

'I THOUGHT SHE CONSENTED': DEFEAT OF THE RAPE SHIELD OR THE DEFENCE THAT SHALL NOT RUN?

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Abstract. This article examines the extent to which the rape shield is displaced by reliance at trial on the defence of honest or honest and reasonable belief in consent. It also raises the question of the legitimacy of judicial intervention in terms of denying the accused the opportunity to raise the defence of lack of mens rea.

The controversy in England and Wales over the fate of section 41 of the Youth Justice and Criminal Evidence Act 1999 (the 'rape shield') has raged² in the main in the absence of analysis of its relationship with the defence of belief in consent in sexual offence cases.³ Belief in consent is not an 'issue of consent' according to section 42(1)(b), so the restriction on defence evidence or cross-examination about any sexual behaviour of the complainant, which is subject to the gateways in 41(3)(c), does not bite. This suggests that where mens rea is a contested issue and the complainant's sexual past could have affected the defendant's belief in consent, section 41 is powerless to prevent complainants from a humiliating inquiry. The effect of this may be to prompt an acquittal by undermining the stereotype of the 'real rape'.⁴ It has been argued that solution of the problem lies in the abolition of Morgan⁵ mens rea for rape and sexual assault cases.⁶ However, the reasonableness of the defendant's belief remains an issue,⁷ leading to fears of an open 'invitation to the jury to scrutinise the complainant's behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent.'⁸

There are good reasons, however, to believe that this is not necessarily the case. In the House of Lords it has been said that in practice the incidence of cases where there is a real issue of honest belief may be fewer than feared.⁹ In recent cases, courts have avoided this consequence through a variety of strategies, most notably in W,¹⁰ where, although counsel attempted to raise the defence of belief in consent, the Court of Appeal declared that it was not an issue in the trial. There are signs that courts in England and Wales (and, possibly, Scotland¹¹) may be embarking on a path that is much more adventurous than is generally realised. The current debate on reform of section 41 must take account of the logical consequences of the approach in A (No2) and W; the crucial role of trial judges in relation to mens rea has not been fully appreciated to date. This key element of the verdict may be entirely removed from consideration by the jury with the incidental effect that to deny mens rea will not provide a means of circumventing the rape shield. This enhanced role of the trial judge raises questions of the legitimacy of refusing accused persons the opportunity to raise a defence, and of the nature of the prosecution's burden of proof.

Mens Rea as an Issue

On one view, whenever consent is an issue in a sexual case, it is accompanied by that of belief in consent. A defendant is unlikely to allege that the complainant consented to intercourse whilst conceding that he thought she did not.¹² The prosecution must prove all elements of the offence, so that to describe denial of mens rea as a defence at all is misleading. In Morgan, Lord Hailsham said:

Once one has accepted...that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit

it, it seems to me to follow as a matter of inexorable logic that there is no room either for a `defence' of honest belief or mistake, or of a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the required intent, or it does not.¹³

In this particular case, however, there was no practical difficulty. Given that the defendants accused the victim of lying about her attempts to resist them, claiming that she had co-operated in the proceedings with `some relish',¹⁴ there were two diametrically opposed accounts of events, and the jury simply had to decide which to believe.

In the same vein, Lord Steyn suggested in A (No 2) that the defence of belief in consent would in many trials have no air of reality and would in practice not be available.¹⁵ For instance, a complainant might allege the use of violence whereas it is flatly denied by the defence, who allege that she co-operated. The conflicting versions exclude any claim to honest (and reasonable) belief. Lord Steyn's analysis does not absolve the prosecution of its obligation to prove mens rea. The defendant's reasonable belief in consent, with the issue of consent itself, stands or falls with the plausibility of his version of events. A story that the complainant was a willing participant bases the claim to belief in consent, not on the complainant's sexual history, but on her alleged conduct.¹⁶ This may be seen in W,¹⁷ where an accusation of rape was made against the brother-in-law of a complainant who had been blind from birth and depended upon relatives for her care. W was accused of committing various sexual offences against her, including rape by way of inserting a foreign object into her anus. He claimed that she had consented, and that she had told him about various relationships with men in the past. The trial judge refused defence counsel leave to cross-examine the complainant about this on the question of the defendant's belief in

consent. The Court of Appeal agreed both that the proposed questions were about the complainant's sexual behaviour and that the refusal was justified; the clear conflict of testimony meant that there was only one issue in the case, which was consent.

Maurice Kay LJ declared: 'The primary issue before the jury was therefore a stark one. Honest but mistaken belief was at best a secondary issue'. The trial judge, of course, had to make his decision before hearing the defence evidence. The content of the defendant's testimony, however, was probably immaterial. It is likely that the judge considered that the defence could be based only on one of the following propositions: first, the complainant consented and made it clear that she was content to be penetrated anally by solid objects, in which case sexual history of a conventional nature was irrelevant; alternatively, she expressed no view at all on the matter, in which case it is inconceivable that the defendant, on the basis of her previous sexual relationships, decided that she consented to this.

In the absence of a clear set of principles, it is difficult to reconcile W with the earlier case of Barton,¹⁸ where the Court of Appeal considered that the defence of consent could be run simultaneously with what O'Connor LJ described as 'genuine but mistaken belief' in consent. It is not clear why both defences arose in that case. According to the complainant, the accused arrived at her flat at about 2.00 am, while she was in bed. He banged on the door, so she got up and shouted to him to go away. He broke the door open, pulled her to the floor and raped her. His account was that she had invited him to her flat and was a willing participant.¹⁹

Air of Reality

Lord Steyn's phrase, 'air of reality', is derived from a line of cases in the Canadian Supreme Court. Here the defences of consent and belief in consent are clearly separated, so that reliance on the former does not necessarily presuppose a claim to the latter, and may preclude it. The approach is that the defence of (in this context, honest but not necessarily reasonable) belief is, in every case, the defence of mistaken belief in consent; in most cases, a defendant who denies mens rea is taken to concede that the complainant did not consent. Thus, in Pappajohn v The Queen,²⁰ the accused was charged with raping a female estate agent who visited the house he proposed to sell. She alleged that he had violently overcome her struggles, ignored her pleading, stripped her, tied her up and raped her. The accused claimed that she had been willing throughout. The Supreme Court held that there was only one issue in the case, which was whether or not the complainant had consented to sex. The trial judge was right not to put the defence of belief in consent to the jury; logically, a claim to have a mistaken belief cannot sit with a defence of consent.²¹ The two defences can co-exist only if there is evidence of something that could have led the accused to conclude that the complainant consented even though she did not. Where the two parties give diametrically opposed versions of the event, there is no such evidence.

The requirement then, in the Canadian cases, is that there must be evidence of equivocal conduct from the complainant – something which could have caused the accused to make the mistake. In Esau,²² McLachlin J explained that consent as a defence is generally incompatible with denial of mens rea, given 'the fact that human beings have the capacity to understand each other on matters such as these... the two

propositions require a third element of proof – evidence explaining how it could be that the complainant’s non-consent could honestly be read by the accused as consent’.²³ The Californian Supreme Court has taken a similar approach. In The People v Williams,²⁴ the defence argued that denial of mens rea (honest and reasonable belief) does not presuppose a mistaken belief, that is, does not automatically concede the consent issue. The court held, however, that a defendant may not plead both defences `absent substantial evidence of equivocal conduct that would have led a defendant reasonably and in good faith to believe consent existed where it did not.’²⁵ Between them, the parties gave wholly divergent accounts, with Williams’ testimony suggesting actual consent. If believed, it would preclude any reasonable mistaken belief in consent.

It is not clear whether the House of Lords in A (No 2) similarly embrace an equivocal conduct requirement, nor how far in this direction Scots courts wish to travel. In Doris v HM Advocate²⁶ it was held that whether or not a judicial instruction on honest mistake is required depends on the circumstances. The Scottish Law Commission declared recently that a Morgan defence cannot be run unless the defendant accepts that the victim did not consent.²⁷ The equivocality requirement has been criticised on the ground that cases of alleged sexual assault are portrayed as disputes in which the testimony of one party must be taken to be entirely true while that of the other is entirely false.²⁸ Nobles and Schiff have suggested that it is quite possible that in these cases neither party will tell the absolute truth; perhaps there is no absolute truth. Effectively there are two sets of constructed truth, the differences between them reflecting the differences between individual interpretations of the same events.²⁹ Cavallaro³⁰ argues that jurors should be entitled to find any middle ground between two conflicting accounts if they choose. Her example is the Californian case,

Mayberry.³¹ The complainant testified that she accompanied the accused, a stranger, to a shop to buy cigarettes, although he had threatened her with violence and demanded sex. The parties walked to his apartment where the alleged rape took place. The jury might have disbelieved the complainants' account of Mayberry's violence, whilst at the same time believing that nevertheless she did not consent. If so, Cavallaro argues, there was a valid defence of reasonable mistake. However, the equivocality approach does not in fact rule out a middle ground between the two conflicting versions of events. In Esau,³² Lieberman J explained that if there is a straight conflict of testimony between the complainant and the accused, the court should consider whether the jury can splice together some of each party's evidence and settle upon a reasonably coherent set of facts capable of supporting a defence of belief in consent. This will not be an easy task. It should be noted, also, that even on Cavallaro's analysis, Mayberry may have had no evidence on which to found mistaken belief. The trial judge would have to decide whether the complainant voluntarily accompanying the accused to his apartment could have led him to believe that she was willing to engage in sexual intercourse with him; the subjective nature of the equivocality judgment is discussed below.

To many lawyers it may seem curious to find that the more evidence of consent the defendant in a sexual assault case has, the less he can raise the defence of belief in consent. Instinctively they may consider an accused entitled to ask the trier of fact to find that the complainant did consent, while simultaneously suggesting that even if she did not he nevertheless proceeded in the mistaken belief that she was willing.³³ However, we have seen a similar evidential burden imposed, in relation to the issue of belief in consent, on defendants who engage in sexual intercourse without informing their partner of a known risk of infection with the HIV virus.³⁴ And in a

conventional rape case, the evidence which supports consent is likely to be the very evidence upon which the claim to belief in consent is based. If the jury reject it on the one issue, they will reject it on the other. A separate defence of mistaken belief is therefore necessary only where it rests on different evidence from that which suggests actual consent. The equivocality doctrine therefore does not remove from the prosecution the obligation to prove mens rea. It is true that, as Cavallaro points out, there is no stated equivocal conduct requirement in trials of other offences, such as bigamy and assault, where the defendant denies actus reus and mens rea simultaneously. In relation to bigamy, however, the issue of equivocality does not arise. The dispute is likely to be about the validity of a divorce proceeding and/or its effect on his belief, rather than any equivocality in someone else's behaviour. In self-defence cases, the defendant is indeed entitled to argue in the first place that the victim was about to attack him (which the court may accept or reject) and also that he believed that he was about to be attacked. There could be two wholly divergent accounts of what the victim was doing. But here there may well be effectively an evidential requirement that amounts to an equivocality test. There must be some evidence that the purported victim was behaving in a manner that could be interpreted as aggression, whether or not he did actually intend violence. The evidence of violence in fact and the evidence suggesting that the defendant anticipated violence is likely to be the same. The jury can accept or reject it. In the absence of some evidence of threat from the alleged victim, the defence is effectively one of mistaken belief – there should be evidence which could have led the accused to believe he was about to be attacked, even though this was not the case.

Ideology and the Definition of Equivocal Conduct

In sexual assault cases, unfortunately, the classification of actions by the complainant as equivocal or otherwise is unlikely to be a matter of universal agreement. It is a judgment that depends upon highly personal perceptions of the norm in sexual encounters. If the described behaviour is such that no reasonable person would consider it indicative of a willingness to engage in sex, it is not equivocal. This means that the defence of absence of mens rea may not be put, even in Canada, a jurisdiction in which the belief has only to be honest, and not necessarily reasonable. In Pappajohn³⁵, it was not disputed that the parties had had an agreeable lunch together and had been drinking wine prior to the alleged rape. It was held that there was no evidence to support a mistaken belief in consent. Similarly, there was no equivocal conduct in Reddick,³⁶ where a fifteen-year-old complainant had opportunities to escape a 'continuing and developing situation', but did not, and got into the defendant's car to go to his apartment. It was held that the evidence was incapable of supporting honest belief. Instances of apparent equivocality are in fact quite short in supply. There seems a greater readiness to accept as a source of the alleged belief in consent some event external to the complainant, as in Morgan, where, had the defence been based on the husband telling his friends to disregard his wife's resistance, there would have been an evidential basis for the defence of honest belief.³⁷ Equivocality was a quality conferred externally also in a case³⁸ where one man raped the complainant and then the defendant arrived and had sexual intercourse with her. He claimed that he had no idea that she had been threatened previously, and so assumed that her actions were not inspired by fear. Similarly, in Bulmer,³⁹ there

was some evidence that the complainant, who may have been a prostitute, had consented to sex with Bulmer's friend prior to the alleged rape by the accused and others, and had negotiated a price with the group of men. It was held that the defendant could have been mistaken as to her state of mind.

Thus, whether or not the mistaken belief must be reasonable, the jury's perception of reasonableness is neither here nor there. In The People v Williams⁴⁰ the defence evidence that the complainant had consented was that she accompanied the defendant, much older than she and hardly known to her, to a hotel room, and did not object when he was handed a bedsheet by the hotel clerk (she said she thought they were going to watch television together). This was held to be insufficient evidence of equivocality. In the Court of Appeal Justice Low had argued that to hold otherwise would revive the 'mistaken and repugnant idea that a woman loses her right to refuse sexual consent if she accompanies a man alone to a private place.' The trial judge must assess the complainant's conduct and decide whether it could have led a reasonable man in the defendant's shoes to believe she wanted to have sex with him. Where he decides there was nothing on which such a belief could be founded, the jury's opinion of the reasonableness of the accused's belief will not be sought.

It seems, therefore, that the question of the reasonableness of the defendant's belief is more likely to be determined by trial judges', not jurors', perceptions of the meaning of behaviours in a sexual context. The significance of this is clearly illustrated in by the divergent views of Justices of the Canadian Supreme Court in Esau.⁴¹ The complainant was very drunk at the time of the alleged rape. The defendant claimed that she invited him into her bedroom. The majority of the judges refused to make an a priori determination that an honest but mistaken belief in consent is impossible when the complainant is intoxicated. McLachlin and L'Heureux-Dubé

JJ dissented, however, on the basis that if the complainant had been so drunk that afterwards she could not remember the event, the accused must have been at least wilfully blind on the matter of her consent. Espousing a communication model of sexual relations, they argued that a man is not entitled to take ambiguity as the equivalent of consent.⁴² In reply, Lieberman J, for the majority of the court stated;

My colleague, Justice McLachlin, in her reasons in this case, narrows the defence to where it practically ceases to exist. [They]. .would expand the role of the trial judge and deny the jury the ability to apply its own wisdom to issues that arise in these cases by removing nearly all questions of fact from them.⁴³

It is clear, however, that the equivocal conduct requirement does involve trial judges in making crucially important judgments of fact. These are not value-free.

The importance of cultural context may be seen in an appeal in Scotland, a jurisdiction in which only recently has it been held that the use of force is not essential to the actus reus of rape.⁴⁴ In McKearney v HM Advocate,⁴⁵ the appellant broke into the house during the night when the complainer had gone to bed. It was undisputed that she awoke to find his hands round her throat. A prolonged and violent struggle ensued, during and after which he threatened to kill her. Overturning McKearney's conviction, the High Court of Justiciary held that there was nevertheless evidence of her behaving in a manner that could have led to him forming an honest belief. This consisted of a 'clear and long break' in time between the violence and the intercourse. How long this lasted is unclear. During a discussion about access to their son, the appellant appeared to become calmer. He told the complainer to lie on her bed and lay down with her. He took no steps whatever to ascertain consent to intercourse. Lord McCluskey stressed that at that 'second stage. . .there was evidence that the

complainer had, at the very least, not resisted the penetration; nor had she said or done anything to indicate that she was refusing intercourse.’ It is submitted that the trial judge was correct in his finding that the absence of physical resistance or actual violence at the precise moment of intercourse is not evidence on which to found belief in consent. We do not have to go as far as the decision in The People v Williams to hold that there was no evidence of equivocal conduct in McKearney.⁴⁶

The Evidential Basis of Equivocal Conduct

In The People v Williams,⁴⁷ it was said that the defence of honest and reasonable mistake must be put to the jury if there is some substantial evidence deserving of consideration, ‘not any evidence no matter how weak.’⁴⁸ A bare assertion by the defendant that he thought the complainant consented is insufficient unless ‘supported to some degree by other evidence or circumstances arising in the case’.⁴⁹ Lieberman J concedes that in sexual assault cases testimony from each party is the most important source of evidence, but justifies the rule thus: ‘A belief that is totally unsupported is not an honestly held belief. A person who honestly believes something is a person who has looked at the circumstances and drawn an honest inference from them.’⁵⁰ The contrary view is that an accused’s oath to the effect that he or she honestly believed in consent constitutes some evidence. However implausible it might be, its probative value is for the jury to decide.⁵¹ But such an argument overlooks the nature of the accused’s evidential burden in a criminal trial. The duty to adduce evidence is to provide evidence of the defence on which a reasonable jury could act, that is, evidence of

sufficient substance to merit consideration by the jury...It is not every facile mouthing of some easy phrase of excuse that can amount to an explanation. It is for a judge to decide whether there is evidence fit to be left to a jury which could be the basis for some suggested verdict.⁵²

The defence, then, must adduce sufficient evidence, whether or not furnished by means of the defendant's testimony, of the complainant's equivocal conduct.⁵³ The effect of cultural assumptions about sexual behaviour on this judgment also cannot be avoided. They can be seen to operate in decisions on sufficiency of evidence of the falsity of sexual complaints made by the complainant in the past.⁵⁴ Most dramatically, their role was decisive in McKearney v HM Advocate.⁵⁵ The appellant did not give evidence at the trial. On appeal, however, it was held that the evidence lay in the complainant's description of her own conduct, that is, her failure to resist, and the fact that he had desisted from violence for a while; he may have convinced himself at this point that they had made up their quarrel.

The obligation on the defence to adduce sufficient evidence of equivocality does not undermine the presumption of innocence. The evidential burden to raise accident fell upon the accused in Woolmington⁵⁶ simply because the prosecution had already discharged its own evidential burden on mens rea by dint of the substantial inference of intention arising from the accused pointing a gun at his wife and firing it. Some credible evidence of lack of intention was clearly required. In rape and sexual assault cases, similarly unambiguous prosecution evidence would cast an evidential burden on the accused to suggest a belief in consent. Thus the presumptions under section 75 Sexual Offences Act 2003, which in certain instances impose on the

defence an obligation to adduce sufficient evidence to raise the issue of reasonable belief in consent,⁵⁷ are necessary only when the prosecution evidence of mens rea is not strong enough on its own to impose an evidential burden upon the accused.⁵⁸

Relevance of Sexual History to Belief in Consent

Where mens rea is validly raised as an issue,⁵⁹ [t]he basis of the accused's honest belief in the complainant's consent may be sexual acts performed by the complainant at some other time or place.⁶⁰ The issue of relevance is highly contentious, however. Even a previous relationship with the defendant himself⁶¹ was seen to be of little significance by L'Heureux-Dubé J in Seaboyer and Gayne.⁶² The Canadian provisions under consideration⁶³ allowed admission of proximate sexual history. Heureux-Dubé J concluded that these were sufficient to deal with any relevant sexual relations between the complainant and defendant; matters in the past had no bearing on the issues of either mens rea or consent. The majority of the Supreme Court disagreed with her on this.

In the English case, Barton,⁶⁴ the defence conceded that the complainant had been kicking the defendant and screaming during sexual intercourse, but argued that she had to his knowledge in the past similarly accompanied acts of consensual sexual activity with other men. O'Connor LJ directed trial judges to use common sense on the question of relevance: 'There is a difference between believing a woman is consenting to intercourse and believing that a woman will consent if advances are made to her'.⁶⁵ Otherwise, the cloak of belief may routinely be used to justify allegations of promiscuity. In contrast, in Doe v US⁶⁶ it was held that the complainant's alleged promiscuity, which the defendant had heard about from his

friends, was admissible to support his assertion that he reasonably but mistakenly believed the victim had consented. A counter-argument to this kind of reasoning is that a reasonable person should make their own inquiries rather than rely on gossip or bragging to found their own belief in another person's consent.⁶⁷

Barton suggests that a complainant's sexual experience with others will rarely have a bearing on reasonable belief. Even where it has, there will seldom be any justification for demanding that the complainant provide more than the bare facts of the alleged promiscuity or relationship. Section 41(2)(b) stipulates that any question as to a complainant's sexual behaviour must be justified on the ground that to refuse it would render a conviction unsafe.⁶⁸ How much detail is appropriate to a particular line of defence is not always clear.⁶⁹ In Davies⁷⁰ a fourteen-year-old complainant was said by the defendant to have told him that she had slept with two men before. It was accepted that she could be cross-examined about this, in accordance with the decision in RT;RH⁷¹ that a complainant's statements about her sexual behaviour fall outside section 41. The Court of Appeal also accepted the defence argument that the issue of whether or not the statement was true was important; if it were true, it was more likely that she had indeed told him this, and if so, that would be relevant to his belief in consent. It was held, however, that the cross-examination should be limited to confirmation that she had slept with two men. Since even this level of detail is likely to have a serious effect on juror perceptions of the complainant's credibility, it is reassuring to find the Court of Appeal more recently in W⁷² taking the view that RT;RH applies only to allegedly false complaints in the past. Cross-examination for other reasons on a complainant's statement to the accused about sexual experience invokes section 41.

Conclusion

It is submitted that the judgment in A (No2) has set courts in England and Wales some way along a road already travelled in North America. Although the judicial power to reject the mens rea defence in sexual cases may appear a robust one, it is not entirely unfamiliar. Judges routinely have to decide whether or not an evidential basis for a particular defence exists. If judges in sexual assault trials are to decide as a preliminary whether a complainant's conduct can be regarded as sufficiently equivocal to support a defence denial of mens rea, the question of the reasonableness of a purported belief in consent will effectively be decided without jury involvement. The role of the trial judge is therefore crucial, and, perhaps, unenviable.⁷³ Study of the North American experience shows how murky the waters become at the point where the complainant's conduct, and whether a man could have interpreted it as indicative of assent to sexual intercourse, is judged. Here, perceptions can be highly personal, and potentially a source of unfairness. In Seaboyer and Gayne L'Heureux-Dubé J stated that an accused person does not have a right under the Canadian Charter of Rights and Freedoms

whether under the rubric of a right to a fair trial or the right to make full answer and defence, to adduce evidence that prejudices or distorts the fact-finding process at trial. As a corollary, neither do notions of a 'fair trial' or 'full answer and defence' recognise a right in the accused to adduce any evidence that may lead to an acquittal⁷⁴

Fairness, therefore, does not justify evidence based on irrelevance, prejudice and stereotypes. On the issue of mens rea, it is for trial judges to decide whether that is the direction in which a proposed line of defence questioning will take the court.

¹ Exeter University. This article is based on a paper given at the Rape Reform Workshop held at the University of Edinburgh, April 28-29, 2006. I am most grateful to the participants for their contributions, particularly in relation to Scottish developments, and to the Review's referees. Any errors are my own, however.

² Most recently L Kelly, J Temkin and S Griffiths, Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials, (London, Home Office 2006)

³ The issue of consent arises in trials for the offence of rape under s1, Sexual Offences Act 2003, but also in relation to s2, assault by penetration, s3, sexual assault, and s4, causing sexual activity without consent.

⁴ HL Littleton and D Axsom, 'Rape and Seduction Scripts of University Students: Implications for Rape Attributions and Unacknowledged Rape' (2003) 49 Sex Roles: a Journal of Research 465; B Krahe, 'Police Officers' Definition of Rape: a Prototype Study', (1991) 1 Journal of Community and Applied Social Psychology, 223; KM Ryan, 'Rape and Seduction Scripts' (1988) 12 Psychology of Women Quarterly 237; A Clarke, J Moran-Ellis and J Slaney Attitudes to Date Rape and Relationship Rape: a Qualitative Study, Sentencing Advisory Panel Research Report No 2 2002, www.sentencing-advisory-panel.gov.uk/research 23, 37-38; KM Ryan, 'Rape and Seduction Scripts' (1988) 12 Psychology of Women Quarterly 237; S Estrich, Real Rape: How the Legal System Victimises Women Who Say No (Boston, Harvard UP 1987)

⁵ [1976] AC 182

⁶ Eg., J Temkin 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 JLS 219, 247; Home Office, Setting the Boundaries: Reforming the Law on Sex Offences (Home Office 2000) 14; DJ Birch, 'Untangling Sexual History Evidence' [2003] Crim LR 370

⁷ Sexual Offences Act 2003 s1(2); A commits rape if he does not reasonably believe that B consents. Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

⁸ AJ Ashworth and J Temkin 'The Sexual Offences Act 2003: Rape, Sexual Assault and the Problem of Consent' [2004] Crim LR 328, 342

⁹ Lord Clyde, R v A (No 2) [2001] 3 All ER 1, 43

¹⁰ [2005] Crim LR 965

¹¹ In Scotland it has not been clear whether or not the belief has to be reasonable; Scottish Law Commission, Discussion Paper on Rape and Other Sexual Offences (Edinburgh, TSO, 2006) 4.36, n.36. Now see McKearney v HM Advocate, 2004 SCCR 251, discussing mens rea in terms of intention or recklessness

¹² cf C Tapper, Cross and Tapper on Evidence (London, Lexis/Nesis, 2004) 357

¹³ Above, n 5, at 381. cf Pappajohn, in the Canadian Supreme Court; the dissenting judges Dickson and Estey JJ argued that mens rea is always an issue before the jury, the onus being on the prosecution.

¹⁴ Lord Cross at 204

¹⁵ Above, n 9, at 14, Lord Clyde said that for an accused to raise the defence of honest belief, it must be clearly viable on the facts; ibid., at 43

¹⁶ Lord Steyn conceded that in the small number of cases where the defence is available and sexual history admitted on mens rea rather than on the consent issue,

trial judges will have to direct the jury that the complainants' sexual behaviour is relevant only to belief and not the issue of consent itself. He apparently shared the view of the Court of Appeal that the distinction owed 'more to Lewis Carroll than to sensible jurisprudence', A [2001] EWCA Crim 4; sub. nom. R v Y [2001]Crim LR 389; (2001) The Times February 13; Rose LJ (V-P)

¹⁷ W [2005] Crim LR 965

¹⁸ (1986) 85 Cr App R 5

¹⁹ Her sexual history was nevertheless inadmissible, as it was held to be irrelevant to his purported belief, discussed below

²⁰ [1980] 2 SCR 120

²¹ cf Darrach [2000] 2 SCR 443

²² [1997] 2 SCR 777

²³ Ibid., at [63]

²⁴ 841 P.2d 961 (1992) In Esau, (above n 22) this decision was described as a 'leading case' by McLachlin J. She notes that it is being followed by courts in some other American states.

²⁵ Arabian J at 966

²⁶ 1996 SCCR 854

²⁷ Above, n 11, 4.40 In Morgan itself, however, the defence concession was not made until the appeal stage.

²⁸ R Cavallaro 'A Big Mistake: Eroding the Defence of Mistake of Fact about Consent in Rape' (1996) 86 Journal of Criminal Law and Criminology 815

²⁹ R Nobles and D Schiff Understanding Miscarriages of Justice (OUP 2000) p 21

³⁰ Above, n 28

³¹ People v Mayberry 542 P.2d 1337

³² Esau, above n 22

³³ For example, the dissenting judges in Pappajohn, above n 20 (Dickson and Estey JJ), and in The People v Williams, above, n 24 (Mosk and Kennard J).

³⁴ Konzani, [2005] EWCA Crim 706

³⁵ Above n 20

³⁶ [1981] 1 SCR 1086

³⁷ Above, n 5, Lord Cross at 204, a view accepted in Pappajohn above n20, McIntyre J at 133, also in the ‘communication model’ of consent; S Murthy, ‘Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim’s Sexual History to Show the Defendant’s Mistaken Belief in Consent (1991) 79 Calif. L R 541

³⁸ R v Plummer and Brown (1976) 24 CCC (2d) 497 quoted with approval in Pappajohn; above, n 20, McIntyre J 132.

³⁹ [1987] 1 SCR 782

⁴⁰ Above, n 24.

⁴¹ Above, n 22

⁴² Ibid., at [80]

⁴³ Ibid., at [21]

⁴⁴ Lord Advocate’s Reference No 1 of 2001 2002 SCCR 435

⁴⁵ Above, n 11

⁴⁶ Unsurprisingly, the Canadian Supreme Court took a very different view in the factually similar case, Sansregret, [1985] 1 SCR 570

⁴⁷ Above, n 24

⁴⁸ People v Flannel (1979) 25 Cal. 3d 668, Arabian J at 684 – 685, his emphasis

⁴⁹ Seaboyer and Gayne [1991] 2 SCR 577, L’Heureux-Dubé J at 689; Park [1995] SCR 836: Esau, above, n 22

⁵⁰ Esau above n 22 at [4]

⁵¹ Eg., Lamer J in Bulmer above, n 39 [22]-[24]

⁵² Bratty v Attorney-General for Northern Ireland [1963] AC 386, Lord Morris at 416.

⁵³ McLachlin J in Esau above n 22 at [57]

⁵⁴ A large number of implausible allegations insufficient evidence of the falsity of previous complaints, RT; RH [2002] All ER 683; Alan David C and Julie B. [2003] EWCA Crim 29. Contrast Garaxo [2005] EWCA Crim 1170; [2005] Crim LR 883, plus commentary

⁵⁵ Above n 11

⁵⁶ Woolmington v DPP [1935] AC 462

⁵⁷ As well as in relation to consent itself

⁵⁸ Discussion of the implications of the presumptions, J McEwan, 'Proving Consent In Sexual Cases: Legislative Change And Cultural Evolution' (2004)

⁵⁹ [1991] 2 SCR 577

⁶⁰ In Seaboyer and Gayne above, n 49, McLachlin J at 613

⁶¹ Potentially relevant according to DJ Birch, Note on Y [2001] Crim LR, 392; cf survey responses, N Kibble, Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999 (Aberystwyth, Criminal Bar Association and University of Wales, Aberystwyth 2004)

⁶² Above, n 49

⁶³ Declared unconstitutional by the majority. Provision replaced in reformed s276 Criminal Code, which prohibits evidence of the complainant's sexual activity unless it falls within exceptions including relevance to an issue at trial and also has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. upheld in Darrach, above, n 21

⁶⁴ Above, n 18

⁶⁵ Ibid., at 13, cf A McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 OJLS 275

⁶⁶ 666 F 2d. 43 (4th Cir. 1981)

⁶⁷ eg., S Murthy, above, n 37; L Pineau 'Date Rape: A Feminist Analysis' (1989) 8 Law and Phil. 217

⁶⁸ See Lord Hope in A (No 2) above n 9 at 24

⁶⁹ In RT and MH [2002] 1 All ER 683 (making false complaints) there was a cautious approach; cf., Mokrecovas [2002] 1 Cr App R 227, (motive to lie). But see Durwayne Martin [2001] EWCA Crim 916; (2001) The Times June 8; R v F [2005] EWCA Crim 493; [2005] Crim LR 564 (motive to lie). The 'vast majority' of judges participating in Kibble's survey decided that although the sexual context was an important part of the background in a 'motive to lie' scenario, the precise details of what the complainant and her boyfriend were doing was unnecessary; N Kibble 'Judicial Perspectives on the Operation of section 41' [2005] Crim LR 190,195

⁷⁰ [2004] EWCA 1389

⁷¹ Above n 54

⁷² Above n 10

⁷³ Jackson argues that Strasbourg jurisprudence may be exerting pressure on judges to be more proactive, making judgments about sufficiency of evidence.; JD Jackson, 'The Effects of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68 MLR 737, 753

⁷⁴ Above, n 49, at 696