2014] EWCA Crim 1467. See also *R v MBA* (Lewis) [2012] EWCA Crim 3233. *R v Edwards (Jason)* [2012] EWCA Crim 1145 [9].
56. [2016] EWCA Crim 1677 [12].
57. [2019] EWCA Crim 1164 [18].
58. [2018] EWCA Crim 187. *See also John Yule v HM Advocate* [2009] HCJAC 53 Appeal Court, High Court of Justiciary [5].
59. See also *R v Javed (Asim)* [2012] EWCA Crim 905.
60. Trial of Anokye. See <https://www.tcsnetwork.co.uk/sadistic-bbk-rapper-solo-45-on-trial-for-22-rape-charges/> accessed 30 March 2020.
61. Awaiting sentence, the next hearing is fixed for 30 July 2020.*

* This footnote has been updated from the originally published version.

In some cases, the defendant attempts to legitimise the conduct by alleging that the victim initiated the violence. In *R v D'Ambrosia*,[62] the defendant described rough consensual intercourse enjoyed by the victim which included violent rapes involving a knife and a bat. The defence said 'it being the complainant's preference for intercourse of that type, with which the appellant complied' because she was a dominatrix, 'whereas he was a mild, humble person'. In *R v Latimer*[63] (above), the defendant made similar claims, suggesting 'that she enjoyed rough sex, which he claimed made him feel uncomfortable'. There is also evidence that juries may be persuaded by defence claims that women have consented to 'rough sex' and return 'not guilty' verdicts. Steven Lock[64] was charged with s 47 OAPA assault. The victim suffered bruising to the buttocks and neck. He chained her 'like a dog' to his bedroom floor and whipped her repeatedly with a rope. In his evidence, he said that he had got the idea from *Fifty Shades of Grey*.[65] The jury returned a 'not guilty' verdict. It is not known how frequently jurors acquit in such cases, but certainly a presumption of jury acquittal impacts on a Crown Prosecution Service (CPS) decision to discontinue proceedings prior to trial. At the Public Committee stage of the Domestic Abuse Bill on 16 June, Jess Phillips MP reported that in one case brought to her attention by a solicitor,

> prosecutors declined to pursue charges against a man accused of sexual assault because of fears he would claim it was consensual sexual behaviour. . . . and said in a letter to the complainant, "A prosecution could follow in relation to this offence, but the courts have shown an interest in changing the law so that the suspect could say that you consented to these assaults. This would be difficult to disprove, . . . for reasons set out earlier in the letter . . . . If I prosecuted this offence it is likely to lead to lengthy legal proceedings in which the background to the case would have to be visited as far as the sexual practices that led to and accompanied the infliction of the injuries. In my opinion it is not in the public interest to pursue this charge."[66]

As Catharine MacKinnon[67] recognises:

> The problem with consent only approaches to criminal law reform is that sex, under conditions of inequality, can look consensual when it is not wanted at the time, because women know that sex that women want is the sex men want from women. Men in positions of power over women can thus secure sex that looks, even is, consensual without that sex ever being freely chosen, far less desired.

Her Character on Trial—Sexual Offences, Consent and 'Rough Sex', s 41 YJCEA 1999

Where a defendant is charged with a sexual offence (defined in s 62 SOA) and alleges consent to 'rough sex', he may apply for leave to adduce character evidence of the complainant and YJCEA s 41(3)(b) applies. In *R v A*[68] (a rape case), the position is set out by Lord Slynn:

> Section 41 of the Youth Justice and Criminal Evidence Act 1999 prohibits the giving of evidence and cross-examination about any sexual behaviour of the complainant except with leave of the court. Leave may be given where (a) consent is an issue and where the sexual behaviour of the complainant is alleged to have taken place 'at or about the same time as the event which is the subject matter of the charge against the accused' (s 41(3)(b) of that Act) and (b) where the sexual behaviour of the complainant to which the question or evidence relates is alleged to have been 'in any respect, so similar' to the sexual behaviour which is shown by evidence to have taken place as part of the event which is the subject matter of the charge or to any other sexual

62. [2015] EWCA Crim 182 [4].
63. [2019] EWCA Crim 1164 [18].
64. *Independent.co.uk* (22 January 2013).
65. See (n 19).
66. See (n 4) Col 317.
67. C MacKinnon, 'A Sex Equality Approach to Sexual Assault' (2003) 989 *Annals New York Academy of Science* 265.
68. [2001] 3 ALL ER 1.

> behaviour of the complainant which took place at or about the same time as that event 'that the similarity cannot reasonably be explained as a coincidence' (s 41 (3)(c)).[69]

If the judge refuses leave to admit such character evidence, and the defendant is subsequently convicted, the conviction may be quashed on appeal on the grounds that if the jury had heard the evidence they may have reached a different conclusion. This is not an exact science and there is no doubt that judgments about the 'weight', 'relevance' and 'probative value' of character evidence are shaped by gendered inflections and phallocentric assumptions. In *Razzaq v HM Advocate*,[70] the appellant, who was convicted of indecent assault following inserting a deodorant can into his wife's vagina which caused injury, made an application for leave to appeal on the grounds of fresh evidence (Criminal Appeal Act 1995 s 4) from three of his wife's girlfriends which related to discussions they had with her about the use of sex toys and, specifically, a deodorant can. The Court of Criminal Appeals (Scotland) considered the fresh evidence relevant, but no retrial was ordered which properly would have allowed a jury to test it. Instead, the Court took it upon themselves to decide the weight to be attached and ordered an acquittal. Conversations of consensual penetration in the past with a particular object resulted in penetration with the same object in the present being construed as inevitably consensual. Replace 'deodorant can' with 'penis' and the fallacy of the supposition and inference is risible.

However, in *Kevin Oliver v HM Advocate*,[71] the court took a different view. Here, the defendant was charged with rape, whipping, slapping, choking, all of which he described as consensual sadomasochistic behaviour. His application to adduce character evidence of prior acts between them (s 275 Criminal Procedure Scotland Act 1995, the rape shield provision) was refused. The judge '. . . was not satisfied that the detail of previous sexual activity was of sufficient probative value to be likely to outweigh protection of the privacy and dignity of the complainer'. This decision to refuse to admit such evidence was upheld on appeal.

Reconstructing Murder as 'Rough Sex' Gone Wrong

A finding of murder requires the prosecution to prove that there was an intention to kill or cause grievous bodily harm and that the defendant foresaw death or serious bodily harm as a 'virtual certainty'. Where these elements are not satisfied, a defendant may be convicted of manslaughter or GNM (discussed below). When intimate partners and 'first dates' die, defendants allege that the death was an accident and, in some cases, that the deceased consented to 'rough sex', including beatings, strangulation, asphyxiation, choking and penetration with objects. In *Niall Duncan McDonald v HM Advocate*[72] (convicted of culpable homicide), the appellant said he put his hands round the victim's throat

> I inserted my finger and then got a leather whip that we have out of the bedside cabinet, on Mandy's side of the bed. Then I inserted it vaginally, I think, followed by anally. At this point my arms were round Mandy's throat because that's the way we normally love sort of thing.

The victim died following compression to the neck and trauma to the recto sigmoid junction. A sentence of four years' imprisonment for culpable homicide and three years' imprisonment for disposing the body was upheld. In 2006, Graham Coutts[73] was convicted of the murder of a girlfriend of his female

69. *R v A* [2001] 3 ALL ER 1 [7].
70. [2017] HCJAC 45, [2018] JC 21.
71. [2019] HCJAC 93 [25].
72. [2004] Scot (D) 17/2, see <https://www.scotcourts.gov.uk/search-judgments/judgment?id=28ab87a6-8980-69d2-b500-ff0000d74aa7> accessed 2 June 2020.
73. *R v Coutts* [2005] EWCA Crim 52.

partner. He pleaded that at the deceased's instigation they had engaged in consensual erotic asphyxial sex and that 'with her consent, tied a pair of tights round her neck and tied a knot in them',[74] admitting that he had held a fascination for women's necks for approximately 20 years. On this point, bad character evidence of the defendant was admitted (s 101 CJA) from former girlfriends. One former girlfriend said

> .... he would put pressure on her windpipe during sex and would sometimes use a stocking tied around her neck, which he would pull from both sides ... She allowed him to do such things because it made him happy, but she never enjoyed it herself.[75]

He admitted that they had engaged in sex of this sort together on at least 100 occasions.[76] Two previous girlfriends and his present girlfriend also attested to his interest. Another former girlfriend said that on one occasion 'he had appeared to be sexually aroused by her being distressed'.[77] Convicted of murder, he was sentenced to a minimum of 26 years. In *R v Sacket*,[78] the appellant (convicted of murder) killed a young woman whom he knew by manual and ligature strangulation. On the night of her death, he claimed they had consensual sexual intercourse in a garage. He claimed he had 'playfully' taken hold of her in a headlock and was 'just winding her up' in 'play-fighting'. In *R v Dunstan (David)*[79] (convicted of murder), the defendant raped and poured lighter fuel on the deceased and set it alight. She died of her injuries. When asked what had happened, he said '[W]hen we are having sex, we like to get a bit rough and hurt each other .... we were just play fighting'.

Her Character on Trial—Assault, Murder and Deceased Character Evidence s 100 CJA 2003

Where the defendant is charged with a non-sexual offence (assault, strangulation, choking, beating/murder/manslaughter) and relies on pleading consent and 'rough sex', the defence case is bolstered by inferring that the deceased had a propensity to engage in the kind of conduct which is in issue.[80] Character evidence of a person other than the accused is regulated by s 100 CJA and admitted,

> (1) by agreement between the parties; (2) where the bad character evidence is important explanatory evidence; (3) where the bad character is of substantial probative value (s 100 (1)(b)(ii)) in relation to a matter which (a) is a matter in issue (s 100 (1)(b)(i)) in the proceedings, and (b) is of substantial importance in the context of the case as a whole having regard to s.100 (3).[81]

If the conditions for admissibility are met, the judge is obliged to admit the evidence,[82] yet, if admitted, it may be so prejudicial and unfair to the deceased, given the sea of sexual presumptions

74. Ibid [28].
75. Ibid [32].
76. Ibid [32–33]. This case instigated law reform by introducing s 63 of the Criminal Justice and Immigration Act 2008. An image is 'extreme' if it falls within Criminal Justice and Immigration Act 2008 s 63(7) and is 'grossly offensive, disgusting or otherwise of an obscene character' 'which made it illegal to possess "an extreme pornographic image" which included in its definition' 'an act that threatens a person's life, ... including depictions of hanging, suffocation or sexual assault using a weapon'.
77. Ibid [31].
78. [2012] EWCA Crim 3229.
79. [2016] EWCA Crim 2098 [7].
80. *R v Martin* [2017] EWCA Crim 488.
81. *Blackstone's Criminal Practice* General Editor David Ormerod QC(Hon) David Perry QC and a team of expert contributors. (Oxford University Press, Oxford 2019) F 15.8–15.9.
82. *R v Phillips* [2012] 1 Cr App R 25, 332.

about women that 'the landscape of the trial'[83] is fundamentally altered.[84] In assessing probative value under s 100 (3), sub-s (1)(b) applies where

> the court must have regard to the following factors (and to any others it considers relevant)—(c) (i) the evidence is evidence of a person's misconduct, and (ii), it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct.

Forays into the deceased's character/sexual history in non-sexual offences to infer 'her' propensity do not fall under the protection of YJCEA s 41 which would otherwise be the case in sexual offences. The injustice arising as a result of sexual history evidence being admitted in this context is also the concern of Jess Phillips MP, who at the Public Committee stage of the Domestic Abuse Bill was unsuccessful in moving cl 10, 'Prohibition of reference to sexual history of the deceased in domestic homicide trials' which states,

> If at a trial a person is charged with an offence of homicide in which domestic abuse was involved, then—(a) no evidence may be adduced, and (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the deceased.

Mark Garnier MP[85] added his concern stating that in such cases the victim's reputation is being traduced in 'postmortem abuse'. While s 100(4) does provide that 'evidence of the bad character of a person other than the defendant must not be given without leave of the court', there is no guidance as to how judges should approach applications for leave in this very specific and particular set of circumstances. I question again whether a feminist judgment might make a difference to judicial assessments under s 100. A further point arises too, regarding fairness. With this in mind then and turning for a moment to the admissibility of evidence of the defendant's bad character, it is to be noted that in granting leave, the judge must consider fairness as it applies in s 101(3) CJA[86] and in the Police and Criminal Evidence Act 1984 s 78,[87] but there is no such similar 'fairness' requirement with respect to the reception of defence evidence pertaining to the deceased/victim under s 100 CJA.[88] Any assessment of 'fairness' would need to recognise the consequence of allowing sexual history evidence into trial and the inevitable consequence, that juries take a different view of the evidence[89] since myths, assumptions

83. Ibid.
84. *R v Funderburk* [1990] 2 All ER 482. 'We are disposed to agree with the editors of *Cross on Evidence* (6th edn, 1985) 295 that where the disputed issue is a sexual one between two persons in private the difference between questions going to credit and questions going to the issue is reduced to vanishing point. I read from that work: "It has also been remarked that sexual intercourse, whether or not consensual, most often takes place in private, and leaves few visible traces of having occurred. Evidence is often effectively limited to that of the parties, and much is likely to depend upon the balance of credibility between them. This has important effects for the law of evidence since it is capable of reducing the difference between questions going to credit and questions going to the issue to vanishing point."'
85. See <https://www.youtube.com/watch?v=YGwwxE5a8og> accessed 10 May 2020. See also <https://hansard.parliament.uk/Commons/2020-04-28/debates/AABF0D9C-D3BC-40C5-830A-52073E09ED35/DomesticAbuseBill> Col 265, accessed 10 May 2020.
86. (3) The court must not admit evidence under sub-s (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
87. 'Exclusion of unfair evidence. (1) In any proceedings, the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.
88. See *R v Edwards* [2018] ECWA Crim 424.
89. J Temkin, 'Sexual History Evidence—The Ravishment of Section 2' (1993) Crim L R 3, 4. C McGlynn 'R v A (No 2) Judgment' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments* (Oxford, Hart 2010) 211.

and stereotypes, contaminate the trial and infect jury findings. This inclusionary discretion of judges is too broad and a more structured approach along the lines of YCEA s 41 is called for.

There is also the matter of the trial itself and while defending counsel must present the defendant's case, however obnoxious, a line should be drawn to prevent collusion. Sir Michael Havers when defending Peter Sutcliffe who killed 13 women asked, 'was this not a classic case of provocation?' since Sutcliffe had said that he was angered when his first victim, who was a prostitute, said he was 'fucking useless' because he could not achieve an erection.[90] It is also to be noted that after the Grace Millane murder trial in New Zealand, the presiding judge, Justice Simon Moore responding to public criticism of defending counsel said that the defence case was 'entirely proper' and that counsel are required to put the defence case.[91]

In *McDonald*[92] (above) where physical injury had been inflicted on the deceased wife by partial manual strangulation and the forceful insertion of a rigid blunt instrument into her bowel, the defence made an application to admit evidence that the deceased had spoken to friends about her 'interest' in sexual matters and that the defendant and the deceased had an 'adventurous relationship'. This application was rejected, as of no probative value, as was the defence submission of 'no case to answer'. However, in *R v Coutts*[93] (above), the defence was granted leave to adduce character evidence of the deceased in exploring the victim's relationships. Here,

> Lincoln Abbots gave evidence that he was in a normal, non-deviant sexual relationship with the victim between 1996 and 1997, and a former teaching colleague of the victim, Ruth Davis, gave evidence of a 'whispered conversation' with the victim in the staff room. During that conversation, the victim indicated that her sexual relationship with Lincoln Abbotts (her boyfriend at the time) involved the intentional stopping of breathing or the cutting-off of breath. . . . In response to this evidence, Lincoln Abbotts stated in cross-examination that the topic of asphyxial sex was "categorically never raised" between him and the victim . . . .[94]

This evidence turned out to be of no value, but the attempt to impugn her character on her family was devastating. During the trial of Mark Bruce in 2017, for the murder of his partner, a previous sexual partner was called to give character evidence of the deceased and said 'erotic sexual asphyxiation' was something the deceased had been 'interested in'[95] although the defendant, said his counsel, could not 'recall the specifics of what went on'. However, that did not stop counsel from indulging in speculative sexual innuendo. 'But it seems they had a shared interest. I don't wish to sound like I'm suggesting she was the author of her own misfortunate, but it is a significant factor'.[96] In the Grace Millane murder case, the deceased had met the defendant (his identity protected by anonymity) on a Tinder date and that evening was killed by him by strangulation (the prosecution alleged lasting several minutes). He later disposed of her body. At trial, the defence was granted leave to adduce sexual history evidence of the dead Grace Millane. This included evidence from her long-term former boyfriend, a previous sexual partner, and men she had never met but connected with on the dating sites, Tinder, Fetlife and Whiplr. The defence purpose was to establish her prior interest in 'rough sex' and to suggest she had a propensity for this kind of sex to bolster the defence case of her consent.

---

90. W Holloway, '"I Just Wanted to Kill a Woman" Why? The Ripper and Male Sexuality' 9 Fem Rev 37.
91. See <https://www.msn.com/en-nz/news/national/grace-millane-murder-judge-says-defence-case-was-entirely-proper/ar-BB10eb7o> accessed 21 June 2020.
92. [2004] Scot (D) 17/2, see <https://www.scotcourts.gov.uk/search-judgments/judgment?id=28ab87a6-8980-69d2-b500-ff0000d74aa7> accessed 2 June 2020.
93. See (n 73).
94. Ibid [36].
95. See <https://www.pressandjournal.co.uk/fp/news/aberdeen/1448323/sex-strangler-jailed-for-killing-20-year-old-chloe-miazek/> six-year sentence accessed 30 March 2020.
96. See <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-43373648> accessed 30 March 2020. See <https://www.dailymail.co.uk/news/article-5492075/Killer-strangled-woman-death-sex.html> accessed 30 March 2020.

Reconstructing 'Rough Sex' Gone Wrong as Unlawful Act Manslaughter

When juries do not convict the defendant of murder, in these circumstances, a finding of unlawful act manslaughter is returned when the jury are not satisfied that the prosecution has proved an intention to kill or cause grievous bodily harm. Such an outcome may indicate that the jury is influenced by the defendant's claims that the deceased possibly enjoyed 'rough sex', and/or that the defendant did not intend to kill, and that death was an accident. Sentence length for manslaughter in such circumstances reflects, to some degree, the extent to which judges are persuaded by such defence claims.[97] In *R v Williamson*,[98] the defendant was convicted of manslaughter. He said that he and the deceased engaged in mutual asphyxiation and to heighten her sexual pleasure he had put a pillow on her face. He was sentenced to four years' imprisonment and reduced to three following submissions made on his behalf that he and the deceased had been 'deeply attached to each other', that there had been no hostile intent on his part and that his plea of guilty to manslaughter was based upon his acceptance that what had happened had been the result of gross negligence amounting to criminality. Yet, the appellant had a long record of previous offences of violence. However, the court said they were not relevant to the 'consensual practice aimed at giving pleasure'. (Upon release, Williamson went on to assault his next partner and to kill his mother).[99] In *R v Coates*,[100] the court said,

> One of his favourite sexual practices is paraphilia, which is the practice of asphyxiation for the purpose of sexual gratification. According to his ex-wife he had practised it on her on four or five occasions, on a consensual basis, as part of sexual foreplay during their marriage. This activity, according to her, had been his idea.

He visited the deceased, a woman he knew, and

> . . . put a belt around the deceased's neck which had an extra hole in it so that he could tighten it more than would otherwise be the case. He tightened the belt around her neck, . . . fractured her thyroid cartilage and killed her by asphyxiating her. He then made untrue prepared statements saying that the deceased had practised paraphilia; . . . . that she was responsible for putting the belt around her own neck and her death was an accident.[101]

Convicted of manslaughter, the court said he had 'a terrible record of sexual offences'.[102] In *R v Doblys*,[103] the defendant

> maintained that all sexual activity, both vaginal and anal, had been consensual. Upon examination of the deceased, it was found that she had suffered numerous injuries to her vaginal and anal areas, indicative of repetitive and deep penetration. There were numerous bruises to her breasts, arms and thighs, suggesting the use of force by gripping, and an injury to her chin consistent with a forceful impact with the floor.

The defendant was convicted of manslaughter and sentenced to 20 years' imprisonment. In *R v Tobin*,[104] 'the applicant pleaded guilty to manslaughter on a basis of plea which was not acceptable to the Crown. Eventually, he changed his basis of plea to one which was acceptable'. The deceased had

97. *R v Doblys (Dainotas)* [2014] EWCA Crim 402.
98. (1994) 15 Cr App R (S) 364. See Edwards (n 41) 353, 393.
99. Edwards (n 41) 354.
100. [2012] EWCA Crim 2400 [2].
101. Ibid [2], [3], [5].
102. Ibid [8].
103. [2014] EWCA Crim 402.
104. [2017] EWCA Crim 1235 [7].

sustained injuries to the head, the defendant said the deceased had fallen and that there had been an argument, and consensual 'rough sex' between them. The injuries, 36 bruises, he said, 'might have been caused during earlier sexual activity'.

No Unlawful Act—'No Crime'

Where the defence case is, that the act itself is lawful, that the victim consented to it and that the outcome of death was unexpected, the prosecution may decide not to bring any charges,[105] or, as in the following case, a 'judge directed acquittal' may follow. In *R v Slingsby*,[106] (Judge J) held that a charge of unlawful manslaughter could not be sustained, since no injury was intended or foreseen and no crime had been committed because the victim consented to all the acts, none of which were in themselves unlawful. The defendant claimed that sexual intercourse, anal sex and the penetration of the deceased's vagina and rectum with his hand, 'fisting', was consensual. The deceased died of septicaemia from cuts caused by a signet ring on his hand. While the judge accepted the principle that infliction of bodily harm is unlawful, even if the victim consents (citing *R v Boyea*[107]), the defence submission of 'vigorous sexual activity' and death caused by the coincidental fact of the signet ring causing internal injury was also accepted, such that judge withdrew the case of constructive manslaughter from the jury, the Crown offered no evidence and the judge directed an acquittal.[108] In cases characterised by a similar blend of circumstances, the prosecution may decline to prosecute.[109]

Reconstructing 'Rough Sex' Gone Wrong as GNM

In cases resulting in death where 'rough sex' is alleged by the defence, the prosecution has also accepted a plea to GNM. It is this outcome which prompted the need to press for a 'no drop' murder prosecution policy, as proposed by cl 6, during the Public Committee stage of the Domestic Abuse Bill.[110] While GNM is increasingly being pleaded where, for example, D supplies a drug to V, and in relation to medical cases, its use in circumstances involving male intimate partner violence and death is untypical. GNM has been adopted, where a number of features confound the prosecution case including: where the defence contests that the act(s), albeit that they contributed to death, are unlawful, where there are problems of proof of causation and the proximate cause of death is contested (especially where there is intoxication), where the deceased's injuries may possibly be caused by accidental falling and where the defence submits that the deceased consented to the assault(s). To establish GNM, there must be a duty of care. The defendant must be in breach of that duty and the negligence must have caused death in the opinion of the jury. That breach of duty must give rise to an obvious and serious risk of death.

No Unlawful Act—'No Crime'

In *R v Bowler* (2015)[111] (a case which involved two men), the deceased was allegedly consensually wrapped in cellophane and black plastic bags, fastened around in duct tape, which resulted in death. The

105. No charges were brought against Trevor Thompson where Lorraine Thompson was killed 'during a bondage sex session with her husband', 1984, see <https://wecantconsenttothis.uk/> accessed 30 March 2020.
106. *R v Slingsby* [1995] Crim LR 570.
107. See (n 45).
108. See (n 106).
109. CM Milroy and M Beckman, 'Murder, Manslaughter or Nothing' (1997) 147(6818) New Law J 1736. I am assuming that the prosecution then offered no evidence on either charge or a verdict of not guilty was entered.
110. See (n 4).
111. [2015] EWCA Crim 849. See T Storey, 'A Dangerous Situation: The Duty of Care in Gross Negligence Manslaughter: *R v Bowler* [2015] EWCA Crim 849 *R v S* [2015] EWCA Crim 558' (2016) 80(1) J Crim L 12–16. See also *R v S* [2015] EWCA Crim 558.

defendant claimed that he and the deceased engaged in consensual sadomasochistic practices, in this case mummification. The judge conceded the allegedly consensual nature of the act and concluding that the act itself was not unlawful, albeit potentially dangerous, said:

> But of course what distinguishes the culpability in this case both from the cases of manslaughter by an unlawful act, such as those dealt with in Appleby, and from the cases of the neglect of a victim in the care of a defendant, such as Barrass and Reeves, or the gross negligence of a builder being paid to do work, such as R. v Johnson [2008] EWCA Crim 2976; [2009] 2 Cr. App. R. (S.) 28 (p.210), is that here the circumstances which led to this tragic death were expressly assented to by the victim as part of his achieving satisfaction.[112]

The defendant was convicted of GNM and sentenced to five years' imprisonment, reduced to three years on appeal. In the case against *Gaskell* (unreported),[113] the defendant stabbed his girlfriend while having sex, piercing her carotid artery. He claimed it was consensual and that the knife was used to simulate threatening behaviour 'to heighten sexual pleasure'.[114] The judge in passing a sentence of six years' imprisonment for GNM said, 'You unlawfully killed the woman with whom you were having sexual intercourse by stabbing her through the neck during bizarre and violent sadomasochistic sexual activity'.

Determining Proximate Causation and Fault

Where the proximate cause of death is also contested, a conviction for GNM may also be the outcome. Jamie Nicholson (unreported)[115] was initially charged with the murder of Belinda Dalby. She was found dead with a ligature around her neck. Nicholson reported her death immediately to the police and said he must have killed her and must have put the ligature around her neck though he said he could not remember. Counsel for Nicholson said there was some suggestion that Nicholson and the deceased may have been 'playing a sex game' involving the ligature. Toxicology tests found high levels of heroin and cocaine in the deceased's blood, and a post-mortem examination concluded that her death was caused by drug use. In this case, a not guilty verdict was recorded after the Crown Prosecution Service offered no evidence.

Getting Away With Murder—The Crown Against John Broadhurst

It is the case of John *Broadhurst*,[116] convicted of the GNM of Natalie Connolly, that has been the catalyst in this press for legislative change. Natalie Connolly died as a result of

> . . . a combination of the alcohol level (acute alcohol intoxication) and the 40 separate physical injuries and resultant blood loss. The physical injuries included bruising to the head, a blow-out fracture to the left eye socket, internal bleeding and tissue haemorrhaging on the bottom and lower back. The insertion and/or the removal of the spray bottle had caused lacerations of the vagina which resulted in arterial and venous haemorrhage.[117]

Broadhurst claimed that Natalie Connolly derived sexual satisfaction from being assaulted in this way:

---

112. Ibid, per Gilbart J at [20].
113. Gaskell 2018, see <https://www.hulldailymail.co.uk/news/hull-east-yorkshire-news/jason-gaskell-laura-huteson-hull-1883481> accessed 30 March 2020.
114. Ibid. See also <https://www.hulldailymail.co.uk/news/hull-east-yorkshire-news/jason-gaskell-handed-six-year-1885607> accessed 30 March 2020. 'Gaskell was sentenced on the basis of gross negligence manslaughter. Holding a knife to her throat even without the intention of using it was clearly putting her life in danger, but it was not Gaskell's intention to use it during their sadomasochist sex game'.
115. See <https://www.bbc.co.uk/news/uk-england-hampshire-28470900> accessed 30 March 2020.
116. See (n 18).
117. See (n 18) [8].

> . . . at the deceased's request, the applicant hit her on the bottom and the lower back with his hand and then with a boot . . . and struck her breasts with his hand . . . . at Miss Connolly's request inserted into her vagina a spray bottle containing carpet cleaner with a protruding plastic trigger mechanism. It became lodged in her vagina and the applicant was unable to remove it, he inserted his hand into her vagina and managed to extract the bottle, but broke parts of the trigger mechanism . . . . He saw that she was bleeding from her vagina'. . . . he left her, almost naked, lying on her back at the foot of the stairs and went to bed.[118]

Broadhurst then sprayed bleach on her face because he said, 'he didn't want her to look a mess'. He did not call an ambulance or seek assistance. At 6.11 am, he walked upstairs, past her body and sent a text to a friend. At about 9.23 am, he phoned the emergency services and reported that she was 'as dead as a doughnut'. The prosecution proceeded with a charge of murder. This was, they submitted, a case of violence, anger and jealously by a man who beat the deceased with his fists following his discovery that she had sent explicit texts to a former boyfriend. At the conclusion of the prosecution case, the defence prepared to make a submission of 'no case to answer' on the grounds of the defendant's allegation of (i) her consent, (ii) that the acts were lawful, (iii) that cause of death was uncertain, since some injuries were likely caused when she fell and that (iv) the deceased's levels of intoxication may have been the proximate cause of death. The defence in attempting to defeat intention to kill or cause serious bodily harm claims, spoke of Broadhurst and Connolly being in a 'loving relationship'.

The judge in addressing the difficulties presenting the prosecution in proving murder or unlawful acting manslaughter said, 'I cannot be sure she was incapable of consenting to being beaten with a shoe'. He accepted that she instigated 'being penetrated by the carpet cleaner bottle'[119] and accepted, following *R v Slingsby*[120] that penetration with an object was not an unlawful act (albeit potentially dangerous) and said that a woman can consent to having something inserted into her vagina or rectum without it being unlawful. Although he did find that Broadhurst had caused most of the injuries to Miss Connolly's breasts, bottom and lower back, which he found to be 'actual bodily harm of quite a serious type'. The judge then withdrew the charge of murder and assault by penetration (s 2 SOA 2003).

The defence then offered a guilty plea to GNM which the prosecution accepted. The judge found that the duty of care to summon assistance had been breached and (constrained by sentencing guidelines) took five years and six months as the starting point which was reduced by one-third to reflect Broadhurst's guilty plea.[121] (His renewed application for leave to appeal against a sentence of three years' and eight months was refused.) He is due for release in September 2020 when he will have served half of his sentence.

Aspects of this case, including the acceptance of the plea, and the sentencing outcome, have been criticised as plea bargaining at its worst, since the prosecution anticipating a jury verdict of 'not guilty' to murder or manslaughter and being persuaded by defence submissions that (i) the cause of death may have been alcohol poisoning and not vaginal haemorrhaging, and (ii) that given the deceased's 'sexual character' she consented,[122] then accepted a plea to GNM.

The Urgency of Law Reform

Parliament is presently reforming the law in this area. First, there is broad agreement that consent is no defence to s 47 assault or more serious injury or death (the proposed cls 4 and 5 amendments to the

118. See (n 18) [4], [5].
119. See (n 18) [23], [31].
120. See (n 107).
121. See <https://www.sentencingcouncil.org.uk/offences/crown-court/item/gross-negligence-manslaughter/> accessed 30 March 2020.
122. It is acceded that the prosecution called her sister in addressing the consent issue and she testified that her sister talked of being hit with a belt but nothing further than that. The prosecution no doubt called this evidence upon which the defence relied to ring fence the ambit of questioning through adducing such evidence in examination-in-chief.

Domestic Abuse Bill).[123] That has, in law, in any event been the position since *R v Brown*[124] albeit that, in some cases, the defence has tried to suggest otherwise. My second point concerns the exercise of judicial discretion especially regarding the admissibility of character evidence where presumptions about women's sexuality are exploited, and as Lord Hutton observed, 'Issues of consent and credibility may well run so close to each other as almost to coincide'.[125] Regarding admissibility of evidence of the deceased's character (s 100 CJA), then safeguards similar to the 'rape shield' provisions (s 41 YJCEA) must be introduced so that her character is not impugned. Parliament has not supported cl 10 in its current form which would shut down adducing any sexual history evidence altogether particularly bearing in mind the right of the defendant to a fair trial (art 6 ECHR). This takes me to my third point relating to the construction of fairness which I have already made in the body of this article suggesting that fairness is currently skewed in favour of the defence. Fourth, there is a need for judicial guidance regarding admissibility of character evidence of the victim, acceptance of plea and training in understanding the fallacy of gendered stereotypes and understanding how they inform the exercise of judicial discretion and affect assessments of 'weight' and 'relevance and 'probative value' of evidence. It is to be noted that there is some judicial guidance (albeit limited) on curtailing gendered assumptions in rape cases (although only in relation to false accusation and delayed reporting). Judicial guidance in this area may assist judges in determining relevance (see *McDonald* above) and prevent the forays into the deceased's character observed in *R v Coutts* and the Millane case. Such guidance may also restrain judges from inserting their own opinions and endorsements of defence assumptions in summing up (*Slingsby* above) where the judge referred to 'vigorous sexual activity' and said, 'social attitudes are changing'. Fifth, there is also a need to restrain defending counsel from voicing sexual stereotypes to secure some advantage, especially when not put by the defendant. In *Frazer Angus Neil v HM Advocate*,[126] where the defendant said he couldn't remember what he had done 'The defence case was directed to the possibility that the appellant killed the deceased during consensual sexual intercourse involving the sexual practice of erotic asphyxiation'. This overstretching the mark is a matter for Bar Council Rules and ethics to consider with regard to gender presumptions and their impact on discriminatory practices and the repeated victimisation of the dead.[127] Sixth, regarding experts, their evidence should be confined to findings that do not stray into the ultimate issue which in some cases endorses prejudice and misogyny lending a veneer of pseudo-scientific credibility to myths about women's sexual preferences. Dr Fintan Garavan a drug and toxicology expert, in giving evidence in the Millane case, referred to American literature on the vagaries of sexual congress and 'what women want' yet his remit was to give opinion on clinical findings on the body of Grace Millane. In this respect, he said as he found no evidence of a sign of struggle merely 'pressure to the neck', which he said was consistent with a consensual act. However, under cross-examination he acknowledged she might have been restrained and unable to fight. It is to be noted that no expert has been called in any of these cases to address the jury on male violence, control and force, on male sadism and misogyny or on what men do to women or on the prevalence of male violence. Seventh, regarding sentencing, while strangulation, choking, assault by penetration and rape are all humiliating, degrading and sadistic, 'sadism' as an aggravating factor appears only in s 269 sch 21 CJA regarding sentencing for murder[128] and (sentencing guidelines in children cases, above). Since sadism is a feature in many of these cases, it should be a recognised aggravating feature in sentencing considerations in all non-fatal and fatal cases. Eighth, prosecutors

123. See (n 4).
124. See (n 12).
125. *R v A (No 2)* [2001] 1AC 45 [138].
126. 2019 Scot (D) 21/10. [2019] HCJAC 70 [14] (appeal against sentence). See <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019hcjac70.pdf?sfvrsn=0> accessed 30 March 2020.
127. See <https://www.msn.com/en-nz/news/national/grace-millane-murder-judge-says-defence-case-was-entirely-proper/ar-BB10eb7o> accessed 30 March 2020.
128. *R v Archer* [2007] EWCA Crim 536. *R v Walker* [2010] EWCA Crim 1108. *R v Sacket* [2012] EWCA Crim 3229.

concerned that jurors may not convict where the defence alleges the victim consented to 'rough sex' of the kind which resulted in death or serious injury should not accept a lesser plea and should proceed on a merits-based approach[129] not on a crystal ball prediction of jury outcome. Ninth and finally, prosecutors should be encouraged to add as routine practice a s 21 OAPA count to the indictment where strangulation or choking is committed while committing another offence. There is much to be done if this gross injustice is to be estopped, but any new provisions must be implementable, workable, no loopholes and no inconsistency with other legislation. Shutting down these avenues of legal misogyny means shutting down the way in which women are constructed both within and outside the law. At last, the moral will is on the side of the right, and feminist judgments are making the difference.[130]

Declaration of Conflicting Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

R v Brown (1994): This case set a key precedent that consent is not a defense to grievous bodily harm during consensual sadomasochistic acts. This ruling established that serious bodily harm for sexual gratification is not excusable by consent.

R v Emmett (1999): The defendant was convicted after covering his partner's head with a plastic bag and setting her breasts on fire. He claimed both acts were consensual "rough sex." The Court ruled that consent was invalid, emphasizing the high risk of serious harm.

R v Meachen (2006): Involving an unconscious victim, the defendant was charged with grievous bodily harm after inserting an object into her rectum, causing severe injuries. Despite claims of consent, the Court upheld the conviction, reinforcing that consent is not valid when significant injury occurs without the victim's awareness.

R v Williamson (1994): The defendant argued mutual asphyxiation during sex, resulting in the victim's death. Convicted of manslaughter, his sentence was reduced due to arguments of mutual consent. This outcome has been criticized, as he had a history of violence and continued violent behavior post-release.

R v Slingsby (1995): The defendant was acquitted of manslaughter after his partner died from injuries caused by a signet ring during consensual "fisting." The judge held that the injuries were accidental and not intended, and thus consent was a valid defense for the non-criminal act that led to unintended harm.

R v Coates (2012): Here, the defendant killed a woman by asphyxiation using a belt, claiming consensual paraphilia (autoerotic asphyxiation). He received a manslaughter conviction, with the Court noting his violent history and rejecting the rough sex defense.

R v Latimer and R v Lovell: Both cases involved defendants who inflicted severe violence under the guise of consensual rough sex. Each received manslaughter convictions instead of murder, raising concerns about the potential influence of the rough sex defense on jury perceptions.

Andy Anokye (2020): The defendant, a musician known as Solo 45, was convicted of multiple rapes and assaults. He used the "rape game" defense, claiming his extreme acts of violence were consensual. His case exemplifies the troubling application of rough sex claims in cases involving extreme sadistic behavior.

DPP v Morgan (1975): This pivotal case highlighted the issue of "consent by assumption," where the defendants claimed they believed the victim's resistance was "play acting." It underlined the problems with interpreting resistance as consent, especially in cases involving violence.

Natalie Connolly Case (2016): Connolly's death following extreme sexual violence led to a gross negligence manslaughter conviction for her partner rather than murder, as the Court accepted arguments of consensual rough sex. This sparked calls for legislative changes to limit the rough sex defense in fatal cases.

129. Harriet Wistrich has similarly challenged the CPS on their approach to rape prosecutions in which they have abandoned a merit-based approach in favour of what the CPS precognise a jury may conclude being influenced less on the evidence and more on erroneous presumptions about women and sex. See <https://rapecrisis.org.uk/news/latest-news/womens-groups-refused-permission-to-pursue-judicial-review-of-cps/> accessed 20 June 2020.
130. MJ Mossman, 'Feminism and Legal Method: The Difference It Makes' (1986) 3 Aust J Law Soc 30.