How Consent is Constructed in Case Reports of Rape

An Analysis of Judicial Discourse

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by

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This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

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In a jurisdiction where the definition of rape is based on consent, how consent is understood and assessed is of paramount importance. While the concept of consent is fundamental to the definition and proof of rape, there is considerable disagreement about the nature of consent, how it is conceptualised and determined in different circumstances. My study examines the construction of consent in case reports of rape by applying a methodology based on discourse analysis. By examining case reports between 2002 and 2015, I demonstrate the diversity and evolution of judicial discourse and the impact of the Sexual Offences (S) Act 2009 on judicial assessment of consent. The study focuses on judicial discourse rather than judicial doctrine. This allows me to consider how consent is established through judicial handling of the facts as well as the application of law. By reading across the cases, I identify and examine four key aspects of judicial discourse that demonstrate how consent is constructed: the relevance of force in determining consent; how particular patterns of behaviour are understood in judicial discourse; the value attached to the complainer's response to rape and her expression of distress; how consent is understood in circumstances where the complainer is asleep or in a borderline state of consciousness. My study reveals a complex picture of an evolving discourse and heterogeneous ideas about consent. While there is greater fluidity and richness in judicial thinking about consent following the 2009 Act, entrenched ideas about gender, intoxication and sexual availability persist. I also identify new problems emerging in the wake of the 2009 Act. By advancing our understanding of judicial decision-making about consent and the development of judicial discourse in the context of the 2009 Act, the study makes an original contribution to legal scholarship in the area of sexual consent and rape.

CONTENTS

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Introduction

How is sexual consent constructed in case reports of rape? This is the central question that my study aims to answer. Consent to sex matters because it performs a normative function in shaping the boundary between what may be deemed a legally innocuous act and the criminal offence of rape[1]. How consent is understood in law is not only important in the prosecution of rape but the legal conception of consent shapes societal ideas about what constitutes permissible and impermissible sexual relations. In the criminal law of Scotland, the absence of consent and the lack of a reasonable belief in consent by the accused are essential components of rape, under s.1 of the Sexual Offences (Scotland) Act, 2009 (the 2009 Act). In a jurisdiction where the definition of rape is based on consent, how consent is conceptualised and assessed in relation to the behaviour and intentions of the accused and complainer is of paramount importance. However, while the concept of consent is fundamental to the definition and proof of rape, there is considerable disagreement about the nature of consent, the requirements necessary to establish consent, and how the presence or absence of consent is established in widely varying circumstances[2].

In this study, I examine how consent is constructed in case reports of rape by applying a methodology based on discourse analysis. The introduction provides some context to the study and explains how it is undertaken. I begin by setting out the relevant social and legal background to the subject area. I outline the complexities and problems of applying a consent-based definition of rape and I explain how my understanding of these difficulties has shaped the focus of the study. I identify the research questions that underpin the study and I explain the rationale for focusing on judicial discourse in case reports of rape. I identify a gap in current research in this field that my study aims to fill. I consider what makes the study distinctive and the contribution it makes to scholarship in this area.

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[1] Hurd, H, (1996) 'The Moral Magic of Consent', *Legal Theory* 2 121, p.121.

[2] See Wertheimer, A. (2003) *Consent to Sexual Relations*, Cambridge: Cambridge University Press; McGregor, J (2005) *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously*, Hampshire: Ashgate Publishers; Cowan, S. (2007a) 'Freedom and capacity to make a choice: A feminist analysis of consent in the criminal law of rape' in Munro, V. and Stychin, C. (eds) *Sexuality and the Law: Feminist Engagements*, London: Routledge; Cowan, S. (2007b) 'Choosing freely: theoretically reframing the concept of consent' in Hunter, R. & Cowan, S. (eds) *Choice and Consent: Feminist Engagements with Law and Subjectivity*, Abingdon: Routledge-Cavendish.

Background

Rape is not a rare occurrence[3]. Research across different jurisdictions confirms the systemic and gendered nature of sexual violence in that the vast majority of all sexual offences, including rape, are perpetrated by men against women and children[4]. Rape is mostly committed by a man who is already known to the woman; for example, a current or ex-partner, an acquaintance or neighbour. It is estimated that 90% of complainers in Scotland are raped by a man whom they know and this finding is consistent with other research in the UK[5]. Sexual coercion typically arises, then, in the context of some kind of relationship between the parties, although not necessarily a sexual relationship[6]. Most women who experience sexual coercion also report other forms of abuse or violence[7]. There is very little domestic abuse that does not involve some form of sexual coercion and most women in abusive relationships report multiple instances of forced sex[8]. As Brindley, National Coordinator for Rape Crisis Scotland, observes, there is a "greater recognition now of rape as part of domestic abuse, whereas in the past it was hidden"[9]. According to Kelly *et al*, "rape is a more frequent and mundane crime than conventionally believed … and, for a substantial proportion of women, rape involves repeat victimisation", usually by a partner or ex-partner[10]. There are important implications that flow from this understanding of rape.

Resolving issues of sexual coercion in the context of a relationship evokes the symbolic power of the private sphere that frames our understanding of sexual behaviour that

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[3] While the statistics for many crimes in Scotland are going down, those for sexual offences continue to rise. Sexual crimes have been on a long-term upward trend since 1974 and have increased each consecutive year since 2008-09. According to the figures for recorded crime in Scotland in 2015-16, sexual crimes are at the highest level seen since 1971, the first year for which comparable crime groups are available. See https://www.rapecrisisscotland.org.uk/help-facts/#faq_2.

[4] See Temkin, J. and Krahe, B. (2009) *Sexual Assault and the Justice Gap: A Question of Attitude*, Oxford: Hart; McGlynn, C. and Munro, V. (eds) *Rethinking Rape Law: International and Comparative Perspectives*, Oxfordshire: Routledge; McMahon, S. and Schwartz, R. (2011) 'A review of rape in the social network literature: A call to action', *Affilia: Journal of Women and Social Work*, 26 3, 250; Stark, E. (2013) 'Coercive Control' in Lombard, N. and McMillan, L. (eds) *Violence against Women: Research Highlights*, London: Jessica Kingsley Publishers.

[5] See MacMillan, L. (2013) 'Sexual Victimisation: Disclosures, Responses, and Impact' in Lombard, N. and McMillan, L. (eds) *Violence Against Women*, London: Jessica Kingsley Publishers, p.74. This study was based on an examination of all reports of rape over the period of one calendar year in Scotland.

[6] See Kelly, L., Lovett, J. and Regan, L. (2005) 'A gap or a chasm? Attrition in reported rape cases', *Home Office Research Study* 293, February 2005. In my study, there was only one case of 'stranger rape'. In 30 out of 31 cases, the perpetrator was already known to the woman.

[7] Walby, S. and Allen, J. (2004) 'Domestic violence, sexual assault and stalking', *Home Office Research Study* 276, March 2004, p.30; see also McMillan, L. (2013) 'Sexual Victimisation: Disclosures, Responses and Impact' in Lombard, N. and McMillan, L. (eds) *op.cit.,* p.74.

[8] For example, the Crown Office cites a near 500% increase in rape cases linked to domestic abuse between 2010/11 and 2014/15: see Scott, D. (2015) 'Domestic abuse rape cases rise by almost 500%', *Daily Express*, 28/12/2015; see also Stark (2013) *op. cit.*, p.22.

[9] Cited by Scott, D. (2015) *op.cit.*

[10] Kelly, L., Lovett, J. and Regan, L. (2005) *op.cit.*, p.33.

takes place 'behind closed doors'; for example, the conditions or circumstances in which we believe a woman might consent to sex, or where it would be reasonable for a man to believe she was consenting, or the degree of control or coercion exercised within a relationship that would amount to abuse[11]. Assessing consent is also shaped by our perception of the circumstances and events leading to the allegation of rape, including the behaviour and intention of the parties towards each other and the nature of their relationship, if any. In many cases of rape, the crucial question may not be whether the victim did agree to have sex but, *even if* she did, whether her choice was sufficiently voluntary in the circumstances to render her consent valid or whether it was reasonable for the accused to believe that it was. These questions involve an evaluative judgment based on limited evidence and competing factual accounts as to what took place. In circumstances involving uncertainty and ambiguity, there is considerable scope for relying on assumptions and pre-conceived ideas about normative behaviour within heterosexuality.

Sexual consent and coercion are understood within a historical, cultural context and prevailing ideas about gender and sexual violence[12]. For example, our understanding of normal gender roles and behaviour within heterosexuality will shape our conception of what amounts to consensual or coercive behaviour. As Mackinnon observes, if sex is understood as something that men do to women and that women either refuse or allow to happen, then a woman's sexual consent may be seen as a very passive act[13]. Conceptions of sexual coercion may be woven around well-worn myths and stereotypes about rape; most notably, the paradigm of the 'real rape', where rape is conceived as a sudden violent attack by a strange man, somewhere outside and in the dark[14]. When non-consensual intercourse falls within the scope of this paradigm and is clearly interpretable as an act of violence, it is more likely to be viewed as rape, both

[11] See Weait, M. (2005) 'Harm, Consent and the Limits of Privacy', *Feminist Legal Studies* 13 97, p.99.
[12] According to Gavey, prevailing ideas about gender roles and behaviour within heterosexuality provide a cultural framework for understanding rape; see Gavey, N. (2005) *Just Sex? The Cultural Scaffolding of Rape*, London: Routledge, p.177; see also Larcombe, W. (2005) *Compelling Engagements: Feminism, Rape Law and Romance Fiction*, South Australia, BSW: The Federation Press, p.20; Du Toit, L. (2007) 'The conditions of consent' in Hunter, R., and Cowan, S. (eds) *op.cit.*, p.60; Anderson, I. and Doherty, K. (2008) *Accounting for Rape: Psychology, Feminism and Discourse Analysis in the Study of Sexual Violence*, London: Routledge, p.67.
[13] Mackinnon, C. (1983) 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence', *Signs: Journal of Woman in Culture and Society*, 8 649, p.650.
[14] Gavey, N. (2005) *op.cit.*, p.51; see also Estrich, S. (1987) *Real Rape*, Cambridge MA: Harvard University Press. In one study, less than half the women whose experience of sexual assault met the legal definition of rape actually defined it as such and the figure was even lower where the perpetrator was a current or ex-partner; see Kelly, L., Lovett, J. and Regan, L. (2005) *op.cit.*, p.3.

within the criminal justice system and society more widely[15]. Although this paradigm fails to reflect the reality of most women's experience of rape, it still provides a template against which women's actual experiences may be understood and found wanting[16]. The pernicious effects of the 'real rape' syndrome operate throughout the criminal justice system and are believed to contribute to the low reporting and conviction rates for rape and the high rate of attrition[17].

In Scotland, like many jurisdictions, rape convictions remain "unjustifiably low"[18]. It is estimated that less than half of the cases of rape that go to court - which represents an extremely small proportion of all reported rapes - result in conviction[19]. In this context, the Scottish Law Commission was commissioned by the Scottish Government in 2004 to examine the law relating to rape and make recommendations for reform. In their Report, published in 2007, the Scottish Law Commission identify a range of difficulties in applying a consent-based approach to rape; for example, the vagueness and "inherent ambiguity" about consent as a concept, the focus on the behaviour of the victim rather than the accused, prevalent stereotypes about women's sexuality, and the association of female passivity with the notion of consent[20]. The Scottish Law Commission also highlight practical problems in establishing sufficient evidence of the complainer's non-consent and the accused's awareness that there was no consent[21]. Since most sexual offences take place in private, there is often little evidence other than that provided by the parties. Given the requirement of corroboration in Scots law, the complainer's account of rape must be supported or confirmed by other evidence. Corroboration frequently depends on the inferences that can be drawn from circumstantial evidence which, in an adversarial system, is subject to radically different interpretations[22]. Under the common law, prior to the 2009 Act, the accused's honest

[15] Gavey, N, (2005) *op.cit,* p.51; McGlynn, C. and Munro, V. (2010) *op.cit.*; Larcombe, W. (2011) 'Falling Rape Convictions Rates: (Some) Feminist Aims and Measures for Rape Law', *Feminist Legal Studies*, 19 27, p.35.
[16] See Temkin, J. (2002) *Rape and the Legal Process,* 2nd edition, Oxford: Oxford University Press, p.151; Gavey, N. (2005) *op.cit.*, p.61; Larcombe, W. (2011) *op.cit.,* p.31; McMillan, L. (2013) *op.cit.*, p.31.
[17] In this context, the reporting, conviction and attrition rates for rapes can be understood to both reflect and reproduce notions of 'real rape'; see Kelly, L., Lovett, J. and Regan, L. (2005) *op.cit.*, p.2.
[18] McGlynn, C. (2010) 'Feminist activism and rape law in England and Wales: A Sisyphean struggle?' in McGlynn, C. and Munro, V. (eds) *op.cit.,* p.139; Cowan, S. (2010) makes a similar point in relation to the experience in Scotland, in McGlynn, C. and Munro, V. (eds) *op.cit.,* p.166.
[19] See https://www.rapecrisisscotland.org.uk/publications/Daly-and-Bouhours-2010-Rape-case-attrition.pdf
[20] The Scottish Law Commission (2007) *Report on Rape and other Sexual Offences*, Publication No. 209, p.15-16.
[21] The Scottish Law Commission (2007) *op.cit.*, p.16.
[22] In Scotland, the evidential requirement of corroboration - and the burden of establishing a formal sufficiency of evidence - is considered to be one obstacle that results in the very low conviction rate; see Cowan, S. (2010) *op.cit.,* p.157.

belief in consent provided a defence to the crime of rape[23] and the subjective nature of such a test, as definitive of rape, attracted particular criticism[24].

The 2009 Act was welcomed as long awaited, progressive reform of the law on rape in Scotland. The legislative intention behind the 2009 Act was to "refine the idea of consent to make it a more satisfactory and workable concept in the context of sexual offences"[25]. By defining consent as free agreement, the 2009 Act installs a positive, co-operative model of consent, with an emphasis on choice and freedom. A non-exhaustive list of conditions are provided where free agreement is deemed absent; for example, where there is violence or threats, incapability due to intoxication, or unlawful detainment[26]. Compared to the subjective assessment of the accused's honest belief in consent under the common law, the 2009 Act introduces a more objective assessment based on the test of reasonableness: was it *reasonable* for the accused to believe the complainer was consenting? In an attempt to shift the focus from the role and behaviour of the complainer and locate consent "in the interaction between the parties"[27], the 2009 Act also allows for the consideration of whether the accused had any knowledge that the complainer was consenting or took any steps to ensure that there was consent[28].

Given the limited impact of progressive legal reform in different jurisdictions and prevailing attitudes and misconceptions about rape and its victims, the interaction of the substantive law of rape and evidential requirements of proof may continue to pose considerable difficulties for law in dealing with rape[29]. The juridogenic effects of the criminal justice system - by that, I mean the unintended or negative effects of seemingly neutral or benign institutional responses - particularly in relation to rape are well documented[30]. Many of the provisions of the 2009 Act - the concept of free agreement, the notion of incapability to consent, what constitutes violence or threats, or how immediate these should be - are broadly stated and their meaning and scope are uncertain. Judicial interpretation will be critical in fleshing out these concepts and, in

[23] This is set out in *Meek v HMA* 1983 SLT 280 and *Jamieson v HMA* 1994 SLT 573.
[24] See Larcombe , W. (2005) *op.cit.;* see also Cowan, S. (2010) 'All change or business as usual? Reforming the law of rape in Scotland', in McGlynn, C. and Munro, V. (eds) *op.cit.*
[25] The Scottish Law Commission (2007) *op.cit.*, p.17.
[26] Under s.13 of the 2009 Act.
[27] The Scottish Law Commission (2007) *op.cit.*, p.20.
[28] Under s.16 of the 2009 Act.
[29] See McGlynn, C. and Munro, V. (eds) (2010) *op.cit.;* see also the various contributions to Horvath, M. and Brown, J. (eds) (2009) *Rape: Challenging Contemporary Thinking*, Devon: Willan Publishing.
[30] See Smart, C. (1989) *op.cit.*; Gavey, N. (2005) *op.cit.*; Kelly, L., Lovett, J. and Regan, L. (2005) *op.cit.*; Temkin, J. and Krahe, B. (2009) *op.cit.*

doing so, the courts will shape the application and development of the law in relation to sexual consent and rape. In the context of recent legal changes introduced by the 2009 Act and the perceived difficulties in applying a consent-based approach to rape, how consent is constructed in case reports of rape is worthy of critical examination.

The study

In March 2002, the *Lord Advocate's Reference* (*No 1 of 2001*) abandoned the historic requirement of force and defined rape as sexual intercourse without the woman's consent (the *actus reus* of rape) and the man's knowledge of or recklessness regarding the complainer's consent (*the mens rea* of rape)[31]. My study is based on an analysis of case reports of rape from March 2002 to 2015 which were referred to the Appeal Court of Scotland on a question relating to consent[32]. By examining a group of cases over this period of time, I am able to consider how consent is constructed in judicial discourse before and after the legal changes introduced by the 2009 Act. My understanding of the conceptual complexities and practical problems of applying consent have shaped the focus of the study[33]. For example, consent can be conceptualised in quite different ways and this has implications for assessing consent in practice. Gauging a woman's ability to give her free agreement is a value-laden judgment as to how free her choice should be and the degree of coercion that will render it invalid. Determining consent also depends on the weight and value attached to relevant circumstantial factors and the inferences that are drawn from them. Such an assessment may be influenced by broader contextual factors, such as particular beliefs about gender roles and behaviour in heterosexual relationships. At present, we know very little about how consent is understood and applied by courts in relation to conceptual issues, circumstantial and contextual factors, and underlying values.

The central question underpinning my study is: how is consent constructed in case reports of rape? I use the term 'constructed' to encompass how consent is conceptualised and understood in judicial discourse as well as assessed and determined in varied circumstances. The use of 'constructed' is also intended to

[31] The *Lord Advocate's Reference (No 1 of 2001)* 2002 S.L.T. 466.
[32] I explain in more detail how cases were selected for examination in Chapter Two, when I set out the methodology for the study.
[33] The problems and complexities of consent that are identified in academic literature are discussed in greater depth in Chapter One.

convey an active process through which meaning is achieved in case reports; for example, how a particular conception of consent is applied to a set of events and circumstances that are, themselves, subject to construction and interpretation. In order to provide an answer to the primary research question, my study will address the following questions:

- how is consent conceptualised in judicial discourse?
- how is consent understood in different circumstances?
- to what extent are circumstantial and contextual factors recognised as relevant in judicial decision-making about consent and what value is attached to them?
- how does judicial discourse relate to broader social discourses that have a bearing on consent?
- what is the impact of the 2009 Act on the judicial discourse of consent?

My study addresses these questions through an analysis of judicial discourse in the 'consent' cases. While such questions have generated considerable debate in the theoretical literature on consent, they have not been systematically examined in an applied study of judicial practice; that is, in relation to a group of cases involving rape[34].

At present, there is no applied research examining judicial discourse in 'consent' cases. While academic work in the field of consent explores the conceptual basis of consent and provides theoretical critiques of a consent-based approach to rape, there is little applied work that examines the relevance of these concerns in case reports of rape[35]. In the field of applied studies, most analysis of legal discourse has been based on transcripts of individual hearings and criminal trials[36]. This includes research based on mock jury trials[37], judicial summing up in trial court processes[38], the language used in court proceedings[39] and the use of narrative by the prosecution and defence at trial[40].

[34] I will discuss the theoretical literature on consent in Chapter One.
[35] For theoretical work and different perspectives on consent, see Hurd, H. (1996) *op.cit.*; Baker, K. 1999) Understanding Consent in Sexual Assault' in Burgess-Jackson, K. (ed) *Most Detestable Crime*, Oxford: University Press; Cowan (2007a) *op.cit.*; Cowan (2007b) *op.cit.;* Wertheimer, A. (2009) 'Consent to Sexual Relations', in Miller, F. and Wertheimer, A. (eds) *The Ethics of Consent: Theory and Practice*, New York: Oxford University Press. I discuss different conceptions of consent in Chapter One.
[36] For example, Ehrlich, S. (2001) *op.cit.*; Winter, J. (2002) 'The Truth Will Out? 'The Role of Judicial Advocacy and Gender in Verdict Construction', *Social and Legal Studies* 11 (3) 343. I will discuss how my study sits in relation to prior research in this field in Chapter Two.
[37] For example, see Finch, J. and Munro, V. (2005) *op.cit.;* Finch, J. (2006) *op.cit.*
[38] See Winter, J. (2002) *op.cit.*
[39] See Coates, L. Bavelas, J. and Gibson, J. (1994) 'Anomalous Language in Sexual Assault Trial Judgments', *Discourse and Society* 5 189; Coates, L. and Wade, A. (2004) 'Telling it like it isn't: Obscuring perpetrator responsibility for violent crime', *Discourse and Society*, 15 499.

Applied research has also tended to focus on individual case studies and particular issues relating to consent; for example, how intoxication and incapability are understood in relation to consent[41]. There is no applied study that assesses a broader range of issues arising in a group of 'consent' cases. My study aims to fill this gap by examining one particular aspect of the legal response to rape; the construction of consent in case reports of rape.

The methodology that I use to examine these cases is a textually oriented approach to discourse analysis[42]. Discourse can be understood as any communication through the medium of language (and visual media) and it can be applied to a particular group of statements or, more broadly, to a general domain of knowledge, such as judicial discourse of consent[43]. Discourse is constituted in texts through the language that is used, the different generic elements that can be identified in a text, such as the use of narrative and reasoning, and the broader contextual elements that are incorporated into the text[44]. By focusing my analysis on judicial *discourse*, rather than judicial *doctrine*, I examine how consent is constructed within the different elements of case reports, such as the use of language, reasoning, narrative and broader ideas and social discourses that are drawn upon or relied on within the text. Applying this methodology allows me to consider not only what is stated about consent but it enables me to examine broader aspects of judicial discourse which reveal how consent is understood and assessed; for example, the particular use of language, different forms of reasoning, the narrative construction of events and broader ideas about gender and sexual violence that can be identified in the texts. Examining these elements of case reports, often regarded as peripheral in more conventional legal research, might appear to go against the grain. A conventional doctrinal approach to legal research, for example, would focus on judicial *dicta* contained in case reports - that is, the *ratio* and any significant *obiter* commentary - and the other elements would be accorded little importance[45].

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[40] See Ehrlich, S. (2006) 'The Discursive Reconstruction of Sexual Consent' in Cameron, D. and Kulick, D. (eds) *The Language and Sexuality Reader*, London: Routledge.
[41] See Cowan, S. (2008) 'The Trouble with Drink: Intoxication, (In)Capacity and the Evaporation of Consent to Sex', *Working Paper Series* No. 2011/14, University of Edinburgh.
[42] This is based on the approach set out by Fairclough, N. (2003) *Discourse Analysis: Textual Analysis for Social Research*, Oxon: Routledge; I set out the methodology that I use in Chapter Two.
[43] See Fasold, R. (1990) *Socioliguistics of Language*, Oxford: Blackbell. I will discuss what is meant by discourse in more depth in Chapter Two.
[44] See Machin, D. and Mayr, A. (2012) *Critical Discourse Analysis*, London: Sage.
[45] The *ratio* is the point of law on which a case is decided and which is then applicable to subsequent similar cases; other relevant judicial opinion is viewed as *obiter* – not strictly relevant, although it may be more or less persuasive.

In broader approaches to legal scholarship, discourse is identified as an important site of research in law and a wider variety of methodologies are applied to examine legal texts[46]. Applying discourse analysis to examine legal texts reflects a 'cultural' or 'linguistic' turn within qualitative approaches to legal research. These approaches apply theoretical perspectives and methods drawn from various disciplines within Social Sciences and the Humanities to examine aspects of law that are not empirically quantifiable and go beyond strict legal doctrine[47]. For example, the theoretical underpinnings of discourse analysis are drawn from work across a range of disciplines, including literary theory and criticism, functional linguistics, social and critical theory and social constructionism[48]. My study can be contextualised in relation to this developing strand of inter-disciplinary approaches to qualitative legal research that applies theories and methods offered by these disciplines to define new topics of research and interrogate legal texts.

In some ways, applying discourse analysis to examine case reports decentres what is normally privileged in these cases and places what lies in the margins at the heart of these texts. This reflects an understanding of case reports as multi-layered and multi-dimensional, comprising a mix of different generic elements; for example, the use of language, the narrative construction of events, reasoning and argumentation, and broader social discourses that can be discerned in the text. Case reports also incorporate material drawn from a range of sources, such as the trial transcript, witness testimony, the trial judge's report and relevant antecedent cases. Judicial discourse is produced from a mix of all these elements. Since my focus is the construction of consent, my analysis focuses on the particular aspects of discourse that reveal how consent is understood and determined[49]. The underlying premise in adopting this approach is that judicial decision-making about consent is more than a mechanical process of adjudication and can be understood in the context of broader meanings and values that are constructed within judicial discourse; for example, how events are narrated, the type of reasoning that is applied, the particular ideas about

[46] See Ehrlich, S. (2001) *Representing Rape: Language and Sexual Consent*, London: Routledge; Cotterill, J. (2007) *Language in the Legal Process*, Basingstoke: Palgrave Macmillan; Cammiss, S. and Watkins, D. (2013) 'Legal Research in the Humanities' in Watkins, D. and Burton, M. (eds) *Research Methods in Law*, Oxon: Longman.
[47] See Cownie, F. and Bradney, A. (2013) 'Socio-legal studies: a challenge to the doctrinal approach' in Watkins, D. and Burton, M. (eds) *op.cit.*,p.35.
[48] I discuss the conceptual and theoretical underpinnings of discourse analysis when I set out my methodology in Chapter Two.
[49] I explain the framework for analysis and how this is applied to examine judicial discourse in case reports in Chapter Two, when I set out my methodology and methods of analysis.

gender, heterosexuality and sexual violence that are relied on. In this way, it is possible to examine not only what exists on the surface of a text but what is conveyed implicitly or indirectly within the text.

I believe such an approach is justified - indeed, I would argue that it is necessary - to understand fully how consent is understood and determined in appeal court cases. That is, we need to look beyond judicial *dicta* to appreciate how consent is constructed in case reports of rape. As Lacey has suggested, focusing on different forms of legal discourse facilitates a broader study of meaning and allows for an examination of aspects of law that go beyond strict legal doctrine[50]. This provides for a richer interrogation of the different elements that make up case reports. Such an analysis may help provide an answer to the vexed question posed by Cowan[51]: *how* is consent constructed in cases where proper attention to context would suggest none exists?

Why case reports?

While case reports can be understood as highly selective, incomplete accounts of atypical cases, they occupy a commanding position in articulating and developing a judicial discourse of consent which, in turn, shapes and is shaped by broader social discourses. It might be argued that Appeal Court judgments raise purely technical questions of law. However, while each case is appealed on the basis of a particular legal question - sufficient evidence, corroboration, an unreasonable verdict or misdirection by the trial judge - the judgment involves more than the mechanical application of law. This can be illustrated by considering a type of case commonly seen as involving a technical issue of law; an appeal on grounds of misdirection by the trial judge. In such a case, the appeal court identifies any legal error made by the trial judge in directing the jury and considers how material the error is. In assessing the materiality of the misdirection, the court will weigh its significance in relation to the overall strength or weakness of the case and decide whether the jury might have reached a different verdict if appropriate directions had been provided. This involves an evaluative judgment, which cannot be arrived at by a formulaic application of law. What constitutes a strong or a weak case is not self-evident in a case of rape. For example, is a case involving violence always or necessarily stronger than one where there is no

[50] Lacey, N. (1998) *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, Oxford: Hart, p.10.
[51] Cowan, S. (2007a) *op.cit.,* p.54.

evidence of any force or injury? The answer will depend on various factors; how rape is understood, the meaning and value that is attached to different elements of evidence by the appeal court, and whether the court considers *all* the evidence that was available to the jury or merely the evidence relied on by the prosecution at trial[52].

Case reports are important historical and cultural documents. The impact of legal judgments in appeal court cases extends beyond the individual case by shaping the application and development of the law. This, in turn, has a bearing on police, prosecutory and pre-trial processes - which cases are perceived as worth progressing and the likelihood of a guilty verdict - and on reporting, conviction and attrition rates for rape. As an authoritative legal discourse, some aspects of judicial discourse achieve a cultural reach beyond its intended recipients. The idea that discourse only impacts on those who actually read the relevant texts does not capture the potency of discourse. The effects of discourse can be understood as more diffuse and fluid, circulating throughout the social body in myriad, subtle ways[53]. It is this 'capillary' quality of discursive power that enables discourse to be reproduced, elaborated and circulated across different spheres and channels in society. In this way, judicial discourse stretches beyond the narrow circulation and readership of legal judgments through a range of discursive practices generated by, for example, research, media, academic literature, interaction with the psy-disciplines, and representation in various aspects of civil society.

Such an understanding of the potency and effects of discourse has generated interest in how power is exercised through different representations of the social world in discourse[54]. For example, case reports can be understood as part of a network of discursive practices that regulate the boundaries between normative and criminal behaviour through the particular meanings that are attached to the events and behaviour of the parties. Judicial discourse, in conjunction with numerous other legal and social discourses, moulds our conception of consent and the attribution of responsibility and blame in rape. This relates to the expressive function of law as well

[52] The court exercises considerable discretion in deciding *which* evidence to consider when assessing the evidential strength or weakness of a particular case.
[53] The conception of discourse power - the power that is exercised through the production and circulation of discourse - comes from Foucault's genealogical studies of the construction of knowledge; see Foucault, M. (1972) *The Archeology of Knowledge*, London: Tavistock; Foucault, M. (1976) *The History of Sexuality: An Introduction*, Harmondsworth: Penguin. I discuss this in more depth in Chapter Two when I set out the theoretical underpinnings of the methodology.
[54] See Eagleton, T. (1991) *Ideology: An Introduction*, London: Verso.

as the legitimacy of law, which is of particular relevance to my study given concerted criticism, across many jurisdictions, as to how rape is dealt with in the criminal justice system[55]. Case reports are an important site to identify and examine changing representations of the social world, such as gender and sexual violence. Through an analysis of judicial discourse, it is possible to consider the interpretative framework through which the events and their subjects are imbued with meaning.

We know that jury decision-making in cases of rape is influenced by a variety of different factors, including attitudes and assumptions about gender, intoxication and risk-taking behaviour, which affect the outcome of the case[56]. However, we know comparatively little about the factors that influence judicial decision-making about consent and how judicial discourse relates to broader social discourses of gender and sexual violence. As McGlynn has observed, it is not always legal principles that are problematic but it is their implementation in practice that may be elusive[57]. In this context, it is important to be aware of the gap between the law in books and law in practice. According to Ehrlich, this discrepancy is "probably most explicit in judicial decision making"[58]. While Ehrlich's comments refer to a different jurisdiction (Toronto, Canada), they are, arguably, equally pertinent here. In the context of legal changes introduced by the 2009 Act, and the importance of legal interpretation at appellate level, it is timely to examine how consent is constructed in judicial discourse.

The perceived failure of the legal system in tackling rape and impatience with incremental reform have led some to suggest that turning to law is of limited value, while others warn of the dangers of feminist disengagement from law[59]. Cowan, for example, could be speaking for many critics when she questions "what role we can legitimately expect substantive criminal law reform to play"[60]. In this respect, my study is in the best tradition of feminist engagement in legal scholarship to develop greater awareness of the kinds of changes in discursive practices that are needed to help enrich a legal discourse of consent. It is part of a wider feminist strategy of broadening and

[55] I consider such criticisms, particularly those concerning a consent based approach to rape, in Chapter One.
[56] See Finch, J. and Munro, V. (2005) 'Juror stereotypes and blame attribution in rape cases involving intoxicants', *British Journal of Criminology* 45 25; Finch, J. (2006) 'Breaking Boundaries: Sexual Consent in the Jury Room', *Legal Studies* 26 303.
[57] McGlynn, C. (2010) *op.cit.,* p.150.
[58] Ehrlich, S. (2001) *op.cit.*,p.25.
[59] See Smart, S. (1989) *op.cit.*; Lacey, N. (1998) *op.cit.*; McGlynn, C. (2010) *op.cit*; Larcombe, W. (2011) *op.cit.*
[60] See Cowan, S. (2010) *op.cit.*, p.166.

enhancing the legal story of rape by bringing legal discourse into line with women's actual experiences of rape.

Structure of thesis

In Chapter One, I examine the different ways in which consent can be conceptualised, how consent is constructed in law, and the various requirements that are considered necessary in establishing consent. I also highlight the inherent tensions within and limitations of consent as a concept. Chapter Two sets out the methodology that I apply to examine case reports of rape. This is based on discourse analysis. I explain the theoretical underpinnings of the methodology and the framework of analysis that I apply to examine the texts. I consider the particular challenges this approach poses, its strengths and weaknesses, and how I plan to address these weaknesses in my study.

In the following four chapters, I present my analysis of the 'consent' cases. Each chapter is organised around a key aspect of judicial discourse which I identify as important in determining how consent is constructed. In Chapter Three, I examine the relevance of force in establishing consent and I consider different conceptions of what amounts to force. In Chapter Four, I explain how the assessment of consent is shaped by judicial recognition and understanding of particular patterns of behaviour. These are relevant in establishing the nature of the relationship between the parties or the context in which rape is committed and provide a basis from which criminal intent may be inferred. In Chapter Five, I examine the value that is attached in judicial discourse to the complainer's response to rape and, in particular, her expression of emotional distress. In Chapter Six, I consider how issues of capability and consent are understood in the context of sleep or borderline states of consciousness. In my conclusion, I consider the diversity and evolution of judicial discourse over the time-line of the cases, and the contribution the study makes to legal scholarship in this field.

Chapter One Conceptualising consent

When courts undertake the task of distinguishing rape from permissible sexual relations, they come up against the concept of consent. Although consent is fundamental to the definition of rape, there is considerable confusion about the nature of consent, what it consists of and how it may be determined in widely varying circumstances[1]. While consent is broadly generic in denoting an individual's agreement to a particular activity with another, it also takes the form of normatively contrasting conceptions, each constituted by its own suppositions and set of values[2]. As Westen observes, while consent may be a "single concept in law", it encompasses a "multitude of opposing and cross-cutting conceptions of which courts tend to be only dimly aware"[3]. In this chapter, I examine the various ways in which consent can be understood. I consider particular conceptions of consent, how consent in defined in law, the requirements that may be considered necessary to establish consent, and the inherent tensions within and limitations of the concept of consent.

The value of consent

According to Fletcher, "no idea testifies more powerfully to individuals as a source of value than the principle of consent"[4]. Consent can be understood as promoting two related values: a person's wellbeing or interests; and her autonomy and self-determination[5]. Typically, people want to make decisions for themselves and being able to do so is a component of their general wellbeing. Consent plays a crucial role in protecting and promoting autonomy in sexual relations through the choice an individual makes in whether to engage in sexual activity with another person. The primacy of consent in social and legal discourse has been found to lie in its relationship

[1] Compare the 'civil liberties' approach of consensual minimalism proposed by Wertheimer, A. (2003) in *Consent to Sexual Relations*, Cambridge: Cambridge University Press with a richer, feminist model of consent advocated by Cowan, S. (2007b) in Choosing freely: theoretically reframing the concept of consent' in Hunter, R. and Cowan, S. (eds) *Choice and Consent: Feminist Engagements with Law and Subjectivity*, Abingdon: Routledge-Cavendish.
[2] See Baker, K. (1999) Understanding Consent in Sexual Assault' in Burgess-Jackson, K. (ed) *Most Detestable Crime*, Oxford: University Press, p.49; Wertheimer, A. (2003) *op.cit.*, p. 144; Westen, P. (2005) 'Some Common Confusions about Consent in Rape Cases*', Ohio St. J. Crim. L., 2 333.*
[3] Westen. P. (2005) op.cit., p.333.
[4] Fletcher, G. (1996) 'Basic Concepts of Legal Thought', cited by Munro, V. (2008) 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' *Akron L. Review* 41 923.
[5] Miller, F. (2009) 'Preface to a Theory of Consent Transactions: Beyond Valid Consent' in Miller, F. and Wertheimer, A. (eds) *The Ethics of Consent: Theory and Practice*, New York: Oxford University Press, p.83.

to individual autonomy and self-determination[6]. While the Scottish Law Commission understands consent to be a "key element of giving effect to sexual autonomy"[7], it also recognises the tension that arises from the promoting and protective function of consent; the promotion of the positive dimension of sexual autonomy based on respect for individual freedom of choice, and the protective function of consent in safeguarding freedom from different forms of sexual coercion[8].

In classical liberal theory, what autonomous rational agents consent to is deemed worthy of respect; this relates to the positive dimension of sexual autonomy. Witmer-Rich identifies three distinct approaches within liberal theory that relate the value of consent to autonomy[9]. According to Mill, we value consent because individuals are the best judges of their own interests and therefore consent demonstrates that they have exercised their autonomy to decide on these interests. Feinberg suggests that an individual's consent matters because one has a right to autonomy based on the notion of an intrinsic sovereignty over one's own life. Raz also relates the value of consent to personal autonomy and argues that it is not only the individual but society, more broadly, that values autonomy; for example, it is in the state's interest to promote autonomy as a constituent element of individual well-being. Rape can be understood as the quintessential violation of an individual's autonomy over bodily integrity. As West puts it, rape denies sovereignty over "one's physical boundaries … the sure knowledge that one's will is irrelevant, the immediate and total reduction of one's self to an inanimate being for use by another"[10].

Consent is important because it provides individuals with the right to protect their choice and sexual autonomy[11]. In sexual relations, consent can be understood as operating as a kind of border control protecting bodily integrity over which the individual has legitimate control[12]. As Feinberg observes, "any act that crosses the boundaries of a sovereign person's zone of autonomy requires that person's

[6] See Hurd, H. (1996) 'The Moral Magic of Consent', *Legal Theory* 2 121, p.121; McGregor, J. (2005) *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously*, Hampshire: Ashgate Publishers, p.23; Cowan, S. (2007b) *op.cit.,* p.96.
[7] The Scottish Law Commission (2007) *Report on Rape and other Sexual Offences*, Publication No. 209, p.8.
[8] I discuss the tension arising from different functions of consent later in the chapter when I compare two contrasting models of consent.
[9] Witmer-Rich, J. (2011) 'It's Good to be Autonomous: Prospective Consent, Retrospective Consent and the Foundation of Consent in the Criminal Law', *Crim. Law & Philosophy*, 5 377, p.377.
[10] West, R. (2009) 'Sex, Law and Consent' in Miller, F. and Wertheimer, A. (eds) *op.cit.,* p.227.
[11] See McGregor, J. (2005) *op.cit*., p.106; Cowan, S. (2007a) 'Freedom and capacity to make a choice: A feminist analysis of consent in the criminal law of rape' in Munro, V. and Stychin, C. (eds) *Sexuality and the Law: Feminist Engagements*, London: Routledge, p.51.
[12] The concept of border control is used by McGregor, J. (2005) *op.cit*., p.107.

permission otherwise it is wrongful"[13]. In this sense, consent is a fundamentally relational concept. It denotes a permission-creating act that alters the relations in which individuals stand with respect to what they may or may not do in relation to each other. As Hurd suggests, consent performs a kind of "moral magic" on relationships by transforming injunctions against physical interference, thereby altering the moral quality of conduct that would otherwise constitute a wrong against the consenting person[14].

Consent draws its primacy in law from this transformative power in rendering permissible what would otherwise be impermissible. To achieve this, consent must be volitional. Consent does not connote a neutral act that is subsequently justified as having moral force. As Kleinig points out, to say that a person consented is not "to report some evaluatively neutral doing, such as A's saying 'yes', which is then followed by further discussion about the significance of saying 'yes'"[15]. Instead, it is meant to convey that whatever A did to consent (including, perhaps, saying 'yes'), it also possesses a normative force as a voluntary, deliberate act of permission-giving. It is for this reason that consent changes the moral and legal landscape of sexual relations[16]. According to Kleinig, the concept of consent is "normative through and through"[17]. The significance of consent lies in its moral legitimation to transform relations based on the expression of an individual's *willed* intention. In this view, consent must be more than mere submission or acquiescence to another's will, since these lack volitional intent and do not carry the moral force of consent[18].

The transformative power of consent is negated if an individual's choice lacks sufficient voluntariness and freedom; for example, if consent is compelled through violence, threats or coercion. For consent to be meaningful in protecting autonomy it must be given under conditions in which a person is sufficiently free from coercive pressure. However, determining exactly how *much* voluntariness or freedom is sufficient for consent to work its moral magic is a difficult, contentious question, over which there is considerable disagreement[19]. For example, within liberal theory, the conception of

[13] Feinberg, J. (1986) *Harm to Self*, New York: Oxford University Press, p.177.
[14] Hurd, H. (1996) *op.cit.*, p. 121.
[15] Kleinig, J. (2009) 'The Nature of Consent' in Miller, F. and Wertheimer, A. (eds) *op.cit.*, p.4.
[16] See Beauchamp, T. (2009) 'Autonomy and Consent' in Miller, F. and Wertheimer, A. (eds) *op.cit.,* p.56.
[17] Kleinig, J. (2009) *op.cit.*, p.4.
[18] See McGregor, J. (2005) *op.cit.*, p.118.
[19] See Westen, P. (2005) *op.cit.*, p.119.

consent often relies on the notion of a detached, abstract human agent who enjoys unrestrained agency and the requisite power to give or withhold agreement. However, as Munro points out, this conception of consent fails to reflect the "messy and multi-faceted realities of women's daily lives"[20]. Cowan suggests that in place of "narrow liberal values" based on an atomistic sense of self, consent may be imbued with "feminist values, encompassing attention to mutuality ... relational choice and communication"[21]. Similarly, Munro emphasises the protective function of consent and argues that, in the context of rape, the threshold of consent should be at its most stringent to protect women from sexual coercion[22].

Given the conventional liberal account of values that underpin a consent-based approach to rape - of individual autonomy, choice and freedom - developing a more contextual approach to consent that recognises the relational aspect of choice and the dimension of power in gender relationships presents a considerable challenge for law. The question of the appropriate threshold for consent - that is, the requirements necessary to establish consent - is a question I return to throughout this chapter. Having considered the transformative and moral value of consent, I turn now to consider the legal conception and standard of consent in the Scots law of rape.

Consent in law

The *Lord Advocate's Reference (No 1 of 2001)*[23] removed the historic requirement to prove that a woman's will was overcome by force and that she resisted rape to the last. In a landmark judgment that traced the evolution of Scots law on rape, the court accepted that the common thread underpinning the crime of rape was the concept of consent. By a majority ruling, but with dissenting voices, the *Lord Advocate's Reference* held that the crime of rape consisted of intercourse without the consent of the woman (the *actus reus* of rape), where the man intended to have intercourse knowing she was not consenting or reckless as to her consent (the *mens rea* of rape). In this judgment, consent was defined as an "active consent, as opposed to mere submission or

[20] Munro, V. (2008) *op.cit.*, p. 926.
[21] Cowan, S. (2007a) *op.cit.,* p.53.
[22] Munro, V. (2008) *op.cit.,* p.940.
[23] The *Lord Advocate's Reference* (*No 1 of 2001*) 2002 S.L.T. 466. This was a landmark judgment in the common law of rape in Scotland. In a majority judgment, the full bench of the Appeal Court reviewed the law of rape and held that the common thread underpinning the development of the law was the concept of consent.

permission"[24]. Then, as we have already seen, in 2009 the Sexual Offences (Scotland) Act provides a statutory definition of consent as free agreement[25] and a non-exhaustive list of circumstances where free agreement is absent[26]. The *mens rea* of rape, as defined by the 2009 Act, is the lack of a reasonable belief in consent[27]. The accused's claim that he honestly believed there was consent is now assessed according to a standard of reasonableness. This reflects an important shift from a subjective test, which was applied under the common law[28], to a more objective assessment of the accused's state of mind. In assessing reasonableness, consideration may be given as to whether the accused had any knowledge of consent or took any steps to ascertain whether the complainer was consenting[29]. The absence of consent and lack of a reasonable belief in consent are now essential components of the *actus reus* and *mens rea* of the crime of rape.

Under the general rule of corroboration in Scots criminal law, both elements of consent must be supported by evidence other than the complainer's own testimony. When consent is contested, there are three possible sources of corroboration[30]. The first is through the application of the *Moorov* doctrine in cases involving multiple offences against more than one complainer[31]. Here, the complainers may provide mutual corroboration if the offences committed by the appellant are considered sufficiently similar in time, manner and circumstances to amount to a single course of criminal conduct[32]. Secondly, corroboration may come from independent evidence of the complainer's emotional distress soon after the rape[33]. In certain circumstances, the doctrine of *de recenti* distress allows evidence of her distress to support her account that she did not consent and that this would have been apparent to the appellant[34]. Corroboration may also be provided by other circumstantial evidence that is capable of supporting or confirming the complainer's account; for example, evidence of the events

[24] The *Lord Advocate's Reference (no 1 of 2001*) 2002 per Lord Justice General Cullen, par.39.
[25] Under s.12 of the 2009 Act.
[26] Under s.13 of the 2009 Act; these include where a person is incapable of consent because of the effects of alcohol, because of violence or threats of violence, where a person is unlawfully detained, or where there is deception.
[27] Under s. 16 of the 2009 Act.
[28] This was set out in *Jamieson v HMA* 1994 JC 88 and *Meek v HMA* 1983 SLT 280.
[29] S.16 of the 2009 Act states: "In determining … whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, what those steps were".
[30] In principle, both elements could be corroborated by direct evidence, for example by the confession of the accused, but this would result in a guilty plea since consent would not be contested.
[31] *Moorov v HMA* 1930 J.C. 142
[32] I discuss the application of the common law doctrine of mutual corroboration in more detail in Chapter Four.
[33] The common law doctrine of corroboration through *de recenti* distress is set out in *Smith v Lees* 1997 S.C.C.R. 139 and *Cannon v HMA* 1992 S.C.C.R. 505.
[34] I discuss how *de recenti* distress is conceptualised and assessed in judicial discourse in Chapter Five.

leading up to the rape or the circumstances of the rape, such as the location and time of intercourse, the nature of the relationship between the parties, particularly where the parties had just met, and the absence of shared communication. Although circumstantial evidence may generate competing interpretations, a formal sufficiency of evidence is established if any *one* of these interpretations is capable of supporting the complainer's testimony.

Historically, there has been a judicial reluctance to discuss the nature of consent; for example, how it is conceptualised and how its presence or absence is established in different circumstances. The assumption was that consent should be understood in relation to its ordinary, common-sense meaning[35]. As Cowan puts it, the notion of consent was not seen as requiring explanation and "could only be obfuscated by judicial gloss"[36]. This is reflected in the comments of one trial judge who, when asked by the jury for guidance on the meaning of consent, explained that consent is a "common, straightforward" term that should be given "its common meaning. Consent is consent and that I'm afraid is it"[37]. When this case was appealed, the court accepted that "the word 'consent' had no special meaning in law [but] should be given its normal meaning"[38]. In their response to the Scottish Law Commission's Discussion Paper on Rape, judges of the High Court of Judiciary refuted "the idea of consent [as] inherently ambiguous", maintaining that "consent should carry its normal meaning, which in the context of rape and sexual assault was quite clear"[39]. The meaning of consent has largely been assumed, therefore, to be self-evident and its determination unproblematic. However, the diversity of opinions in the *Lord Advocate's Reference (No 1 of 2001)* as to what constitutes the crime of rape and the role played by consent in establishing rape suggests that judicial conception of consent varies considerably[40].

According to the Scottish Law Commission, the statutory definition of consent as free agreement not only provides a "richer" understanding of consent but it clarifies the law and makes consent a "more satisfactory and workable concept"[41]. Benefiting from the experience of reform in other jurisdictions, the provisions relating to consent have also

[35] Cowan, S. (2010) *op.cit.*, p.155.
[36] Cowan, S. (2010) *op.cit.*, p.155.
[37] *Marr v HMA* 1996 SCCR 699, cited by Cowan, S. (2010) *op.cit.* p.155.
[38] *Marr v HMA* 1996 SCCR 699, p.699.
[39] The Scottish Law Commission (2007) *Report on Rape and other Sexual Offences*, Publication No. 209, p.18.
[40] The *Lord Advocate's Reference (No1 of 2001)* 2002; for example, compare the majority opinions of Lord Justice General Cullen and Lady Cosgrove with the dissenting opinions of Lord Marnoch and Lord McCluskey.
[41] The Scottish Law Commission (2007) *op.cit.,* p. 15; 18.

been described as "more progressive and more open-ended" than similar reform in England and Wales[42]. However, as Cowan points out, progressive legislation must be interpreted appropriately for it to be implemented in practice[43]. Since free agreement is broadly abstract and undefined, it may not resolve the uncertainties and ambiguities of consent, particularly when we consider that consent has always implied voluntariness and choice[44]. As Wertheimer reminds us, attempts to clarify the meaning of consent by qualifying it - such as *meaningful* or *genuine* consent or *free* agreement - may simply displace the ambiguities and uncertainties of consent onto the qualifier; the question 'what do we mean by consent?' becomes 'what do we mean by *free* agreement?'[45]. Although the terms are worded differently, they may pose the same problems in application. This can be illustrated with some examples.

Under the 2009 Act, free agreement is absent when a person is incapable of consent because of the effects of alcohol or other substances[46] or when asleep or unconscious[47]. While the Act refers to incapability, it is unclear what amounts to incapability or free agreement in the context of extreme intoxication, a fluctuating state of consciousness or awakening from sleep. It also raises the question as to what is law and what is fact in determining capability. If capability is a matter of law - a legal standard - then it is subject to judicial determination at appeal. If it is a matter of fact, then it is for the jury to determine at trial. Concepts, such as consent, freedom and incapability can be interpreted in radically different ways. Cowan observes that judges have proved "unwilling to flesh out these rather skeletal concepts"[48]. Mock jury studies in England and Wales suggest that such broad concepts, which are rich in emotive value but short of descriptive meaning, tend to be interpreted quite narrowly[49]. This tendency towards a reductive interpretation may also be reflected in judicial decision-making. For example, Cowan cites two UK rape cases where the complainer was deemed to have sufficient ability to consent despite severely impaired functioning, including vomiting,

[42] Cowan, S. (2010) *op.cit.*, p.162.
[43] Cowan, S. (2010) *op.cit.,* p.166.
[44] For example, consent was defined as 'active consent' and was distinguished from submission and acquiescence; see the *Lord Advocate's Reference (No 1 of 2001*) 2002 per Lord Justice General Cullen, par.39.
[45] Wertheimer, A. (2003) *op.cit.*, p.122.
[46] Under s.13(2)(a) of the 2009 Act.
[47] Under s.14(2) of the 2009 Act.
[48] Cowan, S. (2008) 'The Trouble with Drink: Intoxication, (In)Capacity and the Evaporation of Consent to Sex', *Working Paper Series* No. 2011/14, University of Edinburgh, p.11.
[49] See Finch, J. and Munro, V. (2005) 'Juror stereotypes and blame attribution in rape cases involving intoxicants', *British Journal of Criminology* 45 25; Finch, J. (2006) 'Breaking Boundaries: Sexual Consent in the Jury Room', *Legal Studies* 26 303.

memory black-outs and periods of unconsciousness[50]. In such cases, consciousness seemed to stand in for capability regardless of how brief or fleeting the periods of consciousness were[51]. If the same approach is applied in Scottish courts, it will weaken the legislature's intention in providing a positive, co-operative model of consent, with an emphasis on choice and voluntariness[52].

To take another example, where the accused is well known to the complainer or there is a history of sexual relations between the parties, there may be an *implicit* presumption of consent based on a propensity to attribute agency and choice to the complainer, particularly when there is no medical evidence of any injury sustained[53]. There is some judicial ambivalence regarding rape within a relationship, where it has been viewed as *both* a mitigating factor (the assumption being it is less invasive and traumatic than rape by a stranger) and an aggravating factor (involving a greater breach of trust)[54]. As one English judge observed, "when it's the boyfriend, you're probably not in fear of your life"[55]. Studies across different jurisdictions indicate this is not the case[56]. The severity of physical injury is associated with the relationship between the offender and victim, with victims likely to suffer greatest injury when sexually assaulted by an ex-partner[57]. While the 2009 Act recognises that free agreement is absent where there is force or the threat of force, it is unclear how coercion or fear of violence will be interpreted in the context of an intimate relationship and how immediate or recent the violence or threat should be before free agreement is deemed absent[58]. For example, will this provision be interpreted to cover sexual coercion in a relationship where there is no immediate assault or explicit threat but an established pattern of abuse?

[50] *R v Gardner* [2005] EWCA Crim 1399; *R v Bree* [2007] EWCA Crim 804.
[51] Cowan, S. (2008) *op.cit.,* p.11.
[52] The Scottish Law Commission (2007) *op.cit.*, p.20.
[53] Temkin, J. and Krahe, B. (2009) *op.cit.*, p.120.
[54] Compare judicial opinion in *Petrie v HMA* 2011 S.C.L. 424 and *HMA v Cooperwhite* 2013 S.C.L. 741.
[55] Temkin, J. and Krahe, B. (2009) *op.cit.*, p.138.
[56] See Koss, M. (1985) 'The Hidden Rape Victim', *Psychology of Woman Quarterly* 9 (2) 193; Lievore, D. (2003) 'Non-reporting and hidden recording of sexual assault: an Australian study' Canberra: *Office of the Status of Women*; Kelly, L., Lovett, J. and Regan, L. (2005) 'A gap or a chasm? Attrition in reported rape cases', *Home Office Research Study* 293, February 2005; Larcombe, W. (2011) 'Falling Rape Convictions Rates: (Some) Feminist Aims and Measures for Rape Law', *Feminist Legal Studies*, 19, 27; MacMillan, L. (2013) 'Sexual Victimisation: Disclosures, Responses, and Impact' in Lombard, N. and McMillan (eds) *Violence Against Women*, London: Jessica Kingsley Publishers.
[57] See Larcombe, W. (2011) *op.cit.,* p.36.
[58] Under s.13(2)(b) of the 2009 Act.

The standard of reasonableness is also unclear, although it avoids the problematic construction of reasonable 'in all the circumstances' under English law[59]. It is uncertain how objective the assessment of reasonableness will be or the conditions or circumstances that might make such a belief reasonable or unreasonable. Cowan suggests that although the test is framed objectively, in practice it may be applied as a 'mixed' text incorporating both subjective and objective elements, as suggested in the explanatory notes in the Bill[60]. For example, in assessing the reasonableness of the accused's belief in consent, a subjective element may be included if there is regard to the particular characteristics of the accused. In evaluating reasonableness, consideration may also be given to whether the accused had any knowledge of the woman's consent or whether he took any steps to ascertain her consent[61]. However, as Cowan observes, there is no guidance as to what might constitute 'knowledge', the type of circumstances where this provision will apply, or whether consideration of 'any steps taken' should be routinely addressed[62]. Furthermore, since the accused need not testify at court, there may be little evidence available on which to base such a consideration.

While the Scottish Parliament suggests that free agreement is a concept "that can be easily understood by everyone", doubts persist[63]. For example, the Association of Chief Police Officers in Scotland has indicated that there is insufficient clarity or guidance as to what *free* agreement means[64]. The Scottish Law Commission also acknowledge that defining consent as free agreement may simply state "what is obvious" and add little that is new[65]. It is difficult to distinguish between the statutory definition of consent as free agreement and the conception that was articulated in the *Lord Advocate's Reference (No 1 of 2001)* based on a model of "active consent"[66]. Cowan suggests that there is "huge scope for disagreement" in applying the notion of free agreement[67]. Given judicial reluctance to elaborate the meaning of consent, courts may continue to apply the 'common-sense' approach to consent they have always adopted, without any "philosophical foray into the precise meanings of 'freedom' and 'capacity'"[68].

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[59] See Cowan, S. (2010*) op.cit*., p.164.
[60] Cowan, S. (2010) *op.cit.,* p.165.
[61] Under s.16 of the 2009 Act.
[62] Cowan (2010) *op.cit*., p.165.
[63] Scottish Parliament Official Report, Feb. 12th, 2009, col. 15048
[64] Cited by Cowan, S. (2010) *op.cit*., p.162.
[65] The Scottish Law Commission (2007) *op.cit*., p.31.
[66] The *Lord Advocate's Reference (No1 of 2001)* 2002 per Lord Justice General Cullen, par. 39.
[67] Cowan, S. (2010) *op.cit*., p.162.
[68] Cowan, S. (2010) *op.cit*., p.162.

The nature of consent

One of the difficulties in relying on a 'common-sense' approach to consent is that consent can be conceptualised in quite different ways. For example, consent can be understood as a state of mind, an action that is communicated or performed or, in terms of a hybrid approach, it may be seen to comprise elements of both[69]. In this section, I outline different conceptual models of consent and discuss their relative strengths and weaknesses.

A state of mind

Consent can be understood as an attitude or state of mind, akin to a mental intention or choice[70]. In this account, a person consents only if she has the relevant mental state of agreement. It is considered necessary and sufficient that the individual forms the mental intention that another person may cross what would be a moral boundary in the absence of consent. Applying this conception, Hurd defines consent as "an act of will - a subjective mental state … a felt willingness to agree with - or to choose - what another person seeks or proposes"[71]. According to Alexander, the individual must intend to "forgo or waive one's moral objection to the boundary crossing"[72]. While Hurd's account is that A intends that B does something, Alexander suggests that A's mental state looks to what A herself will do. Either way, consent is viewed as a choice that a woman subjectively experiences and determining consent involves, therefore, an inquiry into her state of mind at the relevant time. While verbal or behavioural expressions are neither necessary nor sufficient to establish consent, these may provide some indication of that mental state. However, the expression of consent through words, gestures or behaviour, cannot substitute for the necessary subjective intention.

The advantage of the state of mind approach is that it allows for the possibility that what a woman does or says may not always be a reliable indicator of her consent. If a woman is pressured into agreeing to have sex, it is not her outward behaviour but,

[69] See McGregor, J. (2005) *op.cit.*, p.117; Kleinig, J. (2009) *op.cit.*, p.9-10.
[70] See Hurd, H. (1996) 'The Moral Magic of Consent', *Legal Theory* 2 121, p.122; Alexander, L. (1996) 'The Moral Magic of Consent 11' *Legal Theory* 2 165, p.166.
[71] Hurd, H. (1996) *op.cit.*, p.121.
[72] Alexander, L. (1996) *op.cit.*, p.166.

rather, her state of mind that will reveal her true attitude to what she has seemingly agreed. However, since we have no direct access to an individual's inner mental state, consent may be difficult to discern applying this approach[73]. One difficulty is the possible elision between an active choice and felt desire. That is to say, consent may be equated with a form of subjective desire that can be inferred from ambiguous signs or clues that are deemed significant; for example, expressing positive interest, flirting or kissing[74]. However, as McGregor points out, desiring and consenting are two quite different things and we do not always choose to act on the basis of what we may privately desire or want, nor desire what we consent to[75]. It is perfectly possible to feel sexual attraction or desire but choose not to consent to any sexual activity. Consent becomes subject to considerable speculation if we rely on an interpretation of what a woman may have felt or wanted as opposed to what she actually said or did.

Conceptualising consent as an inner state of mind provides a particularly vulnerable target when applied to female subjectivity, where a woman's desires may be perceived as ambivalent, contradictory or an enigma even to herself[76]. Larcombe suggests that a mental attitude approach ultimately translates into "the vagaries of a woman's mind" and construed as a potentially unknowable object of knowledge[77]. If a woman's subjectivity is viewed as indeterminate, changeable or ultimately unknowable, the benefit of that ignorance may be assigned to the accused in allegations of rape; the thinking, here, is if a woman cannot be sure about what she wants, then the man cannot be expected to know any better. Conceptualising consent as a state of mind creates a gap, then, between the subjective intent of a woman and the objective knowledge of a man. It is not difficult to see how accounts of consent based on a state of mind approach may permit or support a man's claim that he was acting in the belief that the woman was consenting because that was what he thought she really wanted. When assessed by a subjective test of an honest belief in consent, such a claim provides an effective defence in circumstances where ambiguity can be read into the woman's silence or passivity.

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[73] Feinberg, J. (1986) *op.cit.*, p.173.
[74] Larcombe, W. (2005) *Compelling Engagements: Feminism, Rape Law and Romance Fiction*, South Australia, BSW: The Federation Press, p.27; Du Toit, L. (2007) 'The conditions of consent' in Hunter, R., and Cowan, S. (eds) *op.cit.*, p.60; Anderson, I. and Doherty, K. (2008) *Accounting for Rape: Psychology, Feminism and Discourse Analysis in the Study of Sexual Violence*, London: Routledge, p.63.
[75] McGregor, J. (2005) *op.cit.*, p.121.
[76] See Du Toit, L. (2007) *op.cit.*, p.62
[77] Larcombe, W. (2005) *op.cit.*, p.30.

The other problem with this approach is that, while an individual's state of mind may be highly relevant to her giving consent, consent is not constituted *primarily* by a state of mind[78]. If consent is understood as fundamentally relational, it requires some signification in the sense that some expression of agreement must be given by one person to another in order to convey consent. According to Kleinig, a mental attitude of approval or agreement is not sufficient on its own to constitute consent because it remains internal to one individual[79]. Even if consent is often contingent on what we want or desire, it requires some expression by the individual. For consent to alter normative relations between the parties, some observable indication of a person's will or choice is necessary. As Wertheimer argues, "it is hard to see how [a person's] mental state - by itself - can do the job" of consent[80].

A performative approach

In a performative approach, consent is removed from the realm of the subjective and made public[81]. According to this account, consent requires some form of communication or action through which A conveys her agreement to B which then gives B a moral right or entitlement that B previously lacked[82]. If consent is interpersonal, it must be adequately communicated to the other party if they are to have some chance of recognising it. From this perspective, a person consents *only* if she expresses consent through her observable speech or behaviour[83]. It is not that consent lacks an inner dimension, but it is not evidenced by what transpires only in the mind[84]. Since consent is understood as a permission-giving act, it only achieves a transformative effect if it is actually conveyed in some way by one person to another[85]. It is this vital element of shared communication or expression that is fundamental to a performative account of consent.

The advantage of this approach is that the presence or absence of consent becomes knowable by criteria that are observable. In determining consent, the primary

[78] Kleining, J. (2009) *op.cit.*, p.9.
[79] Kleinig, J. (2009) *op.cit.*, p.10.
[80] Wertheimer, A. (2003) *op.cit.*, p146.
[81] Brett, N. (1998) 'Sexual offences and consent', *Canadian Journal of Law and Jurisprudence* 11(1) 69, p.69.
[82] Kleinig, J. (2009) *op.cit.*, p.10.
[83] Wertheimer, A. (2003) *op.cit.,* p145-6; Miller, J. (2009) 'Preface to a Theory of Consent Transactions: Beyond Valid Consent' in Miller, F. and Wertheimer, A. (eds) *The Ethics of Consent: Theory and Practice*, New York: Oxford University Press, p.85.
[84] Kleinig, J. (2009) *op.cit.*, p.11.
[85] McGregor, J. (2005) *op.cit.*, p.125; Kleinig, J. (2009) *op.cit.*, p.10.

consideration is not what A privately felt or thought, but what she actually communicated that gave B some reason to think that A was consenting. The point, here, is that a woman's inner desires or attitudes are not ultimately relevant to consent and should have no bearing on an assessment of whether she gave her consent. Consent must be expressed if it is to provide a reliable indicator of the choice that is made. From this perspective, a mental state *per se* is insufficient to establish consent because it fails to authorise or legitimise B's actions in the absence of any expression of consent by A[86].

While the performative model overcomes some of the difficulties associated with ambivalent mental states and equating consent with subjective desire, there are also problems in its application[87]. Since consent may be conveyed through various forms of behaviour in different contexts, one difficulty is the uncertainty as to what constitutes an adequate expression of consent[88]. There are risks in interpreting or relying on informal or truncated forms of behaviour as indicating sexual consent; for example, is it sufficient for consent to be conveyed through truncated forms of agreement (a particular look, nod of the head, a slight gesture) or does it require a more positive response or explicit verbal agreement? An appeal to social conventions and what may be regarded as appropriate signifying behaviour in a sexual context offers little help. It is well recognised that sexual relations have proven particularly treacherous so far as signification is concerned[89]. Social conventions about sexual relations are ambiguous, contested and permeated by stereotypes and myths that allow for divergent meanings and claims of misunderstanding. The problem with a performative account is that it may not distinguish between behaviour that is merely a *predictor* that a woman *may* consent to sex and actions that *actually* express her consent[90].

Another difficulty in applying a performative model is that simply uttering appropriate words of agreement or performing particular actions does not always express consent in certain circumstances. Consent must be voluntary and deliberate to transform the moral relations that exist between the parties. The problem with a behaviour-only model of consent is that compliant behaviour may not reflect an individual's

[86] See Wertheimer, A. (2003) *op.cit.,* p.146.
[87] See Cowan, S. (2007a) *op.cit.*, p.93.
[88] Miller, F. (2009) *op.cit.,* p.85.
[89] Archard, D. (1997) 'A nod's as good as a wink: Consent, convention and reasonable belief', *Legal Theory* 2 273.
[90] Archard, D. (1997) *op.cit.,* p.273.

autonomous will or the conditions necessary to establish voluntary agreement. Consent is not merely a matter of saying the right words or demonstrating what may be deemed appropriate behaviour, since these can be extracted through pressure or coercion. Consent must be expressed in the absence of coercive conditions (actual or threatened force or harm) or internal states (extreme intoxication or borderline states of awareness) that undermine the agency of the individual[91]. Focussing purely on the words that are said or the actions performed as indicating consent may fail to take into account the relevant circumstances and conditions that rob consent of its transformative power[92].

A hybrid approach

In a hybrid or combined approach, consent is understood as the relevant mental state accompanied by the appropriate signifying behaviour. Here, it is the act performed along with the requisite mental state that constitutes consent[93]. For example, Sherwin proposes that consent can be understood as both a subjective decision and social act but emphasises that the expression of consent matters most[94]. Similarly, McGregor suggests that the performative model can be developed to accommodate important insights of the mental state approach while avoiding the limitations and pitfalls associated with this model[95]. Cowan suggests that the tension between body and mind conceptions of consent and the tendency to conflate them in practice, where one is read off from evidence of the other, may be avoided through acknowledging their convergence within a sense of self or embodied autonomy[96]. In this way, the performative account has been expanded to encompass the subjective intention behind the particular action or words expressed; that is, the consenter must *intend* that her actions, words or gestures be taken as indicating consent[97]. This recognises the importance of a subjective component while incorporating a behavioural element of expression.

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[91] See McGregor, J. (2005) *op.cit.,* p.142.
[92] See Cowan, S. (2007b) *op.cit.*, p.93.
[93] See Sherwin, E. (1996) 'Infelicitous Sex', *Legal Theory* 2 216; Kazan, P. (1998) 'Sexual Assault and the Problem of Consent' in French, S., Teays, W. and Purdy, P. (eds) *Violence Against Women: Philosophical Perspectives*, Ithaca: Cornell University Press; Cowart, M. (2004) 'Consent, speech act theory and legal disputes', *Law and Philosophy* 23(5) 495; Cowan, S. (2007b) *op.cit*.
[94] Sherwin, E. (1996) *op.cit.,* p.216.
[95] McGregor, J. (2005) *op.cit.*, p.125.
[96] Cowan, S. (2007b) *op.cit.*, p.99.
[97] McGregor, J. (2005) *op.cit.,* p.130.

In this way, a hybrid approach is capable of identifying situations where the individual's performance or expression of agreement fails to signify consent. This is achieved by incorporating Austin's conception of 'infelicity conditions' in his theory of performatives[98]. Austin identifies various circumstances where words or actions will fail to perform a speech act; for example, conditions that affect an individual's capability to consent through temporary mental impairment, lack of sufficient awareness or where there is some abuse of the procedure of consent through coercion or deception. A hybrid model that encompasses a contextual approach, in recognising circumstances where the performance of consent may fail, has been seen as more accurately reflecting a true agreement between the parties[99].

The development and application of the law on rape operates against the backdrop of this debate as to where the locus of consent lies. As we have seen, different conceptions of consent have strengths and limitations with a more contextual, hybrid model offering, perhaps, the most promising account. As suggested within this approach, the transformative value of consent requires sufficient attention to the substantive conditions and particular circumstances in which issues of consent arise[100].

Rich and thin models of consent

The conditions considered necessary for consent to be established may be defined narrowly or more broadly within thin and rich models of consent. In this section, I compare two approaches that identify different requirements for consent: consensual minimalism, a thin model of consent, and, by comparison, consent plus approaches that construct a rich model of consent. While consensual minimalism reflects classic, liberal values of individualism, autonomy and freedom of choice, consent plus approaches encompass what have been identified as feminist values of mutuality and reciprocity[101].

[98] Austin, J. L. (1962) *How to do Things with Words*, New York: Oxford University Press, p.8.
[99] See Cowart, M. (2004) *op.cit.*, p.513; Cowan, S. (2007b) *op.cit.*, p.98-9.
[100] See Lacey, N. (1998) *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, Oxford: Hart, p.117.
[101] See Cowan, S. (2007b) *op.cit.,* p.99.

Consensual minimalism

Wertheimer advocates a model of consensual minimalism as a basis for establishing permissible sexual relations[102]. For Wertheimer, sexual relations are permissible if they are "consensual in some reasonably straightforward sense of that term" and the consenting behaviour falls "within the range of plausible interpretations"[103]. Here, the transformative value of consent is negated only by legally relevant conditions that impinge on its formal validity, such as the use of force, coercion or deception. In consensual minimalism, primacy is attached to an individual's right to make a choice based on her own assessment of the situation. For example, engaging in sexual relations for instrumental reasons in circumstances that appear to be exploitative (such as prostitution or where there is a marked discrepancy of power and vulnerability between the parties) is considered morally permissible so long as the individual indicates her consent. As Wertheimer puts it, individuals should be regarded as "the best judge" of what they want as long as they give legally valid consent"[104]. In this account, the transformative value of consent is achieved as long as the legal requirements are satisfied.

At a broader level, consensual minimalism is understood as promoting the positive dimension of sexual autonomy. It upholds the freedom to seek out and enter sexual relations based on respect for individual freedom of choice[105]. Wertheimer accepts that adopting this approach means that consent may be established in a range of circumstances that are less than ideal and morally doubtful[106]. His argument is that consensual sexual behaviour does not, and should not attempt to, imply morally worthy behaviour[107]. Conceptualising sexual relations as an arena that "does and should not require that people act on the basis of reasons", Wertheimer supports the idea of a "moral time-out"; that is, sexual relations should not be subject to the "normal kind and degree of moral attention"[108]. In this way, consensual minimalism can be seen to provide a libertarian account of sexual consent.

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[102] Wertheimer, A. (2003) *op.cit.*
[103] Wertheimer, A. (2003) *op.cit.* p.130; p.140.
[104] Wertheimer, A. (2003) *op.cit.,* p.130; p.140.
[105] Wertheimer, A. (2009) 'Consent to Sexual Relations', in Miller, F. and Wertheimer, A. (eds) *The Ethics of Consent: Theory and Practice*, New York: Oxford University Press, p.196.
[106] Wertheimer, A. (2003) *op.cit.,* p.142.
[107] Wertheimer, A. (2003) *op.cit.,* p.121.
[108] Wertheimer, A. (2003) *op.cit.,* p.141.

In this approach, consent does not require *explicit* agreement. Adopting a narrow performative approach, consent may be expressed verbally or non-verbally through a "symbolically appropriate act", including silence or passivity[109]. Consensual minimalism allows, therefore, for an implied or tacit consent to be inferred from an individual's seemingly appropriate or compliant behaviour or where sexual relations are "simply allowed to happen"[110]. According to Wertheimer, nothing much turns on the form that consent takes "so long as it is reasonable to assume that its meaning is understood" by both parties[111]. However, the idea of tacit consent is narrowly bounded by subjective intention. In cases of contested consent, claims of misunderstanding are rife and it is precisely the meaning of the behaviour and the intentions of the parties that are disputed. The problem is that what amounts to signifying behaviour and what constitutes coercion or threat is subject to radically different interpretations[112].

Wertheimer's confidence that consent is achieved by just letting things happen is problematic. One concern is that setting a relatively low threshold of consent will encompass forms of assent that are better understood as acquiescence or submission. Where a serious wrong is committed if silence or passivity is misinterpreted, the normative force of consent requires something more than passivity or behaviour that is capable of being construed as symbolically appropriate. As McGregor points out, behaviour that falls short of explicit agreement merely indicates acquiescence and this lacks the moral weight of consent[113]. The problem, here, is that consent is stripped of any transformative value if it can be inferred from ambiguous behaviour, such as the mere fact of silence or passive compliance[114]. Wertheimer's reply to this is that, since sexual consent is given in private and often emotionally charged situations, any expectation or requirement that it should be expressed in particular ways imposes an excessive degree of formality, artificiality and is, simply, impractical[115].

[109] Feinberg, J. (1986) *op.cit.*, p.184; Wertheimer, A. (2003) *op.cit.,* p.131; p.152.
[110] Wertheimer, A. (2003) *op.cit.,* p.153.
[111] Wertheimer, A. (2003) *op.cit.,* p.153.
[112] Kleinig, J. (2009) *op.cit.,* p.20.
[113] McGregor, J. (2005) *op.cit.,* p.134.
[114] McGregor, J. (2005) *op.cit.,* p.107.
[115] Wertheimer, A. (2003) *op.cit.*, p.142.

Affirmative models of consent

In an affirmative or consent plus approach, the expression of consent is necessary but insufficient to ensure its transformative value; something more is required. What constitutes the 'plus' is found in conceptions of an affirmative or positive model of consent and the presence of substantive minimum conditions in which consent is given[116]. These approaches construct a rich model of consent and attempt to draw a clear distinction between consent and other forms of assent, such as compliance, acquiescence or submission. Here, a woman's compliant, passive behaviour that may satisfy a standard based on consensual minimalism is not sufficient to establish the moral value of consent.

For example, Cowart argues that greater attention should be paid to the immediate context and the circumstances in which consent is given[117]. In this approach, the transformative value of consent requires the presence of certain minimum conditions. Cowart identifies three pre-requisites for consent: the subjective intention should be consistent with the act of behaviour signalling consent (a hybrid model of consent); there should be mutual understanding between the parties of the thing being consented to; and there should exist a real choice for the woman, which should be assessed from her perspective[118]. For Cowart, a normative conception of consent includes the right to refuse to engage in sexual activity without fear of *any* harm, not merely physical harm, otherwise the real intention behind consent is avoidance of the harm. From this perspective, there is no transformative value in a woman's consent, even if she expressly agrees, unless these substantive conditions are satisfied.

Affirmative models also look for some form of positive communication, mutuality or reciprocity between the parties[119]. In an affirmative model, consent requires more than the absence of refusal; it requires a positive expression of willingness[120]. For example, Chamallas's approach is based on an egalitarian ideal of mutuality, where consent is determined by whether the woman herself would have initiated the sexual encounter if

[116] See Baker, B. (1999) *op.cit*., Cowart, M (2004) *op.cit.,* Anderson, M. (2005) 'Negotiating Sex', *Southern Californian Review* 78 101, Cowan (2007b) *op.cit.*
[117] Cowart, M. (2004) *op.cit*., p.511.
[118] Cowart, M. (2004) *op.cit*., p.511-4.
[119] Cowan, S. (2007b) *op.cit.,* p.101.
[120] Baker, B. (1999) *op.cit*, p.61.

she had been given the choice[121]. Advocating a reciprocity based model, Anderson suggests that the key question is whether the sexual activity was reciprocal and negotiated, with negotiation defined as dynamic, active and contextually sensitive[122]. In this way, affirmative models of consent direct attention to the process of interaction between the parties and the circumstances in which the sexual encounter took place. These approaches address some of weaknesses of a consent-based approach to rape; such as the individualistic construction of sexual choice and autonomy, the neglect of relevant contextual factors, and the relentless scrutiny of the woman's behaviour.

Applying an affirmative approach to consent, rather than one based on consensual minimalism, a broader range of sexual interactions would be viewed as non-consensual. These would include circumstances involving sexual exploitation or coercion that fall short of actual force or threats of force; for example, where there is a marked disparity of power between the parties, or where a woman's vulnerability is sexually exploited because of her particular circumstances, such as being homeless, impoverished or extremely intoxicated. In these scenarios, a woman's express agreement to sex would not establish a relevant standard of consent based on an affirmative model; either the substantive conditions for consent would be deemed absent or the positive affirmation of her voluntary choice would be lacking. In this way, affirmative models enhance the protective function of consent for women in safeguarding their freedom from sexual coercion or exploitation.

However, there are also difficulties with affirmative approaches to consent. Munro highlights public policy concerns about over-inclusion and the over-reach of the law into areas of personal living[123]. In other words, casting the net too wide would criminalise sexual encounters that may be morally questionable but should not attract liability for rape. There are also practical concerns in that these approaches may not allow for the range of circumstances in which many people have sex and their requirements do not easily translate into practical legal standards. Mackinnon questions whether affirmative or consent plus approaches are either conceptually or practically viable since they fail to recognise broader gender inequalities and the

[121] Chamallas, M (1988) 'Consent, Equality and the Legal Control of Sexual Conduct', *Southern Californian Review* 777, p.836.
[122] Anderson, M. (2005) *op.cit.,* p.107.
[123] Munro, V. (2005) *op.cit.*, p.350.

asymmetric bargaining position in which many women find themselves[124]. Given the continuing disparity in gender experiences and the prevalence of sexual coercion in women's lives, she doubts whether it is meaningful to develop accounts of consent in which women are expected to communicate and negotiate as if they have autonomy[125].

Communicative approaches to consent

Rich and thin models of consent broadly reflect a 'yes' and 'no' model of consent. While consensual minimalism attaches significance to the absence of refusal, affirmative approaches look to the positive expression of consent. While the 'yes' model provides a higher threshold for consent, there are problems with communicative approaches to rape that focus on the expression of consent. By directing attention to how consent is expressed, irrespective of whether a 'yes' or 'no' model is applied, it is the woman's verbal and non-verbal behaviour that is scrutinised to determine whether and how she conveyed her wishes.

Focusing on how consent is articulated suggests that rape can be understood in relation to effective communication. In this way, rape may be seen as a product of a misunderstanding or miscommunication between the sexes. The premise, here, is that a man may misinterpret or misunderstand a woman's communication so that he genuinely but mistakenly believes that she is consenting to sex[126]. Husak and Thomas identify three possible avenues of such misunderstanding: interpreting a woman's refusal as tokenistic and not genuine; believing that 'no' only means 'no' in the instant, unless and until a woman may be encouraged to change her mind or a different move proves more successful; and, that, even when understood as refusing, a woman may be persuadable to have compliant sex either because 'good girls can't say yes' or as a way of bestowing a favour on the man[127]. In this way, cases of contested consent can be understood as a product of ineffective communication based on a victim deficiency model or genuine misunderstanding, based on a gender difference model.

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[124] See Mackinnon, C. (1989) *Towards a Feminist Theory of the State*, Cambridge, Mass.: Harvard University Press.
[125] Mackinnon, C. (1989) *op.cit.*, p.175; Mackinnon prefers a compulsion-based model of rape, where sex is compelled in different ways.
[126] Kitzinger, C. and Frith, H. (1999) 'Just say no? The use of conversational analysis in developing a feminist perspective on sexual refusal', *Discourse and Society,* 10 293, p.294; Frith, H. (2009) 'Sexual Scripts, Sexual Refusals and Rape' in Horvath, M. and Brown, J. (eds) *op.cit.*, p.99.
[127] Husak, D. and Thomas, G. (1992) 'Date Rape, Social Convention and Reasonable Mistakes', *Law and Philosophy* 11 1, p.95.

Constructing issues of consent in terms of miscommunication or misunderstanding suggests that the woman's refusal was not sufficiently clear or persistent[128]. When judged against a normative yardstick that constructs 'real' refusal as a 'no' - immediate, direct and assertive - women's communicative style may be characterised as too weak or equivocal, generating some ambiguity or uncertainty in her behaviour[129]. The most obvious problem, here, is that a model of outright challenge is dangerous and counter-productive in asymmetric situations that are more akin to hostage-taking or victims of school ground bullies. Faced with coercive sexual demands and little opportunity for escape, explicit refusal or confrontation could lead to serious harm by increasing the risk of aggression or violence[130]. In this context, a woman may either freeze through fear or attempt to neutralise the threat of violence by a more strategic response, such as passivity, pleading or negotiation[131]. However, if resistance is equated with direct assertion and challenge, women's more strategic efforts to defuse the situation and minimise potential harm may be recast as forms of ineffective rejection[132].

The idea that women are failing to say 'no' clearly and persistently to unwanted sexual demands ignores evidence of how rejection is normally conveyed. Studies based on conversation analysis show that refusal is not typically conveyed through the bare linguistic act of saying 'no'[133]. The word 'no' is not necessary for a request to be effectively refused in ordinary conversation because culturally normative ways of expressing refusal rarely involve a plain unvarnished 'no'. Not only is it unnecessary to say the word 'no' in order to be understood as refusing, but just saying 'no' is unusual in that it contravenes the norms of everyday conversation[134]. Saying 'no' is not a preferred action in conversation and, therefore, refusal tends to be more intricately crafted to soften the bluntness and offset potential offence[135]. Communicating refusal in everyday conversation generally follows a common pattern comprising various elements: such as the use of pauses, hesitation, prefaces, palliatives such as appreciation or apology, and an account in the form of explanation, justification or

[128] Kitzinger, C. and Frith, H. (1999) *op.cit.*, p.295; see also McGregor, J. (2005) *op.cit.,* p.208; Ehrlich, S. (2006) 'The Discursive Deconstruction of Sexual Consent' in Cameron, D. and Kulick, D. (eds) *The Language and Sexuality Reader*, London: Routledge, p.209.
[129] Ehrlich, S. (2006) *op.cit.,* p.212.
[130] Gavey, N. (2005) *Just Sex? The Cultural Scaffolding of Rape*, London: Routledge, p.41.
[131] See Baker, B. (2005) 'Gender and Emotion in Criminal Law', *Harvard Journal of Law and Gender* 28 447, p.458.
[132] See Gavey, N. (2005) *op.cit.*, p.70.
[133] Kitzinger, C. and Frith, H. (1999) *op.cit.,* p.298.
[134] Kitzinger, C. and Frith, H. (1999) *op.cit.,* p.309.
[135] Kitzinger, C. and Frith, H. (1999) *op.cit.,* p.302; Frith, H. (2009) *op.cit.*, p.112.

excuse[136]. Studies of female sexual refusal indicate that they take exactly the same form, in that they are typically hesitant and indirect[137]. Responding to sexual invitations with a brief silence followed by a palliative comment ("well, I *do* like you, but …"; "it *is* flattering, but …") conforms to a normative pattern of refusal. Even a brief silence followed with a hedge ('well') and a weak or half-hearted agreement ("… well, yeah, we *could* but …"; "… well, I *suppose* so but …") is usually understood as a refusal[138]. As Kitzinger and Frith point out, sexual refusals don't have to be, and usually are not, immediate, direct and emphatic. Like other kinds of refusal, they are precisely the opposite; they are delayed, qualified and mitigated. In fact, the most potent indicators of refusal are these indirect elements of communication and, in particular, the use of hesitation and hedges[139].

Not only do sexual refusals generally conform to the same conversational patterns used in everyday life, but studies of young men's perception of sexual refusal indicate that they are perfectly aware of the subtle cultural cues governing sexual rejection[140]. Taking this into account, it is inappropriate to expect women to provide an immediate, direct and persistent 'no' in sexual situations because that is simply not how refusals are normally done. The argument, here, is that it is not the adequacy of women's communication that should be questioned but the claim not to understand women when they are refusing sex through conventional patterns of conversation.

Issues of contested consent in cases of rape are not reducible to the way that women express their wishes or how men understand their communication. Focusing on whether the complainer said 'no' may be counter-productive in suggesting that other ways of signalling refusal (without saying 'no') are open to doubt. As Kitzinger and Frith point out, 'yes means yes' and 'no means no' may provide useful educational and campaigning slogans, but they do not convey the intricacy of normative conversational patterns[141]. Frith also warns that simply shifting the legal focus from ascertaining whether the victim said 'no' to whether she said 'yes', reinforces the idea of rape as a

[136] Kitzinger, C. and Frith, H. (1999) *op.cit.,* p.301.
[137] Kitzinger, C. and Frith, H. (1999) *op.cit.,* p.306.
[138] Kitzinger, C. and Frith, H. (1999) *op.cit.,* p.309.
[139] Antaki, C. (1994) Explaining and Arguing: The Social Organisation of Accounts, London: Sage, p.81.
[140] Kitzinger, C. and Frith, H. (1999) *op.cit.,* p.310; O'Byrne, R., Hansen, S. and Rapley, M. (2008) 'If a girl doesn't say no…: Young men, rape and claims of insufficient knowledge', *Journal of Community and Applied Social Psychology* 18 (3) 168, p.177; Frith, H. (2009) *op.cit.*, p. 113.
[141] Kitzinger, C. and Frith, H. (1999) *op.cit.,* p.311.

problem of communication[142]. In both 'yes' and 'no' models, it is the complainer's behaviour that is targeted for critical scrutiny in the search for signs of refusal or agreement. Focusing on the communicative aspect of consent normalises a lack of clarity about consent by constructing a grey area of uncertainty in gender communication, in which rape can be seen as the product of misunderstanding between the parties.

The focus on the articulation of 'yes' and 'no' within a communicative approach to rape has a broader resonance in the construction of heterosexuality. Kulick, for example, points to a 'cultural grammar' where saying 'yes' and 'no' is part of what produces gendered subjectivity within heterosexuality[143]. He suggests that the subject position of woman is conventionally produced, in part, by a normatively exhorted 'no' when encountering male sexual desire. By contrast, the subject position of man is normatively produced by never saying 'no' when confronted by female desire. Here, the utterance of 'yes' and 'no' invokes a cultural domain where male subjectivity is constructed by transforming a woman's 'no' into a 'yes' and female subjectivity is performed by facilitating the extension and prolongation of seduction by saying 'no'[144]. The point, here, is that in a culture that objectifies and sexualises women, a woman's refusal of sex may be understood as always provisional. In this way, the performative force of a woman's 'no' can be consistently thwarted to mean 'not now', 'not yet' or 'keep trying'. According to Kulick, the cultural resonance and salience attached to the expression of consent within heterosexuality permits men to claim that they misread a sexual refusal and allows women to be blamed for not conveying their refusal more effectively[145].

The tensions and limitations of consent

There are inherent tensions and limitations in consent as a concept. It is argued that the concept is simply too nebulous and ambiguous, its divergent meanings amounting to a conceptual minefield[146]. For example, consent may be used without any normative implications to provide a factual description of behaviour: 'she consented to

[142] Frith, H. (2009) *op.cit.*, p.116.
[143] Kulick, D. (2006) 'No' in Cameron, D. and Kulick, D. (eds) *op.cit.*, p.287.
[144] Kulick, D. (2006) *op.cit.,* p.287.
[145] Kulick, D. (2006) *op.cit.*, p.287.
[146] See *Westen, P.* (2005) *op.cit.* and McGregor, J. (2005) *op.cit.*

intercourse with a knife at her throat'. In this example, consent merely conveys the woman's submission under threat and does not denote any transformative value in rendering permissible what would otherwise be impermissible. Consent can be used, therefore, both descriptively and normatively: 'consent to intercourse under pressure is no consent'[147]. Here, the first consent is used descriptively to denote factual agreement whereas the second consent implies both moral and legal force. If consent is used interchangeably for all forms of agreement, descriptive and evaluative, there is considerable scope for confusion around the normative work usually reserved for consent[148].

A consent-based approach to rape is also viewed as overly individualistic in that it focuses on the agreement of two individuals in a snap-shot moment of time. With the exception of consent plus approaches, consent is removed from a social context of gender disparity and may rely on a decontextualised notion of agreement between the parties who are assumed to have the requisite power and agency to give or withhold consent[149]. This fails to recognise the "interconnected nature of choice" and a range of contextual factors that may undermine a woman's agency[150]. Mackinnon argues that while consent is presented as "a free exercise of sexual choice", it is made "in conditions of inequality"[151]. In the context of continuing gender inequalities and the prevalence of male violence to women, she questions whether free agreement is possible. From this perspective, the legitimacy of consent as the primary marker of rape is undermined because of the broader constraints on a woman's ability to exercise sexual choice.

It is also argued that the application of a consent-based approach to rape directs a relentless, critical gaze on the victim's conduct rather than the perpetrator's actions or circumstantial factors that may indicate lack of free agreement[152]. In no other crime does the role of the victim play such a pivotal role in its definition and proof. From this perspective, consent-based accounts of rape are inevitably tainted with notions of victim responsibility. The application of consent - whether it is based on a state of mind, outward behaviour or some combination of the two – has been understood to generate untoward consequences in focusing attention on the role the victim: what she

[147] McGregor, J. (2005) *op.cit.,* p. 117.
[148] McGregor, J. (2005) *op.cit.,* p. 118.
[149] Lacey, N. (1998) *op.cit.,* p.117.
[150] Cowan, S. (2007a) *op.cit.* p.52.
[151] Mackinnon, C. (1989) *op.cit.*, p.175.
[152] See Tadros, V. (2006) 'Rape without Consent', *Oxford Journal of Legal Studies*, 515.

was thinking and feeling at the time, what did she say and what did she do, did she encourage him, was there any ambiguity? A consent-based approach to rape may reinforce the conception of female passivity in heterosexuality (in accepting or refusing male advances) while at the same time invoking notions of victim precipitation and responsibility[153].

How much 'moral magic' can consent work in relation to sexual behaviour? Wertheimer offers a cautionary warning of the inherent limitations in the transformative value of consent; there are limits to its power[154]. Consent is only transformative in that it removes *one* important reason for regarding certain behaviour as immoral or wrong[155]. The presence of consent may make an act permissible but it does not always "work to make an action right when it would otherwise be wrong"[156]. That is, even where there is consent, it hardly follows that all consensual sexual behaviour is morally good or worthy. Both Wertheimer and Mackinnon would agree, from their radically different perspectives, that consent cannot protect certain standards of sexual interaction because sexual behaviour is often problematic for reasons that have little to do with consent. Prostitution or other forms of exploitative or predatory sexual behaviour may be morally problematic *even if* the woman knowingly agrees. The point, here, is all our moral concerns can't be packed into one concept - of consent - without depriving it of its *particular* moral value[157]. It is not feasible to expect consent to do all the conceptual work needed to delineate moral and immoral behaviour in sexual relations.

Another problem is that, while the degree of voluntariness or coercion within a sexual interaction can be understood as falling within a continuum, consent in law operates on a binary plane. That is, consent is a binary construct applied to a range of situations that stretch from the fully voluntary through degrees of coercion to the completely involuntary[158]. Law forces the question of consent into a yes/no answer; a woman either consents or she does not[159]. For some, this binary choice fails to capture the

[153] A problem acknowledged by the Scottish Law Commission (2006) *op.cit.* p.30.
[154] Wertheimer, A. (2003) *op.cit.*, p.121.
[155] Wertheimer, A. (2009) *op.cit.,* p.197.
[156] Alexander, L. (1996) *op.cit.*, p.165.
[157] Wertheimer, A. (2003) *op.cit.*, p.139.
[158] See McGregor, J. (2005) *op.cit.*, p.143.
[159] The same binary approach is applied when assessing reasonableness and capability. However, in assessing the defence of provocation, the law recognises degrees of emotion in the loss of control. As McDiarmid points out, in *Drury v HMA* 2001 SLT 1013, Lord Rodger observed that the accused's response to a provoking event will exist on a continuum between "icy detachment and going berserk", par.23-4. That is, even if an accused lost control upon being provoked, he

range of coercive experiences described by women[160]. As Kelly suggests, women's experiences of heterosexual sex may not simply be "either consenting or rape, but exist on a continuum moving from choice to pressure to coercion to force"[161]. This notion of a continuum captures women's reported experiences of sexual coercion which seem to straddle the boundary between consensual and non-consensual; for example, where sexual encounters are described as "like rape, but not rape"; "no, not rape, only coerced"; "I wouldn't exactly call it rape, but it was the next thing to it"; "he didn't rape me, because I really more or less consented"; "it's rape with consent … rape because it's pressurised but you do it because you feel you can't say no"; "I wouldn't have seen that as rape … I didn't put up much of a struggle, but *I didn't want to*, so in a sense it was rape" (original emphasis)[162]. Victim recognition of rape may depend, in part, on where a woman places her sexual experience within a spectrum of voluntariness and coercion. Here, the black-and-white requirements of the law may fail to reflect the more shaded, subjective meanings attached to sexual experiences.

Smart has argued that the "binary logic of consent is completely inappropriate to rape" because it fails to capture the diversity of women's experiences of sexual coercion[163]. According to Mackinnon, women's experiences of coercion and fear of rape have conditioned their sexual responses to men in such a way that it is not easy to distinguish what *is* consensual and non-consensual[164]. However, understanding consent within a continuum poses considerable difficulties. It challenges the clarity of a conventional binary model. It dilutes the potency of rape as a qualitatively different *kind* of experience from consensual sex, rather than one of degree[165]. Whether one regards consent as a binary or dimensional concept, the same troubling question of threshold arises in the application of consent. How *much* freedom and voluntariness is required for consent to achieve its normative power as a transformative, permission-giving act?

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or she would not be expected to lose *all* control, see McDiarmid, C. (2010) "Don't look back in anger: the partial defence of provocation in Scots criminal law" in Chalmers, J. and Leverick, F. (eds) *Essays in criminal law in honour of Sir Gerald Gordon*, Edinburgh: Edinburgh University Press, p. 202.

[160] See Kelly, L. (1991) 'The continuum of Sexual Violence' in Hanmer, J. and Maynard, M. (eds) *Women, Violence and Social Control*, Atlantic Highlands, NJ: Humanities Press; Gavey, N. (2005) *op.cit.*

[161] Kelly, L. (1991) *op.cit.* p.54.

[162] Kelly, L. (1989) *op.cit.* p56-8; Gavey, N. (2005) *op.cit.,* p. 155-63.

[163] Smart, C. 1989) *op.cit.*, p.33.

[164] Mackinnon, C. (1987) *op.cit.* p,20.

[165] Lemoncheck, L. (1999) 'When Good Sex Turns into Bad: Rethinking a Continuum Model of Sexual Violence Against Women' in Burgess-Jackson, K. (ed) *Most Detestable Crime*, Oxford: University Press, p.160.

The inherent tensions and limitations of consent have prompted some to turn to coercion to provide an alternative account of rape on the basis that attention is directed to the behaviour of the accused rather than the complainer[166]. However, changing the focus in rape from consent to coercion may not necessarily resolve the contentious issues of consent. This is because consent and coercion-based models of rape can be understood as functionally equivalent[167]. For example, consent often turns on the question of validity and this requires an understanding and awareness of context and coercion. On the other hand, coercion raises questions of threshold and a consideration as to whether the woman's agreement was, in the particular circumstances, sufficiently voluntary. These are fundamental issues of consent. For Westen, the question of whether rape should be based on consent or coercion is a manifestation of our conceptual confusion since they can be recast inter-changeably[168]. Determining the presence or absence of consent involves two inter-related questions: what amounts to sufficient voluntariness and freedom and what form or degree of coercion will negate it?

Applying consent

I have examined the different ways in which consent can be understood and considered the ambiguities and tensions of consent as a concept. How consent is constructed in judicial discourse depends not only on how consent is conceptualised but how that conception of consent is applied to a particular set of circumstances, which are subject to competing interpretations and reconstruction at appeal. Determining the presence or absence of consent is highly sensitive to our perception of these circumstances and a variety of factors operating at different contextual levels. Such factors encompass the behaviour and intention of the parties and the events leading to an allegation of rape; for example, the prior communication between the parties, issues of power and vulnerability in their relationship, the location or time of intercourse, and factors that might indicate a lack of ability to consent or the presence of coercion or threats. A range of social factors may effectively constrain a woman's agency and the voluntariness of her choice: such as substance abuse and addiction, homelessness, or involvement in street prostitution. Aspects of the broader cultural context may also

[166] See Tadros, V, (2006) *op.cit.;* Mackinnon, C. (1987) *op.cit*. proposes a model of rape based on the concept of compulsion.
[167] Wertheimer, A. (2003) *op.cit.,* p.34.
[168] Westen, P. (2004) *op.cit.*, p.356.

subtly shape our understanding of sexual coercion; for example, the paradigm of romance and seduction where a woman is seen as willingly won over by the persistent efforts and persuasion of the man.

Cowan has argued that consent is being constructed in cases "where proper attention to context would suggest none exists ... that is, where non-consent should be obvious"[169]. This raises an important question as to how consent is understood and assessed in cases of rape. By analysing judicial discourse in a group of 'consent' cases, my study attempts to provide a link between the theoretical work on consent that I have discussed in this chapter and the construction of consent in judicial practice. My analysis of the case reports addresses the various aspects of consent that I have discussed here: different conceptions of consent, the application of 'yes' and no' models, the requirements necessary to establish consent, how legal constructs (such as free agreement, reasonableness, capability and *de recenti* distress) are understood and applied, and the value attached to various circumstantial and broader contextual factors.

Cowan's critical observation regarding the application of consent was made prior to the 2009 Act coming into force. At present, we know little about how consent is constructed or the impact of important legal changes on judicial determination of consent. We do not know how the 2009 Act has shaped judicial understanding of consent or the development of the law on consent. By examining a group of cases where the question of consent arises for judicial consideration, my study will help us understand the nature of judicial discourse of consent, the impact of legal changes on this discourse and its development over the timeline of the cases.

[169] Cowan, S. (2007a) *op.cit.*, p.54.

Chapter Two Methodology

This chapter sets out the methodology and methods of analysis that will be applied to examine the 'consent' cases. I apply the definition of methodology and methods offered by Watkins and Burton[1]. While 'methods' refers to a "characteristic set of procedures employed in an intellectual discipline … as a mode of investigation or inquiry", methodology is defined more broadly as encompassing the conceptual and theoretical framework underpinning the particular methods that are used[2]. According to Cryer, methodology has important "theoretical connotations" that guide our thinking and questioning in a field of study and so the theoretical basis of the study should be addressed explicitly rather than uncritically applied[3]. This reflects the belief that situating a research project within an appropriate theoretical context is as important as elucidating the particular methods for carrying out the research.

In this chapter, I set out the theoretical and conceptual basis of the study as well as the procedures used and framework of analysis. I begin by explaining what is meant by discourse. I outline the key concepts of discourse and show how these can be applied to examine judicial discourse contained in case reports. I discuss the theoretical principles of discourse analysis and I consider different approaches to analysis based on a linguistic or broader, philosophical mode of analysis. I set out the particular approach that I have used, which is a textually oriented approach to discourse analysis, and explain why I have chosen this. I set out the framework of analysis that will be applied to examine the case reports and I explain how this is used. I consider the strengths and weaknesses of discourse analysis and suggest how some of the weaknesses can be addressed.

What is discourse?

The term discourse can be understood in various ways. These usually relate to the identification of discourse at different levels of detail and abstraction. Discourse, for example, may refer to any communication through the medium of language (and visual

[1] Watkins, D. and Burton, M. (eds) (2013) *Research Methods in Law*, Oxon: Longman.
[2] Watkins, D. and Burton, M. (eds) (2013) *op.cit.*, p. 2.
[3] Cryer R. (2011) *Research Methodologies in EU and International Law*, Oxford: Hart, p.5.

media) and it may encompass a particular group of statements or a general domain of knowledge, such as judicial discourse[4]. Discourse is also used to denote particular patterns of belief and ways of representing the social world, such as the various conceptions of consent that were discussed in Chapter One. The definition of discourse adopted in this study is provided by Fairclough, who understands discourse as constituted at different levels in a text; for example, through the use of language, the construction of textual content, and the incorporation of broader contextual elements, such as social discourses or material from other texts[5]. These dimensions of discourse can be identified in case reports: the particular language that is used by the court in expressing their legal opinion and judgement; generic elements of content, such as the use of narrative and reasoning; and material incorporated from other texts, such as passages cited from the trial transcript or the trial judge's report to the appeal court, and broader ideas that derive from social discourses relating to, for example, gender, sexual behaviour, domestic abuse, or intoxication.

Multiple discourses exist in all aspects of the social world. Every discourse reveals a way of seeing, inhabiting or explaining the social world by reflecting a particular perspective, bringing some elements to the fore and relegating others to the margins, permitting some actions but not others. Discourse is recognised, therefore, as an important site of struggle between competing representations of the social world and their claim to legitimacy[6]. Discourses also vary in their degree of stability, elaboration and salience and the extent to which they are refashioned over time. As Fairclough points out, existing discourses can, and often are, put together "in novel combinations as a means of finding new ways of doing things to replace what have become the now-problematic old ones"[7]. Particularly where social ideas are evolving and changing, and beliefs about rape and sexual consent are a paradigmatic example, old ideas or constructions may never quite disappear. As a result, sedimented meaning - that is, the left-over remnants of historical meaning - may continue to echo in new forms. For example, historical constructions of rape - such as the requirement of the use of force and resistance by the victim - may continue to exist in judicial discourse alongside more contemporary conceptions of consent and retain a pivotal role. Through an analysis of discourse, it is possible to examine the stability and development of judicial

[4] See Fasold, R. (1990) *Socioliguistics of Language*, Oxford: Blackbell.
[5] Fairclough, N. (1992) *Discourse and Social Change*, Cambridge: Polity Press, p.28.
[6] See Fairclough, N. (1989) *Language and Power*, Harlow: Longman; Eagleton, T. (1991) *Ideology: An Introduction*, London, Verso; Fairclough, N. (2010) *Critical Discourse Analysis,* Harlow: Longman.
[7] Fairclough, N. (1989) *op.cit.*, p.171.

discourse and the extent to which sedimented meaning in relation to rape survives in new discursive forms.

While the exercise of power is not reducible to the production of discourse, discourse is an important *locus* of power, through its contested meanings and competing claims of representation and truth. Different discourses do not serve all equally and this connects with feminist theories of how power is vested in and exercised through discourses that construct or normalise gender inequality as well as challenged through oppositional discourses[8]. Discourse is "not simply that which translates struggles or systems of domination but is the thing for which and by which there is a struggle"; that is, struggles of power can be understood as the struggle for meaning[9]. In this way, power is mediated through the effects of discourse, often in subtle and oblique ways[10]. This model of discursive power can be applied to judicial discourse to conceptualise a constitutive power that is exercised through particular ideas of consent that are conveyed expressly and implicitly within case reports of rape.

Language is not a neutral or impartial means of designating or conveying aspects of the social world. At stake is more than mere words but the power to reinforce particular meanings and values and, thereby, shape the contours of the social world. As Fairclough observes, the struggle for meaning is, in part, a struggle *in* and *over* language[11]. This can be illustrated by considering the performative nature of language and its social effects. Language has been understood as encompassing both constative and performative utterances[12]. While constative language describes things as they are, performative language is understood as "a class of utterances that above all do something … (the utterance) *creates* the state of affairs to which it refers"; the classic example is stating 'I do' at a marriage ceremony[13]. The conception of performative language also includes speech that conveys an *implicit* performance; for example,

[8] See Butler, J. (1993) *Bodies that Matter: On the Discursive Limits of Sex*, London: Routledge; Cameron, D. (1998) 'Introduction: Why is language a feminist issue?' in Cameron, D. (ed) *The Feminist Critique of Language: A Reader*, 2nd edition, London: Routledge.
[9] Foucault, M. (1971) 'The order of discourse' in Young, R. (ed) *Untyjng the Text: A Post-Structural Reader*, London: Routledge and Kegan Paul, p.52.
[10] This draws on Foucault's understanding of discursive power which he developed in his genealogical studies of knowledge, discourse and power; see, for example, Foucault, M. (1976) *The History of Sexuality: An Introduction*, Harmondsworth: Penguin.
[11] Fairclough, N. (1989) *op.cit.*, p.88.
[12] See Austin, J. L. (1962) *How to Do Things with Words*, New York: Oxford University Press. While Austen originally claimed it was possible to distinguish between constative and performative language, others have sought to demonstrate that they are not so easily separable in practice.
[13] Culler, J. (2000) *Literary Theory: A Short Introduction*, Oxford: Oxford University Press, p.97.

castigating someone by exclaiming 'shame on you!'[14]. Through the exercise of rhetorical power, language accomplishes important social acts of affirmation and validation or (as in my example) disavowal and invalidation. In this way, language brings things into being through creating meaning, attributing value and by structuring and defining the world in a particular way.

In many ways, judicial discourse in case reports constantly shifts between constative and performative language, creating a dynamic described by Culler as an "ever-present and undecidable oscillation"[15]. While judicial language refers to particular events and behaviours that have taken place and been told and re-told many times over in pre-trial and trial processes, it can also be understood as performative. For example, judicial discourse mediates different accounts of rape that are incorporated within the case report. These may be based on prosecution and defence submissions to the court or constructed from witness testimony drawn from the trial transcript. The various versions of events are refashioned, disputed or validated through an authoritative re-telling that achieves a particular salience and legal authority. In this way, judicial discourse constructs its preferred account or interpretation of events by attaching meaning and value to the various elements of evidence and the competing arguments considered by the court. Through processes of reconstruction and validation, judicial discourse shapes our understanding of consent; for example, what amounts to free agreement, what constitutes consensual or coercive behaviour or an honest or reasonable belief in consent. At a broader level, judicial discourse can also be understood as performative in defining certain matters as questions of fact, which are determined by the jury, or questions of law, which are then subject to judicial interpretation and determination.

What is discourse analysis?

Discourse analysis is best described as a range of methodologies that examine the construction of meaning at different levels of abstraction[16]. While these approaches are associated with different schools of analysis, they share the same theoretical principles.

[14] See Butler, J. (1990) *Gender Trouble: Feminism and the Subversion of Identity*, London: Routledge.
[15] Culler, J. (2000) *op.cit.,* p.102.
[16] See Silverman, D. (2006) *Interpreting Qualitative Data*, 3rd edition, London: Sage, p.223.

For example, discourse analysis adopts a social constructionist approach, recognising that discourse does not reflect a pre-existing reality but, rather, helps construct what we understand as social reality[17]. There are many versions of the social world constituted through discourse. Discourse is produced in a range of contexts for various purposes; for example, rape will be constructed differently by various parties and in different settings, such as newspaper reportage, survivors' accounts, academic discourse, feminist texts or legal judgments. These texts draw on and knit together different discourses to represent the social world in a particular way. Philosophically, discourse analysis challenges the view that we can treat any one of these representations as comprising the true version of reality. The aim of discourse analysis is not to assess competing constructions to reveal an essential truth. Rather, the focus within discourse analysis is *how* different meanings or versions of reality are constructed through discourse, how they are legitimised or challenged, the nature of their effects, and the stability or fluidity of particular discourses over time.

Another tenet of discourse analysis is the relationship between thought and language; that is, we structure and understand the flux of the social world through available linguistic concepts and categories[18]. In discourse analysis, this relationship is understood as a two way process: not only does language shape our perception of the world but, at the same time, the kind of language we use is influenced by how we see the world. In this way, different meanings of the same event may be constructed through the use of language, some of which may become naturalised or sedimented over time. However, while language shapes our thinking, we retain the capacity to see 'through and around' words and concepts, which allows for the possibility of competing interpretations and representations of the social world[19]. Exercising this capacity usually requires the interrogation of common-sense assumptions and taken for granted knowledge that have become embedded in familiar and habitual uses of language[20].

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[17] See Burr, V. (2003) *Social Constructionism*, 2nd edition, London: Routledge.
[18] Named after the American linguists Edward Sapir and his student, Benjamin Lee Whorf, the classic Sapir-Whorf hypothesis proposes that language structures the categories of our thought; see Bruner, J. (1962) *A Study of Thinking*, New York: Wiley. Discourse analysis adopts a weaker version of the Sapir-Whorf hypothesis in maintaining that language shapes and moulds our thinking rather than determines it.
[19] See the work of the sociolinguist Halliday, M.A.K. (1978) *Language as a Social Semiotic*, London: Edward Arnold.
[20] See Ehrlich, S. (2001) *op.cit.,* p.13.

The focus in discourse analysis is always the *social* use and effects of language rather than an account of its formal, structural codes; for example, how meaning is shaped by different features of language, such as particular patterns of vocabulary, linguistic devices and grammatical construction. Analysis is oriented, therefore, to the social character of texts and draws on various theories of language *in use*, rather than formal linguistics or structuralist approaches to language. In discourse analysis, the interaction between form and content is understood to shape textual meaning[21]. As Fairclough puts it, if content is to be realised, "it must do so in formal clothing"; that is, dressed in the form of a particular genre, style, vocabulary and grammar and shaped by the opportunities, conventions and restraints provided by different social contexts[22]. It is this critical relationship between form and content that is understood as producing the particular texture of a text.

While all forms of discourse analysis share these common theoretical underpinnings, there is no single method of discourse analysis. Discourse analysis comprises a variety of approaches that differ in their methods and the prominence given to particular research issues. There are two broad approaches, a 'micro' and 'macro' approach, which provide an analysis of discourse at different levels of detail. A textually oriented approach to discourse analysis, which I adopt, combines elements of both. I will briefly outline the two main schools of discourse analysis before setting out the approach used in this study. The studies I cite have been selected as prime examples of how that approach has been used to examine questions of gender and sexual violence.

Different approaches to discourse analysis

Discourse analysis based on a detailed linguistic analysis of texts is termed a 'micro' approach[23]. This focuses on the use of language as the medium through which discourses are expressed in texts and has its roots in semiotics[24] and functional

[21] See Fairclough, N. (1992a) 'Discourse and text: linguistic and inter-textual analysis within discourse analysis', *Discourse and Society*, 393 193, p.194.
[22] Fairlcough, N. (2010) *op.cit.*, p.60.
[23] Good examples of this approach are provided by Coates, L. Bavelas, J. and Gibson, J. (1994) 'Anomolous Language in Sexual Assault Trial Judgments', *Discourse and Society*, 5 189 and Coates, L. and Wade, A. (2004) 'Telling it like it isn't: Obscuring perpetrator responsibility for violent crime', *Discourse and Society*, 15 499.
[24] Discourse analysis draws on the work on semiotics developed by Hodge, R. and Kress, G. (1988) S*ocial Semiotics*, Cambridge: Polity Press; and Kress, G. (1989) *Linguistic Processes in Sociocultural Practice*, Melbourne: Deakin University Press.

linguistics[25]. Analysts seek to examine language as a social practice through which particular views and meanings of the world are represented or challenged. The interest, here, is the use and effects of language in the construction of discourse. Examples of this approach are the linguistic studies of sexual assault trial transcripts by Coates *et al* [26] and Coates and Wade[27]. Based on a detailed analysis of trial transcripts, Coates *et al* compare judicial language in cases where the perpetrator was either a stranger or person known to the woman, such as an acquaintance or partner. The study demonstrates how judicial discourse in cases of stranger rape is characterised by language associated with assault and violence, whereas the language used in cases where the parties are known to each other is predominantly that of erotic, affectionate or consensual sex. In their later study, Coates and Wade analyse judicial language in sentencing decisions in sexual assault cases to show how psychological concepts and theories provide explanatory models that justify different sentencing decisions[28].

Discourse analysis is also applied to provide a narrative analysis of legal cases. The focus of analysis is the construction of discourse through the use of narrative; for example, how meaning is shaped through a narrative sequencing of events, the selection, editing and framing of material, and interpretation and focalisation within narrative. An example is Winter's study of the construction of gender and deviance through the use of narrative in judicial summing up in the trials of Myra Hindley and Rose West[29]. Winter demonstrates how the judicial narrative of events functions as a form of advocacy for a particular outcome in each case[30]. In her seminal studies of sexual coercion and violence, Scheppele examines the use of narrative in three cases[31]: Anita Hill's allegations of sexual harassment by Judge Clarence Thomas, a case involving sexual harassment and abuse[32] and the statutory rape of an under age girl[33]. Scheppele demonstrates how victim accounts of sexual abuse are subject to delay and revision as the victim struggles to process traumatic events outside her usual

[25] This was pioneered by Halliday, M.A.K. (1978) *op.cit.*; Halliday, M.A.K. (1985) *An Introduction to Functional Grammar*, London: Edward Arnold.
[26] Coates, L. *et al* (1994) *op.cit*.
[27] Coates, L. and Wade, A. (2004) *op.cit*.
[28] Coates, L. and Wade, A. (2004) *op.cit*., p.499.
[29] Winter, J. (2002) 'The Truth Will Out? The Role of Judicial Advocacy and Gender in Verdict Construction', *Social and Legal Studies*, 11 (3) 343.
[30] Winter, J. (2002) *op.cit*., p.363.
[31] Scheppele, K. (1992) 'Just the Facts, Ma'am: Sexualised Violence, Evidentiary Habits and the Revision of Truth', *N.Y.L.Sch. L. Review* 37 123.
[32] *Reed v Shepard* 939 F.2d 484 (7th cir. 1991).
[33] *Daly v Derrick* 281 Cal. Rptr. 709 (Ct. App. 1991).

experience[34]. The study shows how the credence accorded victim accounts depends on their fit with culturally dominant narratives and the properties by which stories are usually judged, such as immediacy, internal consistency, coherence and stability[35].

A more abstract analysis of discourse has been termed a 'macro' approach. This involves an historical or philosophical analysis of knowledge and may not include any detailed analysis of texts[36]. Here, discourse is identified and analysed at a broader level to discern the rules and conventions governing the construction of knowledge through the production and proliferation of discourse. This approach to discourse analysis is influenced by the genealogical studies of Foucault that trace the development of modern technologies of power from more coercive to discursive forms[37]. Examples of this approach can be found in the studies of Figueiredo[38] and Melrose[39]. For example, Figueiredo examines the rape trial as a discursive arena where individual women are *personally* disciplined through exposure, loss of social reputation, shame and humiliation and women, more generally, are *indirectly* disciplined through setting examples of proper and improper female behaviour[40]. Melrose adopts a similar approach in her analysis of the dominant discourse of child sexual exploitation. Her study demonstrates how the individualistic nature of this discourse, in relation to both the adult exploiter and the exploited young person, obscures and marginalises broader social economic processes that render young people vulnerable to exploitation[41].

These different approaches provide an analysis of discourse at different levels; of bodies of knowledge/power or of language and texts. They are all concerned, in different ways, with the construction of meaning and exercise of power through discourse. The underlying premise is that the social world is created and reproduced in discourse and that, through an analysis of discourse, it is possible to demonstrate how particular aspects of the social world are represented, legitimised or challenged through discursive practices.

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[34] Scheppele, K. (1992) *op.cit.,* p.126.
[35] Scheppele, K. (1992) *op.cit.,* p.162.
[36] See Machin, D. and Mayr, A. (2012) *Critical Discourse Analysis*, London: Sage, p.5.
[37] This approach to discourse analysis was developed by Foucault, M. (1972) *The Archeology of Knowledge*, London: Tavistock Publications; the continuing relevance of this approach is discussed by Ehrlich, S. (2001) *op.cit.,* p.17.
[38] Figueirido, J. (2002) 'Discipline and Punishment in the Discourse of Legal Decisions on Rape Trials' in Cotterill, J. (ed) *op.cit*.
[39] Melrose, M. (2013) 'Young People and Sexual Exploitation: A Critical Discourse Analysis' in Melrose, M. and Pearce, J. (eds) *Critical Perspectives on Child Sexual Exploitation and Related Trafficking*, Hampshire: Palgrave Macmillan.
[40] Figueirido, J. (2002) *op.cit*., p.266.
[41] Melrose, M. (2013) *op.cit*., p.16.

A textually oriented approach to discourse analysis

The methodology that I use is based on the textual analysis of discourse[42]. This combines elements of 'micro' and 'macro' approaches in examining the construction of discourse in particular texts. Here, it is the text that provides the point of entry for this mode of analysis. Textual analysis addresses different dimensions of discourse within a text; the use of language, the construction of textual content through generic elements such as narrative and reasoning, and broader contextual elements that are incorporated within the text. These various elements of discourse are examined by a close reading of the text. The aim is to bridge the gap between, on the one hand, work inspired by a Foucauldian approach that tends not to focus on specific texts or language and, on the other hand, a linguistic analysis that may not engage with contextual factors or social theoretical issues.

Examining meaning in texts raises an important question as to where such meaning is located. As Culler points out, "meaning is not something simple or simply determined"[43]. Language does not come permanently glued to particular meanings but is shaped within various contexts; linguistic, social and institutional. The practice of writing and reading is shaped by various cultural, linguistic and discursive conventions that provide opportunities for flexibility and creativity as well as constraints. From this perspective, discourse does not emanate *wholly* from the individual as a consciously invented strategy designed to achieve certain effects. This is particularly relevant to an analysis of case reports. As a hybrid text, the case report incorporates a variety of sources and antecedent texts produced by different authors and the legal judgement may comprise a single or multiple authors, depending on the number of opinions that are provided. Even if there is a single author, the case report is a product of judicial discussion and will reflect varying degrees of consensus and dissent. This is not to deny individual agency or strategic manipulation of language within discourse, but to recognise that the meaning and effects of discourse are not dependent on authorial intention and may be produced independent of such intentions. Culler suggests that textual meaning is generated by various factors: the potential meanings of the words in

[42] I have drawn on several key works on discourse analysis, which I cite throughout this chapter. The texts that I have found most helpful were those that offered a textually oriented approach to discourse analysis: Fairclough, N. (2003) *Discourse Analysis: textual analysis for social research*, Oxon: Routledge; Johnstone, B. (2008) *Discourse Analysis*, 2nd edition, Oxford: Blackwell Publishing; Machin, D. and Mayr, A. (2012) *Critical Discourse Analysis*, London: Sage.
[43] Culler, J. (2000) *op.cit.*, p.68.

the text, the effect of these words upon a reader, and the meaning attributed to them within particular contexts[44]. It is through this complex process that meaning can be discerned within a text.

In discourse analysis, the interpretation of a text is seen as provisional; that is, it is always situated within a particular time, culture and history. Texts are open to multiple, competing readings and interpretations in different contexts and at different times. Since textual meaning is understood as "indeterminate, open-ended and interactional", there can be no correct reading or closure to the search for meaning[45]. Any claim to provide such closure by, for example, privileging authorial intention or asserting the true meaning of the text, is tangential (if not invalid) to the task of elaborating textual and cultural meaning[46]. Rather, the aim of analysis is to examine how meaning arises from the various properties of a text through the process of reading and interpretation, with an awareness of the broader social context. Meaning is mediated, therefore, through linguistic, textual and contextual factors and the reader, as analyst, must be alert to the interaction of these factors.

Examples of a textually oriented approach to discourse analysis can be found in the studies of Anderson and Doherty[47] and Ehrlich[48]. Anderson and Doherty examine the construction of rape and victimhood in the transcripts of recorded discussions by participants in relation to different scenarios involving male and female rape[49]. From their analysis of the transcripts, the authors identify particular beliefs about individual accountability and risk-taking behaviour, which they relate to broader discourses of gender and neo-liberal citizenship. Their study demonstrates how such beliefs sustain a lack of support for certain categories of rape victims[50]. Ehrlich adopts a similar approach in her analysis of the transcripts of two hearings: a University disciplinary tribunal involving sexual assault and a criminal trial of rape. She examines decision-making in these hearings in relation to various factors: the perceptions of the accused's lack of agency, the complainer's failure to resist, and a notion of tacit consent that is

[44] Culler, J. (2000) *op.cit.*
[45] Denzin, N. (1995) 'Symbolic Interactionism' in Smith, J. and Harre, R. (eds) *Rethinking Psychology*, London: Sage.
[46] A useful account of this approach is provided by Culler, J. (2008) *op.cit.*
[47] Anderson, I. and Doherty, K. (2008) *Accounting for Rape: Psychology, Feminism and Discourse Analysis in the Study of Sexual Violence,* London: Routledge.
[48] Ehrlich, S. (2001) *op.cit.*
[49] Anderson, I. and Doherty, K. (2008) *op.cit.*, p.47.
[50] Anderson, I. and Doherty, K. (2008) *op.cit.,* p.125.

implied from the complainer's behaviour[51]. At a broader level of analysis, she shows how dominant social discourses of gender, heterosexuality and sexual violence are reproduced in legal settings[52].

My methodology, based on Fairclough's textually oriented approach to discourse analysis, follows in the tradition of work by Ehrlich and Anderson and Doherty. My study differs from prior research in two ways. First, I examine judicial discourse contained in case reports of rape rather than trial transcripts, hearings or mock jury discussions and secondly, my analysis is based on a group of cases rather than individual hearings. Because case reports are substantially shorter than trial transcripts, it is possible to examine a number of cases. I read across these cases to consider how consent is constructed in judicial discourse and how judicial decision-making about consent relates to the broader meanings that are constructed in the text.

The textual material provided by these cases allows for an analysis in sufficient depth and richness; that is, the material is detailed, diverse and relevant. I encompass some aspects of a conventional doctrinal study by examining judicial application of the substantive law and evidential requirements relating to consent. However, I also consider how consent is conceptualised and understood more broadly within judicial discourse; for example, how meaning is conveyed through the use of language, narrative construction, different forms of reasoning, and broader social discourses. This allows me to examine how consent is constructed through judicial reconstruction and interpretation of the facts as well as the application of law. Before I set out the framework of analysis that I use to examine case reports, I will explain why I chose this particular methodology.

Why discourse analysis?

The choice of methodology depends on the object of research. This study is concerned, fundamentally, with the construction of meaning and the process by which meaning is produced in case reports. A methodology based on discourse analysis has been selected, therefore, because of its capacity to provide the richest answer to the question posed in this study: how is sexual consent constructed in case reports of rape?

[51] Ehrlich, S. (2001) *op.cit.* p.5.
[52] Ehrlich, S. (2001) *op.cit.* p.149.

Discourse analysis provides a useful conceptual framework and range of analytic tools that can be applied to interrogate the construction of meaning in texts. By examining different elements of a text, it is possible to provide a "descriptively thick" account of a particular topic[53].

In discourse analysis, texts are understood as multi-layered and multi-dimensional. Meaning is examined at different levels of the text; at the level of language, textual content, generic elements that make up the text and relevant contextual factors, including historical and social discourses. Discourse analysis offers a way of engaging with these different elements within a text to explore how meaning is produced. As Lacey suggests, the examination of legal *discourse*, rather than legal *doctrine*, facilitates a broader study of meaning and provides the opportunity to consider the relationship between legal and social discourses relating to sexual consent[54]. The assumption, here, is that the articulation of legal rules or doctrine constitutes only *one* aspect of judicial discourse. By examining the different elements of judicial discourse contained in case reports, it is possible to consider how meaning is constructed more broadly within the text. In this way, judicial decision-making about consent can be examined in relation to different conceptions of consent, the use of reasoning and narrative, the value attached to different circumstantial factors, and relevance of broader social discourses.

Discourse is an important site of research in qualitative approaches to social research[55]. Applying discourse analysis to examine legal texts reflects a 'cultural' or 'linguistic' turn within qualitative approaches to legal research that are not empirically quantifiable and go beyond strict legal doctrine[56]. My study can be contextualised in relation to this developing strand of qualitative legal research that seeks to interrogate legal texts in different ways. Analysis of discourse in the practice of law is possible in that language and texts are central to the application of law. A case report is a prototypical text for discourse analysis; it is a written text - a physical object - that can be read and re-read. Case reports also provide a well documented anthology of 'real life' narratives that, as

[53]See Johnstone. B. (2008) *Discourse Analysis*, Oxford, 2nd edition: Blackwell Publishing, p.269.
[54] Lacey, N. (19998*) Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, Oxford: Hart, p.10.
[55] See Ehrlich, S. (2001) *Representing Rape: Language and Sexual Consent*, London: Routledge; Cotterill, J. (2007) *The Language of Sexual Crime*, Basingstoke: Palgrave Macmillan; Cammiss, S. and Watkins, D. (2013) 'Legal research in the Humanities' in Watkins, D. and Burton, M. (2013) *op.cit*.
[56] See Cownie, F. and Bradney, A. (2013) 'Socio-legal studies: a challenge to the doctrinal approach' in Watkins, D. and Burton, M. (eds) *op.cit*., p.35.

Twining suggests, can be analysed for various purposes unrelated to why they were originally written and preserved[57].

According to Twining, "in no other sphere of social life, are there to be found in such abundance practical decisions by powerful officials that have had to be argued for and justified in public and recorded in texts"[58]. Twining relates the cultural significance of judicial discourse contained in case reports to issues of power and legitimation. As a form of social action - an intervention in the world - judicial discourse generates important social effects. Power is exercised through the way judicial discourse shapes our understanding of events, such as rape, legitimising or challenging particular meanings, interpretations and values. An important characteristic of discursive power is that it operates through disguising its nature and effects. This capacity to mask or hide its own mechanisms is a critical component of discursive power, so that the prevailing ideas of the time, which are partial and contestable, become naturalised and accepted as basic knowledge or just common-sense[59]. The power exercised through an authoritative discourse, such as judicial discourse, is also enhanced through its embodiment within a privileged institutional setting. In this context, *institutional* discourse tends to be seen as emanating from the institution itself, tantamount to it being placed *outside* of ideology, so that it comes to be seen as natural and legitimate[60]. Through an analysis of judicial discourse, it is possible to examine these broader issues of power, decision-making and justification.

Framework of analysis

Conducting a textual analysis is *not* a strict, technical exercise, based on the application of set procedures. According to Johnstone, textual analysis does not comprise a "mechanical set of steps" which must be followed in a particular order or fixed way[61]. She suggests that developing a framework for analysis can serve as an heuristic by helping the analyst explore and examine different dimensions of the text. Here, an heuristic is defined as a "set of discovery procedures" to help the researcher think about "what is potentially interesting and important about a text or set of texts"[62]. I set

[57] Twining, W. (2006) *Rethinking Evidence: Exploratory Essays*, Cambridge: Cambridge University Press, p.320.
[58] Twining, W. (2006) *op.cit.,* p.320.
[59] Foucault, M. (1976) *op.cit.*, p.86.
[60] See Fairclough, N. (1989) *op.cit.,* p.91.
[61] Johnstone, B. (2008) *op.cit.,* p.10.
[62] Johnstone, B. (2008) *op.cit.,* p.9.

out below a framework of analysis that has served as an 'heuristic', by enabling me to think about and examine different elements of the texts. This framework is based on the approach and methods used by Fairclough, Johnstone, and Machin and Mayr[63]. What these authors share is a commitment to a textually oriented approach to discourse analysis.

Legal judgments can be read as acts of rhetoric - albeit not necessarily conscious acts - designed to persuade the audience and legitimise judicial decision-making. While the term rhetoric is often used pejoratively to denigrate forms of discourse that appeal to emotion, stereotypes or prejudice, rhetoric can be understood more broadly as the art of persuasive communication through the use of language[64]. In this way, rhetoric encompasses both rational and non-rational means of persuasion and includes the content of what is being communicated as well as the techniques involved in its delivery. It is possible to identify and examine a range of rhetorical devices employed in legal judgements through which particular meaning and value in relation to consent are constructed; for example, the use of reasoning, narrative construction, choice of vocabulary, various linguistic devices and patterns of grammatical construction.

My analysis of the 'consent' cases is based on a close reading of the texts and this is achieved by addressing different dimensions of discourse and a range of rhetorical devices. I examine three dimensions of discourse: the use of language; the construction of textual content through generic elements of narrative and reasoning; and broader contextual factors, such as social discourses, which are incorporated within the text. Applying this framework has helped focus my analysis on the different elements of case reports and my analysis of judicial discourse is supported and illustrated by material drawn from these different dimensions of discourse. In setting out the framework of analysis below, I provide a brief account of each dimension of discourse and relevant rhetorical devices, and how I approach my analysis of them in the texts.

[63] Fairclough, N. (1989) *op.cit.;* Fairclough, N. (2003) *op.cit.;* Johnstone, B. (2008) *op.cit.* and Machin, D.and Mayr, A. (2012) *op.cit.*

[64] This broad approach to rhetoric is informed by the work of Nicolson, D. *Evidence and Proof: Contexts and Critique*, Edinburgh University Press, forthcoming.

Examining language

Discourses are characterised and differentiated by various features and patterns of language. As Fairclough puts it, discourses tend to 'word' or 'lexicalise' the world in different ways so that the use of certain terms and vocabulary may evoke or make reference to a particular discourse[65]. In this way, particular meanings or values may be conveyed by the use of language without being openly asserted.

Textual meaning is shaped by patterns of language, vocabulary and grammatical construction. For example, the grammatical positioning of action, through the use of dominant and subordinate clauses, often serves to foreground certain elements of content and marginalise others. Greater prominence is attached to content positioned earlier in the sentence within a dominant clause, while placing content within a subordinate clause towards the end of a sentence may work to conceal or background these elements[66]. Examining patterns of grammatical construction reveals how a text inscribes a sense of causation in relation to the events and may accentuate a sense of agency or passivity in the role of the participants. Meaning is also shaped by various linguistic devices, such as overwording. This reflects an unusually high degree of wording involving superfluous words or surfeit of repetitious, quasi-synonymous terms that create a sense of "over-persuasion" or "over-completeness"[67]. The use of over-wording normally suggests that what is being stated is contentious and may denote an attempt to justify or legitimise what is asserted in the text[68].

The degree of certainty or factuality conveyed in discourse is often demonstrated by the particular modality of the verb used ('the appellant *would* or *must have known* …' compared to 'it *is possible* that the appellant *may have known* …'). Modality operates on a scale of intensity and reflects an author's commitment to what is said through the expression of degrees of certainty, probability, or doubt[69]. Texts normally reflect varying degrees of modality in relation to different elements of content. The authorial relationship to what is said may also be conveyed more subtly through the use of hedging terms and verbal qualifiers (*conceivably*, *feasibly*, *possibly*, *apparently*, *properly,*

[65] Fairclough, N. (2003) *op.cit.,* p.129.
[66] Fairclough, N. (1989) *op.cit.*, p.132.
[67] Machin, D. and Mayr, A. (2012) *op.cit.*, p.37.
[68] Fairclough (1989) *op.cit.,* p.115.
[69] See Machin, D. and Mayr, A. (2012) *op.cit.*, p.190.

unarguably, undeniably) that create a sense of tentativeness, ambiguity, confidence or assertion in relation to the particular claim that is made. The use of hedges may also soften the bluntness or assertion of a proposition. For example, evaluative statements may be qualified by hedges so that their meaning or implication is not easy to read off (a *rather* brave response, *fairly* risky action, *somewhat* terse but straightforward account). The use of hedges must be understood in context before their effects can be fully discerned.

Meaning is powerfully shaped through the values conveyed in a text. Examining values allows us to consider various forms of legitimation, how they are realised and the nature of their effects. The expression of values may be conveyed explicitly, through the use of emotive language, or implicitly, where certain meanings are conveyed obliquely or simply assumed. In this way, certain propositions may be established as common knowledge when, on examination, they are indeterminate or contestable. Such assumptions can be understood as a form of content that is 'already said' or 'pre-constructed'[70]. These pre-constructed elements are frequently triggered by textual cues inviting the reader to draw on her pre-existing knowledge of the social world to make the text coherent. For example, the reader may be invited to infer a particular meaning from what is stated or draw on what is assumed to be common-sense or stock knowledge[71]. Through a process described as dis-identification, the reader may recognise the assumed values within a text and refuse this inferential call to meaning. This may generate a sense of dissonance when reading the text.

My analysis of language focuses primarily on judicial language; that is, the language used by the appeal court in constructing the judgement. On occasions, I consider the use of particular terms that derive from external elements, such as witness testimony in the trial transcript or the trial judge's report to the court, which are adopted by the court and incorporated within judicial discourse. In my analysis, I explain the source and context of the language that is examined and explain why it is significant.

[70] This understanding is developed by Pecheux, M. (1982) *Language, Semiotics and Ideology*, London: MacMillan.
[71] See Fairclough, N. (1989) *op.cit.,* p.81.

Examining textual content

The content of a text is built from different generic elements. In case reports, these typically include the use of narrative and reasoning, with closure provided by judicial opinion and judgment.

The meaning and value attached to events is shaped through the use of narrative. According to Twining, narrative construction provides an account of events "arranged in a time sequence and forming a meaningful totality"[72]. Case reports of rape frequently contain different narrative accounts offering competing versions of the events. These may include accounts that were originally presented at trial, the narrative accounts constructed in the prosecution and defence submissions to the appeal court, and the appeal court's own reconstruction of events. Narrative construction is a heavily interpretive process. The organisation and sequencing of events through narrative necessarily refashions experience and shapes meaning in subtle ways[73]. Examining the judicial use of narrative reveals how meaning is formed through the use of structure, sequencing and timing, selection, editing and framing of material, interpretation and focalisation. Through focalisation, for example, the narration of events may be relayed from a particular vantage point. This may not necessarily reflect the author's perspective but, rather, the consciousness or position through which events are brought into focus. Narrative can be understood as both a source of knowledge and artifice. For example, through its sense-making, narrative conveys information and explains what happened but, as a rhetorical structure, it may distort as much as it reveals[74]. While narrative can be a powerful device for reinforcing social norms, it also offers a mode of social criticism, inviting readers to understand experiences from different standpoints.

Another important element of content in case reports is the use of judicial reasoning and evaluation of the evidence. As Nicolson reminds us, factual evidence does not simply appear in a raw, unformed state ready for evaluation[75]. The facts have to be described and the language used to describe them helps construct their meaning. At appeal, the relevance and significance attached to different strands of factual evidence

[72] Twining, W. (2006) *op.cit.*, p.290.
[73] See Jawarski, A. and Coupland, N. (2006) *The Discourse Reader*, 2nd edition, London: Routledge, p.213.
[74] See Culler, J. (2000) *op.cit.,* p.94.
[75] See Nicolson, D. *Evidence and Proof: Contexts and Critique*, Edinburgh University Press, forthcoming.

is established through a process of interpretation and evaluation. Judicial application of the substantive law and evidential requirements regarding the proof of rape may determine which elements of evidence are deemed relevant. This may depend on whether they fit relevant legal categories. For example, evidence of the complainer's distress may provide corroboration of her lack of consent if it fits the category of *de recenti* distress; that is, distress expressed soon after the rape. The value attached to such evidence is subject, therefore, to judicial interpretation as to what constitutes *recent* distress[76]. Similarly, criminal intent can be inferred from the appellant's use of force prior to intercourse. The evidential value of such force depends on judicial interpretation of what amounts to force and how immediate such force should be. Elements of evidence that do not fit certain legal categories may be regarded as irrelevant or relegated to the margins.

Different forms of judicial reasoning can be identified and examined, such as inferential thinking and atomistic or holistic approaches in assessing evidence[77]. Reasoning can also be considered in relation to its explicit and implicit elements. As Nicolson points out, facts do not prove themselves[78]. The relevance and value attached to factual evidence depends on inferential thinking. Inferential thinking involves inferring one fact from another (for example, inferring lack of consent from the use of force or threat) and this usually depends on the use of generalisation or assumption, which may remain unexpressed and implicit in judicial reasoning[79]. Examining the nature of inferential thinking may reveal that the belief or assumption, on which the inference is based, is unfounded, unproveable or relies on supposition.

Judicial reasoning encompasses both atomistic and holistic approaches. In atomistic reasoning, each piece of evidence may be assessed separately without reference to the overall narrative picture or the weight of evidence. This involves bottom-up reasoning from discrete facts to draw conclusions about the evidence as a whole[80]. By contrast, a more holistic approach involves consideration of the relationship *between* the different elements of evidence in the context of the whole picture[81]. This is a top-down

[76] This was explained briefly in Chapter One and is discussed in more depth in Chapter Five.
[77] See Nicolson, D. *Evidence and Proof: Contexts and Critique*, Edinburgh University Press, forthcoming and Twining, W. (2006) *op.cit.,* p.306-7.
[78] See Nicolson, D. *Evidence and Proof: Contexts and Critique*, Edinburgh University Press, forthcoming.
[79] See Twining, W. (2006) *op.cit.,* p. 309.
[80] Wagenaar, W., Van Koppen, P. and Crombag, H. (1993), *Anchored Narratives: The Psychology of Criminal Evidence*, Hertfordshire: Harvester Wheatsheaf, p. 24.
[81] See Twining, W. (2006) *op.cit.,* p. 311.

approach, in which a broader narrative or hypothesis provides a frame of reference that helps organise and interpret individual facts. If there are too many discordant facts, the narrative or hypothesis may be modified or abandoned. The potential weakness in atomistic approaches is that analysis of evidence may be divorced from its broader context and stripped of relevant meaning whereas, in more holistic approaches, the logical inconsistencies or flaws in applying plausible hypotheses or theories may be overlooked[82].

Textual content can also be examined in relation to what is present and what is absent, and what is placed at the centre or at the margins of a text. For example, meaning is shaped not only through the explicit content of a text but is created through its gaps and silences. What is stated in a text is always said against a background of what is not said; similarly, what is foregrounded is made possible by what is marginalised[83]. Culler suggests that meaning is created through these oppositions or differences that are set up in the text[84]. These may be signalled in the text where expected elements are absent - for example, where judicial decisions are reached in the absence of any discussion or reasoning - or where there is a pronounced change in the style or tone in the text. The aim of analysis is to tease out what the gap or shift in style may signify in the text.

One of the ways in which absence is created is through nominalisation. Nominalisation is a form of grammatical metaphor that represents events or actions as entities by transforming clauses, usually processes of action, into nouns or noun phrases[85]. For example, an active process (*employees produce steel; he assaulted her with a weapon*) can become a nominalised representation (*steel production; the assault*). In this way, elements of action may be removed or condensed, participants may be written out of a text, or a sense of ambiguity may be created in relation to the causation or specifics of an event. The underlying action is still implied in the phrase but, through a simplification created by the compression of events, the process or details of the action are obscured. Since these actions now become a 'thing', they can be represented as stable entities and function as participants in new constructions (*steel production* increased; *intercourse* commenced; *the assault* ended). Nominalisation is a common resource for generalising and abstracting but it also elides agency and responsibility.

[82] See Nicolson, D. *Evidence and Proof: Contexts and Critique*, Edinburgh University Press, forthcoming.
[83] Johnstone, B. (2008) *op.cit.*, p.72.
[84] Culler, J. (2000) *op.cit.,* p.57.
[85] See Fairclough, N. (2003) *op.cit.,* p.143.

Its use in a text may be significant because replacing actions or events with abstract nouns contributes to processes appearing common-place or self-evident. It is, therefore, one of the ways in which events or processes become naturalised[86].

Naturalisation is a process that presents certain propositions as common-sense or taken-for-granted knowledge; for example, through the use of assumption or implicit values conveyed within a text. In this way, particular meanings - which are partial and contestable - may be constructed within a text as natural, normal or simply the way things are[87]. The use of naturalisation often brings about a closure of meaning in that it excludes, marginalises or delimits the meanings attached to a particular event or a person's behaviour. Naturalisation can be understood, therefore, as a critical component of discursive power.

Examining contextual elements

Textual meaning is shaped by various contextual elements that are incorporated within case reports; for example, the application of various legal rules and doctrines (which were discussed in Chapter One), elements drawn from other texts and cases, and broader social and historical discourses. For example, the case report draws on multiple discourses, even if the realisation of a particular discourse in the text is minimal. In discourse analysis, the process by which a text draws on and incorporates elements originating from other texts and discourses is understood as inter-textuality and inter-discursivity[88]. In a case report, different elements originating from prior texts and discourses are textured together; some elements are expressed explicitly and other elements remain implicit.

Case reports are richly inter-textual, both horizontally (related thematically) and vertically (related historically or sequentially), forming part of a chain and network of prior cases and discursive practices. As I explained earlier in this chapter, judicial discourse comprises elements drawn from numerous antecedent texts, such as trial court transcripts and witness testimony, the trial judge's report, written and oral submissions to the court, prior hearings and earlier cases. These external elements are

[86] Culler, J. (2000) *op.cit.,* p.103.
[87] Fairclough, N. (1989) *op.cit.,* p.91.
[88] See Fairclough, N. (2003) *op.cit.,* p.40; p.128.

incorporated into the judgment through direct report (reproduction of the actual words used), indirect report (where the original words are paraphrased or summarised) or conveyed through reference or allusion. Case reports may also incorporate ideas that derive from broader social discourses; for example, discourses relating to gender and heterosexuality, intoxication, sexual coercion and prostitution, or the way in which victims are assumed or expected to respond to traumatic events such as rape.

Through the process of inter-texuality and inter-discursivity, these external elements are reframed, modified and reworked through their positioning within new contexts. It is this perpetual refashioning of prior texts and discourses that lies at the heart of how discourse is produced, circulated and refashioned. The aim of analysis is not to examine these external elements in their own right; for example, what trial judges say in their directions to the jury or competing discourses about domestic violence or prostitution. The aim is to demonstrate how the incorporation of external elements - whether these elements are drawn from antecedent cases, aspects of witness testimony or broader social discourses - shapes judicial understanding and determination of sexual consent. Through an analysis of these elements, it is possible to show how judicial understanding of consent is shaped by various discourses and broader social ideas relating to gender and sexual violence.

Judicial discourse regulates the production and circulation of different discourses, by privileging and legitimising some and marginalising or excluding others. The case report can be understood as "ideologically creative" in that it does not merely reinscribe prior meaning systems[89]. To varying degrees - and always in the shadow of antecedent texts - it remoulds and fashions its own system of meaning through the interaction of various discursive processes. Over time, the hierarchical order of such discourses may be reworked and modified as a result of broader social changes. For example, one significant change during the time-line of the 'consent' cases is the coming into force of the 2009 Act. Through textual analysis, it is possible to examine the impact of such changes on judicial discourse and assess the degree of stability and sedimentation as well as innovation and change in judicial thinking about consent.

[89] Fairclough, N. (2003) *op.cit.*, p,97.

By applying this framework of analysis to examine case reports, I am able to demonstrate how consent is constructed through different elements of judicial discourse.

Analysis of case reports

Between March 2002 and May 2015, there are a number of case reports of rape, based on judgments of the Appeal Court of Scotland, that turn on questions of consent. Based on a search of cases on Westlaw, Scottish Criminal Case Records via LexisLibrary, and the website for Scottish Courts, I identified 31 'consent' cases over this period of time (see Appendix 2). This comprises all the reported cases in this time-line involving the rape of an adult woman where *at least* one ground of appeal related to consent; for example, insufficient evidence or lack of corroboration, misdirections on consent or an unreasonable verdict[90]. Examining cases over this period of time allows me to consider the diversity as well as the evolution of judicial discourse in the context of the new statutory provisions.

In my analysis of the 'consent' cases, I draw on the three dimensions of discourse I outlined earlier; the use of language, textual content and broader contextual elements. While each chapter includes examples of these different dimensions of discourse, my analysis of an individual case often focuses on specific elements; for example, the use of language, narrative construction, judicial reasoning, or broader social discourses that can be identified in the text. The selection of textual material for analysis is based on two factors. First, it depends on the material that was available in the text. Case reports vary greatly in length and content[91]. They do not conform to a *proforma* approach and the material contained in each text varies considerably from case to case. Some cases contain several pages devoted to the background and narrative account of the events[92], while other cases offer little more than a few lines describing what happened[93]. There are also marked differences in case reports regarding the extent of reasoning and opinion that is provided, the focus and breadth of discussion, the actions of the parties and their response afterwards.

[90] All cases involving an under-age child were excluded, although I included two cases involving multiple complainers, where one of the complainers was just under 16.
[91] The longest case report was *Burzala v HMA* 2008 S.L.T. 61 (comprising 27 pages) and the shortest was *Patterson v HMA* 2005 HCJAC 57 (at just over 2 pages).
[92] For example, *McKearney v HMA* 2004 J.C. 87; *Cinci v HMA* 2004 S.L.T. 748; *Burzala v HMA* 2008 S.L.T. 61.
[93] For example, *Patterson v HMA* 2005 HCJAC 57; *Melville v HMA* 2006 S.C.C.R. 6; *Wiles v HMA* 2007 S.C.C.R. 191.

Second, the selection of textual material is based on the elements of discourse that most clearly demonstrate how consent was understood and determined in that particular case. This may be the form of reasoning that was applied, the way in which an event was framed within a broader narrative, the particular assumptions or meanings that derive from broader social discourses, or the language that was used to represent the event or frame the actions of the parties. Again, this varies from case to case according to the relevance and significance of different elements of discourse. The selection of material for analysis in each case depends, therefore, on the material that was available and the particular aspects of discourse that demonstrate how consent was constructed.

Since the focus of this research is consent, I only consider aspects of judicial discourse that reveal, either directly or indirectly, how consent is understood and assessed by the court. Elements of discourse that do not relate to consent are not examined; for example, the headnote that is added to the beginning of a case report; elements of the trial transcript or trial judge's report cited by the court where they have no bearing on consent; judicial discussion of a ground of appeal where it is entirely unconnected with consent (for example, misdirection regarding the evidential value of 'mixed' statements[94] or a *Cadder* appeal on grounds that the appellant was not offered legal advice prior to his police interview[95]).

When I present my analysis, I explain why I have selected a specific passage or element of discourse for examination and, in my discussion, I demonstrate its relevance in relation to the construction of consent. In doing so, my aim is to illuminate how judicial decisions about consent are reached in the context of the broader meanings contained in the case report. An underlying assumption in discourse analysis is that there is a relationship between different elements of the text; for example, the choice of language, the construction of narrative, the particular form of reasoning, and the broader discourses that are drawn on. In my analysis, I highlight relevant connections between different aspects of judicial discourse and the degree of coherence or dissonance that is achieved in the text; for example, how judicial reasoning relies on a particular construction of the event, the way discourse coheres around the use of a particular

[94] A mixed statement by the appellant includes both incriminating and excusatory elements. If such evidence is led by the prosecution, the jury should be advised that the whole statement is admissible and that the appellant can rely on the excusatory elements.

[95] The case of *Cadder v HMA* 2010 SLT 1125 held that the accused was entitled to legal advice prior to police interview. Following this judgement, there was a spate of appeals on '*Cadder*' grounds; that the appellant had not been offered the right to legal advice prior to his police interview.

word or phrase, or the relationship between judicial decision-making about consent and broader discourses in society.

In conducting the analysis, I read across the cases to identify prominent features of judicial discourse, the degree of sedimentation of historical ideas about rape, the diversity and the evolution of judicial thinking about consent. Most of the 'consent' cases are presented in some depth in the following chapters. In each chapter, I focus on the cases that most clearly demonstrate a particular aspect of judicial discourse. Where the same issue or element of discourse is reflected in numerous cases, I focus on the cases that provide the clearest example or best demonstrate the nature, diversity or development of judicial discourse in relation to that element. This gives a sense of breadth as well as depth to my analysis.

Discourse analysis: strengths and weaknesses

As a methodology, discourse analysis shares the strengths and weaknesses associated with much qualitative research. For example, research based on discourse analysis is subject to criticism that it lacks robustness and transparency in the methods applied[96]. I have addressed the concern about transparency by setting out the methodology, explaining its theoretical underpinnings, outlining the framework of analysis, and the basis on which material is selected for examination. In this way, I have tried to provide a clear account of how I use the methodology to examine the cases.

The robustness of any research reflects the extent to which a study can withstand intellectual challenge and this depends, in part, on the relationship between the methodology used and the nature of claims made. If these are in alignment - that is, if the claims do not exceed what may be reasonably proposed on the basis of the methodology applied - one may defend the research as intellectually robust. For example, claims made on the basis of discourse analysis will not relate, generally, to quantitative outcomes or the distribution of occurrence of particular phenomena but, rather, illuminate the process of *how* or *why* something occurs. If it is possible to generalise at all from discourse analysis, it is usually about processes rather than

[96] Johnstone, B. (2008) *op.cit.*, p.269.

outcomes or the distribution of results. The strength of discourse analysis lies, therefore, in its explanatory and critical depth.

Research based on discourse analysis is sometimes regarded as subjective and ephemeral[97]; such research rarely yields "a single definitive explanation" for any phenomenon studied[98]. Arguably, questions of validity cannot be considered separately from the theoretical basis of the methodology. An important implication of the theoretical framework I set out earlier in this chapter is that discourse analysis cannot, and is not intended to, produce a single *correct* or *true* meaning of a text. As with any textual analysis, analysis of discourse does not claim to provide a complete or definitive interpretation of a text that can be objectively assessed and verified[99]. Reading is inevitably shaped by what the reader brings to the text, including the questions she considers and the particular methodology that is applied, as well as the historical and cultural context in which the text is read. This reflects the contextual nature of knowledge. The onus on the researcher is to make explicit the particular approach that is adopted, the methods that are used, and not to over-reach in any generalisations or conclusions drawn from the analysis.

Discourse analysis does not assert itself as an empirical science or make positivist claims to knowledge. The epistemological position of discourse analysis is that knowledge is always provisional and incomplete. This means that there is no way of getting behind an interpretation to produce an analysis that can be independently tested and evaluated. Since textual meaning is understood as situational, contextual and historically variable, there can be no limit or end to the search for meaning. As Fairclough observes, "there is no such thing as an 'objective' analysis of a text … our ability to know what is 'there' is inevitably limited and partial"[100]. Put simply, reading case reports of rape a hundred years ago, or a hundred years in the future, would inevitably produce a quite different analysis based on changing social contexts and prevailing beliefs. How we read and understand case reports - as, indeed, how we read *any* text - is shaped by historical, cultural ideas and values at any given time. The

[97] See Stubbs, P. (1997) 'Whorf's children: Critical comments on critical discourse analysis' in Rayan, A, and Wray, A. (eds) *Evolving Models of Language*, Clevedon: Multilingual Matters.
[98] According to Johnstone, B. (2008) *op.cit.,* p.10.
[99] According to Johnstone (2008), discourse analysis is not a "mechanical procedure" which can be applied to "uncover the truth"; rather, the purpose of discourse analysis is to explore how "discourse shapes and is shaped by the world as we experience it", *op.cit.,* p.260.
[100] Fairclough, N. (2003) *op.cit.,* p.15.

resulting analysis becomes another text, written within a particular social context, available to be read and scrutinised in turn.

Discourse analysis recognises the imperfect nature of the practice of research. Judging discourse analysis on standards of reliability and verification - based on replication and generalisation of findings associated with empirical or quantitative research - is inappropriate and misplaced, because such concepts are problematised within the theoretical framework of discourse analysis. Instead, Rapley suggests that research based on discourse analysis should be appraised in relation to the plausibility of its insights and transparency of the methods applied[101]. According to Potter and Wetherell, discourse analysis should be evaluated on the basis of its coherence and ability to show how a text fits together[102]. For Fairclough, research based on discourse analysis should be judged according to the richness of analysis and quality of textual evidence and he suggests that is best achieved by linking the 'micro' and 'macro' approaches in textual analysis[103].

Grounding discourse analysis in a detailed textual analysis provides a level of substantiation that is wanting in some research based on a more abstract, philosophical tradition[104]. A textually oriented approach to analysis provides concrete examples and a level of detail and illustration that may be lacking in discourse analysis at a more abstract level. By showing how judicial discourse draws on and interacts with relevant social discourses, there is also a broader context to my analysis, something that is often lacking in purely linguistic studies of texts. The construction of meaning is always particular and situational, so a textually-oriented approach to analysis is well-suited to examine how sexual consent is constructed through the operation of discourse at different levels in case reports. Fairclough argues that a "detailed textual analysis will always strengthen discourse analysis"[105]. Johnstone points to textual analysis as restoring some of the "rigour and systematicity" that is sometimes missing in interpretative work at a more abstract level[106]. According to Machin and Mayr, applying a multi-dimensional approach to analysis generates a "more thorough and

[101] See Rapley, T. (2008) *Doing Conversation, Discourse and Document Analysis*, London: Sage.
[102] Potter, J. and Wetherell, M. (1994) 'Analysing Discourse' in Bryman, A. and Burgess, R. (eds) *Analysing Qualitative Data*, Abingdon: Routledge.
[103] Fairclough, N. (2003) *op.cit.*, p.15.
[104] Johnstone, B. (2008) *op.cit.,* p.269.
[105] Fairclough, N. (1992a) *op.cit.,* p.194.
[106] Johnstone, B. (2008) *op.cit.*, p.269.

systematic analysis of language and texts" than is possible through "content-analysis type procedures or a more literary style interpretation"[107]. These claims can be justified on several counts.

At a theoretical level, texts constitute an important form of social action and it is difficult to examine the exercise of power through social practices without recognising the relationship between language, power and discourse. Language is not transparent and a close reading of the text is necessary to examine the discursive effects and ideological work of language. From a historical perspective, texts provide a sensitive gauge of social processes and of diversity and change. In this respect, textual analysis offers an invaluable method to chart the evolution of social and cultural practices. Given recent legal changes in relation to rape, this is particularly relevant in helping us understand the impact of such changes on the development of judicial discourse of consent. Methodologically, texts constitute an important source of evidence for grounding any claims about the nature of discursive practices. The role of discourse in social practices cannot be taken for granted; it has to be founded on a detailed analysis. An examination of the various properties of texts helps provide such an analysis.

Summary

In this chapter, I have set out the methodology and framework for analysis that will be applied in this study. In doing so, I have sought to demonstrate that discourse analysis provides an appropriate conceptual framework and tools of analysis that can be used to examine how consent is conceptualised and determined in judicial discourse. In the following chapters, I examine four key aspects of judicial discourse that have been identified by reading across the cases. These emerge as significant because of the interaction of various factors; for example, the application of substantive law, the nature of legal rules and evidential requirements, the legacy of historic legal concerns, and the broader ideas and social discourses that are relied on in the case reports. In each chapter, I examine one particular aspect of judicial discourse that demonstrates how consent is constructed: the relevance of force in determining consent; how particular patterns of behaviour are identified and understood in judicial discourse; the value attached to the complainer's response to rape and her expression of distress; and

[107] Machin, D. and Mayr, A. (2012) *op..cit.*, p.1.

how consent is understood in circumstances where the complainer is asleep or in a borderline state of consciousness.

Chapter Three The Relevance of Force

In this and the following three chapters, I set out a detailed and nuanced answer to the research question that underpins this study: how is consent constructed in case reports of rape? My analysis of each case is based on the law applicable at the time of the judgement and my terminology in referring to the appellant's honest belief in consent (prior to the 2009 act) or a reasonable belief in consent (after the 2009 Act came into force) will reflect this. Sometimes, the same case is discussed in more than one chapter. I provide a summary of the case when I present it for the first time. In all the cases, with the exception of *Hutchison*[1] which was an appeal brought by the Crown, the appellant was convicted of rape by the jury. Since the appellant admitted to intercourse with the complainer, each case was appealed on a question relating to consent: for example, insufficient evidence, lack of corroboration, an unreasonable jury verdict, misdirection on consent. The broader question facing the court was whether, given judicial determination of the legal issues raised in the appeal and the evidence placed before the jury, it was open to the jury to reach the verdict that they did[2].

This chapter examines the relationship between force and consent in judicial discourse. Historically, the absence of consent and the appellant's criminal intention to commit rape has been inferred from the use of force. Under the common law, force is understood in its "extended meaning" as encompassing implied or constructive force through the use of threats or menacing behaviour in instilling fear in the victim: "in the estimation of the law", any degree of force is relevant to consent if it is "sufficient in fact to overcome the opposing will of a woman"[3]. While there is no longer any legal requirement to prove that force was used, the presence of force helps establish the sufficiency of evidence. In particular, it can corroborate the absence of consent and the appellant's awareness that the complainer was not consenting to intercourse at the time; hence, the use of force.

[1] *HMA v Hutchison* [2013] HCJAC 91
[2] In *Hutchison*, the court had to determine whether there was sufficient evidence, such that the trial judge erred in accepting a 'no case to answer submission'.
[3] The *Lord Advocate's Reference (No 1 of 2001)* 2002 S.L.T. 466, per Lord Justice General par.11; par.22.

In this chapter, I examine the continuing relevance of force in determining issues of consent. Like consent, there is an elastic quality to the concept of force and, in my analysis, I identify different conceptions of force in judicial discourse and consider how the effects of force on the complainer are understood and assessed by the court. I examine the nature of judicial reasoning and the inferences drawn by the court from the presence or absence of force. I consider the relevance of circumstantial factors in establishing the presence of force and the value and weight attached to particular contextual factors. I discuss the use of narrative in the court's reconstruction of events and show how judicial reasoning often relies on a particular interpretation, sequencing of events or narrative focalisation in the portrayal of these events. I identify implicit values and norms in judicial discourse, conveyed through the pattern of language used, and I demonstrate how these shape judicial conception of force and understanding of consent in accounts of rape.

A question of timing

The relevance of the appellant's violence was considered in *McKearney v HMA*[4], where intercourse took place approximately four hours after the appellant's violent attack on the complainer. In *McKearney*, the judicial equation of force with an immediate physical assault prior to intercourse provided a conceptual frame of reference for the court in determining whether, in the circumstances, it was possible the appellant may have honestly believed the complainer was consenting. In *McKearney*, judicial assessment of an honest belief in consent depended on the narrative sequencing of events and the particular conception of consent applied by the court. My examination of the case focuses on the judicial reconstruction of events, how force was understood and the model of consent that underpinned judicial reasoning.

In *McKearney*, the complainer and appellant had lived together for three years and were separated for one year. Since their separation, they had not had sexual relations and the appellant had formed a new relationship. Late one evening, the complainer received unwelcome telephone calls from the appellant. She told him not to phone her since she was trying to sleep. Later that night, the complainer awoke to find the appellant, having broken into her flat, was sitting astride her with his hands around her

[4] *McKearney v HMA* 2004 J.C. 87.

throat. She was subjected to a series of physical assaults, including strangulation, and repeated threats that he intended to kill her. At one point, the appellant ripped the telephone from the wall so that she could not phone out. Some hours later, the appellant told the complainer to go to bed and try to get some sleep. She refused as she was too frightened of the appellant and what he might do. The appellant asked her to lie on the bed and he began to rub her back. He then proceeded to have intercourse with her. He did not ask her if she wanted to and she said nothing "for fear of what he might do otherwise"[5]. When she arrived at work the following day, she reported the assault and rape to the police. Medical examination of the complainer revealed injuries consistent with her account of events, including bruising around her neck.

At trial, the appellant was convicted of rape. The narrative element of the indictment indicated the use of force and threat: "you did force entry to the flat … and there you did assault [the complainer], repeatedly threaten to kill her, sit astride her, repeatedly place your hands around her throat and compress same, restrict her breathing, and further you did repeatedly handle her breasts, rub your private member against her body and rape her"[6]. The case was appealed on multiple grounds: the jury had not been asked to consider the question of an honest belief in consent; there was no corroboration of the appellant's *mens rea* (that he knew the complainer was not consenting or was reckless as to her consent); and the trial judge failed to direct the jury that the Crown had to prove *mens rea*.

As I have explained, the use of violence or threat by an appellant is normally considered sufficient to establish the absence of consent and exclude the possibility that the appellant could have honestly believed the complainer was consenting. However, at appeal, the defence pointed to a critical gap of around four hours between the appellant's assault and the intercourse that took place subsequently. The defence argued that there was no evidence of any force immediately prior to intercourse and, consequently, the possibility that the appellant may have honestly believed there was consent had not been excluded. The defence submitted that, since the appellant's honest belief was a live issue, the trial judge's failure to provide adequate directions on this amounted to material misdirection. Against this, the Crown argued that the jury were entitled to regard the events that took place that night as "one continuous chain",

[5] *McKearney* 2004 par.28.
[6] *McKearney* 2004 par.26.

where the complainer's will was overcome by the appellant's violence "even if the use of force and other menacing behaviour did not immediately precede the sexual behaviour"[7]. Any misdirection by the trial judge on *mens rea* or an honest belief was not material since the appellant's criminal intent could be inferred from his use of violence and threats against the complainer.

While the court acknowledged that the complainer had been subjected to multiple assaults and threats, there was no evidence of "force at the relevant time … other than as might be used in achieving penetration"[8]. Judicial opinion was that the defence narrative - that, after the violence, the appellant might have believed there was consent - provided "one view of the facts that the jury might have properly taken" and it was on "that possible view of the facts" that the jury should have been directed[9]. The court accepted the defence submission that an honest belief in consent had not been excluded at trial and, consequently, the lack of direction on *mens rea* was material, amounting to a miscarriage of justice. In light of this, the appeal was upheld.

The possibility that the appellant *may* have believed the complainer was consenting to intercourse was constructed through an interplay of various elements of discourse. The narrative sequencing of the events provided the basis for judicial reasoning and this, in turn, relied upon a particular conception of force and consent that was applied by the court. The possibility of an honest belief in consent arose through the narrative construction of events as comprising two distinct phases of action, where the appellant's sexual behaviour formed "a separate chapter of events from those involving violence and menace"[10]. Constructing the appellant's violence and sexual behaviour as two discrete episodes created the space for his honest belief in consent. The court accepted that "there was clearly room [for the view] that, although the complainer did not consent … nonetheless the possibility that the appellant acted in the belief she was consenting was not excluded"[11].

In the judicial reconstruction of events, the appellant's assault on the complainer was separated "in point of time and circumstance from the sexual intercourse [by a] long

[7] *McKearney* 2004 par.33.
[8] *McKearney* 2004 par.10; par.24.
[9] *McKearney* 2004 par.34.
[10] *McKearney* 2004 par.34.
[11] *McKearney* 2004 par.34.

significant gap"[12]. During this interval, the complainer and appellant were described as having a "constructive" discussion[13], from which it was inferred that the effects of the appellant's violence on the complainer were "spent" and that "both the complainer and the appellant had calmed down"[14]. However, this account overlooks the volatility and unpredictability of the appellant's behaviour that continued into the second stage of events. During this time, the appellant repeated his earlier threats to the complainer: "in the bedroom he said 'I've had enough of this. I'm just going to kill you now'. He did not appear angry but the complainer thought that he was serious. He went to put his hands round her throat again and the complainer started to cry"[15]. Unable to leave or phone for help, the complainer was effectively trapped in the flat by the appellant, although this was not recognised by the court. For example, she was described as having to seek permission to go the bathroom, which he "allowed her to do"[16]. As the complainer returned from the bathroom, she again overheard the appellant talking to himself, "Just do what you came to do. Just kill her, John"[17]. When the complainer joined the appellant in the bedroom, he again repeated his threat: "I've had enough. I'm just going to do it"[18]. During the interval that was said to separate the violence from the sexual activity, the appellant threatened to kill the complainer at least three times.

The sense of continuing danger is also reflected in the strategic nature of the complainer's responses to the "unpredictable" appellant during the "constructive discussion"[19]. For example, the complainer asked if she could have some water: "she took her time over drinking the water. The appellant told her not to take so long saying … 'I can do in here what I was going to do in the bedroom'"[20]. The complainer stopped crying "to try to calm him down" and she engaged him in conversation: "she asked him why he was doing this but got no answer"[21]. She appealed to the appellant's feelings for her son and asked him to consider "who would look after him if the appellant killed her"[22]. In an attempt "to appease the appellant", she promised to see a lawyer and

[12] *McKearney* 2004 par.32.
[13] *McKearney* 2004 par.32.
[14] *McKearney* 2004 par.17; this reflects a rather mechanistic conception of emotion and I consider the significance of different conceptions of emotion in judicial discourse in Chapter Five.
[15] *McKearney* 2004 par 28.
[16] *McKearney* 2004 par.28.
[17] *McKearney* 2004 par.28.
[18] *McKearney* 2004 par.28.
[19] *McKearney* 2004 par.28.
[20] *McKearney* 2004 par.28.
[21] *McKearney* 2004 par.28.
[22] *McKearney* 2004 par.28.

arrange for him to have contact with her son[23]. At this point, the appellant accused the complainer of deliberately lying: "people who fear for their lives will say anything to save it"[24]. This remark indicates that the appellant understood that the complainer was fearful of him and that her efforts at conversation were a calculated ploy designed to pacify and distract him[25]. However, judicial interpretation of the discussion between the parties as "constructive" and "calm" allowed the court to infer that the danger had passed and the effects of violence had dissipated. In doing so, it disregarded the appellant's menacing behaviour in the period of time leading to intercourse and his awareness that the complainer was frightened of him, which is suggestive of constructive force.

During the period of discussion, the complainer expressly resisted the sexual overtures of the appellant. When the complainer joined the appellant in the bedroom, he "put his hand onto her shoulder and moved his hand down to her left breast"[26]. She shook her head and took his hand away, saying "no, John, this isn't happening"[27]. The appellant responded by saying "you'll shag everybody else but you won't shag me"[28]. The complainer then "ended up against a window … [the appellant] put his hands round her throat but did not exert as much pressure as on previous occasions"[29]. This interaction demonstrates a clear refusal by the complainer and it is also evident, from his jealous response, that the appellant understood it as such. The evidential value of this prior refusal was not considered relevant by the court because it was not expressed by the complainer "at the time of, or immediately preceding, the sexual penetration"[30].

This would seem to suggest that 'no' only means 'no' in that moment of time unless and until a woman changes her mind or a different move proves more successful. If consent is understood as the end goal, then a woman's refusal may be seen as always provisional; that is, irrespective of what she might say, a woman may still be

[23] *McKearney* 2004 par.28.
[24] *McKearney* 2004 par.28.
[25] Baker (2005) argues that the law has assumed that the typical reaction is an adrenaline fuelled 'fight or flight'. According to Baker, this assumption relies on research that uses men as subjects. When experimenters focussed on women's responses and compared gendered reactions to situations of danger, they identified different responses, such as freezing and a reaction that was characterised as 'tend and befriend'. This takes the form of pacifying, bargaining or negotiation, in order to neutralise a threat and the possibility of violence. This more tactical approach may be the best available response in situations when a woman is unable to escape and cannot hope to win a physical struggle; see Baker, K. 'Gender and Emotion in Criminal Law', 28 *Harv. J. L. & Gender* 447, p.449 and 458.
[26] *McKearney* 2004 par.28.
[27] *McKearney* 2004 par.28.
[28] *McKearney* 2004 par.28.
[29] *McKearney* 2004 par.28.
[30] *McKearney* 2004 par.35.

considered amenable to further persuasion. Since the complainer did not reiterate her refusal at the relevant time - understandable, since her first response was met with further threats and assault - judicial reasoning allowed for the possibility that the appellant might have made a genuine mistake in believing she was consenting. The premise for such a mistake relies on the uncertainty and ambiguity that can be read into a woman's passivity and silence, even in circumstances involving violence and threats.

In assessing the appellant's state of mind, the court allowed for his ignorance of the complainer's prior refusal and the impact of his violence on her, despite indications that he was aware of both. Here, judicial reasoning applies a very narrowly drawn, performative model of consent that focuses on the outward expression of a woman's intentions at the point of intercourse; that is, through her demonstrable behaviour at that particular moment[31]. By focusing on the absence of refusal by the complainer (a 'no' model of consent) rather than the presence of her consent (a 'yes' model), the court accepted that the appellant could have interpreted the complainer's silence as conveying an unspoken agreement. However, the tacit consent that was construed from the complainer's passivity in the circumstances of *McKearney* was not the "active consent" envisaged by Lord Justice General Cullen in the *Lord Advocate's Reference (No 1 of 2001),* which he distinguished from "mere submission or permission"[32].

Although force in law encompasses constructive force - that is, fear induced through threatening or menacing behaviour - the court appeared to regard *McKearney* as an exemplar of non-forcible rape: "it was exactly the kind of case that I have been considering [where] there was no evidence of force at the relevant time"[33]. *McKearney* was a landmark case that shaped judicial discourse through conceptualising non-consensual intercourse, for the purposes of proof, as either forcible or non-forcible. There is also a suggestion in judicial comments that, in cases where no force was alleged, the Crown would face a more onerous burden in establishing "full legal proof of *mens rea*" and excluding an honest belief in consent, since criminal intent could not be inferred from the appellant's actions in using force at the time of intercourse[34]. The

[31] This is discussed in greater depth in Chapter One.
[32] The *Lord Advocate's Reference (No 1 of 2001)* 2002 S.L.T. 466, par.39.
[33] *McKearney* 2004 par.10.
[34] *McKearney* 2004 par.35. The approach taken in *McKearney* was later qualified in *Blyth v HMA* [2005] HCJAC 110 and *Spendiff v HMA* 2005 1 J.C. 338. In *Blyth*, judicial opinion was that a direction on honest belief was required only where it was put at issue. In *Spendiff*, the court explained that *mens rea* is an 'inferential fact' ("it can seldom be anything else",

underlying question posed in *McKearney* - how is criminal intent established in the absence of relevant force - is explored and tested in judicial discourse through the time-line of the 'consent' cases[35].

The effects of force

The cases of *Dalton*[36], *Drummond*[37] and *Hutchison*[38] also involved the appellant's violent assault on the complainer some hours or days before intercourse took place. While the factual circumstances in these cases were similar to those in *McKearney*, my analysis suggests that, in the context of changes introduced by the 2009 Act, there is a broader understanding of the relationship between force and consent[39]. By examining judicial discourse in these cases, it is possible to identify a richer model of consent that is reflected in the quality of judicial reasoning and a shift in discursive style.

In *Dalton*, the complainer testified to three instances of rape over the course of one night. After a series of brutal attacks on the complainer earlier in the evening, the appellant demanded to have sex despite her telling him that she did not want to. The appellant told the complainer to put on a particular dress, which she did, and he then proceeded to have intercourse with her without her consent. After the complainer and appellant went to bed, the appellant had intercourse with her on two further occasions. The complainer did not expressly refuse or resist his behaviour on these later occasions. As in *McKearney*, the complainer believed that "if she did not go along with what he wanted, she could not predict what might happen"; she felt she had "no choice but to go along with the appellant's demands"[40].

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par.30) and, where force is not used, it may be inferred from other circumstantial evidence, such as "the place, the individuals' relationship … and preceding events" (par.28). In the context of the 2009 Act, judicial opinion in *Dalton v HMA* [2015] HCJAC 24 and *Drummond v HMA* [2015] HCJAC 30 suggests that a reasonable belief will not be a live issue in every case (*Dalton* par.43) and that the prosecution need not "negative a state of affairs which does not arise" (*Drummond* par.19). That is, the Crown need not prove the absence of a reasonable belief where there is no evidential basis for it. This reinstates the practice under the common law, set out in *Doris v HMA* 1996 S.L.T. 995, in the new statutory context.

[35] This is a theme that I return to in subsequent chapters.

[36] *Dalton v HMA* [2015] HCJAC 24.

[37] *Drummond v HMA* [2015] HCJAC 30.

[38] *HMA v Hutchison* [2013] HCJAC 91.

[39] Of particular relevance is the definition of consent as free agreement (s.12) and the appellant's belief in consent should be reasonably held, with regard "to whether the person took any steps to ascertain whether there was consent" (s.16). Free agreement is absent in circumstances "where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person" (s.13(2)(b)).

[40] *Dalton* 2015 par.8.

The case came before the appeal court on multiple criticisms of the trial judge's directions, described by the defence as inadequate, partial and providing an inaccurate summary of the appellant's position. While the court considered that "so many criticisms [were] a matter of concern", the court identified one material error of law: the trial judge had failed to explain the need for corroboration of the appellant's *mens rea* for the second and third rapes[41]. This resulted in the quashing of the appellant's conviction for those rapes, while his conviction for the first rape was upheld. However, the court explained that it was the lack of direction on *mens rea*, not the lack of evidence from which *mens rea* could be inferred, that was fatal to the appellant's conviction for the second and third rapes. Judicial opinion was that "evidence of the [complainer's] physical injuries and distress" resulting from the assault earlier that evening was available "as corroborative of all three rapes"[42].

In *Dalton*, the length of time between the appellant's violence and the intercourse that took place later that night was around four hours, roughly the same period of time estimated in *McKearney*. Unlike judicial thinking in *McKearney*, the court in *Dalton* considered that this interval of time did not prevent these instances of non-consensual intercourse from being regarded as forcible, despite the complainer's silence at the time. Citing the trial judge's words, the appeal court portrayed the complainer that night as having to "go through the motions so as to avoid a further beating"[43]. While in *McKearney*, the complainer's silence at the time of intercourse was deemed sufficiently ambiguous to render the appellant's honest belief in consent a live issue, in *Dalton* the complainer's passivity in 'going through the motions' did not provide the basis for inferring a *reasonable* belief in consent[44].

At the trial, the complainer "kept asking rhetorically … why would anyone want to have sex with someone who they had beaten up so badly and who was bruised and battered all over"[45]. In his charge to the jury, the trial judge inverted this question to address the state of mind of both the complainer and appellant: "why would a person who had inflicted a beating on someone and left her battered and bruised believe that she would be willing in that state to have sex with him, whatever she was saying?"[46]. At appeal,

[41] *Dalton* 2015 par.35.
[42] *Dalton* 2015 par.42.
[43] *Dalton* 2015 par.8.
[44] Under s.16 of the 2009 Act.
[45] *Dalton* 2015 par.20.
[46] *Dalton* 2015 par.20.

the defence argued that this question "implied incredulity as to the appellant's position", thereby demonstrating the trial judge's partiality and imbalance in his charge to the jury[47]. The appeal court dismissed this criticism, considering it was a "legitimate" and "obvious question to ask" and that the "trial judge was entitled to focus that matter for the jury's attention"[48]. In *Dalton*, judicial reasoning was underpinned by a richer model of consent compared to that applied in *McKearney*, encompassing the complainer's state of mind as well as her outward behaviour.

In *McKearney*, judicial assessment of an honest belief in consent allowed for the appellant's ignorance of the complainer's physical and emotional condition after his violent conduct towards her. In *Dalton*, it was considered reasonable that the appellant would - or should - know the complainer's state of mind at the time of intercourse, based on an awareness of the impact of his own violent behaviour on her. The shift towards a more objective evaluation of the appellant's claim, that he believed there was consent, is reflected in the different conceptual models of consent applied in these cases. The narrow, performative 'no' model of consent that can be identified in *McKearney* - which focused on the complainer's outward behaviour at the time of intercourse and, in particular, the absence of her refusal or resistance - can be contrasted with a richer, more contextual approach to consent applied in *Dalton*. This allowed for judicial consideration of the complainer's likely state of mind in the context of the events leading to rape.

While in *McKearney* there was little consideration of the continuing effects of violence on the complainer, in *Dalton* there is a willingness to consider the impact of violence on the complainer's mental and physical condition later that night. This is reflected in the narrative focalisation of the events. The judicial construction of events offers an insight into the reasoning and thinking that lay behind the complainer's decisions and her outward behaviour: "she had no choice but to go along with the appellant's demands"; she had to "go through the motions so as to avoid another beating"; she "denied that she could have escaped during this period, as she had been in no condition to run"[49]; "if she did not go along with what he wanted, she could not predict what might happen"[50]. The complainer's perception of the change in the appellant's behaviour after his assault

[47] *Dalton* 2015 par.29.
[48] *Dalton* 2015 par.45.
[49] *Dalton* 2015 par.8.
[50] *Dalton* 2015 par.7.

is suggested in a judicial aside: "After it started to get light, the appellant began to talk in sexual tones. His behaviour became different; as though nothing had happened" (my emphasis)[51].

Judicial awareness of the effects of force on the complainer is also evident in *Hutchison*[52], an appeal brought by the Crown against a 'no case to answer' submission that was sustained by the trial judge. The Crown argued there was sufficient evidence based on the appellant's violent attack on the complainer on the day prior to the rape. This assault had resulted in an anal fissure that would have caused the complainer acute pain. As in *Dalton*, judicial assessment of consent encompassed the complainer's state of mind at the relevant time as well as contextual factors, including the continuing effects of the appellant's violence on her and her detainment in the flat. The central question posed in both *Hutchison* and *Dalton* was the credibility of the appellant's claim that there was consent to intercourse after he had seriously assaulted the complainer and prevented her from leaving the flat. In *Hutchison*, the court considered it "unlikely that any person would have consented to intercourse with the person, who had carried out the assault, on the very next day"[53]. Despite the interval of time between the assault and the alleged rape, evidence of the assault was capable of corroborating the complainer's account of a forcible rape the following day. Judged by the standard of reasonableness, under the 2009 Act, the court considered that the appellant should or would have known that the complainer was not consenting in such circumstances. On this basis, the Crown's appeal was upheld.

Similar reasoning can be identified in *Drummond*[54] where the interval between the appellant's assault and intercourse with the complainer amounted to three days. In this case, the complainer and appellant were in a relationship that involved excessive consumption of alcohol. On night one, while the complainer was at the appellant's flat, he repeatedly assaulted her, striking her on the neck with a knife. When she awoke the next morning, she was bruised and in pain, her clothes were blood-stained and two teeth were missing. The front door and windows were locked. Over the next six days, the complainer said she was too scared of the appellant to attempt to escape. During this period, she was not seen other than by one neighbour who saw the complainer

[51] *Dalton* 2015 par.7.
[52] *HMA v Hutchison* [2013] HCJAC 91.
[53] *Hutchison* 2013 par.4.
[54] *Drummond v HMA* [2015] HCJAC 30.

outside her flat on day two. On day four, when they were in bed together, the appellant asked the complainer if she wanted to have sex. She said 'no' and explained that she had her period. He replied "Oh come on" and then, without any further response from the complainer, proceeded to have intercourse with her[55]. It was put to the complainer in cross examination at trial that "she had not said anything to the appellant" to convey her lack of consent after his attempt to persuade her[56]. In reply, the complainer accepted that "he may not have known that she was not consenting" and, on re-examination, she said that "she could not know what he had been thinking"[57]. When the complainer eventually left the flat, she went to a friend's house where she was taken by ambulance to hospital. Her medical examination revealed multiple injuries. The appellant was convicted of assault and rape (committed three days after the assault) but acquitted of abduction.

The case was appealed on several grounds, including insufficient evidence of non-consent and lack of a reasonable belief in consent. The Crown submitted that the complainer's lack of consent was corroborated by her distress as well as evidence of her assault and detention. The absence of a reasonable belief in consent could be inferred from the complainer's injuries, which would have been apparent to the appellant, evidence of her later distress and the appellant's failure to take any steps to ascertain her consent[58]. The complainer's medical examination also confirmed that she was menstruating at the time.

The account of events offered by the defence in *Drummond* was based on the same narrative sequencing and reasoning that proved successful in *McKearney*: that the violence and intercourse comprised two discrete chapters of events, separated in this instance by a period of three days. The defence submitted that, given this interval of time, the "antecedent physical assault … was of no significance" and, consequently, there was insufficient evidence of criminal intent[59]. The defence argued that evidence of the complainer's distress could not provide corroboration since it was witnessed three days after the alleged rape and she had not attributed it to the rape as distinct from the earlier assault. The defence also relied on the presence of an intimate

[55] *Drummond* 2015 par.5.
[56] *Drummond* 2015 par.5.
[57] *Drummond* 2015 par.5.
[58] This was one of the rare occasions where there was consideration of the 'any steps taken' provision under s.16 of the 2009 Act.
[59] *Drummond* 2015 par.11.

relationship between the parties in which the appellant's assaultive behaviour was presented as exceptional. The court was invited to infer that, once the assault was over, "the relationship had returned effectively back to normal"[60]. The defence argued that the complainer's behaviour was ambiguous since she "had said, and done, nothing to indicate a lack of consent after her initial response"[61]. According to the defence, this created space for a reasonable belief in consent[62]. The court rejected this line of reasoning and regarded the appellant's actions over the six days as one inter-linked chain of events that took place without the complainer's consent. What tied the appellant's assault to the rape were the continuing effects of his violence: "which were still visibly affecting the complainer at the time of the rape [and] where the injuries would have been obvious to the appellant"[63]. The appeal was dismissed.

As in *Dalton* and *Hutchison*, the court applied a rich, contextual model of consent in assessing the events leading to the rape and their impact on the complainer: "[her] physical injuries … indicate that, at the material time, [she] must have been in a visibly distressed state in terms of pure physical pain"[64] (my emphasis); the modality of the verb used conveys judicial confidence in the reasoning adopted. The court inferred from this that the complainer was "unlikely to have decided to give her free agreement to sexual intercourse with the person who had recently inflicted these injuries while … continuing to be detained by him"[65]. In such circumstances, and in the absence of any positive sign of consent, the court considered that free agreement was absent. Judged by the standard of reasonableness, the appellant would - or should - have been aware that the complainer was not consenting to intercourse. Judicial reasoning is set out explicitly in *Drummond*: "she must have been in a visibly distressed state…[and] it is legitimate to infer that the appellant, knowing of the complainer's state and that he had caused it, could not reasonably have believed that the complainer was proffering her consent"[66].

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[60] *Drummond* 2015 par.11.
[61] *Drummond* 2015 par.11.
[62] *Drummond* 2015 par.10.
[63] *Drummond* 2015 par.12.
[64] *Drummond* 2015 par.19.
[65] *Drummond* 2015 par.19. In *Drummond*, the appeal court was willing to accept that the complainer was detained by the appellant although he had been acquitted of abduction at trial. An interesting comparison can be made with *Mackintosh v HMA* 2010 S.C.L. 731 where the appellant was convicted of assault as well as rape. Although the terms of the indictment for assault included the abduction and detainment of the complainer, the appeal court did not accept that the complainer was effectively detained by the appellant. I discuss this more fully in Chapter Four.
[66] *Drummond* 2015 par.19.

The broader field of judicial vision in *Dalton* and *Drummond* indicates a shift from a narrow performative 'no' model of consent, identified in *McKeareny*, to a 'yes' model that encompasses an assessment not only the complainer's outward behaviour but her likely state of mind in the context of events leading to the rape. This conceptual shift is reflected in a discursive style that provides a graphic account of the appellant's violence and its effects on the complainer. In *Dalton*, the physical attack on the complainer and its impact on her are placed at the heart of the narrative. From the outset, the events are set within a narrative frame of the appellant's violent agency: he had "a violent and controlling nature [and] would lose his temper quickly and without provocation ... [he] did not dispute that he had used violence towards his partners"[67]. The appellant's agency is emphasised in a detailed description of his actions: "he punched [the complainer], ripped her clothing, bit her, pushed her against a wall, pulled her by the hair, pulled her to the ground and kicked her repeatedly on the body"[68]. The appellant is described as "pacing up and down, calling her names and being physically aggressive ... he dragged her around the room, squeezed the lower part of her face and pulled her hair at the temples. He punched and kicked her. He threatened her with scissors and scored her inner thigh with the sharp edge of a bank card"[69]. The explicit portrayal of violence in the judicial account of events provides a sharp contrast to the language of love and seduction offered by the defence: "[the complainer] had expressed her continuing love for him … they had started cuddling and kissing … [she] had dressed up for him in a 'black see-through kind of thing' [and] they had made love on three occasions"[70].

Similarly, in *Drummond*, the evidential value of an assault three days before the rape is reflected in a discursive style that conveys the impact of the appellant's violent attack on the complainer. As in *Dalton*, the judicial narrative provides a vivid portrayal of the complainer's condition at the time of the rape: she was "still in a severely injured state. Her eyes were closed, her face was numb, she had missing teeth, bruising all over her body and the cut to her neck 'felt all crusty'"[71]. A similarly graphic account is provided of the scene of crime examination: there was "blood on the appellant's bed and bedroom floor, along with two fragments of missing teeth ... a knife was found under a

[67] *Dalton* 2015 par.4.
[68] *Dalton* 2015 par.5.
[69] *Dalton* 2015 par.6.
[70] *Dalton* 2015 par.12.
[71] *Drummond* 2015 par.4.

sofa and there was blood on the arm of that sofa"[72]. The narrative focalisation provides an insight into the complainer's thinking and motivation. For example, the complainer had explained to the appellant "that she had her period. This form of explanation had succeeded in dissuading him in the past"[73]. The court considered it "significant" that the complainer "had not only said 'no', she had also provided the appellant with a reason for not wanting to have sex"[74]. There is a judicial willingness, here, to consider *why* the complainer offered that particular reason: "[menstruation] may not have been the real, or the entire, reason … [it] may have been thus expressed because the appellant had previously accepted it as a good reason for acceding to her wishes"[75].

In *McKearney*, the subjective assessment of an honest belief in consent, under the common law, allowed for the appellant's ignorance of the complainer's state of mind and permitted his interpretation of her passivity as indicating tacit consent. As Larcombe observes, the application of a subjective test in assessing the appellant's state of mind validates a state of ignorance[76]. A more objective assessment based on the reasonableness of the appellant's belief in consent, under the 2009 Act, as applied in *Dalton*, *Hutchison* and *Drummond* addresses some of the difficulties associated with privileging the appellant's thinking as ultimately determinative of rape[77]. While the court in *McKearney* focused narrowly on the parties' behaviour at the time of intercourse, judicial discourse in the later cases demonstrates a much wider field of vision in considering the relevance of the appellant's behaviour and state of mind over a longer span of time. Applying an affirmative model of consent, the court did not accept that the complainer's passivity at the time of intercourse could be interpreted by the appellant as implied consent. Assessed by the standard of reasonableness, the appellant is now expected to be aware of the impact of his own behaviour on the complainer.

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[72] *Drummond* 2015 par.7.
[73] *Drummond* 2015 par.4.
[74] *Drummond* 2015 par.18.
[75] *Drummond* 2015 par.18.
[76] Larcombe, W. (2005) *Compelling Engagements: Feminism, Rape Law and Romance Fiction,* Sydney: The Federation Press, p.21.
[77] The reliance on the appellant's state of mind has arisen, in part, because of the need to distinguish between permissible sexual relations and rape; the acts may look the same but the intentions are not, and it is the difference in intention that has been central to the law of rape. Larcombe argues that the legal construct of *mens rea* reflects an unequal weighting of the parties' intentions; see Larcombe, W. (2005) *op.cit.* p.21. As MacKinnon puts it, law has "rewarded men with acquittals for not comprehending women's point of view on sexual encounters"; see MacKinnon, C. (1989) *Towards a Feminist Theory of the State*, Cambridge, Mass: Harvard University Press, p.182.

Coercion and context

In the cases I have discussed so far, the appellant committed a violent assault on the complainer some time prior to intercourse. However, the conception of force as a direct attack does not reflect the range of actions that amount to physical coercion. For example, coercion may be applied through a very minor assault, such as a push or being held, and a victim's fear may derive as much from her perception of what might happen as from the level of violence used[78]. My analysis suggests that what constitutes a forcible rape, for the purposes of law, depends not merely on the degree of violence used but on judicial interpretation of the surrounding circumstances and the relationship between the parties. In the cases of *Kim*[79], *Burzala*[80] and *Y*[81], which were decided prior to the 2009 Act, judicial assessment of force relied primarily on inferences drawn from circumstantial factors.

In *Kim*, the complainer was celebrating her 19th birthday with friends. At midnight, she was sitting alone outside on some steps and was described as "quite drunk and crying"[82]. The appellant pulled up in his car, spoke to the complainer and offered to drive her to a friend's house. He drove off in the wrong direction, then stopped the car and tried to kiss the complainer. She attempted to get out the car and, when she did, the appellant pushed her to the ground, lay on top of her and had intercourse with her. The complainer told him to stop and tried to push him away. At some point, he put his hand over her mouth. The appellant was convicted of rape and appealed on grounds that the trial judge misdirected the jury on the question of an honest belief in consent.

In this case, the construction of force was based on the appellant's actions when he "pushed her to the ground, lay on top of her and raped her with his hand over her mouth"[83]. In the absence of any medical evidence or injury sustained by the complainer, the complainer's account was supported by inferences drawn from the circumstances in which intercourse took place. According to judicial opinion, there was

[78] Stark argues that the "violence model of abuse has failed us" because it does not capture the range of coercive behaviour that undermines a woman's consent; see Stark, E. (2009) *Coercive Control: How Men Entrap Women in Personal Life*, Oxford: Oxford University Press, p.111.
[79] *Kim v HMA* 2005 S.L.T. 1119.
[80] *Burzala v HMA* 2008 S.L.T. 61.
[81] *Y v HMA* [2009] HCJAC 53.
[82] *Kim v HMA* 2005 par.3.
[83] *Kim* 2005, par.10.

no basis for an honest belief in the complainer's consent in "these circumstances" [84]. There were three circumstantial factors that appeared to exclude the possibility of any mistake or misunderstanding by the appellant as to the question of consent: the appellant was a stranger, the location of intercourse was a piece of open waste ground where the car had been parked, and the complainer was "confined" within the car by the appellant[85]. These factors were seen as consistent with the complainer's account of a forcible rape.

The use of inferential thinking in this case can be contrasted with that in *McKearney*. In *McKearney*, the appellant was not a stranger but a former partner and intercourse took place in the complainer's bedroom, not on open waste ground. Here, the complainer was not regarded as confined despite strong circumstantial evidence; the appellant broke into her flat, wrenched the phone from the wall leaving the complainer effectively trapped, unable to phone out or escape, and having to seek permission from the appellant to go to the bathroom. While there was space for an honest mistake about consent in *McKearney*, there was "no room for misunderstanding" in *Kim*[86]. In *Kim*, unlike *McKearney*, the circumstantial factors were entirely consistent with the paradigm of a 'real rape'; that is, the complainer was raped by a complete stranger in the middle of night, out of doors in a secluded place. This was the only 'consent' case where the scenario was consistent with the stereotypical image of a 'real rape'. Although it is not explicitly stated, the incriminating inferences drawn from these circumstances excluded the possibility of any mistake about consent. By comparison, the construction of an honest mistake in *McKearney* relied implicitly on inferences drawn from the prior sexual relationship between the parties and the domestic location of the intercourse (the complainer's bedroom). In dismissing the appeal in *Kim*, the court held that a specific direction on an honest belief was not required since it was not a live issue.

In *Burzala*, the judicial construction of a forcible rape was also supported by inferences drawn from the circumstances in which it took place. The case came to trial before the decision taken in the *Lord Advocate's Reference (No 1 of 2001)* and the Crown was required, therefore, to prove that the appellant used force to overcome the will of the

[84] *Kim* 2005, par.10.
[85] *Kim* 2005, p.3.
[86] *Kim 2005*, par.5.

complainer. However, on conviction, the jury removed all reference to force from the libel: the phrases "forcibly remove her clothing"; "force her legs apart"; "all to her injury" were deleted[87]. At appeal, the defence submitted that intercourse was consensual and that the complainer's testimony disclosed insufficient evidence of a forcible rape. The prosecution accepted that very little force was involved.

The complainer in *Burzala* had recently given birth and this was her first night out since her child was born. She went to a nightclub with friends. Here, she met the appellant, who was the uncle of her boyfriend. At the nightclub, the complainer was sick after consuming alcohol and was asked to leave. The appellant offered to accompany the complainer home. As they walked together, the appellant told the complainer that she looked sexy and asked her for a kiss. She said 'no' and continued walking. After some time, the appellant stopped the complainer by turning her round to face him. The appellant then undid her trousers and he began to masturbate himself against her legs. The complainer testified that "he had his hands around me … He had one hand round my back … I was frozen and I couldn't move"[88]. She then fell onto the ground due to the unevenness of the path and her trousers being down. The appellant had intercourse with the complainer on the ground where she fell, despite her telling him to stop. Afterwards, she ran home to her parents' house, where she lived, in a state of distress saying the appellant raped her.

At trial, having conceded that the appellant used a degree of physical pressure in turning the complainer round, the defence relied on the narrative sequencing and reasoning that proved successful in *McKearney*: "what happened after the complainer fell to the ground was a different stage … no force was used … when she was on the ground"[89]. The defence argued that any pressure applied by the appellant "was too distant from the act of intercourse in terms of causation"[90]. The appeal court dismissed this argument: it had "no merit … and the trial judge was right to reject it"[91]. At the appeal, the defence departed from their concession at trial and submitted that there was insufficient evidence of force in the complainer's own testimony, other than "the force inherent in achieving penetration"[92]. There was no question of "any act of

[87] *Burzala* 2008 par.1.
[88] *Burzala* 2008 par.8.
[89] *Burzala* 2008 par.14.
[90] *Burzala* 2008 par.14.
[91] *Burzala* 2008 par.14.
[92] *Burzala* 2008 par.8.

violence or aggression … of the appellant having forced the complainer to the ground" and there were no "threats of force"[93]. On this basis, the jury were not entitled to infer that the appellant had the requisite criminal intent. Against this, the Crown submitted that sufficiency could be found "not in the complainer's evidence alone … [but] in the context of the other circumstances"[94]. This was a circumstantial case and "since circumstantial evidence was by its nature open to more than one interpretation, it was for … the jury to decide which interpretation to adopt"[95].

The appeal court accepted that the complainer's account - of the appellant holding her, turning her around and standing "uncomfortably close to her" - amounted to "slight force"[96]. When regard was had to "the whole circumstances", this was deemed sufficient to amount to a forcible rape: "we are unable to confirm that a jury could not legitimately regard it as sufficient force … if only by causing her to freeze"[97]. This rich conception of force contrasts with that applied in *McKearney*, where the use of constructive force (in inducing fear in the complainer) in the context of an earlier violent attack was discounted.

The construction of a forcible rape in *Burzala* was supported by the judicial account of events framed within a narrative of chivalry gone wrong, where the complainer was positioned as vulnerable and dependent on male authority and protection. For example, the complainer is presented through her familial roles, as a daughter, partner and a new, young mother. She was going out for the first time since the birth of her child and the court noted that it was with the "encouragement" of her boyfriend[98]. When the complainer became unwell and was ejected from the nightclub, the appellant, as the uncle of her boyfriend, stepped in and agreed to accompany the complainer home. However, rather than protecting her, he took an unfamiliar route home and lured the complainer down a dark unlit path. This was "[not] the way she would normally have walked home" although she had "no reason to think the appellant would do anything to her"[99]. The appellant abrogated his responsibility to ensure the complainer arrived home safely by taking advantage of her vulnerability. When he held

[93] *Burzala* 2008 par.8.
[94] *Burzala* 2008 par.9.
[95] *Burzala* 2008 par.9.
[96] *Burzala* 2008 par.15.
[97] *Burzala* 2008 par.15.
[98] *Burzala* 2008 par.5.
[99] *Burzala* 2008 par.11.

her uncomfortably close, the complainer recalled her father's advice: "My dad had always said to us … if anything ever happened, don't panic because … it can make him worse"[100]. In this way, the passivity of the complainer appears to be sanctioned by the patriarchal authority of her absent father. The court also noted the lack of protection afforded the complainer in other details of the rape. For example, intercourse took place "out of doors in a muddy uncomfortable location on top of nettles" and "nothing was laid on the ground to protect the complainer from the mud and nettles"[101]. The appellant also had a condom with him but he "did not use it"[102].

The court took into account the complainer's likely state of mind in these circumstances as well as her outward behaviour. The judicial account of events provides an insight into her mental and physical condition at the time: she felt discomfort "when the appellant started to tell her how sexy she looked"[103]; she "did not [want] to be kissed"[104]; she experienced pain from her stitches that made her feel sore (prior to intercourse); and she had not had sexual intercourse since the birth of her child[105]. The court also considered the complainer's emotional response to the rape. When the complainer escaped, she ran home to her parent's house and "collapsed in the hall of the house" where she adopted "an almost foetal position in the corner"[106]. She appeared "terrified … she would not let her mother near her and she was shuddering uncontrollably"[107]. The police officer describes her as "wailing, crying and in shock … the most distressed state that she had ever seen in her four years of police service"[108]. The judicial portrayal of the complainer's vulnerability and emotionality in *Burzala* is in stark contrast to the quiet survival strategies adopted by the complainer in *McKearney*, who could not afford to become "hysterical" because "her crying was annoying [the appellant]"[109].

In *Burzala*, judicial determination of a forcible rape relied, in part, on inferences drawn from the circumstances in which intercourse took place and these, in turn, were shaped by the narrative framing of the event. The court accepted that the "whole

[100] *Burzala* 2008 par.8.
[101] *Burzala* 2008 par.10.
[102] *Burzala* 2008 par.10.
[103] *Burzala* 2008 par.8.
[104] *Burzala* 2008 par.8.
[105] *Burzala* 2008 par.11.
[106] *Burzala* 2008 par.12.
[107] *Burzala* 2008 par.12.
[108] *Burzala* 2008 par.12; the judicial construction of the complainer's distress and its evidential value as corroboration is examined in Chapter Five.
[109] *Burzala*, par.28.

circumstances" - the nature of the relationship between the parties, the absence of any prior intimacy, the location of intercourse, the complainer's physical condition after childbirth, her vulnerability and emotionality - provided "material that a jury would be entitled to rely on … [when] deciding whether the complainer's will was overcome by the slight force" used by the appellant[110]. Inferences drawn from these circumstances were sufficient to remove any doubt or ambiguity arising from the complainer's passivity at the time of intercourse. Constructing the case as forcible rape, the court dismissed the appeal.

The value attached to circumstantial factors is also evident in *Y*. In this case, the appellant was convicted of raping a 16 year old girl in her bedroom while her mother was elsewhere in the house. At her daughter's request, her mother had warned the appellant some days earlier that her daughter was not interested in him. On the evening of the offence, the appellant was in the complainer's house and he went, uninvited, into her bedroom. The complainer left the room and hid in the bathroom. When she returned to her bedroom, the appellant reappeared. He held her face and kissed her, manoeuvred her onto the bed, removed her lower clothing and had intercourse with the complainer without her consent. While this was happening, the complainer said and did nothing: she "couldn't move" and the way the appellant held her face "stopped [her] speaking … [she] tried to scream but nothing came out"[111]. Some time later, the complainer's mother observed that her daughter had some bruising and there was some blood on the bed sheets.

The appellant admitted to consensual intercourse, claiming that the bruises on the complainer were the product of "rough sex"[112]. His conviction was appealed on grounds of insufficient evidence of lack of consent and criminal intent and an unreasonable verdict. At appeal, the defence argued that the complainer gave no indication that she was not consenting. She did not call out at the time or tell her mother what happened and there was evidence that the complainer continued to associate with the appellant at a sporting event three days later. The appeal court expressed some concern that the complainer had not "screamed or otherwise informed her mother in any way … despite the fact that her mother was in the house"[113]. In light

[110] *Burzala* 2008 par.15.
[111] *Y* 2009 par.4
[112] *Y* 2009 par.5; I consider the construction of intercourse as 'rough sex' later in this chapter.
[113] *Y* 2009 par.9

of this, the judgement was expressed cautiously through negative assertion: "[although] a number of aspects of the complainer's evidence would require to be very carefully considered by the jury … in all the circumstances we have come to the view that it cannot be said that there was insufficient evidence"[114].

In *Y*, the court accepted that circumstantial factors were "capable of affording corroboration" of the complainer's account[115]. The complainer's inability to call for help or tell her mother what happened was understood in the context of a vulnerable 16 year old girl: "I was so shocked … I was petrified of [my mother's] reaction. I didn't know what she would do"[116]. In judicial reasoning, particular emphasis was placed on the fact that the jury were evaluating the behaviour of a vulnerable teenager "who, on the evidence, had previously been sexually abused by a third party"[117]. It was "against that background" that the complainer's response was deemed unambiguous; judicial opinion was that "she essentially 'froze'"[118]. Here, the complainer's reaction was normalised in the context of her youth and vulnerability, her prior experience of abuse, and fear of her mother's response. In these circumstances, the complainer's passivity did not provide a basis for inferring an honest belief in consent. The court held that the complainer's behaviour was not "so inherently implausible" as to render the verdict unreasonable[119]. Taken at its highest, there was sufficient evidence to entitle the jury to decide that the appellant's actions amounted to force and that criminal intent could be inferred from his behaviour.

In determining consent, it is not merely an awareness of context *per se* that is significant. It is the nature of the inferences drawn from particular circumstances that are so telling in judicial interpretation of the complainer's silence or passivity; for example, the events leading to the rape, the location of intercourse, the relationship between the parties, and the perceived vulnerability of the complainer. As we saw in *McKearney*, evidence of the complainer's passivity in the context of a prior sexual relationship with the appellant and the domestic location of intercourse appeared to be more probative than her prior rejection of his sexual advances. By contrast, in *Kim*, *Burzala* and *Y*, any ambiguity about the complainer's silence or the possibility of an

[114] *Y* 2009 par.10; par. 7.
[115] *Y* 2009 par.10
[116] *Y* 2009 par.10
[117] *Y* 2009 par.10
[118] *Y* 2009 par.10
[119] *Y* 2009 par.10.

honest mistake about consent was dispelled through judicial interpretation of the circumstances in which the rape took place.

Force and the act of connection

Historically, courts have distinguished the notion of extrinsic force in rape - through the use of violence, constructive force or some form of physical coercion - from an intrinsic or implied force in the act of non-consensual intercourse. Relevant force excluded "mere bodily contact" and "the force inherent in the act itself"[120]. This distinction was questioned in the *Lord Advocate's Reference (No 1 of 2001)* by Lady Cosgrove who argued that the "physical reality is immutable" and that the act of intercourse "without the woman's consent … involves the criminal use of force"[121]. That is, non-consensual intercourse cannot be achieved "where there is a genuine lack of consent, without the exertion of a degree of force, physical or constructive … [such as] the application of bodily pressure or the moving apart of the limbs of the woman"[122]. I consider the notion of intrinsic or implied force in rape by examining the cases of *Gordon*[123], *Spendiff*[124] and *Mutebi*[125], the latter case decided after the 2009 Act.

In *Gordon*, the complainer met the appellant while she was out drinking with her friends. The appellant invited her back to his flat. On entering the flat, the complainer asked the appellant for a taxi number and his address so that she could get home. He refused and pulled her onto the floor where he then raped her. The appellant admitted intercourse with the complainer but claimed it was consensual. There was evidence of minor bruising on the complainer although the prosecution did not rely on this at trial. The appellant was convicted of rape and his conviction was appealed on grounds of insufficient evidence of criminal intent and inadequate directions by the trial judge on criminal intent.

At trial, the Crown invited the jury to accept that, based on "[the complainer's] evidence as a whole", intercourse was forced on her against her will[126]. What the complainer's

[120] *The Lord Advocate's Reference* 2002 per Lord Justice General Cullen, par.11.
[121] *The Lord Advocate's Reference* 2002 par.5; par.10.
[122] *The Lord Advocate's Reference* 2002 par.5.
[123] *Gordon v HMA* 204 S.C.C.R. 641.
[124] *Spendiff v HMA* 2005 1 J.C. 338.
[125] *Mutebi v HMA* [2013] HCJAC 142.
[126] *Gordon* 2004 par.6.

evidence disclosed was not merely the appellant's action of pulling her onto the floor. The most explicit account of force given by the complainer was the appellant's use of body weight, his handling of her body and his non-consensual penetration of her: the appellant "forced her legs open with his hands, lay on top of her and penetrated her … he was 'very forceful'. He was forcing himself inside her … she was trying to fight back, trying to push him off her but she could not do so"[127]. In this account, force could also be implied from the complainer's physical efforts to resist the appellant. At appeal, the defence argued that the case presented at trial was not "one in which the will of the complainer had been overcome by the use of force", nor had the prosecution relied on medical evidence "as to the interpretation of any injuries to the complainer"[128].

In *Gordon*, the court held that while the defence submissions were dependent on the case being treated as non-forcible rape, they were "entirely satisfied that it was not a case of that type"[129]. The jury were entitled to infer criminal intent from the appellant's use of force and find corroboration in the complainer's distress. There is a broad conception of force in judicial discourse in *Gordon* that encompasses not only the appellant pulling the complainer onto the floor but his more forceful actions in pushing her limbs apart and his non-consensual penetration of her.

In *Spendiff*, the court went further and explicitly recognised that non-consensual penetration of the complainer could amount to forcible rape in the absence of any prior coercion or assault. The case of *Spendiff,* like *Burzala*, came to trial before the decision taken in the *Lord Advocate's Reference (No 1 of 2001)* that removed the requirement of force. The appellant was convicted of clandestine injury (non-consensual intercourse with the complainer while she was asleep) and rape. His conviction was appealed on multiple grounds, including lack of corroboration that the complainer was asleep at the relevant time and insufficient evidence of criminal intent.

The complainer was 18 years old and a friend of the appellant's step-daughter. She was staying at the appellant's house after a row with her parents. In the evening, the complainer went out drinking in a pub with a group of friends, including the appellant and his step-daughter. After the others left, the appellant and complainer made their

[127] *Gordon* 2004 par.2.
[128] *Gordon* 2004 par.5.
[129] *Gordon* 2004 par.6.

way home together. The appellant, who was under the influence of drink, "began to cuddle the complainer and became affectionate"[130]. At this point, the complainer ran on ahead. When she reached the house, she partially undressed and went to bed on the settee in the living room. She had a snack, watched some television, then turned the TV off and went to sleep. The complainer awoke to find "the appellant lying on top of her with his penis in her … she felt the jagging pain of his penis penetrating her at the angle at which she was lying"[131]. When she realised what was happening, she pushed him off her. She ran from the house, still partially clothed, and made an emergency telephone call to the police from a call box. A passing car stopped and the driver waited with her until the police arrived. At the trial, there was a transcript of her 999 call and evidence of her distress given by the car driver and police who attended the scene. The appellant claimed that intercourse was consensual. According to the appellant, when he touched the complainer's feet as she lay in bed "she responded by moaning in a way that encouraged him to think that further advances would be welcome"[132].

At the appeal, the defence submitted that it was unclear in the complainer's account whether she was awake or asleep at the time of intercourse. Without sufficient evidence that the complainer was asleep, the requisite criminal intent could not be inferred from the appellant's actions or corroborated by her distress. The court rejected the defence argument and the appellant's version of events: "evidence of [the complainer] moaning was not eloquent of the response of a teenager to physical contact by a middle-aged man such as to indicate that she was awake"[133]. The court refused the appeal and found "ample evidence … of the overcoming of the complainer's will by force"[134].

In the absence of any prior assault, force was found in the act of non-consensual penetration. In reaching their decision, the court emphasised the need to consider the "whole circumstances"[135]. In *Spendiff*, the judicial construction of a forcible rape was supported by a narrative account of events that centred on the complainer's physical struggle and her efforts to escape: "It took her a few seconds to realise what was going on. As soon as she did, she used her weight to try and remove [the appellant] … she

[130] *Spendiff* 2005 par.11.
[131] *Spendiff* 2005 par.12.
[132] *Spendiff* 2005 par.17.
[133] *Spendiff* 2005 par.22.
[134] *Spendiff* 2005 par.34.
[135] *Spendiff* 2005 par.22.

asked what he was doing, and screamed at him to stop … [she] was able to bring her leg up between his legs and kick him, she thought possibly in the testicles. She pushed him off … she got up and ran"[136]. Here, the complainer's active resistance may also have implied the use of force through the appellant's countervailing strength.

The court accepted that the appellant exercised force when he "penetrated [the complainer] … as she lay prone, causing sharp pain because he entered at an inappropriate angle"[137]. In judicial reasoning, the act of non-consensual penetration was recognised as forceful in circumstances where it caused injury through the pain experienced by the complainer. *Spendiff* was the only case examined where a forcible rape was constructed in circumstances where the complainer was asleep or had just woken prior to intercourse[138]. In this case, the conception of relevant force encompassed non-consensual intercourse where "the complaint was of intercourse at an unnatural angle causing pain"[139]. The notion of intrinsic force was also qualified and its scope limited: "even if intercourse against the consent of the woman were not always 'real injury' to her person, there was evidence that it was of that character in this case"[140]. Judicial discourse was silent as to whether non-consensual penetration could amount to force in the absence of 'real injury' or any pain experienced by the complainer[141]. In *Spendiff*, the judicial conception of force comes close to that proposed by Lady Cosgrove in the *Lord Advocate's Reference (No 1 of 2001),* that non-consensual intercourse necessarily involves the criminal use of force.

In *Mutebi*[142], which was held after the 2009 Act, the question of force arose in the context of the appellant persisting with intercourse after the complainer withdrew her consent[143]. The complainer had been to a nightclub with friends where she consumed a considerable quantity of alcohol and could not fully recall what happened[144]. She remembered being outside her close with a man whom she did not know and that she kissed him. She remembered being in the bathroom of her flat. Her next memory was

[136] *Spendiff* 2005 par.12.
[137] *Spendiff* 2005 par.22.
[138] In Chapter Six, I discuss how consent is constructed in relation to sleep.
[139] *Spendiff* 2005 par.36.
[140] *Spendiff* 2005 par.35.
[141] In Chapter Six, I discuss the case of *Patterson v HMA* 2005 HCJA 57, where the court did not infer the use of force or attach any value to the complainer's account of pain.
[142] *Mutebi v HMA* [2013] HCJAC 142.
[143] Under s.15 of the 2009 Act, consent to any sexual activity "may be withdrawn at any time before, or in the case of continuing conduct, during the conduct". If the sexual activity continues to take place after consent had been withdrawn, it takes place without consent.
[144] In this case, the complainer was extremely intoxicated and I consider the particular issues raised by intoxication in Chapter Six.

coming to in her bed unclothed with the appellant, also naked, lying on top of her having intercourse with her. At trial, the complainer testified that she said 'no' but that the appellant ignored her and continued to penetrate her. She tried but failed to push him off. The complainer estimated that penetration continued for approximately 20 seconds before she was able to escape.

At trial, a defence submission of 'no case to answer' was made on the basis of insufficient evidence and lack of corroboration of the appellant's criminal intent. The defence argued that the circumstances did not involve force and that there was no corroboration of the appellant's intention to commit rape. The Crown argued that corroboration could be found in strong circumstantial evidence, including the complainer's distress. The trial judge refused the defence submission on the basis that "distress alone might provide the necessary corroboration"[145].

At appeal, the case was transformed because of the complainer's admission at trial that she may have originally agreed to intercourse. Given the possibility of her initial consent, the court focused exclusively on what happened after her consent was withdrawn. The "real issue", as identified by the court, was whether there was sufficient evidence of the appellant's criminal intent in persisting with intercourse without the complainer's consent[146]. Having narrowed the question of *mens rea* to this time-frame, judicial opinion was that the circumstantial evidence held "no relevance": "none of the [circumstantial] factors … appeared to provide any evidence as to the appellant's … state of mind"[147]. The court upheld the appeal on the basis that the trial judge erred in repelling the 'no case to answer' submission.

There was some uncertainty, at trial and at appeal, whether the case involved force. The trial judge's directions had implied that an interpretation of the appellant's actions as forceful was open to the jury. Once the appeal court narrowed its focus to the withdrawal of consent, establishing the presence of force depended on the recognition of actual force (through the appellant's use of superior strength in pinning the complainer down) or intrinsic force (through the appellant's non-consensual penetration of her) or implied force (implied from the complainer's physical struggle to

[145] *Mutebi* 2013 par.6.
[146] *Mutebi* 2013 par.7.
[147] *Mutebi* 2013 par.13.

push the appellant off her). As we have seen in earlier cases, the court has at various times accepted these different conceptions of force. However, in these cases there was no initial consent and there was often some evidence of bruising, injury or pain reported by the complainer. In *Mutebi*, prior consent was presumed and there was no evidence of any pain or injury sustained by the complainer. In these circumstances, the court did not accept that any force was involved.

Language is crucial in shaping the meaning of the complainer's behaviour, particularly where it is scrutinised for signs of tacit agreement or possible ambiguity. In *Mutebi*, the language used to describe the complainer's attempt to escape as she lay underneath the appellant subtly shaped its meaning and significance: "she eventually managed to wriggle free"; "penetration had continued … before she succeeded in wriggling away"[148]. The portrayal of the complainer's physical struggle as 'wriggling' is a familiar trope in judicial discourse across a number of cases: "during the incident, she wriggled about but could not get away from the appellant"[149]; "she was trying to wriggle about, trying to escape, but she did not have any success"[150]; "the appellant loosened his grip enabling the complainer to wriggle free"[151]; "he was lying with his legs positioned outside hers. She had tried wriggling but without success"[152]. In the context of an alleged rape, the depiction of a woman 'wriggling' fails to capture the sheer effort involved in throwing off a stronger assailant and it neutralises the significance of the complainer's response as physical resistance. The judicial portrayal of the complainer's "wriggling" in *Mutebi* can be compared with the depiction of the complainer's active resistance in *Spendiff*.

There is also a suggestion in *Mutebi* that the complainer's expectation that the appellant should stop when she said 'no' was unreasonable. While it was considered unnecessary to 'express a concluded view', judicial opinion was conveyed obliquely in a particular passage in the judgment where the court pondered whether the complainer's allegation of rape did indeed amount to non-consensual intercourse. This can be illustrated by examining the language used in the following passage:

[148] *Mutebi* 2013 par.2.
[149] *GM v HMA* [2011] HCJAC 112, par.6.
[150] *Gordon* 2011 par.2.
[151] *McKearney* 2004 par.28.
[152] *KH* 2015 par.14.

> Because the argument before us related to the absence of corroborative evidence, it is not necessary for us to express a concluded view on the *prima facie* stark submission that the mere indication - by a single, short word - of some unwillingness by one, previously willing, party further to continue in what is by its nature a passionate activity makes the other party guilty of a criminal offence if that party does not instantly desist, with no interval whatever for appreciation of the fact that consent has been revoked and reaction to it (my emphasis)[153].

This passage stands out for two reasons. It is, by far, the longest and most complex sentence in the judgement and the emotive language reveals the implicit norms that underpin it. The sentence construction is marked by the presence of multiple clauses, qualifications and use of descriptive emphasis. The use of adjectival and adverbial words in the passage reveals an over-wording, where a surfeit of words creates a sense of over-persuasion[154]; for example, *stark* submission, *mere* indication, *single short* word, *some* unwillingness, *previously willing* party, *passionate* activity, *instantly* desist, no interval *whatever*, *appreciation* of the fact. As I explained in Chapter Two, the use of over-wording normally suggests that what is being conveyed is problematic or contentious and denotes an attempt to justify or validate what is being said[155]. Through the numerous clauses and descriptive terms, the sentence reads as over-stated and conveys a sense of partiality.

While the 2009 Act allows for an individual's consent to be withdrawn "at any time", there is an implied suggestion that simply saying 'no' may not be sufficient to stop intercourse once it has started[156]. For example, the judicial depiction of the '*mere* indication' of withdrawing consent by use of a '*single, short* word' can be compared to the judicial portrayal of the complainer's "pleas to stop" in *KH*[157]. The sense of judicial equivocation about the complainer saying 'no' can also be contrasted with *McKearney* where the fact that the complainer failed to say 'no' proved definitive in judicial reasoning. The sense of the complainer's unreasonableness in *Mutebi* is also conveyed, implicitly, through depicting her expectation that the appellant should stop as one of '*instant*' desistance. By emphasising the lack of time ('with no interval *whatsoever*'), the implication is that 20 seconds was insufficient time for the appellant to stop. The

[153] *Mutebi* 2013 par.8.
[154] See Machin, D. and Mayr, A. (2012) *Critical Discourse Analysis*, London: Sage, p.37.
[155] See Fairclough (1989) *Language and Power*, London: Longman, p.115.
[156] S.15(3) of the 2009 Act
[157] *KH v HMA* 2015 S.L.T. 380 par.5; I discuss this case later in the chapter.

focalisation, here, appears to be entirely from the appellant's perspective[158]. An interesting comparison can be made with *Spendiff*, which was held prior to the 2009 Act, where the complainer also said 'no' during intercourse. Here, the estimated time before the appellant stopped was gauged at "about 35 seconds"[159]. However, in *Spendiff* the question of time, or the reasonableness of the complainer's expectation that the appellant should stop, did not any attract any comment by the court.

The judicial representation of intercourse as a '*passionate* activity' also reflects the appellant's perspective. Although it is presented as self-evident, it would presumably depend on the circumstances. In *Mutebi*, the complainer's allegation of rape indicates that she did not experience the activity as passionate. Constructing intercourse as passionate 'by its *very nature'* carries a positive connotation and naturalises heterosexual intercourse as a normal, healthy, desirable activity. In a legal context, it also suggests a presumption of consent, such that a refusal to continue engaging in such a natural activity might require some justification. Portraying intercourse as *naturally* passionate brings about a closure of meaning that excludes an alternative interpretation of the appellant's behaviour as, for example, opportunistic or exploitative. Although it is the activity that is described, the attribution of 'passionate' subtly encompasses the appellant himself, implying that he could not be both passionate *and* exploitative. In many ways, the emotive language and perspective adopted in this passage reflect the subjective nature of the common law test of an honest belief in consent rather than the *reasonableness* of such a belief, which was the relevant legal test at the time[160].

In *Mutebi*, the complainer's admission that she *may* have initially agreed to intercourse proved fatal to the prosecution case at appeal. The complainer was presumed to have consented and the court focused exclusively on the time after consent was withdrawn. Having narrowed the appeal in this way, the circumstantial evidence that the jury were

[158] There is no reference in either the 2009 Act or the Scottish Law Commission's Report on Rape as to the question of time. The expectation appears to be that the appellant should stop when a woman says 'no': "in our view, the exercise of sexual autonomy involves the right to withdraw, at any time, consent previously given ... there is already Commonwealth authority that where a man has consensual intercourse with a woman and during the intercourse she indicates that she no longer consents to it, then if the man continues with the intercourse he is guilty of rape"; see the *Scottish Law Commission on Rape and Other Sexual Offences*, Publication No.209, December 2007, par.2.85.
[159] *Spendiff* 2005 par.12.
[160] While the court cites the relevant terms of the 2009 Act - for example, the definition of consent as free agreement and the test of reasonableness of the appellant's belief in consent - there is no explicit discussion as to how they applied in this case.

invited to consider was deemed irrelevant to that time-frame[161]. All doubt about consent was excised and the complainer was presented as the 'previously willing party' who unreasonably expected the appellant to stop simply because she said 'no'. Persisting with intercourse when consent is withdrawn may be viewed as a less serious form of rape because of prior consent and the perceived absence of force.

My analysis of these cases reveals the diversity of judicial discourse in conceptualising force in non-consensual intercourse. In *Gordon*, the court recognised intrinsic or implied force in the appellant's use of superior body weight, pushing the complainer's legs apart and his forceful penetration of her. However, this was accepted in circumstances where the appellant used actual force in pulling the complainer onto the floor. In *Spendiff*, the appellant's non-consensual penetration of the complainer amounted to force in circumstances where it caused injury through the pain she experienced. In *Mutebi*, there was no recognition of force in the appellant's exercise of superior strength in pinning the complainer down or his non-consensual penetration of the complainer after she said 'no', in the context of her (presumed) prior consent.

Categorising rape by force

As I explained earlier in this chapter, judicial reasoning in *McKearney* had the effect of categorising cases of rape for the purpose of proof according to the presence or absence of force. Since the application of law works on the basis of precedent and reasoning by analogy, the extent to which cases of rape can be characterised and, therefore, distinguished on the basis of force is an important aspect of judicial discourse of consent. I examine this dynamic in the recent cases of *Keaney*[162] and *KH*[163], where the question of comparability of different instances of rape arose in the context of mutual corroboration.

In *Keaney*, the prosecution relied on the application of the *Moorov* doctrine to corroborate the allegations of rape made by two complainers, X and Y[164]. This is a common law doctrine that provides for mutual corroboration by complainers where there are a number of offences committed by the same appellant. In other words,

[161] I will return to the issue of the complainer's intoxication in Chapter Six.
[162] *Keaney v HMA* 2015 S.L.T. 102.
[163] *KH v HMA* 2015 S.L.T. 380.
[164] *Moorov v HMA* 1930 J.C. 68.

where there is only a single witness to each crime, each of the separate offences may corroborate the other if they are deemed sufficiently similar to amount to a single course of criminal conduct. In determining the availability of mutual corroboration, the court will consider the character and circumstances of the offences and when they were committed to determine if they reveal an underlying unity of intention by the appellant.

Keaney was appealed on grounds that the trial judge erred in dismissing the defence's submission of 'no case to answer' and that the jury were misdirected on the question of criminal intent. There was common agreement that both complainers experienced considerable violence by the appellant and that X's allegations of rape involved the use of force. At appeal, the defence argued that mutual corroboration of X and Y's account of rape was excluded by material differences in their complaints. According to the defence, Y's testimony "did not in fact add up to a description of non-consensual intercourse" since she would give in to the appellant's sexual demands "to avoid there being any violence"[165]. It was submitted that, even if Y's account did amount to non-consensual intercourse, *mens rea* would be different in cases of forcible and non-forcible rape. In cases involving force, the appellant would *know* the complainer was not consenting, whereas in cases of non-forcible rape the appellant would be *reckless* at to whether there was consent. According to the defence, these different states of mind - of knowledge and recklessness - could not form the basis of a single course of criminal conduct.

The two questions facing the court were whether Y's account amounted to non-consensual intercourse and, if so, whether it could corroborate X's allegations of forcible intercourse. The defence case was founded on Y's own testimony that she would "frequently give in and permit the appellant to have sexual intercourse … because of her fear of his violence … [and] in order to have peace"[166]. The defence accepted that Y's relationship with the appellant was marred by violence but it was argued that her account of rape "lacked her having complained, prior to intercourse … that she did not want it to happen"[167]. The defence relied on the approach adopted in *McKearney*: the application of a 'no' model of consent and the construction of two

[165] *Keaney* 2015 par.18; par.20.
[166] *Keaney* 2015 par.7.
[167] *Keaney* 2015 par.18.

distinct phases of events, where the appellant's violence was separated from his sexual behaviour by a gap, in this instance, of 15 minutes.

The appeal court rejected the defence submission and applied a more contextual model of consent that sought to understand Y's likely state of mind and her outward behaviour against the background of an abusive relationship. In judicial reasoning, no ambiguity was inferred from Y's passive response to the appellant's sexual demands. Rather, her behaviour was interpreted as a form of induced submission as a consequence of his abuse. The court recognised that force "need not feature on every occasion for the relevant course of conduct to be established"[168]. Where force was absent, the appellant's criminal intent could still be inferred from circumstantial evidence and his use of force on prior occasions. Judicial reasoning was explicit: where "a woman is too frightened to resist … force is not required" and "in [such] circumstances … the appellant must have known she was not consenting"[169].

In *Keaney*, the appellant's criminal intent was inferred from constructive force (instilling fear in the complainer) and his resort to violence on prior occasions. As in *Dalton* and *Drummond,* it was considered reasonable that the appellant should be aware of the complainer's state of mind and the impact of his own violent behaviour on her. The primacy attached to the appellant's agency in the relationship is reflected in the judicial account of events. Here, the violence of the appellant's actions is emphasised through the use of short, staccato phrases and a predominance of action verbs: "he would be physically violent towards [X], dragging her about by the hair or her arms, hitting her off walls, pushing, punching and kicking her, shouting abuse at her, and threatening her with violence"[170]. The appellant's violence to Y is described in similarly graphic terms: "[he would be] twisting her arms, pulling her hair, pushing her, grabbing her neck, and placing her in a headlock"[171]. This is contrasted with the induced passivity of the complainer: "[regardless of whether she refused] he would then simply have sex without her consent and she would just lie passively" (my emphasis)[172]. The futility of any resistance is emphasised by the use of 'simply' and

[168] *Keaney* 2015 par.16.
[169] *Keaney* 2015 par.16; par.21.
[170] *Keaney* 2015 par.3.
[171] *Keaney* 2015 par.7.
[172] *Keaney* 2015 par.4.

'just'. Here, the complainer's passivity was understood as a necessary strategy for her survival[173].

The court concluded that, given the nature and impact of the appellant's actions on the complainer, "it was clearly open to the jury to decide that, when Y's whole evidence was considered in context … no true consent had been given" (my emphasis)[174]. In *Keaney*, a rich model of consent as free agreement finds clear expression. The judicial conception of "true consent" encompasses consideration of the complainer's state of mind in the context of a violent relationship. This is reflected in a discursive style that incorporates the complainer's subjective experience through her own expressions: "she would let the appellant do what he wanted because … otherwise she would 'get a doing'"[175]; "her evidence can, perhaps, best be summarised in her own words … that he would not 'take no for an answer'"[176]. On some occasions, the complainer "would frequently give in … but only because of her fear"[177]; "she would have intercourse … in order to have peace"[178].

The court did not accept that *mens rea* is different in particular instances of rape. While criminal intent can be established either through knowledge or recklessness as to the complainer's consent, it "does not mean that different criminal conduct is involved"[179]. The categorisation of rape according to the presence or absence of force, which formed the basis of judicial thinking in *McKearney*, is rejected in *Keaney*. The court asserted that there is "a single crime of rape" and it occurs "when a man has non-consensual intercourse with a woman in circumstances where he has the relevant *mens rea*"[180]. Accordingly, there is "no difficulty for *Moorov* purposes" where the appellant uses force in the case of one complainer but "not, or not always, in the case of the other"[181]. It is possible to identify in *Keaney* an explicit rejection of the historic focus on force and resistance that has continued to permeate judicial discourse after the *Lord Advocate's Reference (No 1 of 2001)*, in which rape was defined as the absence of consent rather than the presence of force[182]. The court refused the appeal, holding that "*mens rea* was

[173] *Keaney* 2015 par.22.
[174] *Keaney* 2015 par.22 .
[175] *Keaney* 2015 par.4.
[176] *Keaney* 2015 par.19.
[177] *Keaney* 2015 par.7.
[178] *Keaney* 2015 par.7.
[179] *Keaney* 2015 par.15.
[180] *Keaney* 2015 par.15.
[181] *Keaney* 2015 par.16.
[182] The *Lord Advocate's Reference (No 1 of 2001)* 2002 S.L.T. 466.

unitary in character" and that the crime of rape is "not divided into forcible and non-forcible rape"[183].

KH was heard in the same year as *Keaney*. In this case, a different approach is applied and the pendulum swings back towards force as a structuring dynamic in judicial discourse. The appellant was convicted of two charges of assault (against X and Y) and two charges of rape (against X and Z). The convictions for rape were appealed on the basis that the jury were not entitled to apply mutual corroboration. The defence submitted that the time interval of nearly eight years was too great and the circumstances in which the rapes occurred were materially different. The Crown argued that, although Y did not allege rape, her account of the appellant's coercive and abusive behaviour bridged the time interval between the rape charges and provided the underlying unity of intent linking all the charges. The appeal court disagreed and held that Y's evidence could not be used as corroboration for the rape charges[184]. In the absence of Y's evidence, the question facing the court was whether the instances of non-consensual intercourse described by X and Z showed sufficient similarity to amount to a single course of criminal conduct[185].

The appellant started a relationship with X when she was aged 15. Before her 16th birthday, X left home and moved into a shared flat with the appellant who was then aged 23. There was regular consensual intercourse by this time. The complainer described physical assaults and one occasion of rape when the appellant persisted in intercourse after she withdrew consent. In her testimony, she described the appellant as "being rough and using his fingers as well"[186]. On one occasion, she realised something had happened and that she was injured. She said "Hold on, I think I am bleeding" and then "Stop. I am bleeding"[187]. The appellant did not stop but replied "Hold on baby I am nearly finished. Just let me finish"[188]. Despite the complainer's "pleas to stop", the appellant persisted in penetrating her[189]. X went to the bathroom and found she was bleeding from her vagina. The appellant took her to the local hospital where she was found to have a vaginal tear. The complainer was given some

[183] *Keaney* 2015 par.15.
[184] In the following chapter, I examine how Y's evidence was assessed by the court when I discuss how patterns of behaviour are understood in judicial discourse.
[185] *KH* 2015 par.34.
[186] *KH* 2015 par.5.
[187] *KH* 2015 par.5.
[188] *KH* 2015 par.5.
[189] *KH* 2015 par.5.

gel and advised not to have sexual intercourse for several weeks. When they got home, using the gel to numb the pain, the appellant had intercourse with her on the same night.

Z was a single mother aged 22 at the time of the offence and had given birth to a child a few months prior to meeting the appellant, who was then aged 31. Z spoke to two accounts of non-consensual intercourse. On the first occasion, three weeks into their relationship, Z went to have a shower and the appellant also entered the shower room. When he told the complainer he wanted to have intercourse, Z said 'no' and tried to back away. Ignoring this, the appellant turned the complainer to face the wall and penetrated her from behind. She repeated 'no' several times. She testified that "it did not last long" and eventually managed to "move away"[190]. She felt scared because he had continued despite her saying 'no'. On the second occasion, Z was in bed asleep. She awoke and found the appellant lying on top of her. She said "no, I don't want this" to which he responded "'okay' but then just carried on"[191]. She tried moving "without success" because he was lying "with his legs positioned outside hers"[192].

There was a similar background to the incidents described by X and Z. Both complainers were vulnerable, through youth or having just given birth to a child, and there was a disparity between the ages of the parties. The appellant was described as very controlling and coercive by each complainer. There were also similarities in his sexual behaviour towards X and Z. He refused to take 'no' for an answer and used superior weight and strength to pin the complainer to the spot. The court did not find these points of similarity sufficiently compelling and pointed to material differences in the accounts. In particular, the appellant's sexual conduct towards X and Z was not considered to be "of the same character"[193]. The court accepted that Z's account amounted to "two incidents of forceful rape"[194]. Here, force was identified in the use of superior strength in physically confining the complainer in the shower room and in bed and in his non-consensual penetration of the complainer. By comparison, X's account was of the appellant "persisting in intercourse" after she withdrew consent[195]. Here,

[190] *KH* 2015 par.13.
[191] *KH* 2015 par.14.
[192] *KH* 2015 par.14.
[193] *KH* 2015 par.35.
[194] *KH* 2015 par.35.
[195] *KH* 2015 par.35.

the appellant's sexual behaviour was not seen as amounting to forcible rape, despite medical evidence of pain and injury sustained by X.

In *KH*, the appellant was described as engaging in "rough sex" with both complainers[196]. While this should put courts on notice that there is a degree of violence involved in the appellant's sexual behaviour, constructing "rough sex" as consensual intercourse may also serve to normalise sexual violence in intimate relationships, even where it causes pain and injury to the complainer. Put another way, if the use of rough sex is understood outside a frame of male violence because the complainer has appeared to agree to it, then it is unlikely to be recognised as a form of violence once consent is withdrawn. In such circumstances, an appellant's persistence in intercourse may be viewed as non-consensual but not as forcible. In the context of an abusive relationship, understanding the appellant's use of force in sexual behaviour as a form of consensual rough sex may also mask the complainer's lack of free agreement in circumstances where she is relatively powerless, vulnerable and frightened[197].

In *KH*, the court considered that there was no "special or extraordinary feature" linking the accounts of rape by X and Z and that, without such a feature, the appellant's behaviour was not sufficiently similar to amount to a single course of criminal conduct[198]. In sustaining the appeal, the court held that the application of mutual corroboration to instances of forcible and non-forcible intercourse would be "to take a step which is not justified by authority"[199]. In reaching this decision, judicial reasoning relied on the particular way in which non-consensual intercourse was conceptualised and categorised by the court: as forceful as opposed to non-forcible, and without consent as opposed to the withdrawal of consent. Despite judicial understanding in *Keaney* that rape does not have sub-categories of forcible or non-forcible types, it would appear that force continues to play a significant role in how rape is understood in judicial discourse.

[196] *KH* 2015 par.19.
[197] I consider more fully how sexual consent is understood in the context of an abusive relationship in Chapter Four.
[198] *KH* 2015 par.30.
[199] *KH* 2015 par.35.

Conclusion

Conceptualising rape as either forcible or non-forcible is problematic for different reasons. There are diverse conceptions of force and there is no clear line that demarcates the use of force. The presence or absence of force is used to construct different types of rape, which undermines the application of a consent-based approach to rape. While case reports contain powerful testimony by complainers of their experience of non-consensual penetration as an act of violence, there is considerable judicial ambivalence about recognising actual or implied force in non-consensual intercourse. What constitutes force depends not only on the particular actions of the appellant and the degree of coercion applied, but on inferences drawn from circumstantial factors, such as the location of intercourse, the events leading to intercourse, the relationship between the parties and the perceived vulnerability of the complainer. However, reliance on contextual factors is a double-edged sword in that inferences drawn from circumstantial evidence are also influenced by social norms about gender, heterosexuality and violence. For example, the construction of consensual rough sex may normalise the use of force and, in the context of an abusive relationship, conceal the lack of free agreement by the complainer. It would also appear that force is unlikely to be recognised in circumstances where consent is withdrawn, as in the cases of *KH* and *Mutebi* (both held after the 2009 Act).

While there is some sedimentation of historic ideas about rape - in the continuing focus on force and resistance rather than the presence or absence of consent - judicial discourse has also evolved over the timeline of the cases. In the context of statutory changes introduced by the 2009 Act, there is a much broader conception of force and a less mechanistic understanding of the effects of force on the complainer. My analysis suggests a shift from a narrow, performative 'no' model of consent that focuses on evidence of refusal to a richer, more contextual approach that encompasses consideration of the complainer's state of mind as well as her behaviour, in the context of the circumstances and events leading to rape. When judged by the standard of reasonableness, the appellant is expected to be aware of the impact of his violent behaviour on the complainer, even if the violence occurs days before the rape. Relevant force is also recognised in the context of an abusive relationship, where force may not be used on every occasion. Applying an affirmative model of consent and a more objective assessment of the appellant's claim that there was consent addresses

some of the difficulties in relying on the legal construct of *mens rea* as determinative of rape.

Chapter Four Understanding Patterns of Behaviour

Women experience multiple, overlapping forms of abuse. Most women who experience sexual coercion within an intimate relationship also report other forms of abuse, including threats, intimidation, coercion and physical assault[1]. Domestic abuse very rarely manifests as a single, isolated incident but is experienced as part of a continuing pattern of behaviour[2]. In this chapter, I consider how the construction of consent in judicial discourse is shaped by the recognition and understanding of particular patterns of behaviour. The cases that I discuss include diverse factual circumstances and a range of legal questions relating to consent, such as sufficiency of evidence, corroboration of *mens rea* and application of mutual corroboration. Across these different settings and issues, a common underlying question can be identified: whether the appellant's sexual conduct towards the complainer can be understood as a discrete event or as part of a broader pattern of abuse.

Judicial assessment of relevant patterns of behaviour arises in different contexts. For example, in cases where there is more than one complainer, mutual corroboration may be available if the appellant's pattern of offending behaviour amounts to a single course of criminal conduct. In cases where there is a single complainer, criminal intent may be inferred from the pattern of the appellant's conduct towards the complainer over a period of time[3]. Particular difficulties arise in the context of an intimate relationship between the parties where there is both consensual and non-consensual intercourse. Here, the perceived impact of the appellant's pattern of behaviour within the relationship may help establish whether there was consent on a particular occasion or whether the appellant may have honestly or reasonably believed that there was. Understanding an appellant's action in relation to a broader pattern of behaviour also

[1] See Walby, S. and Allen, J. (2004) 'Domestic violence, sexual assault and stalking', *Home Office Research Study* 276, March 2004, p.29-30; Kelly, L., Lovett, J. and Regan, L. (2005) 'A gap or a chasm? Attrition in reported rape cases', *Home Office Research Study* 293, February 2005, p.33-34; MacMillan, L. (2013) 'Sexual victimisation: disclosure, responses and impact' in Lombard, N. and MacMillan, L. (eds) *Violence Against Women*, London: Jessica Kingsley Publishers, p.74; see also Youngs, J. (2015) 'Domestic violence and the criminal law: reconceptualising reform', *The Journal of Criminal Law*, Vol.79(1) 55, p. 59.

[2] See Stark, E. (2009b) 'Rethinking Coercive Control', *Violence Against Women*, 15(12), Sage 1509 and Stark, E. (2010) 'Do violent acts equal abuse? Resolving the gender parity/asymmetry dilemma', *Sex Roles*, 62 201, p.207.

[3] I touched on this in Chapter Three when I discussed the notion of immediacy in establishing the relevance of force and resistance. My focus, then, was the significance attached to interval between the use of force and the complainer's resistance and intercourse. In this chapter, I consider the relevance and value attached to a wider range of behaviour and actions by the appellant in establishing a pattern of behaviour.

arises in the economic sphere of sexual relations where the use of intimidation and coercion against women engaged in street prostitution is rife. Here, the appellant's intention towards the complainer may be understood in the context of a general pattern of sexual coercion. By examining different elements of judicial discourse - the use of language, reasoning, narrative and broader social discourses that are incorporated within the text - I show how judicial recognition of relevant patterns of behaviour helps determine issues of consent.

Sexual predation

The cases of *Dodds v HMA*[4] and *Livingstone v HMA*[5] involved the appellant's sexual violence against a number of women who were known to him. In each case, the Crown relied on the application of the *Moorov* doctrine to provide mutual corroboration of the complainer's account of rape[6]. In determining whether mutual corroboration was available, the court considered whether the offences revealed the same underlying intention by the appellant and were sufficiently similar (in time, manner and circumstance) to amount to a single course of criminal conduct.

In *Dodds*, the appellant faced historic charges of rape and assault of seven women. At trial, he was convicted of four charges of rape, with three charges not proven. The four convictions of rape related to offences that took place in the same district of Edinburgh over a period of eight years in the 1970s. Each complainer was vulnerable through youth, or a physical or psycho-social disability[7]. Charge 1 involved two instances of forcible intercourse by the appellant (aged 19) against LD (aged 14). Charge 2 took place two to three years later and involved the rape of AP (aged 28) who had cerebral palsy. Charge 10 involved the rape of TM (aged 25) four years later; TM was described as a "deaf mute, who could speak to a very limited extent"[8]. Charge 15 involved the rape of AM (aged 16) in the following year; AM was effectively homeless and staying in a hostel. She described forcible intercourse involving "a delivery of blows to her and

[4] *Dodds v HM Advocate* 2002 S.L.T. 1058.
[5] *Livingstone v HMA* 2014 S.C.L. 868.
[6] *Moorov v HMA* 1930 J.C. 68; I explain the doctrine of mutual corroboration in Chapter Three in my discussion of the cases of *KH v HMA* 2015 S.L.T. 380 and *Keaney v HMA* 2015 S.L.T. 102.
[7] I use the term psycho-social disability to cover a broad spectrum of conditions that are best thought of within a social rather than medical model, such as emotional or psychological instability, mental illness, learning disability, and cognitive disabilities. There are very high reporting levels of sexual violence by women who have a physical or psycho-social disability or are at risk of social exclusion through substance misuse or prostitution. According to Ellison, L., Munro, V. *et al* (2015), this is of particular concern in tackling sexual offences in the criminal justice system, 'Challenging criminal justice? Psychosocial disability and rape victimisation', *Criminology & Criminal Justice*, Vol.15(2) 225, p.241.
[8] *Dodds* 2002 per Lord Osborne, par.8.

[which] had endured all night long"[9]. She sustained "significant injuries" and said that she "felt she had been drugged"[10].

The convictions were appealed on two grounds: misdirection on the application of mutual corroboration; and that the jury should have been directed that mutual corroboration could not apply to charge 1 and 15 on account of the gap of time. The appeal was upheld on the second ground and on the basis of an unreasonable verdict.

In their submission at appeal, the defence urged the court to adopt a formal, restrictive approach to mutual corroboration based on the trial judge's words to the jury: that "provided the jury accepted the evidence of at least two of the women and were satisfied that the circumstances of those offences … were sufficiently closely linked, it would be open to them to find the appellant guilty of those offences"[11] (my emphasis). The defence argued that there was insufficient similarity in the accounts provided by any two of the complainers; either the time interval was too great or the circumstances were materially different. For example, while the time interval between charges 1 and 2 and between 10 and 15 was considered reasonable, the offences lacked sufficient similarity. Conversely, there were similarities between charges 1 and 15 and between charges 2 and 10 but, here, the time interval was too great. According to the defence, it was "impossible to know" how the jury had applied the doctrine and, under the particular directions given, it was possible that mutual corroboration had been applied to illegitimate pairings[12].

The Crown argued that separating out particular pairs of offences and focusing on the similarities and dissimilarities afforded by these pairings was an "artificial approach"[13]. The test to be applied was a holistic one: the "whole circumstances" should be examined and the evidence "looked at as a whole"[14]. The key question was whether the offences were separate, discrete events or whether they formed a common pattern of criminal conduct. There was no maximum time interval laid down and the longest time gap between any two of the charges was four years, which was at the upper end of the

[9] *Dodds* 2002 per Lord Osborne, par.8.
[10] *Dodds* 2002 per Lord Osborne, par.8.
[11] *Dodds* 2002 per Lord Osborne, par.9.
[12] *Dodds* 2002 per Lord Osborne, par.11.
[13] *Dodds* 2002 per Lord Osborne, par.15.
[14] *Dodds* 2002 per Lord Osborne, par.13-14.

time interval accepted by the court in prior cases[15]. The Crown submitted that, in *Dodds*, the number of offences and similarity of detail compensated for the time gap. According to the Crown, the "stamp or design" of the appellant's conduct was evident in the pattern and detail of the four offences[16]. They were committed in the same local district over a period of eight years. All the women were known to the appellant and appeared to be targeted "on account of their vulnerability"[17]. Each rape was planned in advance, in that the appellant set up opportunities to "impose himself" on the complainer[18]. There were similar details in the commission of the offences: the attacks were sudden, unexpected and forcible and, in each case, the appellant removed the complainer's lower clothing while he did not undress. The Crown submitted that it was not necessary (or indeed possible) to know how the jury applied the doctrine of mutual corroboration. When the four offences were considered together, a pattern of sexual predation was evident. It was open, therefore, to the jury to apply mutual corroboration.

Implicit in the competing arguments considered by the court lay a more fundamental question as to whether the evaluation of the similarities and differences in the offences was ultimately a determination of fact (for the jury) or a question of law (for the court). The defence invited the court to hold that it was a question of law and that the jury strayed too far in applying mutual corroboration. The Crown argued that the matter was one of fact and degree regarding the relevance and weight attached to the various elements of evidence. Mutual corroboration should be withdrawn from the jury only where it was impossible to establish sufficient connection between the offences.

The court applied a distinctive approach in evaluating the offences. Eschewing a holistic assessment in favour of the more formal approach advocated by the defence, judicial reasoning focused on the similarities and differences afforded by particular pairs of offences. In this way, only two offences were considered by the court at the same time. As a result, importance was attached to specific factors: the age of the complainers, the location of the rape (indoors or outdoors), the means used to access

[15] There is no time limit laid down by the court regarding the permissible gap between offences. In *Dodds*, the court accepted that it was impossible to identify a maximum period of time but stated that the more unusual or striking the similarity of circumstances the greater the latitude in time would be permitted. The court applied mutual corroboration in relation to two offences (the minimum number of offences) separated by a gap of just under four years in *Bargon v HMA* 1997 SLT 1232, a case involving indecent offences against two under age girls.
[16] *Dodds* 2002 per Lord Osborne, par.17.
[17] *Dodds* 2002 per Lord Osborne, par.17.
[18] *Dodds* 2002 per Lord Osborne, par.17.

the complainer, and the greater violence shown in charge 15. This approach was justified by the phrasing of the trial judge's directions that the jury could convict if there was sufficient similarity in the evidence of "at least two of the women"[19]. The court did not consider the overall pattern of the appellant's offending in relation to all four complainers. Broader themes of sexual predation linking the offences as well as signature details marking the offences were rendered invisible by the particular method of assessment. It is also possible that the gender asymmetry of power and vulnerability was regarded as so common that it was not deemed sufficiently distinctive to connect the offences.

The court held that the "the character and circumstances of the offences" did not amount to "a systematic course of criminal conduct"[20]. Judicial comments invoked the 'no reasonable jury' test: "no reasonable jury would be entitled to hold that the offences" were sufficiently similar[21]; "I do not consider any jury would be entitled to discern the necessary relationship between these offences"[22]. The judicial decision to uphold the appeal was based on two inter-related factors: the application of a formal, mechanistic approach rather than a more holistic assessment of all the offences and the absence of a unifying narrative capable of linking them. The narrative offered by the Crown of sexual predation and the exploitation of vulnerable women was discounted, in part, because of the mode of reasoning adopted by the court.

Livingstone v HMA[23] involved three offences against two complainers separated, in this instance, by a longer gap of five years. The accused was convicted of two charges of rape and one of sexual assault with intent to rape AD (charges 3, 4 and 5) and the rape of DMK (charge 7). The appellant was convicted of charges 3 and 7 as libelled and charges 4 and 5 under certain deletions. The conviction on charge 7 was appealed on the basis the trial judge erred in repelling a defence submission of 'no case to answer' and the conviction of charge 4 was appealed on the grounds of a perverse verdict. The particular issues raised in relation to charge 4 are discussed later in this chapter. My focus, here, is the approach adopted by the court in determining whether AD's evidence

[19] *Dodds* 2002 per Lord Osborne, par.9.
[20] *Dodds* 2002 per Lord Osborne par.37.
[21] *Dodds* 2002 per Lord Osborne par.38.
[22] *Dodds* 2002 per Lord Osborne par.41.
[23] *Livingstone v HM Advocate* 2014 S.C.L. 868; while the appellant in *Livingstone* was convicted of four charges of rape, one conviction was quashed so that charge 7 was corroborated by charges 3 and 5.

of rape and sexual assault (charges 3 and 5) was capable of corroborating DMK's account of rape (charge 7).

Charge 3 libelled that, while AD was asleep, the appellant penetrated her with his fingers and, when she awoke, seized her by the hair and slapped her face. Grabbing her by the wrists, he pulled her onto a mattress, lay on top of her and raped her. Charge 5 related to an incident later the same year, when the appellant followed AD into a bedroom, forcible threw her onto a mattress, lay on top of her and attempted to remove her clothing with intent to rape her. At the time of the offences, AD was aged 16 and the appellant was 22. AD was described as "sexually inexperienced" when the relationship with the appellant began[24].

Charge 7 related to the rape of DMK (aged 19) by the appellant (aged 27). DMK had initiated contact with the appellant via a social networking site and they exchanged text messages and telephone numbers. One evening, DMK went to the appellant's house. In the course of the evening, the appellant assaulted DMK by seizing her hair and slapping her face. The appellant dragged her by the wrists to a bedroom where, holding her down, he repeatedly kissed and licked her face. After licking his hand and rubbing her vagina, the appellant sexually penetrated DMK with his fingers and raped her, thereafter masturbating in her presence.

At appeal, the defence argued that there was insufficient evidence of non-consent by DMK and that mutual corroboration could not be applied because of "significant and material differences" in the charges relating to AD and DMK[25]. For example, DMK had an "apparent maturity" that AD did not have and, while the appellant had a relationship with AD lasting a year and a half, there was no pre-existing relationship between the appellant and DMK[26]. There was also a significant time interval between the offences of five years. The Crown argued that the time gap was not necessarily fatal to the application of mutual corroboration and that it could be offset by similarities in the appellant's use of violence and restraint.

[24] *Livingstone* 2014 par.9.
[25] *Livingstone* 2014 par.15.
[26] *Livingstone* 2014 par.16.

In considering whether mutual corroboration could be applied to the offences, the court adopted a different approach to that in *Dodds*. In *Livingstone*, the availability of mutual corroboration was not seen as an exercise of judicial preference between competing assessments of factual evidence. The court explained that where there are similarities and differences in the offences, a process of evaluation is required and "this issue [is] one for the jury"; that is, it is a matter of factual determination on the available evidence[27]. The court in *Livingstone* applied a high threshold for the withdrawal of mutual corroboration, arguing that the doctrine should be excluded only where "on no possible view can it be said that the individual instances were component parts of a single course of conduct by the accused" (my emphasis)[28]. While recognising that "this was, perhaps, a narrow case", the court held it was for the jury to evaluate the factual evidence. On this basis, the court refused the appeal on charge 7, holding that the trial judge rightly dismissed the defence submission of 'no case to answer'.

Three inter-related factors underpinned the different outcomes in *Dodds* and *Livingstone*. The first concerns the demarcation between what is considered a question of fact or law and the way in which the appeal court may recast a matter that was accepted as factual at trial as a question of law, which is then subject to re-examination and judicial determination. In *Dodds*, the evaluation of the similarities and differences between the offences and the weight attached to various factors became a function of the judicial role and this allowed the court to apply its preferred interpretation of the evidence over that of the jury. In *Livingstone*, the court upheld the traditional role accorded the jury in determining and evaluating factual evidence.

The second factor relates to the mode of reasoning adopted by the court in its application of legal doctrine; whether, for example, a narrow, formal approach or a more holistic, contextual approach is applied. The mechanistic approach applied in *Dodds* restricted judicial focus and limited the range of factors that were perceived as relevant. This had the effect of marginalising broader themes as well as signature details connecting all the offences. In *Livingstone*, the court adopted a more holistic approach in accepting that the jury was entitled to base their assessment on "all the circumstances"[29].

[27] *Livingstone* 2014 par.17.
[28] *Livingstone* 2014 par.14; the court applied the *dicta* in *Reynolds v HMA* 1995 J,C. 142, a case that did not involve sexual offences.
[29] *Livingstone* 2014 par.17.

The third factor relates to the judicial construction or acceptance of an overarching narrative that could provide the underlying nexus linking the offences and establishing the appellant's unity of intent in committing them. In *Livingstone*, a judicial narrative was constructed from "the consistent pursuit by the appellant … of obtaining sexual intercourse by employing a similar pattern of violence towards women who were also younger than him"[30]. In *Dodds*, the court rejected the prosecution narrative of sexual predation based on the appellant's targeting a number of vulnerable women who were known to have a physical or psycho-social disability. In the absence of such a narrative, the rapes committed by the appellant were viewed as a number of disparate incidents.

The outcome of these cases can be understood as the product of the contrasting approaches taken by the court. Judged by the standard and reasoning applied in *Livingstone*, the jury's decision in *Dodds* may have been upheld. In *Dodds*, there were more offences suggestive of a pattern of conduct. There were underlying themes connecting the offences (the appellant's predatory behaviour, the particular vulnerability of the complainers due to their disability) and signature details in the commission of the offences (they were all planned, sudden, violent attacks, and involved removal of the women's lower clothing while the appellant did not undress). The different approaches adopted by the court did not reflect any change in legal doctrine or substantive law between the earlier and later case[31]. Adopting one approach rather than another, privileging certain factors over others, constructing or rejecting an overarching narrative, reflects a judicial choice and preference. This may be the product of particular policy considerations; for example, an emphasis on crime control and the protective function of consent in safeguarding women from sexual coercion in *Livingstone* while *Dodds* suggests an emphasis on the civil liberty protection provided by a more stringent application of the corroboration requirement[32]. These cases demonstrate the diversity of judicial discourse and the power of judicial discretion in determining the availability of mutual corroboration in confirming the complainers' accounts of rape.

[30] *Livingstone* 2014 par.17.
[31] There was virtually no discussion of substantive law in either case as the focus of judicial discussion in each case was the relevance of mutual corroboration.
[32] The competing policy considerations that underpin different conceptions and approaches to consent are discussed in more detail in Chapter One.

Power and domination

In *Mackintosh v HMA*[33], the question of a pattern of conduct arose in relation to the appellant's behaviour towards a single complainer over a period of four days. The issue, here, was whether intercourse between the parties could be understood as a discrete event, where the appellant may have honestly believed the complainer was consenting, or whether his criminal intent could be inferred from his exercise of power and domination over a young, vulnerable woman whom he abused over the four days.

At trial, the appellant was convicted of the assault and rape of the complainer. The indictment of assault referred to the abduction and detainment of the complainer in the appellant's house for over four days[34]. The conviction of rape was appealed on grounds of insufficient evidence of criminal intent and lack of corroboration of the complainer's account to entitle the jury to infer that the appellant knew she was not consenting. The appeal was upheld on both grounds.

The complainer was aged 24 and described by the trial judge as a "very vulnerable person", having been abused by her former partner[35]. From time to time, she had used heroin and "there was a suggestion" that, at least for a period, she resorted to prostitution while sleeping rough in Glasgow[36]. The complainer was separated from her former partner and, without any permanent accommodation, she was staying temporarily with a friend. In her evidence at trial, the complainer said she knew the appellant as an acquaintance through his former girlfriend. She described him "pestering her" by making repeated phone calls, despite her saying that she was not interested in him[37]. When the complainer happened to meet the appellant at a railway station, she agreed to join him for a drink. According to the trial judge's report to the appeal court, this "appeared to be the start of his domination of her"[38]. On another occasion when they again met by chance, the complainer told him she could not spend any time with him as she was going to see her children at her parent's house, where they stayed. At this point, the appellant took her forcibly by the hand and led her to his

[33] *Mackintosh v HMA* 2010 S.C.L. 731; this case was heard by the appeal court only months prior to the implementation of the 2009 Act, so that the relevant standard of the appellant's belief in consent was that of an honest belief.
[34] *Mackintosh* 2010 at 732.
[35] *Mackintosh* 2010 par.5.
[36] *Mackintosh* 2010 par.5.
[37] *Mackintosh* 2010 par.6.
[38] *Mackintosh* 2010 par.6.

flat "although she did not want to go there"[39]. Once in the flat, the appellant gave her some coffee that made her feel sedated[40]. The complainer testified that she was not fully conscious for a good part of the four days she remained in his flat. The appellant admitted to administering heroin to the complainer and she was also given ecstasy in another flat, where she was taken by the appellant.

The complainer said that the appellant raped her, possibly on day one. Having been unconscious, she remembered coming to and finding that she was undressed in his bed, with the appellant lying on top of her having intercourse with her. She said that it lasted "for some time" and she described the weight of his body and pressure of his face against hers[41]. Over the following three days, the complainer was seriously assaulted on two or three occasions resulting in a broken jaw, loss of teeth and lumps of hair pulled out by the roots. No medical help was sought for her injuries. When she was able to leave the flat, the complainer made her way to her former partner's house and he testified that she was injured and hysterical when she arrived. The complainer was taken to hospital for treatment and forensic evidence of her injuries was presented at trial. At hospital, the police became involved and they also gave evidence that the complainer was unable to speak for some time due to her fractured jaw and extreme distress.

In his police interview, the appellant admitted intercourse but claimed it was "with [the complainer's] full consent"[42]. In his explanation of the injuries sustained by the complainer, the appellant accepted that he grabbed her "by the throat at one point", when his thumbs might have been on her neck[43]. His testimony at trial was characterised by the trial judge as a "bizarre series of allegations", in which the appellant maintained that the complainer's principal injuries were caused when she fell down the stairs and that it was not his voice on the recording of the police interview[44]. The appellant's aunt, who visited the flat while the complainer was injured, also gave evidence. Described by the trial judge as a "deeply unsatisfactory witness"[45], the aunt maintained that the complainer was lying on the floor but then "got to her feet and …

[39] *Mackintosh* 2010 par.6.
[40] The original indictment contained a charge of unlawfully administering drugs to the complainer in order to render her incapable of resistance, but this was deleted by amendment before the close of the Crown case.
[41] *Mackintosh* 2010 par.7.
[42] *Mackintosh* 2010 par.9.
[43] *Mackintosh* 2010 par.9.
[44] *Mackintosh* 2010 par.9.
[45] *Mackintosh* 2010 par.8.

fell, injuring herself"[46]. The appellant claimed that he "pleaded with her" to go to hospital but she "didnae go"[47]. According to the trial judge, the jury "rejected all of that"[48]. The evidence that the jury appeared to accept disclosed that, for four days, "the appellant was able to dominate a vulnerable young woman and systematically abuse her sexually and physically for no apparent reason other than to exploit her and inflict pain on her"[49].

At appeal, the defence relied on the particular sequence and timing of events. While it was unclear precisely when intercourse took place, the likelihood was that it occurred prior to the serious physical assaults on the complainer. The defence argued that, in the absence of any significant preceding violence, intercourse could not be regarded as forcible and, since the complainer did not express any dissent, it was possible that the appellant honestly believed she was consenting. According to the defence, the complainer's distress when she eventually left the appellant's house could not be attributed to non-consensual intercourse as opposed to the physical assaults. Consequently, evidence of her distress did not provide a basis from which to infer criminal intent to rape[50].

The Crown presented an account of the appellant's power over a young, vulnerable woman who was "under the appellant's control [and] dominated by him" such that everything that took place in the appellant's flat was without her consent[51]. Accordingly, the jury was entitled to infer that the complainer was not consenting to intercourse any more than she was consenting to being detained in the flat or of being assaulted there. Corroboration was provided by strong circumstantial evidence of the pattern of events over the four days, including the initial assault by the appellant that led to her being in the flat and her subsequent detainment there. For example, there was no prior arrangement that the complainer would stay at the flat; the complainer barely knew the appellant; there was no prior intimacy between the parties; there was a significant age difference of 18 years; she had no change of clothing in the flat; she had been screaming to leave which "she did with noticeable haste"; there was forensic evidence of serious injuries for which no medical assistance was provided; and she was

[46] *Mackintosh* 2010 par.9.
[47] *Mackintosh* 2010 par.32.
[48] *Mackintosh* 2010 par.9.
[49] *Mackintosh* 2010 par.9.
[50] I discuss the significance of the complainer's distress and the evidential value attached to it in Chapter Five.
[51] *Mackintosh* 2010 par.27.

hysterical when she left the flat[52]. The Crown argued that, having regard to these circumstances, it was open to the jury to infer that the complainer would not have remained at the appellant's flat unless she had been detained and that, knowing this, the appellant would have been aware there was no consent.

According to the court, the relevant question was whether "the circumstances relied on in combination can be seen as capable of giving rise to the necessary inference" of criminal intent[53]. The court recognised that "circumstantial evidence may give rise to a number of inferences" and that formal sufficiency is established if any one of these supports the complainer's account. However, the court did not consider different interpretations of the circumstantial evidence[54]. Although mindful of the "danger in scrutinising each of these elements in isolation", this is precisely what the court appeared to do[55]. The sense of dissonance that is generated can be illustrated by examining the nature of judicial reasoning:

> No doubt the complainer was in the appellant's flat without there having been any prior arrangement to that effect … we do not consider that that circumstance could properly give rise to any relevant inference … we attribute no evidential significance to the second factor [lack of prior sexual relationship] relied upon by the advocate depute … while there was a significant difference in age between the complainer and the appellant, in the nature of things, we do not think that that circumstance gives rise to any relevant inference … the fact that the complainer had no change of clothing with her at the time in question … appears to us to be a matter of no evidential significance … The fact that there was no prior arrangement that she should stay there must be seen as an explanation of [that] state of affairs … Plainly, before she left, the relationship between the complainer and the appellant had apparently deteriorated … however we do not consider that that circumstance can cast light upon the appellant's state of mind … [the complainer's screaming to leave the flat] appears to us to reflect no more than that, following the assault … she did not wish to remain in the appellant's flat (par.31-32; my emphasis).

In *Mackintosh*, judicial reasoning seems to comprise a list of categorical assertions. The court's evaluation of the circumstantial evidence reflects a form of atomistic reasoning, where each element of evidence is considered in isolation. There is no attempt to establish possible connections between the various strands of evidence or make sense of the evidence by placing it within a broader narrative picture. By applying this mode

[52] *Mackintosh* 2010 par.26.
[53] *Mackintosh* 2010 par.28.
[54] *Mackintosh* 2010 par.30.
[55] *Mackintosh* 2010 par.29.

of reasoning, rather than a more holistic approach, the overall weight of evidence and the relationship *between* the different elements of evidence was not considered fully by the court. In this way, the meaning attached to the evidence was stripped of any contextual relevance.

The predominant tone in the passage is one of unqualified assertion ("plainly", "must be seen as", "no doubt", "reflect no more than…"), which renders the truth of the statement to be self-evident and closes down the possibility of alternative meanings or interpretations. The complainer's arrival at the flat is detached from the circumstances in which it occurred (the appellant's assault on the complainer on the street). The age difference of 18 years is normalised ("in the nature of things"). The construction of the relationship as "*apparently* deteriorating" introduces a note of uncertainty regarding this deterioration and impliedly suggests a more normative quality to the relationship prior to this point. The potential harshness or stridency generated by this series of statements is softened through a tone of personal observation and reflection that dilutes the force of judicial assertion (repetition of "we do not consider", "we attribute"; "we do not think"; repetition of "it appears to us"). Without considering any alternative interpretations, the judicial conclusion was that none of the elements of evidence were capable of giving rise to an inference of criminal intent and, consequently, the standard of sufficiency was not met.

Judicial reasoning in *Mackintosh* can be compared to the later case of *Hutchison v HMA*[56], which was discussed in Chapter Three. In *Hutchison*, the appellant was charged with assault, abduction and rape and, as in *Mackintosh*, the question facing the court was whether the appellant's criminal intent could be inferred from circumstantial evidence. The quality and nature of inferential thinking in *Hutchison* is markedly different to that in *Mackintosh*. In *Hutchison*, the court adopts a more holistic approach in assessing the evidence. There is a judicial willingness to examine the various elements of evidence in context and to consider more than one possible interpretation. For example, in *Hutchison*, an inference of criminal intent was drawn from the fact that "the buzzer on the entry phone was kept on silent and, on at least one occasion, the appellant locked [the complainer] inside"[57]. Judicial reasoning, here, was that "although there may be other reasons why a person might wish to have the buzzer on

[56] *HMA v Hutchison* [2013] HCJAC 91.
[57] *Hutchison* 2013 par.3.

silent", one "obvious reason" would be to prevent a person in the flat calling for help if someone came to the door[58]. In *Mackintosh*, the appellant also "kept the door of the flat locked" for some of the time ("latterly"), but no relevant inference was drawn from this[59]. The crucial difference in reasoning in these cases is that, in *Hutchison*, the court considered whether *any* interpretation of the evidence could support the complainer's account: "although there may be other reasons why … , one obvious reason is …"[60]; "although there are again explanations of an innocent nature as to why that might have been done, one is that …"[61]; "although there may be other explanations for the cause of this injury, one is that …"[62]. In *Mackintosh*, the court considered only *one* interpretation of each element of evidence, without considering alternative interpretations or the broader context. The different quality of reasoning in the earlier and later case might be attributable, at least in part, to the test of reasonableness in assessing the appellant's belief in consent, although this was not explicitly stated in *Hutchison*.

What the court did attach importance to, in *Mackintosh*, was the complainer's response to intercourse. This was "an important part of the background" and it was "with that background" in mind that the court dismissed the relevance of other circumstantial factors[63]. In her evidence at trial, the complainer testified that at the time of intercourse "she did nothing to resist the appellant … she did not react in any way … she said nothing to the appellant"[64]. As we have seen in *McKearney*, a focus on the absence of refusal or resistance by the complainer reflects a 'no' model of consent, where passivity conveys an ambiguity that affords support for the appellant's honest belief in consent. The test of an honest belief requires some evidence of what the appellant did think at the relevant time. In *Mackintosh*, this was provided by the appellant's espousal of love of the complainer. Particular importance was attached, at both trial and at appeal, to the appellant's words to the complainer at the time of intercourse: that "he loved her"[65]. In cross-examination, the complainer said that, given this expression of love, "maybe the appellant had thought that [she] was a willing

[58] *Hutchison* 2013 par.3.
[59] *Mackintosh* 2010 par.8.
[60] *Hutchison* 2013 par.3.
[61] *Hutchison* 2013 par.3.
[62] *Hutchison* 2013 par.4.
[63] *Mackintosh* 2010 par.30; 31.
[64] *Mackintosh* 2010 par.30.
[65] *Mackintosh* 2010 par.30.

partner to an act of sex"[66]. In this way, an honest belief in consent was rendered more credible by a language of love.

The sense of discordance generated by the co-existence of themes of love and honesty and that of power and domination is mediated by the judicial construction of events. Having determined that intercourse preceded the physical attacks on the complainer, the appellant's sexual behaviour was assessed outside a context of violence. Judicial consideration of the appellant's sexual conduct was detached from the preceding events (his initial assault on the complainer in the street) and what happened subsequently (his violent assaults on her). The particular element of evidence that was capable of linking all the events, from which criminal intent could be inferred, was the complainer's detainment by the appellant. However, the court disputed the jury's finding of fact that intercourse took place while the complainer was confined in the flat against her will: "we do not think it can be confirmed … that the evidence showed that the complainer was, in effect, a prisoner of the appellant from Saturday to the succeeding Tuesday"[67]. The court rejected this interpretation of events by emphasising the agency and decision-making of the complainer.

Particular significance was attached to the complainer's behaviour on two occasions when the appellant took her outside the flat. The first involved a visit to Glasgow, where the appellant and complainer were separated for a short time before meeting in a café. The second occasion was when the appellant took the complainer to a pub on the following day. These events were understood by the court as providing opportunities for the complainer to summon help or escape; she could have "removed herself … from the possibility of further contact with the appellant. Yet she did not do so. What she did was to go to a café with him"[68] (my emphasis). The attribution of agency to the complainer's action is conveyed through the repetition of the simple subject-verb statement 'she did', with an adverse inference conveyed by the use of 'yet'. The implicit question posed, here, is 'why didn't the complainer escape when she had the chance?'. While this is a valid question for the court to consider, such a question reflects a broader focus in judicial discourse on the nature of the victim's response to

[66] *Mackintosh* 2010 par.30.
[67] *Mackintosh* 2010 par.34. The appellant was found guilty of rape and assault. The charge of assault included the detainment of the complainer in the appellant's flat and the jury convicted the appellant of this charge without any deletion or amendment of the terms.
[68] *Mackintosh* 2010 par.34.

her predicament and her failure to protect herself rather than the nature of the appellant's behaviour and his intentions towards the complainer.

While there is no legal requirement that individuals should extricate themselves from a threatening or dangerous situation, there is a suggestion in *Mackintosh* that the complainer should have attempted to free herself when she had the chance. Such an expectation may be misplaced for different reasons. Circumstances involving physical and sexual coercion are not akin to a one-off threat that one might be able to walk away from. Sexual coercion invariably involves the exploitation of a woman's vulnerability or dependence within a relationship and the assumption of a 'fight or flight' response fails to reflect the reality of available options to women. The expectation that the complainer could have tried to escape presupposes she had sufficient autonomy to make self-interested decisions as well as the physical and emotional capacity to act on such decisions[69]. This fails to take into account the nature of coercive and violent relationships and that, in attempting to escape, a woman may risk further danger, violence, punishment or that she may be too incapacitated to escape.

Agency is always situated within the exigencies of a particular set of circumstances and is shaped not only by available opportunities but by the limitations and constraints within that context[70]. It is known that various factors – including the effects of violence and coercion, the lack of financial resources or access to safe housing - may undermine a woman's sense of agency and capacity to make independent decisions[71]. In *Mackintosh*, evidence suggests that the complainer's autonomy was compromised by her social and psychological vulnerability, her semi-drugged state and the serious injuries she sustained over the four days. However, judicial reasoning in *Mackintosh* overlooked the likely impact of these factors as well as the disparity of power and capability of the parties. The complainer's agency was largely presumed on the basis of her ability to continue functioning, however difficult that must have been. Perceiving the complainer as an agent rather that a victim of exploitation, the court appeared to interpret her behaviour as demonstrating voluntary co-operation with the appellant.

[69] The inference is that, by not seeking to escape or get help, the complainer failed to protect herself. However, self-protection is not limited to escape and help-seeking behaviour. A victim of abuse may, for a myriad reasons, be unable to ask for help or escape but may still be able to protect herself in more subtle and subterranean ways that ensure her survival.

[70] Vera-Gray, F. (2016) applies de Beauvoir's concept of the 'situated embodied subject' to victims of abuse, which recognizes "both that women have agency and that it is limited by the context in which it is exercised" in 'Situating agency' in *Trouble and Strife*, http://troubleandstrife.org/2016/05/situating-agency, accessed on 20/05/2016.

[71] See Stark, E. (2010) *op.cit.,* p.207.

As Stark has observed, if women in abusive relationships are seen as agents they tend to be blamed for not escaping and, even if they are incapacitated by the abuse, their actions (in continuing to stay in a coercive or violent relationship) may be viewed as inexplicable[72].

The seeming compliance of women with the men who abuse them can be understood as the product of a relational dynamic, whereby a woman's dependence is reinforced and exploited by someone able to exert power within the relationship[73]. One example of this, which is relevant to the complainer's situation in *Mackintosh*, is where a person creates or sustains an imbalance in a relationship by facilitating an emotional dependence in order to exploit it. The imbalance which arises from a woman's extreme vulnerability may be generated in different ways; for example, through a sense of worthlessness and desperation, prior experience of abuse and substance misuse, the lack of material resources, and through social exclusion or marginalisation. The presence of all these factors can be identified in the complainer's circumstances in *Mackintosh*. Her inability to extricate herself from the appellant's grip can be understood not only in relation to the impact of physical injuries and drugs but as a product of psychological vulnerability associated with her prior drug dependence, experience of abuse and resort to prostitution.

Ultimately, the complainer's failure to attempt an escape proved fatal to judicial assessment of her detainment. This can be contrasted with judicial thinking in *Drummond* and *Dalton*, which were discussed in Chapter Three. In these cases, the court accepted that the complainer was detained by the appellant despite apparent opportunities to escape. For example, in *Drummond*, the complainer was seen on her own outside the flat on at least one occasion by a neighbour[74] and, in *Dalton*, judicial opinion was that, although the complainer could have escaped while the appellant was out of the flat and the door was unlocked, "she had been in no condition to run"[75].

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[72] Stark, E. (2009b) *op.cit.,* p.1522.
[73] See Dutton, D. and Painter, S. (1993) 'Emotional attachments in abusive relationships: A test of traumatic bonding theory', *Violence and Victims*, 8(2) 105. The is also discussed more recently in Dutton, M and Goodman, L. (2005) 'Coercion in intimate partner violence: toward a new conceptualization', *Sex Roles,* 52, Nos 11/12, June 2005 and Hanna, C. (2009) 'The paradox of progress: Translating Evan Stark's coercive control into legal doctrine for abused women', *Violence Against Women*, 15(12) 1458. An interesting example is provided by Hanna of the case of Danielle DeMedici, who appeared to co-operate with her own kidnapping and detainment by the man who eventually went on to murder her, p.1461.
[74] *Drummond v HMA* [2015] HCJAC 30 par.3.
[75] *Dalton v HMA* [2015] HCJAC 24 par.8.

Given the complainer "had done nothing to resist him", the court held that it was possible the appellant "might have thought her to be a willing partner"[76]. In reaching this decision, both the agency of the complainer and the appellant's belief in her consent were constructed through processes of decontextualisation and compartmentalisation. The complainer's agency was divorced from the relevant circumstances and largely assumed. The appellant's sexual activity was constructed as a discrete episode rather than as part of a pattern of behaviour towards the complainer. The appellant's state of mind was assessed in a snap-shot moment of time, when he told the complainer he loved her, and was disconnected from his intention in forcing the complainer to accompany him to the flat and his subsequent violence; these matters were deemed "irrelevant"[77]. Viewed through the prism of a very narrow model of violence, the multi-faceted nature of the appellant's abuse and his exploitation of the complainer went unrecognised by the court.

Boundary dilemmas

Complex issues of consent arise in the context of an intimate relationship where there is a pattern of both consensual and non-consensual intercourse. Assessing the degree of voluntariness or coercion in sexual interactions within such a relationship depends, in part, on how the appellant's behaviour and its impact upon the complainer are understood. Determining consent in such circumstances generates difficulties in demarcating the boundary between voluntary and non-voluntary responses by the complainer and distinguishing between the appellant's criminal intent and reasonable belief in consent[78]. I examine these issues in *S v HMA*[79] and *Livingstone v HMA*[80], which was discussed earlier in this chapter.

In *Livingstone*, the conviction of rape on charge 4 was appealed on the basis that, after the jury's deletions to the charge, the verdict was perverse. The complainer AD (aged 16) was involved in an intimate relationship with the appellant. Charge 4 libelled that, on various occasions, the appellant:

[76] *Mackintosh* 2010 p. 731.
[77] *Mackintosh* 2010 p. 731.
[78] While the appellant, of course, may not conceive of intercourse in either of these ways, the application of law requires that he does.
[79] *S v HMA* 2012 S.C.L. 310.
[80] *Livingstone v HMA* 2014 S.C.L. 868.

> did assault AD … pull her hair, seize hold of her, bite her nipple until it bled, bite her body, slap her on the face, pull her hair, hold her down, touch her vagina while she was sleeping and … did penetrate her vagina with [his] penis *without her consent and … did thus rape her* (these words were deleted by the jury)[81].

At trial, the complainer testified that the appellant had non-consensual intercourse with her on several occasions following the conduct detailed in the charge. Since charge 4 cites several instances of non-consensual intercourse, the period of time between the appellant's use of force and subsequent intercourse would have varied on each occasion. The complainer accepted that she frequently did not resist the appellant's sexual behaviour and "it was possible that the appellant would not have known that she was not consenting"[82]. The jury convicted the appellant on charge 4 after deleting the words "without her consent and … did thus rape her".

Given the jury's removal of the *nomen juris* of rape from the charge and an essential element of the crime of rape (non-consent), their verdict can be understood as presenting something of a quandary for the appeal court. As we saw in the last chapter, it is well established that criminal intent can be inferred from the presence of force. The appeal court accepted that the narrative element of the charge referred to conduct that was "demonstrative of the appellant having the *mens rea* of rape"[83]. The jury also seemed to accept that the appellant's behaviour did evince the use of force according to the remaining terms of the charge. However, given the complainer's lack of dissent and her testimony that the appellant may have been unaware of her non-consent, the jury appeared uncertain as to whether intercourse in these circumstances amounted to rape. Of course, the jury could simply have returned a verdict of not guilty or not proven on charge 4. Their willingness to convict the appellant of the remaining elements of the charge suggests that the jury found him guilty of something - sexually assaultive behaviour - but had reasonable doubt about his awareness as to whether the complainer was or was not consenting to intercourse. In other words, despite clear evidence of force prior to intercourse, the appellant's criminal intent was not established.

The jury's verdict raises troubling issues that the appeal court seemed disinclined to consider. The court presented their decision on charge 4 with little preamble or

[81] *Livingstone* 2014, par.5; the phrase 'pull her hair' was used twice in the charge.
[82] *Livingstone* 2014, par.10.
[83] *Livingstone* 2014 par.18.

discussion. It was held that in "the circumstances and having had regard to the description of AD's evidence", the jury's verdict was "so confused as to leave real doubt as to the criminal acts of which they were intending to convict"[84]. By examining the jury's verdict, in light of the complainer's evidence and the court's rather terse comment on it, it is possible to tease out the issues that were not articulated in judicial discourse: how is an appellant's state of mind to be assessed in the context of an intimate, abusive relationship?

In a relationship where there is a pattern of consensual and non-consensual intercourse, establishing the complainer's lack of consent on any one occasion and the appellant's awareness of her wishes, particularly when they are not conveyed explicitly, may be problematic. As we saw in Chapter Three, judicial thinking in *Keaney* suggests that there is no "true consent" where there is a pattern of sexual violence in a relationship, such that the woman may be too fearful to communicate her wishes[85]. In *Keaney*, judicial opinion was that, in such circumstances, the appellant "may be very well aware that she is not consenting" irrespective of the complainer's particular response on that occasion[86]. However, the jury's verdict on charge 4 in *Livingstone* offers a more troubling interpretation; that evidence of a background of violence and sexual coercion in an intimate relationship may not be sufficient to demonstrate criminal intent where there is no dissent expressed by the complainer.

The uncertainty of consent, particularly where circumstantial evidence appears ambiguous and inconclusive, may be resolved by focusing narrowly on the behaviour of the parties at the time of intercourse without reference to what may be perceived as the complex dynamics of a particular relationship. In this way, interactions within an abusive relationship may be assessed outside the relevant history and context and understood as a series of disparate events that happen at a particular moment in time, where the effects do not extend beyond their occurrence; a slap, a misunderstanding, an act of coercion, an apology, a sexual assault and so on. If the appellant's behaviour in *Livingstone* is disaggregated as a number of unconnected actions, then his earlier violence and the intercourse that followed may be viewed as discrete episodes. Similarly, if the complainer's passivity at the time of intercourse is understood outside

[84] *Livingstone* 2014 par.18.
[85] *Keaney v HMA* 2015 S.L.T. 102, par.22.
[86] *Keaney* 2015 par.16.

a frame of violence and its impact on her, it may be interpreted as indicating a tacit acceptance of the appellant's sexual behaviour. In this way, the appellant's physical violence may be recognised as abusive, but his sexual behaviour (and the belief that the complainer's passivity conveyed her agreement) may be seen as normal within an intimate relationship.

The possibility that a complainer is able to give meaningful consent to intercourse in a relationship where there is a pattern of abuse assumes that she retains sufficient agency to be capable of giving or withholding her voluntary agreement. The idea that a woman's autonomy remains sufficiently intact within such a relationship relies on a conception of abuse as comprising discrete acts of violence, interspersed with longer periods of non-violent behaviour. That is, the predominant pattern within an abusive relationship may be perceived as one of non-violence interrupted by periodic bouts of violence that are viewed as exceptions to the appellant's normal, routine behaviour. This understanding is predicated on a paradigm of episodic violence where the interval between violent acts is seen as providing victims with sufficient time to recover, contemplate options and make self-interested decisions[87]. When an abusive relationship is conceptualised in this way, the complainer's ability to make choices and act on them may be regarded as undamaged by the appellant's behaviour: 'she could leave but she chooses to remain'; 'she could refuse his advances but she chooses to accept them'.

The discourse of domestic violence in which abuse is understood as sporadic acts of violence limits and fragments our understanding of abuse within intimate relationships and its corrosive effects on a woman's agency[88]. It is increasingly recognised that the hallmark of an abusive relationship is not discrete, isolated acts of violence but frequent, routine, low level assaults combined with various forms of coercion, including sexual coercion[89]. Such abuse tends to be "ongoing rather than incident specific"[90] and forms a chronic rather than acute pattern: it is "a process of deliberate intimidation

[87] Stark is critical of attempts to understand domestic abuse within a paradigm of violence because it abstracts violent acts from the broader history, experiences and consequences of abuse in intimate relationships; see Stark, E. (2010) *op.cit.,* p.203.
[88] Stark's alternative model of domestic abuse as comprising multiple, overlapping forms of coercive behavior was developed in the context of the perceived failure of the violence model to account for different forms of abuse and the sense of entrapment experienced by women within an intimate relationship. See Stark, E. (2009a) *Coercive Control: How Men Entrap Women in Personal Life*, Oxford: Oxford University Press. Stark's model of coercive control is discussed later in this chapter.
[89] See Dutton, M. and Goodman, L. (2005) *op.cit.*; Stark, E. (2009a) *op.cit;* and Youngs, J.(2015) *op.cit.*
[90] Stark, E. (2010) *op.cit.,* p.207.

intended to coerce the [victim] … to do the will of the abuser"[91]. Within this conception, abusive behaviour is seen as programmatic in nature; that is, it is deliberately designed to erode a woman's capacity to make voluntary decisions by rendering her fearful of expressing her wishes or communicating any dissent. Understanding the coercive intention that lies behind domestic abuse challenges the construction of assaults as exceptional events - that is, distinct from the appellant's usual behaviour - and it undermines the reasonableness of an appellant's claim that he mistakenly interpreted the complainer's passivity as signalling her consent. However, if an appellant's sexual demands are not understood as part of a pattern of control and subjugation within an abusive relationship, they may be regarded as distinct from his physical violence. This conception of domestic violence, as comprising a series of distinct assaults against a background of normative behaviour, may allow for an appellant's claim that he mistakenly construed the complainer's silence at the time of intercourse as conveying her tacit consent.

The appellant's criminal intent with regard to charge 4 in *Livingstone* may have been found lacking for various reasons: the significance attached to the interval of time between the use of force and intercourse (as in *McKearney*); the construction of intercourse as a discrete event outside a frame of coercion and abuse (as in *Mackintosh*); the normative inferences drawn from a domestic setting and intimate relationship where there was a history of consensual as well as non-consensual intercourse; the assumption that the complainer possessed sufficient agency to express her wishes, such that her passivity could be reasonably interpreted by the appellant as conveying consent.

In *Livingstone*, the jury's removal of the term 'rape' from the charge, while problematic and suggestive that the jury didn't classify the appellant's behaviour as amounting to rape, need not have been fatal to the conviction. Given judicial willingness to take on matters that seem purely factual and recast them as legal (as we have seen in cases such as *Dodds* and *Mackintosh*), the court could have accepted that the jury left enough in the charge in relation to both the *actus reus* and *mens rea* to make out that rape had been committed. That is, applying judicial thinking in *Keaney* - that the complainer

[91] Bettinson, V. (2016] describes this pattern of abuse as comprising a combination of criminal and non-criminal tactics where the intention is to control and regulate a victim's life, 'Criminalising coercive control in domestic violence cases: should Scotland follow the path of England and Wales?' *Crim.L.R.* 3, 165, p.167.

need not refuse in order to establish rape in the context of an abusive relationship - the appellant's criminal intent in *Livingstone* could have been inferred from his pattern of violent and coercive behaviour. Particularly in the context of the 2009 Act, where consent is defined as free agreement and a belief in consent should be reasonably held, this approach might have reflected a clearer application of legal principle. Instead, the appeal court quashed the conviction on the basis of the jury's confusion and an illogical verdict. As to the underlying tensions and complexities that lay behind the judgement, judicial discourse was silent.

Similar difficulties can be identified in *S v HMA*[92]. Here, the appellant and complainer were co-habiting in a long-term, intermittent relationship. On the night of the offence, both the complainer and appellant had been out separately, drinking with friends. When the complainer returned to the flat at around 10 pm, the appellant was already there. Later that night, neighbours heard noise coming from the flat and became aware of the complainer in the stairwell. One neighbour, who took the complainer into her flat, described her as bruised, her clothing ripped and in an extremely distressed state. The complainer told her that she had been raped and the neighbour called the police. On arrival, the police discovered that the appellant had left through an open window and he was found later in his car, parked on the edge of the city. At trial, the appellant relied on his police statement in which he admitted to consensual intercourse, claiming a quarrel arose from the complainer's jealous reaction to text messages sent to a friend about attractive barmaids in the pubs he had visited. The complainer disputed this account and said that the appellant had forcibly raped her. In her account, the argument arose because she wanted the appellant to leave the flat since his presence was causing complications over her entitlement to housing benefit. The case was appealed on multiple grounds of misdirection by the trial judge, including his failure to explain that each element of the crime had to be corroborated.

In the judicial narrative of events, the complainer's account of rape was not placed in the context of an abusive relationship despite evidence of a background of violence by the appellant. Instead, the appellant's behaviour was framed within a discourse of interpersonal or situational violence comprising sporadic, episodic fights or blow-ups

[92] *S v HMA* 2012 S.C.L. 310.

between individuals[93]. This can be illustrated in the portrayal of the events that night, where the source of the violence is not identified. Through the use of euphemism and nominalisation, the cause of the violence is either obscured or attributed to the 'relationship'. As I explained in Chapter Two, nominalisation is a common grammatical device whereby action processes or elements of action are replaced with abstract nouns. While nominalisation is a useful linguistic resource for generalising and abstracting, it also elides a sense of agency and causation by removing or masking aspects of action. Its use in a text may be significant in contributing to particular processes becoming normalised or seen as self-evident.

For example, in the judicial account of events, it is the relationship that is described as "stormy" and "volatile", in which "tempers appear often to have run high"[94]; there was a "row [which] had been going on for some time and involved a lot of violent argument back and forth"[95]. This "apparently physical argument" is described as leaving "some bruising and scratching on the body of the complainer"[96]. In this way, the violence seems to be generated by the row, the argument or the relationship rather than the appellant. There is also a suggestion of mutuality or equivalence in the use of violence ('tempers', 'back and forth') rather than a possible interpretation of the complainer's behaviour as an attempt to defend herself. This mode of description contrasts sharply with the centrality of the appellant's agency in judicial discourse in *Dalton* and *Drummond*, where it is "the appellant [who was] violent and controlling", who "would lose his temper quickly and without provocation"[97] and "the appellant, [who] amongst other things, repeatedly kicked and punched [the complainer] on the head"[98].

In *S*, the judicial narrative conveys a subtle judgement of the complainer remaining in such a relationship: "<u>despite</u> [the 'stormy relationship'], <u>and</u> also an earlier allegation of forcible intercourse, the <u>complainer continued to</u> associate and cohabit with the appellant" (my emphasis)[99]. The use of 'despite', in conjunction with the simple subject-verb construction of 'the complainer continued', suggests a sense of defective

[93] Violence in relationships can be understood as isolated blow-ups or sporadic interpersonal 'fights' between individuals. This conception of domestic violence identifies a degree of mutuality of violence in relationships rather than a pattern of asymmetry based on the exercise of power. This notion of interpersonal or situational couple violence has been criticised for failing to recognise the dynamics of power within a relationship, the occurrence of other coercive tactics, and the chronicity of domestic abuse. See Hanna, C. (2009) *op.cit.*, p.1461
[94] *S* 2012 par.3; par.9.
[95] *S* 2012 par.11 .
[96] *S* 2012 par.11.
[97] *Dalton* 2015 par. 4.
[98] *Drummond* 2015 par.3.
[99] *S* 2012 par.3.

agency in the complainer's decision to maintain contact and cohabitation with the appellant. As in *Mackintosh*, the judicial focus is the nature of the complainer's response - her seeming acceptance of an abusive relationship - rather than the appellant's behaviour or its impact on the complainer. As I suggested earlier, a complainer in an abusive relationship may be presumed to possess sufficient agency and autonomy between episodes of violence to extricate herself from the relationship. However, it is well recognised that the process of leaving an abusive relationship "can be long and complex" and, for some women, problems do not end when they have left a violent partner[100].

When considering the trial judge's charge to the jury, the court in *S* identified a "further questionable feature" of his directions[101]. This related to a comment made by the trial judge that was interpreted by the appeal court as "apparently intended to assist the appellant by highlighting the need for circumspection in a case of this kind"[102]. By a 'case of this kind', the court was referring to an allegation of rape within an intimate relationship, where it was on record that the complainer had made a prior complaint of rape against the appellant. In his directions to the jury, the trial judge emphasised the need for caution in assessing the complainer's evidence:

> Just because a male and female live together in a relationship that normally includes sexual relations doesn't exclude the possibility of rape … In such a situation just the same, it should be borne in mind that the claim of rape after sexual relations have taken place can be easy for the female to make and sometimes difficult for the male to rebut. This is, of course, why the law requires there to be a high standard of proof of guilt before such a serious crime can be held to be established against an accused[103].

In the context of the complainer's earlier complaint of rape, the trial judge's comment evokes the spectre of false allegations and need for heightened scrutiny in circumstances where the appellant and complainer are in an intimate relationship. The court observed that the trial judge's "choice of language had not been ideal" and this

[100] Walby. S. and Allen, J. (2004) 'Domestic violence, sexual assault and stalking', *Home Office Research Study* 276, March 2004, p.66 and 71. Walby and Allen discuss the various problems faced by women leaving an abusive relationship and point out that, in their research, some women experienced the worst incident of domestic violence months or years after the woman stopped co-habiting with her abusive partner, p.71.
[101] *S* 2012 par.29.
[102] *S* 2012 par.29.
[103] *S* 2012 par.20.

"rather unfortunate comment" was deemed a further misdirection in respect of "the absence of appropriate reference to and directions about [consent]"[104].

The complainer appears to have anticipated the critical scrutiny urged by the trial judge in the adjustments she made to her evidence. There were inconsistencies in the complainer's statement to the police and her testimony at court as to when she last had consensual intercourse with the accused. At trial, the complainer claimed that she last slept with her partner "months ago" but, when confronted with a contradictory account given in her police statement, she admitted that she had intercourse with the appellant on the night before the rape[105]. Aware of the implicit standards against which she might be judged (which were accurately predicted in light of the trial judge's comment to the jury) and the potential difficulties in establishing her non-consent in the context of consensual intercourse on the previous night, the complainer seems to have revised her initial account in an attempt to enhance her credibility[106].

Despite inconsistencies in the complainer's evidence, the court was in agreement that this was "evidentially a strong case"[107]. Particular importance was attached to evidence of injury and damage to the complainer's clothing. Judicial opinion was that the jury accepted the complainer's account of a forcible rape and found her, ultimately, a credible and reliable witness, "notwithstanding her initial lie"[108]. The only contrary evidence was provided by the appellant "with whom the jury were plainly unimpressed"[109]. The court considered that the trial judge's misdirections were "in the nature of general omissions" and not sufficiently material to suggest that the jury's verdict would have been different if adequate directions had been provided[110]. On this basis, the appeal was refused.

Determining the question of consent and criminal intent in an intimate relationship, where there is a pattern of consensual and non-consensual intercourse, poses considerable difficulties, even where there is evidence of force. Judicial discourse in

[104] *S* 2012 par.19; par.42, per Lady Dorian.
[105] *S* 2012 par.36.
[106] One of the major reasons for not reporting rape is the fear of disbelief. The anticipation of other people's conceptions can significantly affect the victim's own perception and understanding of her experience; see Kelly, L. Lovett, J. and Regan, L. (2005) *op.cit.*, p.31.
[107] *S* 2012 par.33.
[108] *S* 2012 par.33.
[109] *S* 2012 par.33.
[110] *S* 2012 par.33.

Livingstone and *S* illustrates some of the dilemmas that arise in resolving questions of consent in such circumstances. Although the complainer's account of rape in *S* attracted critical scrutiny, the court dismissed the appeal on the strength of evidence of a forcible rape. However, despite clear evidence of force in *Livingstone*, the court upheld the appeal because of the jury's confusion as to what the appellant understood by the complainer's passivity at the time of intercourse.

Coercive control

As I explained earlier in this chapter, the availability of mutual corroboration requires a consistent pattern of behaviour by the appellant across a number of offences, amounting to a single course of criminal conduct. When these offences are committed within an abusive relationship, what amounts to a relevant pattern of behaviour depends on how abuse is understood. As we saw in *Livingstone*, a course of criminal conduct was established in relation to the appellant's sexual violence towards women who were younger than him (in relation to charges 3, 5 and 7). In *Keaney*, which was discussed in Chapter Three, the presence of force was not required on every occasion in order to establish a pattern of violence[111]. In its judgment, the court recognised a pattern of control in the appellant's behaviour: the appellant was "overly protective"; he would "monitor [the complainer] when she carried out routine tasks"[112]; the complainer would be "confined within the house" and she would have her phone-calls monitored[113]. However, the Crown did not rely on this pattern of control in establishing its case. These themes of coercion and control, which were marginal in the case of *Keaney*, were central to judicial reasoning in *KH v HMA*[114]. Here, the Crown relied on evidence of the appellant's controlling, coercive relationship with three complainers to demonstrate a relevant pattern of behaviour.

In *KH*, which was also discussed in Chapter Three, the appellant was convicted of two charges of rape and two charges of assault in respect of three women, who were his partner at the time of the offences. The appellant was convicted of the rape and assault of X in 2004. There was a second conviction of assault against Y during 2007 and 2008 and a second conviction of rape against Z in 2012. The two convictions of rape were

[111] *Keaney v HMA* 2015 S.L.T. 102.
[112] *Keaney* 2015 par.3.
[113] Keaney 2015 par.4.
[114] *KH v HMA* 2015 S.L.T. 380.

appealed on the basis that the jury were not entitled to apply mutual corroboration because of insufficient similarity and the time interval between the offences. The Crown argued that *all* the offences - the rapes and assaults - were linked by a pattern of coercive control in the appellant's relationship with each complainer and, on that basis, invited the court to apply mutual corroboration to instances of physical and sexual assault within an intimate relationship.

X described a relationship where the appellant was abusive and coercive, regularly shaking her or nipping her on the leg. She testified to one occasion of non-consensual intercourse, where the appellant persisted with intercourse to her injury, despite her telling him to stop. On another occasion, the appellant seriously assaulted the complainer, rendering her unconscious. In the GP medical records of the various injuries sustained by X, the appellant was described as "very violent"[115].

Y also described the appellant as "controlling and possessive"; he had "an opinion on everything she did, whom she saw and where she went"[116]. He bought her a mobile phone which became "a major problem" because he would call or text her "hundreds of times" to find out "what she was doing, where she was and whom she was with"[117]. If she did not answer immediately, he would demand to know why. Y described the appellant "nipping her on the leg and arm" on numerous occasions"[118]. On one occasion, she was severely assaulted by the appellant[119].

Z similarly described the appellant as controlling and coercive. After buying her a mobile phone in the second week of their relationship, he "texted her a lot and [soon] it became more frequent"[120]. He would ask her what she was doing and where she was. If she did not reply, he would become angry. She described feeling "threatened by him" as she was not sure what he was capable of[121]. Z described two instances of non-consensual intercourse when the appellant ignored her refusal. On these occasions, she "felt scared" because he persisted in having intercourse despite her saying 'no'[122].

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[115] *KH* 2015 par.7.
[116] *KH* 2015 par.8.
[117] *KH* 2015 par.8.
[118] *KH* 2015 par.8.
[119] *KH* 2015 par.8.
[120] *KH* 2015 par.11.
[121] *KH* 2015 par.12.
[122] *KH* 2015 par.14.

Although there was no allegation of sexual assault by Y, the Crown argued that her evidence effectively tied the two charges of rape by bridging the time interval between them and demonstrating an underlying unity of intent in all the offences committed by the appellant, through the type of relationship he established with each complainer. The Crown submitted that the physical and sexual assaults described by the complainers fulfilled the evidential requirements for mutual corroboration: they were "subordinates in some particular and ascertained unity of intent [or] project … which lies behind – but is related to – the separate acts"[123]. The Crown cited *Livingstone* where the court held that the evaluation of similarities and differences in the appellant's offences is a determination of fact, properly undertaken by the jury. It was only where "on no possible view of the evidence" that the offences could be said to form a single course of criminal conduct that mutual corroboration should be withdrawn[124]. Since there was no criticism of the trial judge's directions on mutual corroboration or a defence submission of 'no case to answer', determining the availability of mutual corroboration was "primarily a question of fact and degree for assessment by the jury"[125].

The Crown pointed to evident similarities in the offences: there was a significant age gap between the parties and each complainer was vulnerable: X met the appellant when she was 14 and was 16 at the time of the offence, Y was a young single mother, and Z was also a young single mother who had given birth a few months prior to meeting the appellant. The compelling similarity was the nature of the appellant's behaviour towards each complainer, which was characterised as "possessive, domineering and controlling"[126]. He used the same methods of coercion in order to control the complainer's life and ensure her wishes were subordinated to his own. The Crown submitted that, while the appellant's offences encompassed sexual and physical abuse, they were all manifestations "of the type of relationship that he habitually conducted"[127]. The question facing the court was whether such a pattern of behaviour was relevant to the application of mutual corroboration and proof of the two charges of rape. More specifically, could Y's testimony of physical assaults in the context of a

[123] *KH* 2015 par.18.
[124] *KH* 2015 par.18.
[125] *KH* 2015 par.18.
[126] *KH* 2015 par.20.
[127] *KH* 2015 par.2.

controlling and coercive relationship provide corroboration of the rapes committed in similar circumstances against X and Z?

The court was urged by the Crown to move beyond a conception of abuse as uni-dimensional, comprising discrete acts of violence, and consider the multi-faceted nature of the appellant's abuse in his relationship with each complainer. This understanding of domestic abuse is informed by a conceptual model of coercive control exercised within an intimate relationship through various means: "a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with … intimidation, isolation and control"[128]. While physical coercion may be evident in the use of force, threats and intimidation to instil a particular response, the exercise of control includes more subtle forms of surveillance, isolation or micro-management that compel obedience indirectly by seeking to limit a woman's choices and direct her behaviour.

When conceptualised in this way, domestic abuse cannot be equated simply with acts of violence. Rather, it comprises different, overlapping forms of behaviour that demonstrate a man's intention to control and subjugate his partner[129]. This understanding of abuse within an intimate relationship reflects a growing awareness that coercion and control "define an abuser's motives, a victim's experiences, and the entire context of the relationship"[130]. From this perspective, focussing solely on incidents of physical assault or sexual violence without attention to the broader pattern of coercion that underpins such abuse does not allow the full story of a victim to be heard. This conceptual framework is relevant in considering both the nature of offending within an abusive relationship and assessing the appellant's state of mind. If a pattern of coercive control is not recognised, then the underlying intention that connects seemingly disparate actions may be obscured[131]. In *KH*, the court was invited to apply this understanding in determining the availability of mutual corroboration to instances of physical and sexual abuse. By viewing the appellant's offences against all three complainers as demonstrating the same underlying intention and pattern of

[128] See Youngs, J. (2015) *op.cit.,* p.59. Youngs draws on and develops the work of earlier proponents of the model of domestic abuse as coercive control, notably Dutton, M. and Goodman, L. (2005) *op.cit*. and Stark, E. (2009a) *op.cit.*
[129] Stark, E. (2010) *op.cit.,* p.202.
[130] Thomas, K. *et al* (2014) 'Strangulation as Coercive Control in Intimate Relationships', *Psychology of Women Quarterly*, Vol.38 (1) 124, p.125.
[131] Youngs, J. (2015) *op.cit.*, p.62.

behaviour, they could be understood as constituent parts of a system of coercive control.

In judicial reasoning, the court recognised that, in applying mutual corroboration, different types of offences may be intimately connected. In *MR v HMA*[132], for example, the court had accepted an underlying connection between physical and sexual abuse perpetrated by the appellant within the same family unit. However, in *KH*, the court did not accept the probative value of Y's testimony of physical assault in relation to X and Z's accounts of non-consensual intercourse. In the absence of any allegation of sexual abuse by Y, the time interval between the two rape charges was considered too great and there was no "special or extraordinary feature" to connect them[133]. Without any reference to the 'on no possible view' test proposed in *Livingstone*, the court perceived the matter to be a legal question regarding the legitimate scope of the doctrine rather than an assessment of fact and degree for the jury. The judicial conclusion was that mutual corroboration could not be applied in such circumstances.

In many ways, the conceptual model of coercive control appears to fit the evidential requirements of the *Moorov* doctrine. Both are based on the identification of a consistent pattern of behaviour where the offences reveal the same intention and can be understood as component parts of a larger project. In relation to coercive control, that larger project is a man's domination and control of a female partner within an intimate relationship. In judicial discussion, the court recognised that "physical abuse and sexual abuse … may be placed on the same spectrum [and have] much the same motivation"[134] and appeared sympathetic to the potential relevance of a model of coercive control in linking offences within an abusive relationship: "we understand the advocate depute's argument" [135]. The use of 'understand', here, suggests an appreciation of the theoretical proposition advanced by the Crown, rather than literal comprehension. The court also accepted that "there will be cases where it will not be possible to make a neat distinction as between physical, on the one hand, and sexual abuse, on the other"[136].

[132] *MR v HMA* [2013] HCJAC 8.
[133] *KH* 2015 par.30.
[134] *KH* 2015 par.32-33.
[135] *KH* 2015 par.32.
[136] *KH* 2015 par.33.

While the court was willing to recognise that abuse is multi-faceted, it was not prepared to apply that understanding to mutual corroboration "at least in the circumstances of this case"[137]. While the relevant offences need not have the same *nomen juris*, there must be sufficient "similarity of the conduct described"[138]. Ultimately, the court could not accept that evidence of physical assault was available to corroborate the accounts of rape; that "would be to take a step … not justified by authority"[139]. However, judicial opinion was that "evidence of attempts to rape or other sexual assaults involving penetration" may have been "relevant to the proof of an allegation of completed rape"; [140]. The willingness to consider such an approach, in principle, suggests that the judicial door remains open to the relevance of coercive control in applying mutual corroboration to varied offences of domestic abuse[141].

The price of consent

In the cases discussed so far, judicial assessment of a pattern of behaviour arose in relation to the appellant's offences against multiple complainers, or the type of relationship he established with different complainers, or his behaviour towards a single complainer over a period of time. The relevance of a particular pattern of behaviour arose in different circumstances in *CJLS v HMA*[142], where the court considered the appellant's conduct towards a woman involved in street prostitution. The question facing the court was whether the appellant honestly believed the complainer was consenting to an agreed sexual transaction or whether criminal intent could be inferred from his threatening and intimidating behaviour. In reaching its decision, the court considered the nature of the appellant's behaviour in the context of an established pattern of sexual exploitation and coercion experienced by women working on the streets.

In *CJLS*, the appellant was convicted of raping the complainer DSG. DSG worked on the streets in central Glasgow and had resorted to prostitution because of her drug habit.

[137] *KH* 2015 par.33.
[138] *KH* 2015 par.34.
[139] *KH* 2015 par.35.
[140] *KH* 2015 par.35.
[141] At the time of writing (April 2017), the Domestic Abuse (Scotland) Act has been introduced by the Scottish Government, creating a new offence of domestic abuse which encompasses a wide range of criminal behaviour. It is hoped that this will address the full spectrum and cycle of coercive control experienced by victims in an intimate relationship. It is uncertain how this Bill, if enacted, will shape the indictment of offences of sexual assault that take place in the context of domestic abuse and whether courts may be more willing to apply mutual corroboration to a range of offences that are linked by a pattern of coercive control.
[142] *CJLS v HMA* 2009 S.C.L. 1255; this was prior to the introduction of the 2009 Act.

She testified that she agreed to perform certain sexual services not amounting to intercourse but had been forced by the appellant to have intercourse with him, without the use of a condom. The appellant claimed that intercourse was consensual and that he had paid DSG £20 for the service. At trial, the appellant was convicted of rape and his conviction was appealed on grounds of misdirection and that the trial judge erred in rejecting a defence submission of 'no case to answer'. The defence argued that there was no corroboration of the appellant's criminal intent and that the trial judge misdirected the jury by suggesting that corroboration could be found in the disparity between the value of the sexual service provided and what was actually paid.

On the evening of the offence, DSG and NS had taken heroin earlier that day and were "rattling" because of heroin craving, which was causing hot sweats, sore legs and nausea[143]. Both women awaited customers near a cashpoint in central Glasgow, where they met the appellant. The appellant withdrew £20 from the cashpoint and approached NS. He asked her for oral sex without a condom for £20, which she refused. DSG agreed but, "in an aside" to NS, explained that she would not do it without a condom and that she would persuade him to wear one[144]. The appellant drove DSG in his car to a secluded area. Although the complainer tried to engage him in conversation, the appellant "had not been responsive" and she said that she was picking up "bad vibes" and that "he looked scary"[145]. When the car stopped, the appellant sat in silence for some time, which DSG found "unnerving" (par.8). She asked him if he was ready for business[146].

The next stage would have been for the appellant to give her the money. Instead, he opened the car door, looked out and, according to the complainer, said words to the effect that "if you want to see the streets again, you will have to do what I say"[147]. DSG said her immediate reaction was to laugh but, when she looked at his face, she realised "he was not joking". She took what he said as "a threat and became scared"[148]. The appellant then told her to take off her trainers and put them in the back of the car, which she did. The complainer was frightened because she understood that this was

[143] *CJLS* 2009 par.6.
[144] *CJLS* 2009 par.7.
[145] *CJLS* 2009 par.8.
[146] *CJLS* 2009 par.8.
[147] *CJLS* 2009 par.8.
[148] *CJLS* 2009 par.8.

intended to "discourage her from escaping"[149]. She said that he "made her" perform oral sex, after which he told her to remove all her clothes and go on top of him for full intercourse, which she also did[150]. No condom was used at any stage. DSG said she did not want to have intercourse and she told him that at the time.

DSG explained that she felt "sick and scared" throughout the experience[151]. When it was over, she put her clothes on and the appellant drove her to the city centre. As they passed a police car, the appellant told her to "pretend to have a conversation with him"[152]. When she got out of the car, the appellant said "there's a tenner" but she told him she did not want it[153]. She was unaware what happened to it as she had no money on her when interviewed by the police. It was possible that she might have taken it but, as she said in her statement to the police, she did not think that she had. After the complainer left the appellant, she "felt numb, sick and shocked"[154]. After discussing the matter with other street workers, she reported it to the police on patrol that night. When speaking to the police, she was still "upset, angry and crying"[155]. DSG told one of the officers that she had been threatened and then raped. In his testimony at trial, the police officer confirmed the account given by DSG and described her as "crying, looking as if she were in shock and shaking"[156].

The terms of the indictment indicate the presence of constructive force through the use of threat: "[the appellant] did assault DSG … threaten her, compel her to remove her clothing, compel her to [engage in oral sex], compel her to sit on top of you, seize hold of her and move her up and down, attempt to kiss her on the mouth and did rape her"[157]. The trial judge directed the jury that, unless they accepted the appellant's threat, "there was no case"[158]. In his charge to the jury, the trial judge stated that corroboration of the appellant's criminal intent could be found in the "combination of the evidence of distress and under-payment and indeed non-payment before the actual event occurs"[159].

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[149] *CJLS* 2009 par.8.
[150] *CJLS* 2009 par.8.
[151] *CJLS* 2009 par.9.
[152] *CJLS* 2009 par.8.
[153] *CJLS* 2009 par.9.
[154] *CJLS* 2009 par.9.
[155] *CJLS* 2009 par.9.
[156] *CJLS* 2009 par.9.
[157] *CJLS* 2009 at 1255.
[158] *CJLS* 2009 par.3.
[159] *CJLS* 2009 par.3.

Evidence at the trial suggested that, generally, intercourse would incur a higher price than the appellant paid particularly where a condom was not used, although prices might be reduced in certain circumstances. The complainer was asked in some detail as to "how she plied her trade"[160]. She explained that, generally, the type of business and the price for it would be agreed and paid in advance. She charged between £15 and £20 for oral sex and £40 for intercourse[161]. She never performed any of these services without a condom although she was aware that others did. On occasion, she said she might reduce her price if the man did not have the right amount of money. Oral sex would be performed while she was fully clothed and only her "bottom half" of clothing would be removed for intercourse[162]. She had never removed all her clothes for any sexual service. Another street worker, NS, confirmed the practices and prices described by DSG.

At the first hearing of the appeal court, there was considerable uncertainty as to whether the case involved force. The defence argued that no force was involved and that the case had not been put to the jury on the basis that distress on its own could corroborate the appellant's *mens rea*. The Crown maintained that there was evidence of constructive force: a "threat had been issued and the complainer had been compelled to remove her clothing"[163]. The approach taken by the trial judge had been "unnecessarily cautious" and the appellant's threat and the complainer's distress provided sufficient corroboration of the complainer's account. The Crown cited previous cases of *Spendiff*[164] and *Burzala*[165] (which I discussed in Chapter Three), where corroboration was provided by the complainer's distress in conjunction with other circumstantial evidence. The Crown argued that, as in *Spendiff* and *Burzala*, the inference of criminal intent could be "drawn from the whole circumstances" of the case[166]. On the basis of these submissions, the court requested transcripts of relevant trial evidence.

[160] *CJLS* 2009 par.4.
[161] *CJLS* 2009 par.4.
[162] *CJLS* 2009 par.4.
[163] *CJLS* 2009 par.15.
[164] *Spendiff v HMA* 2005 J.C. 338.
[165] *Burzala v HMA* 2008 S.L.T 61.
[166] *CJLS* 2009 par.14.

At the second hearing, it became "ultimately common ground" that the complainer's account did not amount to forcible rape[167]. The court accepted there was sufficient evidence of the complainer's lack of consent to intercourse. The "controversy" was whether there was any corroboration of the appellant's criminal intent[168]. The Crown submitted that this could be inferred from the appellant's refusal to use a condom, his under-payment and non-payment before the service was rendered. The defence argued that this material was insufficient to establish criminal intent given the lack of universal practices regarding payment, use of condoms and timing of payment[169]. The court agreed that the only evidence that was *potentially* capable of providing corroboration related to the practices and pricing in the particular sector of the sex industry in which the complainer worked.

In judicial discussion, the dominant discourse is of sexual commodification and the market economy of sexual services. The focus was not only the complainer's own practice (since the appellant had not previously used her services) but "the practice in the market generally in the area in question" of which the appellant "as an habitual user of prostitutes" could be expected to be aware[170]. According to NS's testimony, full sexual intercourse cost around £40 and, generally, payment would be provided in advance. If a client changed his mind, payment could be re-negotiated but any additional sum would also be paid upfront. While condom use was widely practiced, it was not universal. On this basis, the appellant's claim to have paid the complainer £20 would represent a 50% discount off the normal price. However, in her evidence to the court, NS also stated that "some girls in need of heroin would perform oral sex for as little as £10" and, on occasions, "clients had received the service without making [any] payment … and sometimes a payment was never made"[171].

Based on evidence of the coercive practices associated with the sex industry, including the routine exploitation of street workers, the court accepted that the reduced payment given by the appellant could be understood as part of the general pattern of behaviour

[167] *CJLS 2009* par.22. In *Spendiff*, the appeal court accepted that the evidence amounted to a forcible rape although the case was not argued in these terms at trial. Conversely, in *CJLS*, the court was reluctant to accept the case as one of forcible rape, although it appeared to have been presented at trial (and accepted by the jury) as one of constructive force.
[168] *CJLS* 2009 par.22.
[169] *CJLS* 2009 par.13.
[170] *CJLS* 2009 par.23.
[171] *CJLS* 2009 par.19; par.24.

in that market[172]. According to judicial reasoning, the appellant's conduct could not be viewed "as other than a feature of the fluidity of the market indicated in the evidence of the two prostitutes"[173]. In this light, the appellant's behaviour towards the complainer did not demonstrate the necessary criminal intent to have intercourse knowing she was not consenting or reckless as to her consent. Given the prevalence of coercion - refusal to wear a condom, the under-payment or sometimes non-payment of street workers - the judicial conclusion was that there was "no evidence capable of giving rise to the inference of *mens rea*"[174]. In this way, the appellant's intention towards the complainer was assessed in purely commercial terms, in which his coercive and threatening behaviour amounted to little more than hard bargaining[175].

Judicial thinking, here, can be understood as part of a broader libertarian discourse which suggests that prostitution is a job, like any other, and that those involved in prostitution freely enter into a 'contract' in which one person 'supplies' and the other person 'demands' sex[176]. As the evidence in *CJLS* suggests, this 'work' routinely involves exploitation and coercion, and the degree of choice exercised by women entering prostitution or surviving within it is often extremely limited[177]. Given the relevant conditions and practices of the sex industry, particularly with regard to street prostitution, the complainer's experience of the appellant's coercive and intimidating behaviour was understood as part and parcel of her 'trade'. Had the complainer in *CJLS* not been involved in prostitution, the appellant's behaviour - in threatening the complainer, forcing her to remove her trainers and put them out of reach, compelling her to strip naked - would have provided a clear basis for inferring criminal intent. For example, in many respects, *CJLS* is comparable with *Kim*, where *mens rea* was inferred

[172] *CJLS* 2009 par.29.
[173] *CJLS* 2009 par.29.
[174] *CJLS* 2009 par.28. It is debatable whether, in the context of the 2009 Act, such a large discount provided on a commercial basis would be considered reasonable grounds for the appellant's belief in consent.
[175] Gauthier, J. (1999) argues that a '*quid pro quo'* model of exchange theory, which rationalises the provision of services for financial gain, cannot be applied meaningfully to prostitution because of the marked asymmetry of power between the parties. According to Gauthier, such a model disregards the way in which coercion resides in the context in which seemingly voluntary decisions are made, in Burgess-Jackson, K. (ed) *A Most Detestable Crime: Philosophical Essays on Rape*, Oxford: Oxford University Press, p.81.
[176] Matthews, R. (2015) identifies a libertarian tendency in social sciences that supports the notion that prostitution can be understood as 'sex work' and that those involved in prostitution are freely entering into contract with their 'customers', in 'Female prostitution and victimization: A realist perspective', *International Review of Victimology*, Vol.21(1) p.85.
[177] A libertarian exchange model is challenged by the argument that prostitution involves a form of intimacy that is inextricably bound up with one's sense of self and identity. It is the violation of this sense of self and identity which makes the experience of prostitution so damaging. If street prostitution is understood as a choice, then it is a 'choice' of last resort in that women are driven to work on the streets when all other options run out, through poverty, prior sexual abuse, homelessness, trafficking, substance abuse and dependence; see Coy, M. (2009) 'Invaded spaces and feeling dirty', in Horvath, M and Brown, J. (eds) *Rape: Challenging Contemporary Thinking*, Devon: Willan Publishing, p.186.

from the appellant's behaviour in very similar circumstances[178]. As in *CJLS,* the complainer was picked up by a stranger, driven to a secluded spot where she was detained in his car, unable to escape, and then compelled into having intercourse. As we saw in Chapter Three, the inferences drawn from these circumstances were sufficient to exclude the possibility of the appellant's honest belief in consent. While the jury in *CJLS* appeared to interpret the appellant's threat and intimidating behaviour towards the complainer as indicative of constructive force, the appeal court found the same evidence incapable of supporting such an inference. Instead, the appellant's behaviour towards DSG was constructed outside of a criminal frame of reference.

As I explained earlier in this chapter, an honest belief in consent requires some evidence as to what the appellant did think or believe in the particular circumstances. In *CJLS*, evidence of coercive practices and routine exploitation of women engaged in street prostitution met that requirement. Given the vulnerability and desperation of women involved in street prostitution, practices and pricing could be seen as "fluid"; there was always "room for manoeuvre"[179]. The court considered that it was possible that the appellant honestly believed the complainer was consenting to sex on his terms. When evaluating the appellant's state of mind, the court seemed unwilling to accept that criminal intent could be inferred from behaviour that is customary or habitual in certain contexts. In this way, the appellant's intention towards the complainer was not assessed in relation to the inferences normally drawn from threatening behaviour, but by considering whether the discounted price he paid was within market norms. Here, paradoxically, the appellant's belief in consent was rendered credible precisely because his treatment of the complainer conformed to an established pattern of sexual exploitation and coercion experienced by street workers at the hands of their 'clients'. When framed within the context of street prostitution, an honest belief in consent could be inferred from the appellant's initial discussion with the complainer and her agreement to get into his car. Thereafter, the matter of consent was just a question of price.

Acts of coercion and intimidation are not automatically defined as such but are constructed within a social and legal context. In *CJLS*, the narrative of a woman compelled into having intercourse through threat and fear became marginalised within

[178] *Kim v HMA* 2005 S.L.T. 1119; this case is discussed in more detail in Chapter Three.
[179] *CJLS* 2009 par.13.

a dominant discourse that focused on the pricing and practices associated with street prostitution. The nature of judicial reasoning reflects the lens through which the sexual encounter was perceived; that is, through the eyes of a purchaser of sex. This was made possible by the application of a subjective test in assessing the appellant's belief in consent. Judicial discourse in *CJLS* reflects the dehumanising and sexual commodification of a woman whose experience of coercion and intimidation was not legally recognised.

Conclusion

In this chapter, I have shown how consent is understood and evaluated in relation to particular patterns of behaviour. Judicial identification and assessment of relevant patterns of behaviour depends on various factors; for example, the conceptual models that are relied on, the value attached to particular circumstantial factors, the construction an overarching narrative that establishes an underlying theme, or the particular mode of reasoning applied by the court. These elements of judicial discourse are not fixed by substantive law or evidential requirements but are the product of particular choices, value-based judgements or policy considerations. As such, they reflect the exercise of discretion and demonstrate the heterogeneity of ideas contained in judicial discourse of consent.

Judicial evaluation of consent is shaped by broader social discourses relating to domestic abuse. If sexual coercion is understood within a narrow model of violence, it may be seen as a discrete, isolated event rather than as part of a pattern of subjugation or exploitation. In this way, the multi-faceted nature of abuse in a relationship may not be fully recognised in judicial discourse. Understanding sexual assault in the context of a pattern of coercive control allows connections to be made between different types of abuse, including sexual and non-sexual behaviour, and violent and non-violent actions. Applying this understanding in assessing criminal intent challenges the reasonableness of the appellant's claim that he made an honest mistake about consent or mistakenly interpreted the complainer's passivity as indicating her voluntary agreement. My analysis suggests that, in context of the 2009 Act, judicial discourse may be slowly shifting from a narrow assault-based model of violence towards a conception of abuse as comprising different forms of abusive behaviour, including sexual coercion.

The concept of 'true consent' sits uncomfortably in circumstances where there are marked disparities of power and vulnerability in the relationship between the parties[180]. Determining the question of consent in such circumstances depends on the point in the continuum where agency and choice shade into coercion and exploitation. This, in turn, depends on whether the appellant's sexual behaviour is understood in the context of his broader pattern of behaviour and its impact on the complainer and whether the complainer's agency is situated within the constraints of a particular set of circumstances. If judicial assessment of the appellant's intention towards the complainer focuses on the moment of intercourse, then criminal intent may be seen as absent. Similarly, if sexual coercion is not recognised as a deliberate attack on a woman's autonomy, the ambiguity that may be read into her passivity can be interpreted as a form of victim compliance. It is only when the appellant's behaviour and its effects on the complainer are understood in the context of the history, dynamics and exercise of power within a particular relationship, that a pattern of abuse may be identified.

[180] The phrase - 'true consent' - was used by the court in *Keaney* when considering the possibility of a meaningful consent in the context of an abusive relationship, *Keaney v HMA* 2015 S.L.T. 102, par.22.

Chapter Five The Dynamics of Distress

A central focus in judicial discourse is the complainer's response to rape and what may be inferred from her distress after the event. This focus is generated, in part, by the evidential value of the complainer's emotional reaction to rape. The doctrine of corroboration by *de recenti* distress provides a special rule in Scots law for cases of sexual assault, where evidence of the complainer's distress afterwards may corroborate her lack of consent[1]. While such evidence cannot confirm the nature of the sexual act, it can support her account that she did not consent to whatever took place. Once intercourse is established by the appellant's admission or by DNA evidence, evidence of distress may corroborate her lack of consent and, in certain circumstances, the appellant's awareness that she was not consenting[2]. Application of this doctrine requires independent testimony of the complainer's distress, which should be observed immediately or soon after the event. Her distress should be genuine and arise spontaneously because of the rape rather than circumstances outside it[3]. Where there is a sole complainer, evidence of her emotional response may provide the only available corroboration of her account of rape[4]. How the complainer's reaction to rape is understood, and the inferences drawn from her distress, is an important aspect of judicial discourse of consent.

In this chapter, I consider how questions of consent are determined through judicial understanding and appraisal of the complainer's response to rape. By examining different elements of discourse, I identify various factors that shape judicial assessment of the complainer's behaviour. I consider the value that is attached to prompt reporting of the rape and I relate this to historical practices where the victim was required to notify the community and raise help immediately after the event. Judicial discourse is also informed by particular conceptions of emotion and assumptions about

[1] The evidential value of *de recenti* distress is set out in *Smith v Lees* 1997 J.C. 73 and *Fox v HMA* 1998 J.C. 94.
[2] As I will go on to show in this chapter, there is considerable diversity in what courts are willing to infer from the presence of distress and the circumstances in which it was expressed.
[3] As set out in *Smith v Lees* 1997 J.C. 73.
[4] As Lord Hope (2009) observes, "sexual abusers are like highwayman robbers. The places that they select for the outrages that they perpetrate on defenseless women and children - and it is almost always women and children who are their victims - are lonely and unfrequented places where what they wish to do to them will not be seen. The only corroboration that the circumstances are likely to admit is the effect of what they have done on the victim", 'Corroboration and Distress: Some Crumbs from Under the Master's Table', a Lecture delivered in honour of Sir Gerald Gordon on 12/6/2009 in the University of Edinburgh;
https://www.dawsonera.com/reader/sessionid_1439898767753/print/view/false?printOption=range&start=128&en

how individuals respond to traumatic events, such as rape. In my analysis, I identify and examine these assumptions. I consider how different emotional presentations by the complainer, including the lack of emotion or what may be perceived as more ambiguous or discrepant responses, are understood in judicial discourse. The evidential value of distress depends on it being ascribed to the absence of consent rather than other factors. The question of attribution arises, therefore, in circumstances where the victim appears to blame herself for what happened. I examine how issues of attribution and blame are understood in judicial discourse. Although the court normally focuses on post-event distress, the complainer's emotional state before the rape may also be seen as relevant in certain circumstances. I explain how this is established through a process of inferential thinking.

Immediate reporting

In evaluating the complainer's response to rape, the court may consider whether the rape was reported to the police soon afterwards or, failing that, whether the complainer told her family or friends what had occurred. In *McCrann v HMA* [5] and *CJN v HMA*[6], the complainer did not notify the police or, indeed, tell anyone about what had taken place until some time later. In my analysis of these cases, I consider how the complainer's behaviour was understood in judicial discourse. In doing so, I relate the primacy attached to the prompt reporting of rape to the traditional role accorded to victims of crime in raising the hue and cry immediately after the event[7].

In *McCrann*, the complainer and appellant had been in a relationship and remained on friendly terms, 11 years after their separation. According to the complainer, the rape took place one evening when the complainer visited the appellant to give him a present and retrieve her watch. The appellant was charged and convicted of rape in the following terms: "you did assault the complainer, seize her by the arms, force her onto a settee there, remove her clothing, kiss her on the lips, pin her to the settee, loosen your clothing, lie on top of her, force her legs apart and did rape her"[8]. The details of the charge provide the only account of the rape in the case report, which focuses

[5] *McCrann v HMA* 2003 S.C.C.R. 722.
[6] *CJN v HMA* 2013 S.C.L. 18.
[7] As I will go on to explain, raising the hue and cry was a medieval practice in Britain whereby victims of serious crime were expected to raise the alarm, summon help and notify the local community about what happened as soon as possible.
[8] *McCrann* 2003 par.1.

exclusively on the complainer's behaviour afterwards: "we need not go into the details [of the alleged rape]. For the purposes of the appeal, [the complainer's] subsequent actings are what matter"[9]. The appellant's conviction was appealed on two grounds: there was insufficient evidence of non-consent; and the complainer's distress was incapable of corroborating her account[10].

At trial, the complainer said that she walked home alone after the rape, arriving at around midnight. The complainer did not tell her children what happened that night or the following day; nor did she phone anyone or report the rape to the police. She explained that her daughter (aged 14) was asleep when she got back and she did not want to tell her son (aged 23) because she "had been assaulted by someone whom he knew well"[11]. Since it was after midnight, she considered that "it was too late to telephone anyone"[12]. On the following morning, the complainer went to work as a teaching assistant in a local primary school and attempted to behave as normal. She attended a training session for the duration of the morning. During the lunch break, the complainer became upset when the appellant phoned her. She rushed from the staff room to the toilets and, when questioned by two colleagues, she said that the appellant "had forced himself on her" the previous night, adding "I don't think it was rape because he didn't beat me up"[13]. One colleague explained that if it was against her will then it amounted to rape and she gave the complainer telephone numbers for Rape Crisis Centre and Victim Support. It was at this point that the complainer contacted the police.

At the appeal, the court considered it significant that the complainer "failed to complain of rape to any other party the same night" and that she also "failed to complain of rape to anyone to whom she spoke" when she arrived at work the following day[14]. In the judgment, the court repeatedly emphasised the "failure [of the complainer] to complain of rape to anyone to whom she spoke during the period up to 1pm … [including] any other party to whom she might have been expected to complain; for example, to any of her relatives or friends or to the police"[15].

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[9] *McCrann* 2003 par.4.
[10] I will discuss the complainer's emotional response and how this was understood by the court later in the chapter.
[11] *McCrann* 2003 par.7.
[12] *McCrann* 2003 par.6.
[13] *McCrann* 2003 par.6.
[14] *McCrann* 2003 par.16.
[15] *McCrann* 2003 par.16 .

In *CJN*, the complainer did not tell anyone what had happened until some time after the rape. Here, the complainer had gone to a party held by her "best friend", Miss C[16]. At the time, Miss C was in a relationship with the appellant and was shortly expecting their first child. Those attending the party were "mostly teenagers"[17]. In her account, the complainer said she drunk at least three quarters of a bottle of wine. Other witnesses said she consumed much more than this and that she "was very drunk"[18]. Towards the end of the party, the complainer left to get the last bus home, accompanied by two young men. The complainer said she felt "rather strange" on leaving the flat and believed "someone might have spiked her drink"[19]. Feeling unwell, she went into the close of nearby flats, where there was some kind of sexual encounter with the young men who accompanied her. The complainer could not remember the detail of what happened. What she did remember was being alone in the close, with some of her clothing off, when the appellant entered. Realising that the appellant wanted to have intercourse with her, the complainer told him "she was not prepared to have sex with him because he was the boyfriend of her friend, Miss C"[20]. Despite her refusal, he pushed her onto the stairs and proceeded to have intercourse without her consent. The complainer did not tell anyone what happened until several weeks later when she confided in a friend, who took her to discuss the matter with her older sister, Miss F. It was after this discussion that the complainer reported the rape to the police.

At trial, the appellant relied on his police interview in which he admitted having consensual intercourse with the complainer. He was convicted of rape and the conviction was appealed *inter alia* on grounds of misdirection regarding the evidential value of the complainer's distress after the event[21]. At appeal, importance was attached to the delay by the complainer in reporting the rape. As in *McCrann*, the court considered it significant that the complainer failed to say "there and then that she had been raped"[22] and that she had not confided in her sister - her "first natural confidant" - or others "whom she might have been expected to confide in, nearer the time"[23].

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[16] *CJN* 2013 par.3.
[17] *CJN* 2013 par.3.
[18] *CJN* 2013 par.3.
[19] *CJN* 2013 par.3.
[20] *CJN* 2013 par.3.
[21] I will discuss judicial reasoning about the complainer's distress later in this chapter.
[22] *CJN* 2013 par.5.
[23] *CJN* 2013 par.5 .

In *McCrann* and *CJN*, the court did not consider the possible reasons for the delay in reporting. Rather, the perceived failure of the complainer to report the rape appeared to render her an equivocal victim[24]. The underlying assumption would seem to be that a genuine victim would have reported the rape soon afterwards or at least confided in trusted members of her family or friends about what had occurred. Judicial observation of the complainer's failure to inform the relevant authorities of the rape evokes the historic role accorded victims of serious crime to raise the hue and cry immediately after the event. The term hue and cry derives from an old Anglo-Norman legal phrase which, at the time of its usage in medieval Britain, was synonymous with the necessity for a victim to create a loud clamour and public outcry immediately after the event and, by doing so, alert and enlist the help of the local community[25]. Under this medieval rule, "the injured party, in the language of the old law, should make immediate hue and cry … after the occurrence of the outrage"[26].

The raising of the hue and cry facilitated a form of self-policing of various forms of criminal and unacceptable behaviour by creating reciprocal obligations within a community[27]. In an era where there was no official police force and the job of fighting crime fell on ordinary people, it was the victim's responsibility to raise help and warn the local neighbourhood as soon after the incident as possible[28]. On hearing the alarm raised, members of the community were expected to leave what they were doing and go to the scene to give whatever assistance was needed[29]. For example, a local *posse* would form to give chase to a fleeing criminal or members of the community would accompany and support the victim as she publicly demonstrated her injury to others. To establish a complaint of rape, particular actions were required of the victim: "while the act is fresh she ought to repair with the hue and cry to the neighbouring vills (sic) and there display to honest men the injury done to her, the blood and her dress stained

[24] Kelly, L. Lovett, J. and Regan, L. (2005) identify various factors which may affect a victim's decision to report rape; the risk of not being believed, of being blamed, of having her behaviour exposed and scrutinised, not wanting to talk about what happened, inability to recall important aspects of the events (particularly if the victim was intoxicated), continuing disbelief and denial, numbing and detachment, and feelings of shame and humiliation, *op.cit.* p.31.

[25] Huer is an old French verb meaning to shout or the sounding of a bugle or trumpet. The term comes from the Latin *hutesium et clamor* which roughly translated means with horn and voice. See Mitchell, L. (2016) *Voices of Medieval England, Scotland, Ireland and Wales: Contemporary Accounts of Daily Life*, California: Greenwood, p.175.

[26] Kenmore, C. (1984) 'The Admissibility of Extrajudicial Rape Complaints', 64 *B.U.L.Rev*. 199, p.205.

[27] The practice of raising the hue and cry was prevalent both in Scotland and England; see Muller, M. (2005) 'Social control and the hue and cry in two fourteenth century villages', *Journal of Medieval History* 31 29, p.33; Hammond, H. (2013) *New Perspectives on Medieval Scotland 1093-1286*, Studies in Celtic History, Suffolk: Boydell Press, p.168. Other references to the practice of the hue and cry in Scotland can be found in Taylor, A. (2016) *The Shape of the State in Medieval Scotland*, Oxford: OUP, p.114.

[28] Kenmore, C. (1984) *op.cit*., p.205; the author discusses the tradition and roots of raising the hue and cry in Medieval Britain.

[29] Hinton, M. (2003) 'And the Riot Act Was Read', 24 *Adel.L.Rev*. 79, p.83.

with blood, and the tearings of her dress … and make her appeal"[30]. In this way, raising the hue and cry allowed for informal proof by witnesses who could observe the victim immediately after the event; for example, the condition of her clothing, the presence of blood or bruising and her protestations and distress[31]. Although this practice ended in the mid 18th century, the credibility of the victim and the veracity of her allegation continued to be associated with a prompt complaint long after the practice ceased[32].

As official prosecution and the judicial system developed, the prosecuting authority retained the burden of proving that the victim complained shortly after the offence and statements made at the time of lodging the complaint were admissible in aid of proof[33]. In the 1800s, as courts increasingly questioned the practice of admitting extra-judicial statements by the victim, an exception was permitted in the case of rape[34]. The fact that a rape victim reported the offence soon after it was committed was admissible for purposes of corroboration. While courts did not articulate the reason for allowing this exception, possible explanations may have been the historical requirement to prove that the act took place against the victim's will as well as the desire to circumvent vexatious claims of rape[35]. The inference that the woman was an unwilling victim was drawn, therefore, from the fact that she notified the relevant authorities soon after the rape. The corollary of this was that the failure of a victim to complain at the time could be construed as inconsistent with her subsequent testimony at trial[36]. Essentially, the rationale was that silence in the face of circumstances that were understood as "compelling speech" was equivalent to a prior inconsistent statement by the victim, undermining her credibility and the legitimacy of her claim[37].

The assumption - that it was "natural" for a genuine victim to speak out after the rape - may have made sense in the medieval age, when the system of community support, policing, investigation and proof relied on the fulfilment of reciprocal duties by

[30] Kenmore, C. (1984) *op.cit.*, p.210; see also Histed, E. (2004) 'Medieval rape: a conceivable defence?', *Cambridge Law Journal*, 63(3) 743, p.757.
[31] Muller argues that the role of women in 'community policing' was important and integral to keeping order in the communities. From her research, she suggests that raising the hue and cry was used "primarily by women to protect themselves … and allowed women to be active mediators in conflict resolution and community policing", see Muller, M. *op.cit.*, p.52.
[32] Stanchi, K. (1996) 'The Paradox of the Fresh Compliant Rule', 37 *B.C.L. Rev*., 441, p.446.
[33] Kenmore, C. (1984) *op.cit.*, p.205-6. Kenmore describes how the victim's complaint was admitted as proof in the context of the development of official prosecution and the judicial system.
[34] Kenmore, C. (1984) *op.cit.*, p.205.
[35] Kenmore, C. (1984) *op.cit.*, p.206.
[36] Kenmore, C. (1984) *op.cit.*, p.207.
[37] See Stanchi, K. (1996) *op.cit.,* p.446.

members of the local community[38]. However, such an assumption is more difficult to substantiate in contemporary society given advances in knowledge as to how victims experience and respond to sexual offences, such as rape. It is well recognised that immediate reporting is not a typical response by victims of rape[39]. As I explained in Chapter One, few rapes fall within the paradigm of a 'real rape' and many victims fail to recognise immediately - or for some time - that their experience is one of rape, despite the fact that what occurred fell squarely within the legal definition[40]. This suggests that a victim may require some time to make sense of her experience before being able to label it as rape.

The association of prompt reporting with the credibility of the rape victim also assumes that the initial response to an event imparts a truth or reality free from interpretation. However, there is always a large element of construction and interpretation, however rapid and implicit, in any response to an event[41]. While an immediate reaction may appear to reflect a raw, unformed experience, it is inevitably shaped by the particular lens or interpretative framework through which the event was experienced[42]. As Scheppele has explained, what may characterise an initial reaction is the application of an *uncritical* interpretation, which is then subject to revision and modification as the victim comes to understand her experience and the nature of the event in a different light[43].

Understanding delayed reporting of rape in terms of the victim's incomplete awareness of the nature of her assault is relevant to the circumstances in *McCrann* and *CJN*, where the complainer only reported the rape after her experience was validated as rape by an older friend or colleague some time later. For example, in *McCrann*, the complainer appeared not to recognise that her assault was one of rape because she associated rape with a violent attack. It was only when her colleague explained that rape does not

[38] According to Muller, the unjustified raising of the hue and cry was an offence and not to be undertaken lightly; see Muller, M. (2005) *op.cit.*, p.35. See also Saunders, C. (2000) 'The Medieval Law of Rape', 11 *K.C.L.J.* 19, p. 38.
[39] See Temkin, J. (2002) *op.cit*, p.190; see also Mason, F. and Lodrick, Z. (2013) 'Psychological consequences of sexual assault', *Best Practice & Research Clinical Obstetrics and Gynaecology* 27, p.32; McMillan, L. (2013) 'Sexual Victimisation: Disclosures, Responses and Impact' in Lombard, N. & McMillan, L. (eds) *Violence Against Women*, London: Jessica Kingsley Publishers, p.81.
[40] According to Kelly, L. Lovett, J. and Regan, L. (2005), the principal reason for not reporting rape immediately is the failure to identify the act as one of rape. According to the research undertaken by Kelly *et al*, less than half (43%) of their respondents initially believed that they were raped, although the act clearly fell within the legal definition of rape. See also Horvath, M. and Brown, J. (2009) *op.cit.*, p.333; McMillan, L. (2013) *op.cit.*, p.74.
[41] This reflects a social construction approach which is discussed in greater depth in Chapter Two.
[42] As Scheppele points out, the first reaction to any event is "not processed by the mind without interpretation … We always see with the interpretative frameworks we bring to events"; see Scheppele, K. (1992) *op.cit., p.*168.
[43] The first experience or perception of an event is not constructed in the absence of a framework that helps us to make sense of it. However, the *particular* framework that is employed in an initial reaction "may not be the one we would think best to invoke upon further reflection"; see Scheppele, K. (1992) *op.cit.*, p.170.

require the element of violence that she was able to appreciate the nature of her assault and report it to the police. Similarly, in *CJN*, the complainer reported her rape to the police only after discussion and support from her friend and her older sister to whom she disclosed what happened. As I will discuss later in the chapter, the complainer in *CJN* also blamed herself and this too may have shaped her understanding of what happened.

In both *CJN* and *McCrann*, the appeal was upheld. While neither case turned on the matter of delayed reporting, judicial evaluation of the complainer's response was an important part of the backcloth against which the legal issues, sufficiency of evidence and misdirection on distress, were considered. My analysis of these cases suggests a sedimentation of historic ideas in judicial discourse through which the credibility of the complainer's claim, that she did not consent to intercourse, is linked with her prompt reporting of the rape[44]. The continuing relevance of such ideas can be identified in the critical comments expressed by the court regarding the complainer's 'failure' to notify anyone about the rape. In this context, it is significant that new judicial directions, which have recently come into force under the Abusive Behaviour and Sexual Harm (S) Act 2016, are designed to challenge preconceived ideas about late reporting by rape victims. It remains to be seen what impact these have on judicial discourse as well as jury decisions[45].

The language of hysteria

In raising the hue and cry, a rape victim was expected to demonstrate the extent of her suffering to onlookers after the event. Remnants of this archaic expectation are reflected in more contemporary expectations that a victim will publicly display her distress after rape. The notion of extreme distress in the form of female hysteria is a recurring trope in judicial discourse that signals the authenticity and severity of the complainer's emotional response to rape through its overwhelming and uncontrollable nature. This is illustrated in my analysis of *Anderson v HMA*, with reference to a number of other cases [46].

[44] According to Horvath and Brown, the assumption that a 'genuine' victim would make a prompt complaint is one of the many myths and stereotypes that surround sexual assault and rape; see Horvath, M. and Brown, J. (2009) *op.cit*, p.325.
[45] Under this Act, judges are required to give information to juries in certain sexual offences trials, including where there is a delay in the victim reporting the crime. The Act provides for directions that explain to jurors that there may be good reasons why a complainer does not immediately report the crime and that proof of the offence should be based on the evidence presented. Such directions are designed to challenge any preconceived notions jurors may have about how a person reacts - or should react - to a sexual offence.
[46] *Anderson v HMA* 2008 J.C. 111.

In *Anderson*, the complainer, along with her boyfriend and their daughter, called at a neighbour's flat one evening before Christmas to collect a kitten. The neighbours, Mr and Mrs M, were out and another neighbour, the appellant, was in the flat watching television with his girlfriend. There were competing accounts of what happened after this. It appears that the complainer, possibly with her boyfriend, spent the evening visiting some of the adjoining flats, including the appellant's flat and another flat where a party was being held. Later in the evening, a group of people, including Mr and Mrs M, the complainer's boyfriend and appellant's girlfriend, called at the appellant's flat and found the front door locked. After banging on the door and shouting through the letterbox, the appellant came to the door wearing only jeans. The complainer was found in his bedroom where she said she had been raped. Mrs M did not believe the complainer and refused to call the police. Faced with this situation, the complainer "simply left the flat in a very distressed state" and passers-by, who saw her on the street, contacted the police[47].

At trial, the appellant relied on his police interview in which he admitted having consensual intercourse with the complainer after spending some time dancing and kissing at a party held in one of the flats. The appellant said that, once they were alone in his flat, the complainer removed her clothes and those of the appellant and engaged in various sexual acts prior to intercourse. He said that the complainer's distress was "attributable to her fear of being 'battered' … by her boyfriend for having sex with the appellant"[48]. The appellant was convicted of rape and the conviction was appealed on multiple grounds, including an unreasonable verdict.

At appeal, the defence submitted that the overwhelming weight of evidence showed the complainer's testimony to be "confused, contradictory and untruthful", demonstrating that she was "incredible and unreliable"[49]. The defence argued that there was no support for the complainer's account of events and that the evidence presented at trial differed from her version on almost every point. Consequently, the verdict of guilt was one no reasonable jury could have reached. The Crown argued that the defence did not make any submission at trial regarding the sufficiency or character of the evidence that

[47] *Anderson* 2008 par.9.
[48] *Anderson* 2008 par.11.
[49] *Anderson* 2008 par.14.

had been led. Corroboration came not only from medical evidence but from the complainer's extreme distress afterwards, which had been observed by various witnesses. The Crown submitted that the conflicting evidence was collateral to the essential matter of the rape. Assessing competing factual accounts was within the province of the jury and the matter had been properly placed before them for consideration.

At trial, the complainer's account was "to a large extent contradicted" by other witnesses[50]. While the complainer denied that she had been intimate with the appellant, Mr and Mrs M testified that they observed the parties "dancing and getting intimate on the couch … with the complainer sitting on the appellant's knee and having a carry on"[51]. There were similar discrepancies as to how the complainer's underwear became torn. The complainer insisted the appellant ripped it during the rape. According to Mrs M, the complainer accidentally tore it when she was demonstrating what the appellant had done to her. There were different accounts of the effect of alcohol and drugs on the complainer. While the complainer admitted drinking alcohol and smoking two or three joints of cannabis, she described herself as sober at the relevant time. Other witnesses testified that she had been smoking cannabis all day and had consumed a considerable amount of alcohol; "she had a drink on her"[52]. The police officer called to the scene described the complainer as "smelling of alcohol and barely able to explain what had happened to her, other than that she had been to a party and that someone had attacked her … [she was] in a state, with a hazy recollection of events, which chopped and changed"[53]. At trial, the Crown led photographic evidence of various marks on the complainer's body. While the police surgeon said this was consistent with the complainer's account, she could not say "with any certainty" whether the medical evidence indicated "a drink-and-drug fuelled consensual act of intercourse or a non-consensual rape"[54].

The only incontrovertible evidence in *Anderson* was the complainer's extreme distress after the sexual encounter. This was characterised as a state of hysteria. After the group gained entry to the appellant's flat, the complainer was found crying on the bed:

[50] *Anderson* 2008 par.4.
[51] *Anderson* 2008 par.5.
[52] *Anderson* 2008 par.6.
[53] *Anderson* 2008 par.6.
[54] *Anderson* 2008 par.12.

"she was very distressed and very upset … it was like a scream; she was actually pulling at her hair … she was hysterical"[55]. When the complainer left the flat, she was found wandering in the street: "she was in a very distressed state … she was crying, and could not really talk"[56]. It was her "very distressed state" which prompted passers-by to call the police[57]. By the time she was seen by the police surgeon, she remained "very distressed and tearful"[58]. Because of the severity of her emotional reaction, the court dismissed the suggestion that her distress could be attributed to the effect of drink and drugs rather than lack of consent to intercourse.

Judicial opinion was that, despite the various discrepancies and contradictions, the complainer's distress provided sufficient evidence of her lack of consent: the jury were entitled to rely on strong evidence "from a number of witnesses of the complainer's state of distress"[59]. While recognising "there were perhaps more discrepancies than is commonly found in criminal trials of this kind", the court held that the jury's conviction did not meet the test of an unreasonable verdict[60]. The appeal was refused.

The portrayal of the complainer's distress as hysteria is also evident in other cases. In *Mackintosh*, the complainer was "hysterical at the time" of leaving the appellant's house[61]. In *F*, the complainer was in a "very distressed state", she was crying "quite a lot", she was "in a state of hysteria"[62]. In *Wright*, the complainer was found "in hysterics … she was shaking and in shock"[63]. In *GM,* the complainer "sounded hysterical"[64]. In *Dalton*, the complainer was in a "state of hysteria"[65]; this "hysteria could provide, if you took a certain view of it, some support for her evidence as to what was really going on"[66]. In *Spendiff*, the complainer is described as running from the house [of the appellant] in a state of extreme distress; she was "screaming … [and] very distressed"; "she was a wee bit hysterical, really upset"[67]. In *Burzala*, when the complainer escaped from the appellant, she ran to her parent's house. In contrast to her "frozen" state at the time of the attack, the complainer was in a state of

[55] *Anderson* 2008 par.13.
[56] *Anderson* 2008 par.13.
[57] *Anderson* 2008 par.9.
[58] *Anderson* 2008 par.13.
[59] *Anderson* 2008 par.36.
[60] *Anderson* 2008 par.36.
[61] *Mackintosh v HMA* 2010 S.C.L. 731 par.33.
[62] *F v HMA* 2009 S.C.L. 1211 par.5.
[63] *Wright v HMA* 2005 S.C.C.R 780 par.3.
[64] *GM v HMA* [2011] HCJAC 112 par.8.
[65] *Dalton v HMA* [2015] HCJAC 24 par.41.
[66] *Dalton* 2015 par.18.
[67] *Spendiff* 2005 par.19.

uncontrollable emotion by the time she reached her parent's house: she "collapsed in the hall of the house … appeared to be in shock"; she lay in "an almost foetal position in the corner of the hall … and she was shuddering uncontrollably"[68]. The complainer repeatedly "screamed at her mother, 'dinnae touch me'"[69]. Her "wailing and crying" was heard as soon as the police officer got out of the car[70]. She was in "the most distressed state that [the police officer] had ever seen in her four years of police service"[71].

In *Lennie*, the notion of hysteria is invoked to distinguish between the complainer's emotional condition before and after her rape[72]. While the complainer was observed to be distressed throughout the evening, the court accepted that there was "a difference in the level of upset" displayed by the complainer during the evening and after "she alleged that she had been raped"[73]. Earlier in the evening, the complainer was "volatile", "in an erratic and emotional state" and "starting to cry"[74], whereas on leaving the house she became "hysterical"[75]. At this point, the complainer was observed to be "very upset, very scared and hysterical … she was crying and sounded hysterical"[76]. The court considered that the complainer's distress after the assault amounted "to something of the nature of hysteria"[77]. Judicial opinion was that, while the complainer was in "a state of some considerable distress" prior to intercourse, it was "not to the hysterical extent that she was thereafter"[78].

Across these cases, the construction of hysteria signifies the spontaneity, authenticity and severity of the complainer's emotional distress. While hysteria no longer holds any scientific or medical meaning, it evokes notions of extreme psychological distress though somatisation; that is, the manifestation of distress through the presentation of bodily symptoms. Historically, hysteria has been understood as "the quintessential female malady"[79]. In Victorian constructions of female sensibility, hysteria was

[68] *Burzala* 2008 par.8; 12.
[69] *Burzala* 2008 par.12.
[70] *Burzala* 2008 par.12.
[71] *Burzala* 2008 par.12.
[72] *Lennie v HMA* 2014 S.C.L. 848; I discuss this case more fully later in the chapter.
[73] *Lennie* 2014 par.11.
[74] *Lennie* 2014 par.11.
[75] *Lennie* 2014 par.7.
[76] *Lennie* 2014 par.7.
[77] *Lennie* 2014 par.14.
[78] *Lennie* 2014 par.19.
[79] The social construction of notions of hysteria as a form of female pathology is documented in two seminal works: Showalter, E. (1987) *The Female Malady: Women, Madness and English Culture 1830-1980*, London: Virago, and Small, H. *Love's Madness: Medicine, the Novel and Female Insanity, 1800 -1865*, Oxford: Clarendon Press.

associated with the lack of the cerebral and "the essence of the feminine … suggesting the lability and capriciousness of female nature"[80]. Women were seen as particularly vulnerable to hysteria on the basis of theories relating to reproductive biology (in particular, the condition of the 'wandering womb'), female sexuality - both sexual repression as well as desire - and the necessity to conceal unruly or rebellious feelings [81]. Attention focussed on the bodily expression of emotion and its uncontrollable nature; for example, through agitation, crying, screaming, faints or collapse, pulling or tearing at one's hair, shock and loss of speech[82]. During the 19th century, hysteria became the "archetypal functional disorder" for female nervous collapse[83]. Through the catch-all classification of hysteria, the expression of women's distress came to be seen as "the norm, rather than the exception"[84]. In contemporary discourse, the conception of hysteria continues to be associated with female nature and understood - symbolically, if not medically - as the core of female emotionality[85].

Generally, victims are expected to match the intensity of their emotional reaction to the seriousness of the offence[86]. However, there is some evidence that expectations of victim responses are gendered in that the expression of extreme, uncontrollable emotion is considered a more appropriate reaction by female victims of serious crime, such as rape, so that a less outwardly expressive response may be viewed as more unusual in a female rather than a male victim[87]. While victims of rape may be expected to exhibit a great deal of emotionality, actual responses vary considerably; a victim "may be expressive and tearful, quiet and controlled, distressed, shocked or in denial …

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[80] As one doctor in Victorian England put it, "a vast, unstable repertoire of emotional and physical symptoms … and the rapid passage from one to another … is associated with the feminine nature … mutability is characteristic of hysteria because it is characteristic of women - '*La donna e mobile*'", see Showalter (1987) *op.cit.,* p.129.

[81] In the mid to late19th century, the typical subject of hysteria was the young woman. Hysteria was linked not only to "her organism but also to her social conditions … [and] her efforts to stifle and deny her sexual desires" but to the "enforced passivity of girls", see Showalter, E. (1987) *op.cit.*, p.131.

[82] See Showalter, E. (1987*) op.cit.,* p.129. According to Showalter, in 19th century studies of female patients exhibiting hysteria, "very little attention was paid to what the women were saying"; rather, the focus was on the nature and severity of their hysterical symptoms, p.164. It is interesting to note a parallel, here, in relation to current evidential rules in Scotland which focus on - and attach particular value to - the presentation of extreme emotional distress by victims of rape.

[83] Small, H. (1996) *op.cit.,* p.15.

[84] Showalter, E. (1987*) op.*cit., p.131.

[85] Showalter traces the development of historical ideas about female hysteria from the Victorian age through into 20th century narratives of female emotionality and argues that the malady of hysteria can be understood as a consequence of, rather than a deviation from, the traditional female role; see Showalter, E. (1987) *op.cit.,* p. 19-20.

[86] Studies suggest a proportionality rule affects perception of victim responses. For example, "a crime victim who displays a great deal of negative emotion signals to the observers that being a victim of an offence is *inconsistent* with that person's more fundamental identity [and] more emotion indicates greater inconsistency", see Miller, A. Handley, L. Markman, K. and Miller, J. (2010) *op.cit.*, p.203-204.

[87] While a 'mild' reaction to a severe crime is rated as generally unusual, Rose *et al* suggest that such a response by a male victim is viewed as potentially less unusual than the same response by a female victim; see Rose, M., Nadler, J. and Clark, J. (2006) 'Appropriately upset? Emotion norms and perception of crime victims', *Law and Human Behaviour* 30 203, p. 206.

[and she may experience] shame, physical revulsion and helplessness"[88]. Many victims do not show obvious signs of immediate emotional agitation and some may appear withdrawn and unresponsive due to the impact of dissociative mechanisms that allow the victim to cut off from what is happening[89]. For example, the presentation of victims who experience a significant level of shock may "lead those observing them to believe that they are not at all distressed"[90].

Since congruent affect in a rape victim tends to be associated with expressions of overwhelming emotion, any marked divergence in a victim's emotional presentation may be regarded as less authentic or less deserving of sympathy[91]. For example, signs of emotional inconsistency may be viewed as "unusual and untrustworthy"[92] and victims who "fail to muster enough emotion" may be seen as less credible and more responsible for the sexual attack[93]. The representation of more discrepant emotional responses can be found in the cases of *S*[94] and *McKearney*[95]. In each case, the depiction of the complainer's response to rape was part of the emotional backcloth against which the events were narrated; that is, neither case turned on the quality of the distress evidence. However, they illustrate how the construction of emotional inconsistency or emotion that is brought under control may shape a broader appraisal of the complainer's response to the event.

In *S*[96], the instability and oscillation of the complainer's emotional presentation generated uncertainty as to whether it was "spontaneous and genuine" because of the "different descriptions of her demeanour"[97]. Initially, the complainer presented as

[88] Mason and Lodrick point to a "disconnect" between how women imagine they would react to sexual assault (with outrage, anger, screaming, fighting, running) and the way in which many women actually respond (fearful, disoriented, helpless, frozen). The reason for such a mismatch between predicted and actual reactions may be that, when imagining our response, we use our higher brain functions and think rationally and logically. However, when the experience actually occurs, our higher brain functions are likely to be impaired as a result of the threat that is experienced; see Mason F. and Lodrick, Z. (2013) *op.cit.*, p.29; 31; see also Rose, Nadler and Clark (2006) *op.cit.* p.217.
[89] Mason and Lodrick (2013) *op.*cit., p.29.
[90] Mason and Lodrick (2013) *op.cit.*, p.31.
[91] See Mason and Lodrick (2013) *op.cit.,* p.32; Rose, Nadler and Clark (2006) *op.cit.,* p.217; see also Temkin and Krahe, (2008) *op.cit.,* p.32.
[92] Dahlberg, L. (2009) 'Emotional tropes in the courtroom: On representation of affect and emotion in legal court proceedings', *Law and Humanities* 3(2) p.187.
[93] According to Rose, Nadler and Clark, "people expect victims of certain offences [such as rape] to respond with a lot of emotion, despite the fact that many victims do not ... victims [may be] penalized (in terms of credibility assessment) if their response to a rape is initially more muted and less emotional"; see Rose, M. Nadler, J. and Clark, J. (2006), *op.cit.,* p.217. See also Temkin, J. and Krahe, B. (2008) "victims … are expected to be visibly upset and emotional … those who do not conform to these normative expectations are seen as less credible and as more responsible for the assault", *op.cit.*, p.32.
[94] *S v HMA* 2011 S.C.L. 310; this case is discussed more fully in Chapter Four.
[95] *McKearney v HMA* 2004 J.C. 87; this case is discussed in Chapter Three.
[96] This case is discussed more fully in Chapter Four.
[97] *S* 2011 par.14.

quiet and unemotional but, later on, she was "covered in tears", "shaking like a leaf", and "her voice was totally quivering"[98]. When the police sergeant first observed the complainer, she was "quiet and subdued … talking to the other officers"[99]. When the same officer looked in later, the complainer was noted to be "crying and tearful", despite the fact "she had not been tearful or crying the first time"[100]. The defence submitted that "in these circumstances … more needed to be said about the need for the Crown to prove that the distress was spontaneous and genuine" and whether the complainer's distress "was caused by an attack on her against her will"[101]. The concern, here, was whether the complainer's emotional inconsistency implied a lack of authenticity, indicating a feigned response[102]. Ultimately, the court did not accept this argument because of the complainer's "bodily injuries and the damage to clothing"[103]. Here, the evidential value of force was sufficient to expel any doubts raised by the complainer's emotional presentation.

In *McKearney*, the judicial construction of the complainer's response was suggestive of an under-reaction or emotion that was easily brought under control: "the complainer got up and had a bath. She got ready for work and arrived a little late. She was in a distressed condition and reported the matter to the police"[104]. While the complainer is described as distressed, the terse portrayal of her behaviour after the event provides a stark contrast with the language of hysteria, identified in previous cases. The under-stated, matter-of-fact style - conveyed through the simple listing of concrete, mundane tasks undertaken by the complainer - omits any descriptors of overpowering emotion. Here, the representation of a more pragmatic response by the complainer mirrors earlier descriptions of her self-management and control over her feelings; for example, this was a complainer who could not afford to become "hysterical" because "her crying was annoying the appellant … [so] she stopped crying to try and calm him down" [105]. In the absence of any manifest emotion displayed by the complainer immediately before or after intercourse - and judged by a subjective standard of an honest belief in consent

[98] *S* 2011 par.14.
[99] *S* 2011 par.14.
[100] *S* 2011 par.14.
[101] *S* 2011 par.14; 13.
[102] *S* 2011 par.33.
[103] *S* 2011 par.33.
[104] *McKearney* 2002 par.28.
[105] *McKearney* 2002 par.28; the strategic quality of the complainer's response to the appellant's threats and menacing behaviour is described more fully in Chapter Three.

- the court considered that, despite his earlier violence and threats, the appellant could not be expected to know that the complainer was too petrified to express her refusal.

The particular value attached to the public display of uncontrollable emotion by the female victim operates within an historical discourse of female hysteria and reflects a conventional stereotype of women as 'naturally' expressive and emotional. Evidence of the complainer's overwhelming distress appears to provide the unequivocal proof of lack of consent that courts seek. In the cases examined, the presence of such evidence invariably provided corroboration of the complainer's non-consent.

Absence of emotion

If 'real' distress is associated with notions of female hysteria, the absence of emotion may be perceived as a less plausible reaction to rape, particularly where the complainer has the opportunity to convey her distress but fails to do so. I explore how the absence of emotion is understood and assessed in judicial discourse with reference to *McCrann*, which I outlined earlier in this chapter, and *Y* which was discussed in Chapter Three.

In *McCrann*, the complainer testified that she "was stunned" when she arrived home and she accepted that she had "not shown distress to her son or to her daughter [that night] and she had not shown distress on her arrival at work [or] in the course of the [following] morning"[106]. At work the following day, the complainer said that she attempted to "put on a brave face [and] tried to be as normal as possible"[107]. During the lunch break, the complainer received a phone-call on her mobile from the appellant, although there was no evidence to confirm this. After the phone-call, the complainer became visibly distressed and told two of her colleagues what had happened the previous night. They provided evidence of her distress at trial.

At appeal, the defence submitted that evidence of the complainer's distress the following day was incapable of providing corroboration, particularly where there was no immediate distress shown. The defence argued that testimony of the complainer's emotional state some 12 hours after the event was "too long after the incident" to

[106] *McCrann* 2003 par.7; par.10.
[107] *McCrann* 2003 par.7.

establish sufficient connection with the precipitating event[108]. The Crown argued that "the point could not be decided merely by an assessment of the interval between the alleged incident and the distress"[109]. The complainer had provided "reasonable explanations for her failure to show distress at any earlier stage", which appeared to be accepted by the jury[110]. As I explained earlier in this chapter, the complainer said that her daughter was asleep when she arrived home and she did not want to tell her son because the appellant was well known to him. Since it was after midnight, the complainer also felt it was too late to phone anyone else. The Crown argued that it was open to the jury to "look at the whole circumstances [and] take [these] into account[111]. On this basis, the trial judge had "properly left the matter to the jury"[112].

The court in *McCrann* accepted that it was not the time interval *per se* that prevented the complainer's distress providing corroboration but the particular circumstances in which it was expressed. In cases such as *Drummond*, the conception of *de recenti* distress has encompassed the first available opportunity that is afforded the complainer to express her distress to others, even if that occurred some days after the event. In *Drummond*, for example, the complainer was detained in the appellant's house. When she left several days later, it was "the first opportunity for [her distress] to be observed … [and] in such circumstances, proof of the distress was capable of corroborating the complainer's testimony"[113]. In *McCrann*, however, the complainer had not been detained; she left the appellant's flat and returned home to her children the same night. Unlike the complainer in *Drummond*, she had the opportunity to convey her distress to her family or friends immediately after the rape but failed to do so. Although her colleagues at work witnessed the complainer's emotional reaction to the rape the following day, there was no evidential value attached to this as it was not considered the first available opportunity she had to express her distress.

An interesting comparison can be drawn with *Y*, where the complainer also failed to demonstrate any immediate distress to her family. At trial, the complainer explained: "in my head, I was so shocked about what had happened. I was petrified of [my

[108] *McCrann* 2003 par.10.
[109] *McCrann* 2003 par.11.
[110] *McCrann* 2003 par.11.
[111] *McCrann* 2003 par.11.
[112] *McCrann* 2003 par.11.
[113] *Drummond* 2015 par.17.

mother's] reaction. I didn't know what she would do"[114]. In judicial discussion, the court recognised that the complainer "essentially froze"[115]. In *Y*, the complainer's failure to tell her family or express any distress on the night of the rape was accepted by the court in the context of the shock experienced by a vulnerable teenager after a traumatic event. The appeal court emphasised that the jury were evaluating "the actions and reactions not of a mature, confident adult but of a 16 year old who, on the evidence, had previously been sexually abused by a third party"[116]. Here, the absence of express emotion was normalised in relation to the complainer's youth, vulnerability and apprehension about her family's likely reaction. It was "against that background" that her response to the rape was understood in terms of shock[117].

A state of shock, in which there is no expression of any emotion, is a common reaction by a victim of a traumatic event, such as rape[118]. Shock may be experienced as a sense of unreality (experiencing the external world as unreal), disassociation (feeing outside of or disconnected from what is happening) or depersonalisation (feeling divorced from one's own body sensations, emotions or behaviour)[119]. These forms of emotional numbing are well recognised as defining features of post-traumatic stress that may be experienced by victims of rape[120]. The absence or deferral of emotion associated with shock can be understood as a psychological coping mechanism that provides a means of temporary withdrawal after a traumatic event; "a self-imposed time-out from the intensity of the assault"[121]. This enables an individual to manage the impact of an unexpected traumatic event without being overwhelmed and to re-establish a sense of normality and control.

In *McCrann*, the complainer's dazed reaction on reaching home and her conscious effort to behave normally the next day is also suggestive of a state of shock. In this case, however, the complainer's reaction was not that of a teenage girl but of a mature adult woman, the figure that had been evoked as a point of comparison in *Y*. In *McCrann*, the court considered it "significant" that the complainer did not express any emotion about

[114] *Y* 2009 par.10. This case is discussed more fully in Chapter 4.
[115] *Y* 2009 par.10.
[116] *Y* 2009 par.10.
[117] *Y* 2009 par.10.
[118] See Temkin, J. and Krahe, B. (2008) *op.cit.,* p.33.
[119] Mason and Lodrick suggest that dissociative mechanisms, such as derealisation and depersonalisation, result from extreme fear and shock at the time of, or immediately after, the traumatic event and may permit the victim to "endure the otherwise unendurable"; see Mason, F. and Lodrick, Z. (2013) *op.cit.,* p.29.
[120] Kahan, D and Nussbaum, M (1996) discuss the 'phase of numbing' in 'Two conceptions of emotion in criminal law', 96 *Colum.L.Review* No. 2, 269, p.294.
[121] Tannura, T. (2014) 'Rape Trauma Syndrome', *American Journal of Sexuality*, (9) 247, p.249.

the rape until the following lunch-time[122]. The impact of emotional shock on the complainer and her concern about her family's reaction - the same factors that were accepted in relation to a young, vulnerable victim - were not seen as relevant in *McCrann*. Here, the evidential value of the complainer's distress the following day was undermined by the absence of immediate emotion and her attempt to put on a "brave face" in front of both her family and colleagues[123].

The expectation that a genuine victim will display conventional signs of distress immediately after rape is underpinned by a mechanistic conception of emotion and an incomplete understanding of how traumatic events are experienced. A mechanistic approach suggests that feelings are like "impulses or surges", generated by an external cause or trigger that impels expression or action; they are "like things that sweep over us, or sweep us away, often without our control"[124]. Here, feelings are viewed as basic energies or forces that derive from an innate human nature, which precedes social shaping[125]. When conceptualised in this way, emotion is understood as devoid of cognitive content. In other words, emotion is not mediated by particular thought processes or subject to reason and the particular beliefs that might be held by an individual[126]. The expectation that a victim's emotional reaction to rape will be immediate, instinctive and uncontrollable - as in the 'hysteria' cases - is consistent with a mechanistic model of emotion.

This conception of emotion does not reflect contemporary knowledge and understanding of the way in which traumatic events are commonly experienced[127]. Victims of unexpected trauma, such as rape, usually respond to the precipitating event in stages, each of which may be accompanied by quite different feelings. An immediate sense of shock or denial is a common reaction and it may only be later, as the nature of

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[122] *McCrann* 2003 par.16.
[123] *McCrann* 2003 par.7.
[124] Kahan and Nussbaum suggest that the appeal of the mechanistic conception is that it "appears to capture well some prominent features of our emotional experience … a connection between emotion and passivity that occurs in much of our talk and experience … emotions feel like … things that invade us, often without consent or control … and this intuitive idea is well preserved in the view that they really are impulses or drives that go their own way without embodying reasons or beliefs"; see Kahan, D. and Nussbaum, M. (1996) *op.cit.*, p.279-280.
[125] As such, they are understood as part of our "basic innate human equipment … that lies behind culture", see Kahan, D. and Nussbaum, M. (1996) *op.cit.*, p.279.
[126] The mechanistic conception posits emotions as forces that do not contain or respond to thought. If emotions are seen as basic energies or forces, they can "have no connection with our thoughts, evaluations or plans", see Nussbaum, M. (2001) *Upheavals of Thought: The intelligence of Emotions*, Cambridge, Cambridge University Press, p.26. See also Kahan, D. and Nussbaum, M. (1996) *op.cit.,* p.269 and Baker, K. (2005) 'Gender and Emotion in Criminal Law', 28 *Harv. J. L. & Gender*, p.447.
[127] De Houwer and Hermans trace the developing relationship between cognition and emotion and the shift from mechanistic approaches to theories based on cognitive appraisal or evaluation; see De Houwer, J. and Hermans, D. (2010) *Cognition and Emotion: Reviews of Current Research and Theories*, East Sussex: Psychology Press.

the event is better understood and integrated by the individual, that more familiar signs of distress may be expressed[128]. This understanding of how trauma is experienced reflects an evaluative or cognitive appraisal model of emotion[129]. In an evaluative account of emotion, feelings are understood as fundamentally about something and it is this 'about-ness' that is not explained by a mechanistic approach[130]. Within an evaluative conception, emotion is not constructed as something distinct from an individual's beliefs or thought processes. Rather, a cognitive component is integral to an individual's emotional experience. Consequently, the way in which an event is understood at a particular time will shape how it is experienced and felt.

For example, in *McCrann*, the complainer's apparent failure to express any immediate distress can be understood as mediated by both social and cognitive factors[131]. These include powerful cultural norms that govern the display of emotion in particular social contexts, such as in front of one's children. In the complainer's situation, her overriding concern as a parent may have been to shield her children from the emotional consequences of a very disturbing event, particularly since the appellant was well known to her son[132]. The fact that the complainer did not appreciate that she was subject to rape until she spoke to her colleagues the following day may also have shaped her understanding of the event and her emotional experience of it[133].

The court drew an adverse inference from the Crown's failure to lead either her son or daughter as witnesses of their mother's condition when she arrived home; "neither of them had any evidence to give in support of the Crown case"[134]. In judicial reasoning, it

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[128] Tannura, T. (2014) *op.cit.*, p.249.

[129] See Kahan, D. and Nussbaum, M. (1996) *op.cit.,* p.285 and Nussbaum, M. (2001) *op.cit.*, p.27. There are instances where the law does take a more evaluative approach, even if it is only in relation to the degree of emotion expressed. In provocation, for example, it is not accepted that anger is overwhelming and robs the individual of all reason. Rather, the law recognises that there is a continuum between "icy detachment and going berserk", *Phillips v The Queen* [1969] 2 AC 130, p.137 per Lord Justice General Rodger citing Lord Diplock. See McDiarmid, C. (2010) 'Don't look back in anger: the partial defence of provocation in Scots criminal law' in Chalmers, J., Leverick, F. and Farmer, L. (eds) *Essays in criminal law in honour of Sir Gerald Gordon*, Edinburgh: The Edinburgh University Press, p.195.

[130] According to Nussbaum, M. (2001) emotions have an object. That object is an "intentional object; that is, it figures in the emotion as it is seen or interpreted by the person whose emotion it is. Emotions are not about their objects merely in the sense of being pointed at them and let go, the way an arrow is released towards its target. Their aboutness is more internal, and embodies a way of seeing", *op.cit.,* p.27.

[131] Kahan and Nussbaum discuss the significance of social factors and cultural variation in the expression of emotion: "societies construct norms for the proper expression of emotion … and the appropriateness of emotion-types ... these facts of social variation in emotion provide further grounds for preferring the evaluative conception to the mechanistic conception; it can accommodate them well, whereas the mechanistic conception cannot"; see Kahan, D. and Nussbaum, M. (1996) *op.cit.*, p. 297.

[132] One of the reasons cited by rape complainers for not wanting to pursue a rape complaint is because of the potential impact on children; see Kelly, L. Lovett, J. and Regan, L (2005) *op.cit*., p.62.

[133] As I explained earlier in this chapter, the complainer mistakenly believed that she was not raped because the appellant did not beat her up.

[134] *McCrann* 2003 par.14.

was accepted that there was no "fixed interval" after which distress could not provide corroboration and that, "in every case", the nature and extent of the complainer's distress "are all circumstances for the consideration of the jury"[135]. However, the particular circumstances in *McCrann* were considered such "that no reasonable jury, properly directed, could find corroboration in the complainer's distress"[136]. Although the case was appealed on the basis of insufficient evidence, the court appeared to treat the jury's conviction as an unreasonable verdict and upheld the appeal on that basis.

The assumption that genuine distress takes the form of immediate, overwhelming emotion provides a template against which a complainer's actual reaction may be judged. In *McCrann*, *Y* and *McKearney*, the complainer's initial response to rape was not one of spontaneous, uncontrolled emotion. In *McCrann*, the complainer sought to protect her children and did not recognise at the time that she had been raped. In Y, the complainer was petrified of her mother's response. In *McKearney*, the demands of the particular circumstances required the complainer to focus on coping rather than emoting. In these cases, judicial assessment of consent was influenced, in different ways and to varying degrees, by the court's perception of the complainer's emotional presentation.

Relevance of prior distress

In assessing the evidential value of distress, the court normally focuses on the complainer's expression of emotion *after* the rape. In *Lennie v HMA*[137], the court attached significance to witness testimony of the complainer's emotional state prior to any sexual activity. In considering the evidence that could provide corroboration of the complainer's non-consent and the lack of a reasonable belief in consent by the appellant, the court drew relevant inferences from the emotional state of the complainer before and after she was raped.

In *Lennie*, the complainer went to the appellant's house to meet friends. When she arrived, the appellant and co-accused had been drinking for some time. The complainer also started drinking and, by the time others arrived, she was described as

[135] *McCrann* 2003 par.12.
[136] *McCrann* 2003 par.13.
[137] *Lennie v HMA* 2014 S.C.L. 848.

"drunk"[138]. Some time after midnight, the complainer became involved in an altercation with the appellant and co-accused when she intervened to stop them "play fighting"[139]. Both men made "negative remarks" about the complainer and the appellant threw a glass of vodka over her[140]. The complainer said that the atmosphere changed and she became upset. The complainer began to "behave irrationally" and went into the kitchen, where she cut her arms with a knife[141]. The complainer said that she had been self-harming since late childhood. Noticing the injuries she had inflicted on herself, the appellant appeared shocked and told her to leave. The complainer remained upset, saying she could not return home while she was drunk because of her mother's likely reaction. The complainer went into a bedroom and lay down on the bed with her friend JM. The appellant followed the complainer into the bedroom and, again, told her to leave. Grabbing her by the arm, the appellant pulled her from the bed. The co-accused entered the room and pushed the complainer onto the floor, causing her to hit her back against the edge of the bed. At this point, the complainer's friends said they were leaving. The complainer did not leave with them because she had lost her mobile phone and went into another bedroom looking for it.

At this point, the attitude of the appellant and co-accused changed once more and they invited the complainer to stay and sleep over at the flat. The appellant left the bedroom, leaving the complainer alone with the co-accused. The complainer said that the co-accused pushed her on top of the bed and onto her back. He then lifted up her dress and, pulling off her tights and underwear, forced intercourse on her. She told him "no, no" and said she wanted to go home[142]. The complainer could not escape because he had his hands on her shoulders and she was intoxicated. After he left the room, the appellant entered the bedroom and found the complainer lying on the bed, crying. The appellant then got onto the bed and also had intercourse with the complainer without her consent. Eventually, the complainer freed herself. She got dressed, left the flat and phoned her former boyfriend who agreed to collect her in his car. He described the complainer as "very upset, very scared" and said that, based on what she told him, he formed the view that she had been raped by two men[143].

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[138] *Lennie* 2014 par.2.
[139] *Lennie* 2014 par.3.
[140] *Lennie* 2014 par.3.
[141] *Lennie* 2014 par.4.
[142] *Lennie* 2014 par.6.
[143] *Lennie* 2014 par.7.

When the complainer reached home, she initially ran away but returned later, went straight to bed and refused to speak to her mother. She texted her friend JM and asked her to phone, which she did. The complainer told JM that she had been raped. At trial, JM described the complainer's volatile state during the evening and her distress when speaking to her on the phone. Initially, the appellant denied having intercourse with the complainer. When presented with evidence of his semen and that of the co-accused on the complainer, the appellant admitted having sexual intercourse with the complainer but claimed it took place two weeks previously. The co-accused and appellant were convicted of rape.

The appellant's conviction was appealed on two grounds; the trial judge erred in rejecting a defence submission of 'no case to answer' and inadequate directions regarding evidence of distress. At appeal, the defence submitted that, in this "very unusual case", evidence of the complainer's distress could not provide corroboration because of the various causes of her upset, including the earlier incidents in the evening[144]. The trial judge was also criticised for failing to direct the jury that evidence of distress must be clearly related to the alleged rape perpetrated by the appellant rather than any other events that evening. The defence argued that the complainer had not been asked to - and nor had she at any time - attributed her distress, or elements of it, to any specific event. According to the defence, the jury were not given an essential direction regarding the necessary causal connection between the complainer's distress and the second episode of non-consensual intercourse.

The Crown pointed to various sources of corroboration, including the prior verbal and physical assault on the complainer by both the accused and her observed distress after she left the flat. There was also proof that the complainer was subjected to forcible intercourse by the co-accused prior to the second instance of non-consensual intercourse. The Crown argued that, in these circumstances, it was hardly likely that the complainer would have consented to intercourse with the appellant. There was sufficient circumstantial material, including the complainer's distress, which was capable of providing corroboration of non-consent and the lack of any reasonable belief by the appellant that she was consenting. The trial judge had made it sufficiently clear to the jury that the complainer's distress should be attributable to the rape committed

[144] *Lennie* 2014 par.12.

by the appellant. The question as to whether evidence of distress could provide corroboration in the particular circumstances was a matter of fact and degree and, therefore, a jury decision.

The court accepted the narrative account presented by the Crown, of a vulnerable young woman who had been victimised by both the accused prior to the rapes; "including the throwing of the drink over her" and "the efforts to remove her from the flat after she had been self-harming"[145]. According to judicial opinion, the complainer's distress was reflected in her "erratic and emotional state throughout the evening", including her self-harming behaviour[146]. The court considered that evidence of her emotional state was consistent with "the manner in which the accused had treated the complainer, all of which would have made it highly unlikely that she would have consented to intercourse with them, or either of them, after the humiliation which she had already suffered at their instance"[147]. The judicial conclusion was that such evidence "was capable of pointing to lack of consent, whatever other explanations may have been proffered to the jury"[148].

In *Lennie*, judicial consideration of the complainer's emotional state was not restricted to her reaction afterwards. In assessing the evidential value of distress, significance was attached to the complainer's volatile and emotional condition throughout the evening: "this is not a case in which the evidence of distress related only to the complainer's condition after the event … prior to any sexual activity, the complainer had been in a state of some considerable distress"[149]. The complainer's emotional presentation before any sexual activity took place allowed the court to infer that she "must have been showing visible signs of distress … indicative of a state in which she would be unlikely to consent to intercourse"[150]. Evidence of the complainer's emotional state prior to any sexual activity indicated not only her non-consent but the appellant's awareness of her non-consent: "any person attempting such intercourse would be aware of that state"[151]. As we have seen in other cases, when judged by a

[145] *Lennie* 2014 par.10.
[146] *Lennie* 2014 par.11.
[147] *Lennie* 2014 par.18.
[148] *Lennie* 2014 par.18.
[149] *Lennie* 2014 par.19.
[150] *Lennie* 2014 par.19.
[151] *Lennie* 2014 par.19.

standard of reasonableness, the appellant is expected to be aware of the impact of his own behaviour on the complainer[152].

The value attached by the court to the complainer's emotional condition prior to the rape contrasts with the narrow, formal approach adopted by the defence, which focused exclusively on her distress afterwards without reference to her experiences throughout the evening. The court considered that evidence of the complainer's emotional state - both prior to and after the rape - could not "properly be regarded as 'neutral'", a term used by the defence which the court regarded as "problematic"[153]. Given a formal sufficiency of evidence, the matter was one of quality and degree; "properly a matter of the jury's consideration in the context of the evidence as a whole"[154]. In determining whether the complainer had given her free agreement, the court was willing to draw relevant inferences from prior events and the circumstances in which the complainer expressed distress.

A similar holistic approach can be identified in *Drummond*[155], where the court also attached significance to the complainer's emotional condition prior to any sexual activity. In *Drummond*, it was inferred from the nature of the complainer's injuries, "including the multiple bruises to the face and thigh and the crusty neck wound ... [that] at the material time, the complainer must have been in a visibly distressed state"[156]. Given the complainer's emotional state *prior* to intercourse, the court considered that "she would therefore have been unlikely to have decided to give her free agreement to sexual intercourse"[157]. It was further inferred that her distress before intercourse "would have been obvious to the appellant"[158]. In *Drummond*, the court makes explicit an inference that usually remains implicit in judicial reasoning about the evidential value of distress: "proof that the complainer was distressed shortly after the event, leading to the inference that it existed shortly beforehand at the relevant time, may corroborate a complainer's testimony that it would have been clear to the accused that she was not consenting to intercourse; hence the distress"[159]. The

[152] This is discussed is more depth in Chapter Three when I consider the impact of the 2009 Act on judicial evaluation of the reasonableness of the appellant's belief in consent.
[153] *Lennie* 2014 par.15.
[154] *Lennie* 2014 par.19.
[155] *Drummond v HMA* [2015] HCJAC 30; this case is also discussed in more depth in Chapter Three.
[156] *Drummond* 2015 par.19.
[157] *Drummond* 2015 par.19.
[158] *Drummond* 2015 par.17.
[159] *Drummond* 2015 par.16.

significance of *de recenti* distress is what it reveals about the complainer's emotional condition prior to intercourse and, where this would have been evident to the appellant, there is no reasonable belief in consent.

In *Drummond* and *Lennie*, the complainer's emotional condition prior to the rape was an important piece of circumstantial evidence capable of corroborating non-consent and the appellant's criminal intent. In *Lennie*, this evidence was provided by independent testimony of the complainer's humiliation and emotional distress before intercourse. In *Drummond*, the appellant's *mens rea* was established through a more complex chain of reasoning. Here, the complainer's prior distress was inferred by the court from the nature of her injuries after the appellant's physical assault the previous day. Since the appellant would have been aware of the complainer's physical and emotional state, he would have known she was not consenting to sex in such a condition. Judicial reasoning in these cases suggests that, in circumstances where there is no evidence of distress after the event, evidence of the complainer's emotional state *before* intercourse may be sufficient to provide corroboration, *if* such distress would have been apparent to the appellant[160].

Issues of attribution and blame

To provide corroboration, the complainer's distress must be attributed to her lack of consent to intercourse: that is, "the distress [must arise] spontaneously due to the nature of the incident rather than to the circumstances outside it"[161]. Issues of attribution arise where there is some uncertainty or ambiguity about this causal relationship. The question of attribution arose in the cases of *CJN*[162], which was outlined earlier in this chapter, and *Hopton v HMA*[163]. In each case, independent witnesses described the complainer's distress soon after the event. However, the same witnesses also testified that, at the time of her distress, the complainer appeared to blame herself for what happened. Each case was appealed *inter alia* on grounds of

[160] In both *Lennie* and *Drummond*, there was other evidence from which the court could infer that anyone would have been unlikely to consent to intercourse (having a drink thrown over you, being forcefully asked to leave and then assaulted). The court may have been less willing to draw the same inference from circumstances where the *only* other evidence, apart from the complainer's testimony, was her prior distress. However, the corroborative value of prior distress is a logical implication of judicial reasoning in both these cases: that is, the significance of *de recenti* distress is what it reveals about the emotional condition of the complainer before intercourse.
[161] *Smith v Lees* 1997 J.C. 73, p.73.
[162] *CJN v HMA* 2013 S.C.L. 18.
[163] *Hopton v HMA* 2010 S.C.L. 652.

misdirection regarding the evidential value of the complainer's distress.

In *CJN*, the Crown relied on evidence of the complainer's emotional distress for corroboration of her account of rape. There were two sources of evidence. There was evidence of the complainer's immediate distress after she left the common stair, where she said the appellant raped her. Two young men testified that the complainer "seemed to be a bit upset" when she emerged from the close[164]. Their understanding was that the appellant and complainer had intercourse and "it seemed to be their position that Mr CJN should not have been having sex with [the complainer] because he was the boyfriend of Miss C"[165]. There was also evidence of the complainer's distress three weeks later when she disclosed for the first time what had happened to her. This was witnessed by her friend and Miss F, her friend's older sister. Miss F testified that the complainer was very distressed when she revealed that the appellant raped her on the night of the party.

At the appeal, the defence argued that the trial judge failed to provide clear directions regarding the "limitations attaching to the use of distress evidence" and whether Miss F's observation of the complainer's distress "at a point in time so distant from the event could properly constitute evidence having any corroborative function"[166]. Issues of attribution, regarding the causal relationship between the complainer's distress and her lack of consent to intercourse, arose in each element of the distress evidence.

Miss F's observation of the complainer's distress was "at least three weeks after the events"[167]. Here, the intervening gap was considered too great to establish sufficient connection between the emotion displayed by the complainer and the precipitating event. The defence argued that, since the jury were not alerted to the difficulties arising from this interval of time, they may have formed "the impression that evidence of distress, at whatever stage in time, was generally available as corroboration"[168]. The court accepted that while "one cannot set a precise time limit on the admissibility of post event distress as a potential corroborative element in cases of sexual offences", evidence of the complainer's distress after such an interval could have "little or no

[164] *CJN* 2013 par.3.
[165] *CJN* 2013 par.3.
[166] *CJN* 2013 par.6.
[167] *CJN* 2013 par.4.
[168] *CJN* 2013 par.7.

corroborative effect"[169]. Judicial opinion was that, while "there may be exceptional cases, the present case is not one"[170].

The other source of distress evidence came from the two young men who witnessed the complainer's emotional state when she left the common stair. Since this was observed immediately after the incident, there was no difficulty establishing a causal connection on the basis of time. However, the complainer's claim that her distress was caused by lack of consent to intercourse was undermined by a comment she was said to have made at that time. The two witnesses, who described the complainer as "being upset", stated that she said words to the effect that "I can't believe I did that to my best pal", a remark that was later disputed by the complainer[171]. Not only did the complainer fail to state at the time that she was raped, she also appeared to blame herself for having intercourse with the appellant. The assumption of blame by the complainer generated uncertainty as to whether "her distress was caused by being raped or if her distress was caused by some other factor, such as shame or regret about what had occurred"[172].

The evidential value of the complainer's immediate distress rested on an assessment of two competing narratives. The defence account presented the complainer as a young woman who was sexually disinhibited after becoming very drunk at a party. After several voluntary sexual encounters with other young men (which did not amount to intercourse), she then engaged in consensual intercourse with the boyfriend of her closest friend. In this account, the complainer's distress reflected a sense of guilt and remorse in betraying her best friend by having consensual sex with her boyfriend. The defence pointed to the "lack of credibility and reliability" in the complainer's account of rape, suggesting that her own words disclosed the real reason for her emotional state: that "having done that to her best pal" she was in part to blame[173].

In the prosecution account, it was accepted that the complainer was intoxicated at the party and that she had engaged in several consensual sexual encounters earlier in the evening. This account emphasised that "while [the complainer's] not proud of all that happened that night, she knows that she was raped"[174]. In this construction of events,

[169] *CJN* 2013 par.7.
[170] *CJN* 2013 par.7.
[171] *CJN* 2013 par.4.
[172] *CJN* 2013 par.5.
[173] *CJN* 2013 par.5.
[174] *CJN* 2013 par.5.

the complainer's distress could be understood as reflecting her upset that, due to her intoxicated state, she was unable to fend off the appellant as well as her awareness of the problems it would cause her friend, given her relationship with the appellant and her advanced pregnancy. On this interpretation, the complainer's distress was capable of supporting her account of rape.

There is no requirement that evidence relied on for corroboration should be more consistent with the complainer's account of events than alternative interpretations. The question facing the court was whether, on any interpretation of the complainer's distress, it supported her version of events[175]. Given the particular circumstances and the relationship between the complainer, her best friend and the appellant, judicial opinion was that her immediate distress was incapable of supporting her account of events. In light of this, the court held that "clear directions" regarding the evidential value of post-event distress were required "particularly in a case such as this one", involving the "feature of the relationship between the complainer and Miss C and the appellant's relationship with the latter"[176]. Since such directions had not been provided, the court upheld the appeal. Before I go on to examine judicial reasoning in this case, I shall outline another case where issues of attribution and blame arose in different circumstances.

In *Hopton*, the complainer and appellant were neighbours in a block of flats and did not know each other particularly well. The appellant called at the complainer's flat one evening to tell her that she had left her keys in a shed in the common stairway. Subsequently, the complainer, along with her nine year old daughter, visited the appellant's flat and exchanged text messages, some of which were of a "flirtatious character"[177]. On the evening of the offence, the complainer invited the appellant to her flat. They consumed some wine and cannabis and spent several hours together "happily enough"[178]. At some point, they engaged in an arm wrestle and the complainer agreed that if the appellant won she would kiss him, which she did. When the appellant tried to kiss her again, the complainer indicated that she did not want to and pushed him away.

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[175] According to judicial reasoning in *Fox*, "it is not necessary that circumstantial evidence should of itself incriminate the accused … What matters is whether it is capable of providing support or confirmation … of the direct evidence [which] has been given", *Fox v HMA* 1998 JC 94, p.109.
[176] *CJN* 2013 par.6.
[177] *Hopton* 2010 par.4.
[178] *Hopton* 2010 par.5.

The complainer said that, at this point, "everything changed"[179]. The appellant left the living room, apparently to go to the toilet, but returned with a knife from the kitchen that he used to threaten her. Unable to find a key to lock the door to the flat, the appellant wedged a chair against the inside of the door. He pushed the complainer into the bedroom, made her remove her clothing and forced intercourse on her. Some time later, the complainer asked if she could go and see her daughter and he agreed. The complainer took her child to the toilet and, when they came out, she picked up her daughter and ran to a neighbour's flat. After banging on the door and windows, the neighbour let her in. Accompanied by the neighbour, the complainer later returned to the flat to fetch her car keys. She then drove herself and her daughter to her father's house, where she contacted the police.

In his evidence at trial, the appellant admitted having consensual intercourse with the complainer. The appellant said that they had kissed earlier in the evening and ended up in the complainer's bedroom. He placed a chair against the door because he was worried that the complainer's boyfriend might arrive. Since the complainer "seemed to have been in the toilet for an eternity", the appellant went home where he was woken by the police[180]. The Crown presented evidence of DNA material on the knife that matched that of the complainer and the appellant, with "a 55 million to 1 degree of probability"[181]. The appellant said that he could not remember touching it but, since he was interested in the design of knives, he might have handled it when he was in the kitchen to "test its balance"[182]. The defence pointed out that there was no blood on the knife, nor were there any cuts on the complainer's clothes[183].

The appellant was convicted of rape and his conviction was appealed on several grounds of misdirection. This included the partiality of the trial judge's warning to the jury that they should exercise care before attaching significance to the neighbour's impression of the complainer.

[179] *Hopton* 2010 par.5.
[180] *Hopton* 2010 par.14.
[181] *Hopton* 2010 par.18.
[182] *Hopton* 2010 par.6.
[183] *Hopton* 2010 par.17.

This warning related to evidence given by the complainer's neighbour, Mrs C. Mrs C said that she invited the complainer into the flat after she heard her banging on the door. According to Mrs C, the complainer sat down with her arms round her daughter and said "they will say it's my fault"[184]. Mrs C described the complainer "as seeming to be upset and being white in colour" but she added that "the whole thing seem[ed] a bit strange" to her[185]. According to Mrs C, the complainer "never mentioned the word 'rape'" although she "mentioned [the appellant], whom Mrs C knew as a neighbour"[186]. Knowing that the complainer already had a boyfriend, Mrs C said: "it was an eye opener to me when she spoke about [the appellant] and her. I was incredulous. I could not believe it"[187]. The defence argued that Mrs C's evidence revealed an ambiguity or incongruity about the complainer's immediate reaction: "there was something not quite right … something was a bit strange about the episode with the complainer"[188]. In his directions about Mrs C's evidence, the trial judge warned the jury: "be careful about just how much significance you attach to an impression which may be formed on the basis of rather less complete information that you the jury have"[189].

Unlike *CJN*, the court dismissed the appeal in *Hopton*. Judicial opinion was that the trial judge appropriately directed the jury on how to approach Mrs C's evidence of the complainer's demeanour and had not expressed any personal view on the nature of that evidence.

Both *CJN* and *Hopton* involved an allegation of rape in circumstances involving the complainer's intoxication and her sexual disinhibition or sexual behaviour towards the appellant. In each case, the complainer's distress was accompanied by the attribution or anticipation of blame regarding her role in the event. While the complainer in *CJN* blamed herself for what had occurred ("I can't believe I did that to my best pal"), the complainer in *Hopton* anticipated the blame that would attach to her behaviour by others ("they will say it's my fault"). In each case, witness testimony of the complainer's immediate reaction to the sexual encounter indicated some ambiguity or incongruence in her behaviour. For example, while the complainer presented as "a bit

[184] *Hopton* 2010 par.8.
[185] *Hopton* 2010 par.9; 8.
[186] *Hopton* 2010 par.9; 8.
[187] *Hopton* 2010 par.9.
[188] *Hopton* 2010 par.18.
[189] *Hopton* 2010 par.18.

of a paradox"[190] in *CJN*, "something was not quite right" about the complainer's behaviour in *Hopton*[191].

As I explained at the beginning of this chapter, the evidential value of distress requires that such emotion should be "spontaneous and genuine" and observed immediately or shortly after the event[192]. In an authoritative judgement setting out the corroborative value of distress, the court emphasised that the complainer should be "exhibiting genuine distress as a result of the alleged incident rather than feigning it"[193]. There is an association, here, between the authenticity of the complainer's response to rape and the expression of immediate, spontaneous emotion. The underlying premise is that the complainer's instant, natural reaction precludes - or is more likely to preclude - any conscious alteration or artifice that might be adopted later. In both *CJN* and *Hopton*, the evidential value of the complainer's spontaneous distress was undermined by her unprompted attribution of self-blame or belief that she would be blamed.

The idea that a complainer's initial reaction captures her 'true' feelings and reveals the nature of the precipitating event fails to reflect how victims respond to traumatic events, generally, and sexual assaults in particular[194]. The attribution of self-blame by a rape victim, and the accompanying feelings of shame, guilt and remorse, can be understood as the product of larger social and cultural forces. Assigning responsibility to the victim (by the victim herself or by other people) draws on an interpretative framework that is pervasive and culturally sanctioned within our society. When understood in this context, a complainer's spontaneous attribution or anticipation of blame, and her accompanying expression of guilt and regret, may not convey any authenticity or fundamental truth about what happened but may simply mirror a cultural script that holds victims of sexual assault complicit for having failed to prevent it.

A victim's immediate response to sexual violence is often one of complicity or self-blame which draws on stock representations and culturally resonant scripts, such as

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[190] *CJN* 2013 par.5.
[191] *Hopton* 2010 par.9.
[192] *S v HMA* 2012 S.C.L. 310, par.15.
[193] *Smith v Lees* 1997 JC 73, p.73.
[194] Scheppelle, K. L. (1992) 'Just the facts, ma'am: sexualised violence, evidentiary habits and the revision of truth', 37 *N.Y.L. Review* 123. See also Rose, M., Nadler, J. and Clark, J. (2006) 'Appropriately upset? Emotion norms and perception of crime victims', *Law and Human Behaviour* 30, 203; Mason, F. and Lodrick, Z. (2013) 'Psychological consequences of sexual assault', *Best Practice & Research Clinical Obstetrics and Gynaecology* 27.

stories about female provocation, negligence or inadequate gate-keeping of male sexuality[195]. While sexual assault is very common, it is also portrayed as an unusual occurrence that requires some explanation in the individual instance[196]. If sexual violence is not meant to happen – or, at least, not happen to 'me' – a victim may respond by trying to explain to herself why she was singled out and this may take the form of holding herself responsible or blameworthy in some way: 'if a man was sexually violent towards me, he must have had a reason and that reason may have been my behaviour'. In this way, the attribution or anticipation of blame by a victim may be prompted by the recognition that, to be culturally legible, her account requires a prominent role for herself in accounting for the abuser's conduct towards her. Understanding how such a role may be understood in other people's eyes can generate feelings of shame, humiliation and guilt. Such feelings may be particularly marked in circumstances where the victim was intoxicated or sexually disinhibited; that is, in circumstances where she believes, or thinks that other people will believe, that she could - and should - have prevented the assault by exercising greater control over her own behaviour[197].

Self-blame by a victim is a well-documented sequel to sexual assault and is associated with particular cognitive processes, such as negative self-cognition and a counter-factual belief that the event could have been prevented had she behaved differently[198]. Attribution theory has long recognised that ordinary people who are subject to an unexpected, traumatic event engage in "biased estimations of causality, responsibility and blameworthiness"; for example, by focusing on their own personal attributes rather than external factors[199]. There is a pervasive tendency among individuals who

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[195] According to Scheppelle, if a woman says anything at all, on being sexual assaulted, it is usually an account of self-blame and complicity; see Scheppelle, K. (1992) *op.cit.*, p.143. See also Anderson, I. and Doherty, K. (2008) *Accounting for Rape: Psychology, Feminism and Discourse Analysis in the Study of Sexual Violence*, London: Routledge, p.129-131, and Temkin. J. and Krahe, B. (2008) *Sexual Assault and the Justice Gap: A Question of Attitude*, Oxford: Hart, p.41-45. This is discussed further in Chapter 1.

[196] While sexual violence is very common, it is "culturally disguised as the rare deviation from generally accepted norms … the normal case is constructed as the nonviolent relationship or the unraped woman, and the battered or raped woman stands out against this picture of normality as an exception", Scheppelle, K. (1992) *op.cit.,* p.*142.*

[197] A victim of sexual assault may blame herself to the extent that she perceives her behaviour as having been socially undesirable; for example, she was too intoxicated, too flirtatious, too provocative, too trusting, too naïve. See Miller, A. Markman, K. and Handley, I. (2007) 'Self-blame among sexual assault victims', *Basic and Applied Social Psychology*, 29(2) 129, p.130; see also Miller, A., Handley, I., Markman, K. and Miller, J. (2010) 'Deconstructing self-blame following sexual assault: the critical roles of cognitive content and process', *Violence Against Women* 16(10) 1120, p.1122.

[198] Miller, A. and Handley, I. *et al* (2010) *op.cit.*, p.1121.

[199] According to Miller and Handley *et al*, biased causal attributions by victims, who blame themselves for their victimisation, are shared widely: "background factors, social context, roles or situational pressures that may have given rise to behaviour are … relatively pallid and dull and unlikely to be noticed in comparison to the dynamic behavior of the actor ... Theoretical understanding of perceivers' neglect of contextual factors in attributing cause and blame for victimisation events helps explain otherwise perplexing empirical findings, such as persons' well-documented tendencies to blame sexual assault survivors"; see Miller, A. and Handley, I. *et al* (2010) *op.cit.,* p.1121.

have encountered negative and unexpected events, as diverse as sexual assault, spinal cord injury and the traumatic loss of a spouse or child, to blame themselves for the event[200]. This may be engendered, in part, by a perceived failure to have controlled some aspect of their behaviour prior to the event, including behaviour that had no causal bearing on the outcome[201]. Privy to perceived missed opportunities and retrospective imaginings of how the event might have been avoided, a victim may mistakenly believe she was responsible for its occurrence. This counter-factual acceptance of responsibility and self-blame, commonly experienced after a traumatic event, may provide a temporary means of "reinstating positive illusions and defending against the unpredictability and uncontrollability of a world where bad luck happens"[202]. This reflects a 'just-world' theory of defensive attribution and deserved outcomes, which suggests that a victim (as well as other people) may be motivated to blame herself for the misfortune in order to sustain an overarching belief in a fair or just world[203]. For example, 'bad things only happen to bad people' or 'people get what they deserve and deserve what they get'.

In both *CJN* and *Hopton*, the value of the complainer's distress after the rape was mediated by two factors: her initial attribution or assumption of blame for the event and the witnesses' interpretation of her distress at the time it was observed. In each case, these factors were understood and treated differently by the court. In *Hopton*, the court accepted that the trial judge "had been perfectly correct to place a caveat on the jury's approach to the evidence they had heard of Mrs C's impressions whilst the complainer had been at her house"[204]. In judicial reasoning, the court distinguished between evidence of distress and the way in which "the neighbour herself had at the time assessed the circumstances" in which the distress was expressed[205]. The court

[200] Miller, A. Markman, K. and Handley, I. (2007) *op.cit.*, p.130.
[201] Miller, Markman and Handley emphasise the irrational nature of victim self-blame that is generated by negative self-cognition and self-judgments regarding their failure to have controlled innumerable precipitants of their assault: "if only I had done X and Y, then the event would not have occurred'; see Miller, A. Markman, K. and Handley, I. (2007) *op.cit.,* p.130.
[202] According to Mason and Lodrick, "a woman raped by an acquaintance potentially has to question everything she ever held true … she cannot trust her own judgment, nor her previous positive illusions about the world … the world is suddenly a malevolent place where sex offenders are the people she knows, not 'strangers out there' to be mistrusted and avoided". In this context, guilt and self-blame can be understood as normal post-trauma reactions which may function, initially, to stave off the radical re-evaluation generated by the experience of sexual assault; see Mason, F. and Lodrick, Z. (2013) *op.cit.,* p.30-31.
[203] Victim-blaming is consistent with the 'just-world' theory which predicts that persons, including victims themselves, are motivated to blame victims of sexual assault in order to maintain their belief in a just world, see Miller, A. and Handley, I. *et al* (2010) *op.cit*., p.1122. See also Anderson, I. and Doherty, K. (2008) *op.cit.*, p.34-36.
[204] *Hopton* 2010 par.21.
[205] *Hopton* 2010 par.21.

held that any misdirection by the trial judge did not amount to a miscarriage of justice[206].

In *CJN*, the corroborative value of the complainer's distress was undermined by her spontaneous assumption of self-blame and the witnesses' interpretation of it as indicating that the parties "should not have been having sex", because the appellant was the boyfriend of her best friend[207]. The implicit assumption made by the witnesses was that the sex was consensual. Unlike *Hopton*, the court drew no distinction between the evidence of distress and witness interpretation of the circumstances in which her distress was observed. In *CJN*, the evidential value of the complainer's distress was discounted as a product of her "shame or regret about what had occurred"[208]. The court allowed the appeal, holding that the misdirections when taken "cumulatively" were sufficiently material to amount to a miscarriage of justice[209].

Conclusion

Particular significance is attached in judicial discourse to the complainer's initial response to rape. This reflects, in part, the evidential value of her spontaneous emotional reaction to rape. Judicial understanding of the complainer's response is shaped by various factors: assumptions about how victims respond to a sudden traumatic event such as rape, the expectation that a 'genuine' rape victim will report the rape immediately, and particular conceptions of how emotion is experienced and expressed. What is recognised as relevant distress is often highly selective. When the complainer displays immediate, overwhelming emotion, often conveyed through the trope of hysteria, there are few difficulties in it providing corroboration of her lack of consent. However, there is little understanding in judicial discourse of what may be perceived as more discrepant emotional responses, such as guilt, shame and humiliation, and the deferral or absence of emotion.

In richer accounts of emotion, judicial discourse reflects the relevance of the complainer's emotional state throughout the events and prior to any sexual activity. In such accounts, what amounts to relevant distress may be interpreted more flexibly as

[206] *Hopton* 2010 par.25.
[207] *CJN* 2013 par.3.
[208] *CJN* 2013 par.5.
[209] *CJN* 2013 par.13.

encompassing the first practical opportunity the complainer has to express her feelings. In more narrow approaches, emotion is reified and decontextualised in judicial discourse. Here, the role of individual cognition, contextual factors and cultural norms, which mediate the expression of emotion and attribution of blame in particular circumstances, are overlooked. Such approaches tend to reflect a more mechanistic conception of emotion that looks primarily to the immediacy and intensity of emotional expression rather than the nature and diversity of individual responses to rape.

Stereotypical notions about victim responses to rape provide restrictive and, often, unrealistic expectations of how a complainer would or should react. Such expectations are inconsistent with contemporary understanding of emotion and how victims deal with an unexpected, traumatic event. The association of genuine emotion with immediacy, spontaneity and uncontrollable behaviour provides a measure against which a complainer's actual response is assessed. This disjuncture between expected reactions and actual responses means that a complainer who is not immediately 'covered in tears' or 'a wee bit hysterical' may be viewed as a less plausible victim of rape [210]. The importance attached in judicial discourse to the *initial* reaction suggests that the truth is singular, immediate and fixed. In other words, a complainer's spontaneous reaction is understood to reflect an unmediated and, therefore, unquestionable reality. However, this disregards the range of normative responses as well as the demands of particular circumstances, which may require a victim to adopt an external rather than an internal focus.

[210] According to Detective Inspector Raphael's experience of working with rape victims, it is very rare for a victim to present initially as emotionally agitated or in tears, '*Investigating rape: a journey*', Janette De Haan Annual Memorial Lecture in Glasgow on 8/1/2016.

Chapter Six Sleep and Borderline States of Consciousness

The transformative value of consent depends on the complainer's ability to make a conscious choice whether to give or withhold her agreement; that is, she must have sufficient cognitive functioning and awareness of what is happening to make such a decision[1]. In this chapter, I consider how consent is constructed in circumstances where the complainer's mental and physical functioning are compromised by sleep or extreme intoxication. In such circumstances, the complainer's ability to consent may be temporarily but significantly impaired[2]. Extreme intoxication and sleep are also states of vulnerability that can be easily identified and exploited to facilitate sexual assault[3]. Under the common law, an individual is deemed unable to give consent unless she is conscious and awake[4]. Under the 2009 Act, an individual is also considered incapable of consenting to any sexual conduct while asleep or unconscious[5] and free agreement is deemed absent in circumstances where she is incapable due to the effects of alcohol or any other substance[6]. Since what amounts to incapability is not defined in law, the point at which a complainer becomes incapable of consent involves a judgement based on the facts and circumstances of the particular case.

The cases discussed in this chapter involve a range of circumstances where the complainer's ability to consent appeared to be impaired through sleep or intoxication. In my analysis of judicial discourse, I consider how consent is understood and decisions about consent are reached in such circumstances. For example, I examine the use of binary and dimensional approaches in conceptualising the ability to consent. In each case, there is a marked disparity in the physical and cognitive functioning of the parties

[1] The transformative value of consent is discussed in chapter 1. The general principles of the ability to consent have been defined as the "awareness, understanding and ability" of an individual to be a "rational, choosing, autonomous subject"; see Elvin, J. (2008) 'Intoxication, Capacity to Consent and the Sexual Offences Act 2003', 19 *King's Law Journal* 151, p.152-3; see also Cowan, S. (2011), 'The Trouble with Drink: Intoxication, (In)Capacity and the Evaporation of Consent to Sex', *Edinburgh School of Law Working Paper Series*, University of Edinburgh, p.11.

[2] Capability may be undermined by factors that are not temporary, such as through learning or cognitive disability. However, these issues did not arise in any of the cases I examined.

[3] Extreme intoxication may lead to victims being deliberately targeted for sexual assault or render them vulnerable to opportunistic sexual exploitation. Horvath and Brown highlight "the fact that perpetrators may seek out intoxicated women because they are easy targets"; see Horvath, M. and Brown, J. (2006) 'The Role of Drugs and Alcohol in Rape', *Med. Sci. Law* Vol.46 No.3. p.221.

[4] The prior offence of clandestine injury under the common law - where the complainer was asleep at the time of intercourse - is discussed in *Lord Advocate's Reference (no 1 of 2001)* 2002 S.L.T. 466, per Lord Justice General Cullen, par.5-9.

[5] S.14(2).

[6] S.13(2)(a).

and I consider how this disparity is understood in judicial discourse. In doing so, I relate my discussion to broader social discourses about young people and intoxication and cultural narratives of romance and seduction. The construction of consent is also shaped by the use of narrative and the particular mode of reasoning that is adopted by the court. I show how meaning is constructed through different forms of judicial reasoning, such as atomistic or more holistic approaches, and how the agency of the parties may be accentuated or obscured through narrative focus and detail. Focusing on language, I consider how rape is represented in judicial discourse and how courts interpret colloquial expressions used in witness testimony.

A state of sleep

The complainer's account that she was asleep and unable to consent to intercourse must be corroborated. In *Wright v HMA*[7], I consider how the state of sleep and the complainer's inability to consent was established through judicial reasoning. In my discussion, I also refer to *Spendiff v HMA*[8] and *McKearney v HMA*[9]. The court considered two matters in *Wright*. The first was whether the appellant could rely on an honest mistake about consent in circumstances where he also provided evidence that the complainer had in fact consented. The second matter was the probative value of circumstantial factors that could support the complainer's account that she was asleep at the relevant time.

At trial, the complainer in *Wright* said that, on the day of the rape, she had flu and was "feeling awful"[10]. She had taken some medication and spent the day at home with her husband. In the evening, the complainer's brother visited and the three of them chatted and drank vodka and beer. After her brother left, the complainer felt tired and unwell. She went upstairs to her bedroom between 9.30 to 10 pm and fell asleep. At around 11 pm, the complainer's husband went next door to visit the appellant, who was a neighbour and acquaintance. When the husband arrived at the appellant's house, the appellant poured him a vodka "so large that there was hardly any room in the glass for Coke"[11]. The appellant was smoking "a joint"[12]. When the complainer's husband

[7] *Wright v HMA* 2005 S.C.C.R. 780.
[8] *Spendiff v HMA* 2005 1 J.C. 338; this case is discussed more fully in Chapter Three.
[9] *McKearney v HMA* 2004 J.C. 87; this case is also discussed at length in Chapter Three.
[10] *Wright* 2005 par.2.
[11] *Wright* 2005 par.3.
[12] *Wright* 2005 par.3.

said that he left his cigarettes on the table at home, the appellant offered to fetch them. It took the appellant around 10 minutes and the complainer's husband felt that he "was taking his time"[13].

The appellant returned with the cigarettes and appeared to be "normal"[14]. The husband then heard his wife banging on the front door, shouting at him to come home. When he returned home, he found his wife wearing her nightgown, "in hysterics … shaking and in shock"[15]. The complainer said that the appellant raped her. She explained that after going to bed and falling asleep, she became aware of the appellant lying on top of her in the bed, having intercourse with her. She became conscious of this "when he ejaculated inside her"[16]. The appellant then ran downstairs, followed by the complainer[17].

When the police first questioned the appellant, he denied having intercourse with the complainer. The appellant later admitted this was a lie and, in his testimony at court, stated that the complainer "not only consented but actively encouraged sexual intercourse"[18]. The appellant said that when he went next door, he heard the complainer calling from upstairs. He replied that he had come to fetch her husband's cigarettes. According to the appellant, the complainer asked him to come upstairs which he did. He said that the complainer "moved towards him … and started kissing [him] … they were touching each other … she was naked [and] it was obvious that she wanted to have sexual intercourse with him"[19]. The complainer kissed him and they went into her bedroom. The appellant said the complainer "offered no resistance and nothing was said" but she made it "obvious that she wanted to have sexual intercourse with him"[20]. The appellant had intercourse with the complainer but "not for very long [since] he decided that he didn't want to carry on"[21]. As he was getting dressed to leave, the complainer swore at him and told him to get out. He returned to his own house. The appellant was "absolutely sure" that the complainer was awake and that her "evidence was false"[22].

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[13] *Wright* 2005 par.3.
[14] *Wright* 2005 par.3.
[15] *Wright* 2005 par.3.
[16] *Wright* 2005 par.2.
[17] *Wright* 2005 par.2.
[18] *Wright* 2005 par.10.
[19] *Wright* 2005 par.4.
[20] *Wright* 2005 par.4.
[21] *Wright* 2005 par.4.
[22] *Wright* 2005 par.4.

Wright was appealed on grounds of misdirection and insufficient evidence of criminal intent. At appeal, the defence submitted that the Crown failed to provide sufficient evidence that the appellant "had no reasonable belief (sic) that the complainer was consenting" and that the trial judge failed to direct the jury that the Crown was required to prove criminal intent with corroborated evidence[23]. According to the defence, the trial judge also misdirected the jury by stating that "the only issue in the trial" was whether the intercourse took place against the will of the complainer, without explaining that criminal intent was absent in circumstances where the appellant honestly believed there was consent[24]. If an honest belief in consent was a live issue at trial, the trial judge's instruction was a material misdirection.

Prior to the 2009 Act, an appellant lacked criminal intent to commit rape if he honestly but mistakenly believed the complainer was consenting to intercourse. In cases of contested consent, an honest belief in consent was relevant where it was raised on the evidence presented at trial[25]. Typically, the question would arise in circumstances where the appellant claimed that, although the complainer may not have consented, her behaviour was sufficiently ambiguous for him to have made a genuine mistake in believing there was consent. However, in cases where the dispute between the parties was based on competing factual accounts as to whether there was consent, the possibility of an honest belief was not relevant and the jury were not to be invited to speculate on it[26]. In other words, if an appellant provided a clear account of the complainer's *actual* consent - through her verbal agreement or active participation in sexual activity - there was no evidential basis on which to instruct the jury to consider the possibility of his honest mistake.

At appeal, the court accepted that the dispute about consent in *Wright* was one of fact: the accounts provided by the appellant and complainer were "to the opposite effect in

[23] *Wright* 2005 par.9; the term 'reasonable belief' was used in the defence submission although the requisite standard for the appellant's belief in consent was that of an honest or genuine belief. There may have been some conflation between the notion of an 'honest belief' in consent and the standard of proof of 'beyond reasonable doubt'.
[24] *Wright* 2005 par.14.
[25] This was set out in *Doris v HMA* 1996 S.L.T. 995.
[26] In *Doris*, the appellant said that the complainer consented to intercourse. The trial judge considered the issue was a straightforward one of fact, as to whether the intercourse took place against the complainer's will or not. On this basis, no direction on an honest belief in consent was given. The appeal court refused the appeal and held that, where the issue was one of fact – that is, where the parties provided competing accounts as to whether there was consent – no direction on an honest belief was required. The direction was required only where the issue was raised in the evidence. After the decision taken in *McKearney*, there was doubt as to whether judicial *dicta* in cases such as *Doris* would apply. The approach set down in *Doris* under the common law was applied later in *Blyth v HMA* [2005] HCJAC 110 and *Wright*. In *Blyth*, the appellant's awareness that the complainer was lesbian and did not engage in heterosexual relationships was sufficient to exclude the possibility of an honest, mistaken belief in her consent.

regard to whether she consented"[27]. Judicial opinion was that, in such circumstances, "there was no issue as to whether the appellant mistakenly believed that the complainer was consenting"[28]. On this basis, the court held that, on the appellant's own evidence, there was no space for any mistake about consent. It was, therefore, for the jury to determine the matter by evaluating the competing accounts of the event.

The clear distinction drawn by the court in *Wright* between a dispute of fact and an honest mistake about consent can be contrasted with the approach taken in the earlier case of *McKearney*[29]. At trial, the appellant did not give evidence but relied on his police interview in which he described the complainer as "taking an active part [in sexual intercourse] … at one stage [referring] to the complainer taking his penis and rubbing it off her clitoris"[30]. At appeal, however, the defence argued that the appellant may have made an honest mistake about consent in circumstances where, according to the complainer's testimony, she lay passively on the bed, too frightened to say or do anything after the appellant's earlier violence[31]. One of the questions considered by the appeal court in *McKearney* was whether, given the complainer's account of her passivity at the time of intercourse, an honest belief in consent was a live issue at trial.

In both *McKearney* and *Wright*, the appellant described the complainer as a willing party who actively participated in intercourse but also sought to rely on the possibility that he made an honest mistake as to her consent. According to judicial reasoning in *Wright*, the appellant's account of the complainer's active involvement in sexual activity excluded any possibility of an honest mistake. However, in *McKearney*, the appeal court held that "the possibility, that the appellant acted in the belief that she had consented, had not been excluded"[32]. Although the appellant described the complainer's willing participation, the court allowed for the possibility of an honest belief in consent based on the complainer's evidence that she had not refused or resisted his sexual behaviour at the time. In essence, the court in *McKearney* allowed for two different accounts of consent by the appellant. While in law it is possible to

[27] *Wright* 2005 par.10.
[28] *Wright* 2005 par.10.
[29] In *Wright*, the defence relied on *McKearney* as authority that, after *Lord Advocate's Reference (no 1 of 2001)* 2002 S.L.T. 466, the jury should be instructed that *mens rea* should be proved by corroborated evidence. The court in *Wright* distinguished *McKearney* and sought to narrow its application by excluding the relevance of an honest belief in cases of force and sleep and, in doing so, re-established prior practice under the common law.
[30] *McKearney* 2004 per Lord McCluskey par.28; this case is discussed more fully in Chapter Three.
[31] In *McKearney*, the only reference to the possibility of an honest mistake came at the end of the trial when it was raised by the defence. The trial judge in *McKearney* took the view that the dispute was one of fact, since the appellant described the complainer "taking an active part", and on this basis did not provide any directions on an honest belief.
[32] *Wright* 2005 par.10.

raise two conflicting defences, in terms of logic an appellant cannot sustain two competing versions of the same event and claim that each is an honest account.

As we saw in Chapter Three, the court in *McKearney* applied a performative 'no' model of consent by focusing on the absence of the complainer's refusal or resistance at the time of intercourse. However, in *Wright* the court applied a different conception of consent: "by such consent is meant active consent, as opposed to mere submission or permission"[33]. This suggests that any inference of consent that might be drawn from the complainer's passivity - if she had woken immediately prior to intercourse - would not amount to legal consent; that is, a standard of consent recognised in law. It is notable that in *Wright* - an appeal held one year after *McKearney* and prior to the statutory definition of consent as free agreement in the 2009 Act - the court sought to distinguish a positive or affirmative conception of consent from a narrow performative 'no' model.

Since the court in *Wright* excluded the possibility of the appellant's honest mistake about consent, the "critical question" was whether there was corroboration of the complainer's account that she was asleep prior to intercourse[34]. The court found such corroboration through inferences drawn from the surrounding circumstances. For example, the complainer had taken medication for flu and had consumed alcohol which would have made her sleepy. When she retired to bed, the lights in her bedroom were switched off, the blinds were closed and the room was dark. The incident took place after 11 pm, at which point she had been in bed for over an hour and would have been expected to be asleep. When she shouted for her husband, she was still in her nightgown and in a state of visible distress. The court considered that these circumstantial factors were "in our opinion not only consistent with [the complainer's] account but also sufficient to provide confirmation or support for it"[35]. Given a formal sufficiency of evidence, it was for the jury to determine whether the complainer was asleep. The court held that the jury clearly accepted that she "was indeed asleep when the appellant began to have intercourse with her" and "by inevitable inference, the appellant must have known that"[36].

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[33] This was based on the model proposed in the *Lord Advocate's Reference* (*No 1 of 2001*) 2002 per Lord Justice General at par.39.
[34] *Wright* 2005 par.10.
[35] *Wright* 2005 par.11.
[36] *Wright* 2005 par.15.

The same reasoning can be identified in *Spendiff*, where the court also accepted that inferences drawn from circumstantial factors supported the complainer's account that she was asleep and unable to consent[37]. In this case, intercourse took place in the early hours of the morning when the complainer would be expected to be asleep. She had gone to bed alone and there was no evidence of a prior sexual relationship or any shared intimacy between the parties. The court considered this was sufficient evidence for the jury to "properly conclude beyond reasonable doubt that the complainer was asleep at the material time" and that, being aware of this, the appellant would have known she was not consenting[38]. Judicial reasoning in these cases illustrates how inferences drawn from circumstantial evidence may establish both the fact that the complainer was asleep and the criminal intent of the appellant[39].

In *Wright,* the question of consent was determined on the basis of three factors: the clear distinction drawn by the court between an evidential dispute of fact and an honest mistake about consent; judicial willingness to infer from circumstantial evidence that the complainer was asleep at the time; and the model of active consent applied by the court which suggested that, even if the complainer had woken just before intercourse, her passive submission would not meet the legal standard of consent. Although the trial judge failed to provide adequate directions on *mens rea*, the court accepted that the jury were directed to the key element that established proof of non-consent and criminal intent; whether the complainer "was intoxicated or asleep or otherwise unconscious and not in a position to consent or resist"[40].

A borderline state

In *Patterson v HMA*[41], as in *Wright*, the complainer alleged that the appellant raped her while she lay asleep and unable to consent. Here, the court applied a different conception of the ability to consent that allowed for the appellant's honest belief in consent, although the complainer was not fully awake at the time of intercourse.

[37] *Spendiff* is discussed more fully in Chapter Three.
[38] *Spendiff* 2005 par.22.
[39] In *Wiles*, the court also considered whether "the evidence as a whole" justified the inference that the appellant knew the complainer was not consenting. Although the nature of the circumstantial evidence is not discussed, the court deemed it "ample"; *Wiles 2007* par.2.
[40] *Wright* 2005 par.15.
[41] *Patterson v HMA* 2005 HCJAC 57.

In *Patterson*, the complainer went out with her friend N and, at around midnight, they met the appellant whom the complainer knew as an acquaintance. Later, the complainer, N and the appellant went on to a party. When they returned to N's house in the early morning, the complainer went straight to bed in a spare bedroom, falling asleep at 6 am. N told the appellant that he could sleep on the couch in her living room. At trial, the complainer testified that she woke up "feeling pressure on her chest and someone touching her". At first, she thought she was dreaming and then became aware that it was the appellant: "she could feel his naked private parts" and "realised that he was putting his penis into her vagina, more than once"[42]. The complainer testified that she "felt pain" because she was lying "on her right side"[43]. She sat up, pushed him away and then ran through to N's bedroom and told her what had happened.

N confirmed that there had been no prior relationship or any intimacy between the complainer and appellant and that, when the complainer woke her up, she was "very upset and in floods of tears"[44]. When she asked the complainer what was wrong, she answered "he's done something to me – [the appellant] came into my bed beside me"[45]. N asked the complainer "has he raped you?" to which the complainer replied "yes"[46]. N said that she threw the appellant out of her house, wearing only his boxer shorts. As the appellant was leaving, he told N: "If she's saying what I think she is, I'm getting my sister on her"[47]. Once the appellant left, N phoned the police.

In his police interview, the appellant maintained he had consensual intercourse with the complainer. According to the appellant, N told him he could sleep in the complainer's bed. When he got into bed beside her, he said that the complainer "turned round and cuddled into him, put her hand between his legs and aroused him"[48]. He then "kissed and touched her intimately" and "this led to their having sexual intercourse for two or three minutes"[49]. The appellant said that the complainer "encouraged him to have sexual intimacy and behaved as if she was enjoying the intercourse"[50]. According to the appellant, the complainer "did not push him off"[51]. He

[42] *Patterson* 2005 par.3.
[43] *Patterson* 2005 par.3.
[44] *Patterson* 2005 par.4.
[45] *Patterson* 2005 par.4.
[46] *Patterson* 2005 par.4.
[47] *Patterson* 2005 par.3.
[48] *Patterson* 2005 par.5.
[49] *Patterson* 2005 par.5.
[50] *Patterson* 2005 par.5.
[51] *Patterson* 2005 par.5.

stated that, when the complainer got out of bed, he went through to the living room, had a drink and lay down on the couch. N then came in and asked him to leave. The appellant could not explain why the complainer was so distressed and maintained that she was "okay" when he left [52].

The case was appealed on grounds that the trial judge misdirected the jury by stating that the crime of rape is not committed "if the man actually and reasonably believes that the woman was consenting"[53] (original emphasis). At appeal, the Crown accepted that this passage amounted to misdirection since the requirement at the time was that of an honest belief in consent. The question facing the court was whether this misdirection was sufficiently material in the circumstances to amount to a miscarriage of justice. In determining this, the court focussed on the complainer's state of awareness when intercourse began. If the complainer was asleep, the appellant would have known that she could not consent and, as in *Wright*, the question of an honest belief in consent would not arise. If she was awake before intercourse, then it could be argued that the question of an honest belief was a live issue and adequate directions should have been provided to the jury.

At appeal, the defence submitted that, "while the complainer may have been asleep when the appellant entered the bedroom, she was no longer asleep when intercourse took place"[54]. According to the defence, the complainer was awake at this point and knew that it was the appellant who was beside her in bed. The defence also relied on the fact that "nothing was said by either party [and] in particular nothing was said by the complainer to the appellant to indicate that she was not consenting"[55]. The defence argued that, in a non-forcible rape and where there was no evidence of refusal, the trial judge's misdirection on an honest belief in consent was material[56].

The Crown submitted that, in the particular circumstances, the trial judge's misdirection did not amount to a miscarriage of justice. The Crown pointed to "evidence of the complainer, N and the appellant [which showed that] the complainer was asleep when he got into bed"[57]. For example, there was a discrepancy between the

[52] *Patterson* 2005 par.5.
[53] *Patterson* 2005 par.8.
[54] *Patterson* 2005 par.7.
[55] *Patterson* 2005 par.7.
[56] *Patterson* 2005 par.8.
[57] *Patterson* 2005 par.9.

complainer and appellant's estimation of how long intercourse lasted. The appellant testified that intercourse lasted "for two or three minutes", while the complainer was conscious of the appellant's actions "for only seconds", which suggested that she was asleep when intercourse started[58]. The Crown argued that, since the jury convicted the appellant on the full terms of the indictment, it was clear that they accepted that the appellant had raped the complainer "while unconscious and also after she regained consciousness"[59]. In these circumstances, there was no possibility that the appellant could have "entertain[ed] an honest belief that she was consenting" and, therefore, his conviction at trial was inevitable[60].

The court appeared to reject both the complainer and the appellant's account of the events. Disputing the jury's verdict on the charge of rape, that the complainer was asleep when intercourse commenced, the court held that "it is by no means clear that this theory reflects the true position"[61]. The appeal was allowed but not on the basis of the defence submission that the complainer was fully awake and aware of what was happening. In determining consent, the court relied on its own version of the events. In a very brief judgement given by the court, the complainer was portrayed as neither asleep nor awake[62]. Rather, the court considered that "the complainer's state lay on or close to the borderline between sleep and wakefulness"[63]. Through a reconstruction of the facts and the judicial conception of a borderline state - in which the complainer was not fully awake - the court found sufficient ambiguity in her passivity and lack of resistance to allow for the possibility that the appellant might have genuinely believed she was consenting. Despite the jury's factual determination that intercourse took place while the complainer "was asleep and incapable of giving or withholding consent", the question of an honest belief in consent became a live issue at appeal[64].

The law conventionally applies a binary approach in conceptualising the ability to consent in the context of sleep; that is, either the complainer is asleep (and unable to consent) or she is awake (and able to consent). As we saw in *Wright*, the court applied this binary model in holding that the complainer was unable to consent because she

[58] *Patterson* 2005 par.9.
[59] *Patterson* 2005 par.1.
[60] *Patterson* 2005 par.9.
[61] *Patterson* 2005 par.9 .
[62] Extending to two sides of A4, this was one of the shortest case reports I examined.
[63] *Patterson* 2005 par.9; this was the only comment given by the court in relation to the complainer's ability to consent.
[64] *Patterson* 2005 par.1.

was asleep at the relevant time; there was no question as to *how* awake or *how* asleep she might have been[65]. The complainer's ability to consent under the 2009 Act is also underpinned by the same binary approach (although this Act did not apply to either *Patterson* or *Wright*)[66]. However, by constructing a borderline state between sleep and wakefulness, the court in *Patterson* appeared to apply the notion of a continuum in relation to sleep and the ability to consent. In doing so, the court moved the threshold of capability - that is, the point at which the complainer would be deemed able to consent - into the realm of semi-consciousness[67].

The judicial construction of a borderline state in *Patterson* does not amount to a normal waking state. Emerging from sleep and without time to consider what was happening, the complainer would have lacked sufficient awareness to form a willed intention or make a meaningful choice. In such circumstances, her cognitive capacity to give consent would not fulfil the requirements of Wertheimer's model of consensual minimalism[68]. As I discussed in Chapter One, according to Wertheimer, sexual relations are morally permissible if they are consensual in "some reasonably straightforward sense"[69]. That is, consent is transformative in and of itself so long as it is not undermined by any legally relevant circumstances, such as force, coercion or deception, that impinge on its formal validity[70]. However, decision-making by a woman while she emerged from sleep would not meet Wertheimer's standard for consent, far less the conception of 'active consent' applied by the court in *Wright*. Reading consent into the complainer's silence before she was properly awake might be conceivable in an established consensual sexual relationship. However, in *Patterson*, the factors present in such a relationship from which an implied consent could be inferred, such as prior sexual intimacy, shared communication and explicit agreement, were all absent.

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[65] In *Patterson*, no relevant inference was drawn by the court from circumstantial evidence that provided corroboration in *Wright* that the complainer was asleep; for example, the fact that she had gone to bed alone, the lack of prior intimacy between the parties and, considering the time at which the complainer went to bed, the expectation that she would be asleep.

[66] Under s.14(2) of the 2009 Act a person is considered "incapable, while asleep or unconscious, of consenting to any conduct".

[67] Waking to find the appellant lying on top of her and pinned down by his superior body weight, the complainer was effectively confined within her bed. This can be understood as a form of coercion or constructive force that denied her the possibility of escape. She would have been trapped in much the same way as other complainers have been recognised as detained in the appellant's car (in *Kim*) or his flat (in *Drummond* and *Dalton*). The judicial perception of detainment in a car or flat - but not a bed - may reflect the inferences that can be drawn from the location of intercourse. Within popular discourse, the bed has a symbolic significance - not just as a place to sleep - but as a site of sexual intimacy in consensual sexual relationships.

[68] Wertheimer, A. (2003) *Consent to Sexual Relations*, Cambridge: Cambridge University Press. Wertheimer's approach is discussed more fully in chapter 1.

[69] Wertheimer, A. (2003) *op.cit.,* p.140.

[70] According to this approach, engaging in sexual relations for instrumental reasons (other than intimacy and sexual pleasure) in circumstances that may appear to be exploitative (such as prostitution) may be considered consensual and morally permissible so long as the individual expresses a valid token of consent.

There is no recognition in *Patterson* of the distinctive vulnerability and defencelessness that is generated by entering a state of sleep. Falling asleep requires us to trust in the surrounding world. As we enter sleep, we enter a space of anonymity where we are no longer conscious of our bodies and where we experience some respite from the concerns of bodily exposure. The rape of a sleeping woman threatens this most vulnerable state of anonymity and the ability to retreat into the night. This violation has been understood as "exploiting and reinforcing a victim's lack of agency and exposing her body in ways that make it especially difficult for her to reconstitute herself as a subject [as] it damages both her ability to engage with the world … and her ability to retreat from it into the restful anonymity of sleep"[71]. To be roused from sleep by someone penetrating your body is to have this deepest place of privacy, the part of one's life where existence is temporarily but crucially suspended, erased.

Judicial determination of the complainer's ability to consent in such circumstances implies an intuitive or bodily expression of acquiescence rather than a capacity to engage in the cognitive processes necessary for choice and decision-making. When placed in a wider cultural context, the account offered by the court in *Patterson* - that the appellant may have genuinely believed the complainer was consenting to his sexual advances while she remained half-asleep - evokes the themes of an old fable. In *Sleeping Beauty*, a woman is confined within her bed and awakened from sleep through her seduction by an ardent suitor[72]. The heroine in *Sleeping Beauty* epitomises female passivity. She is the object of male desire but, lacking autonomy, she cannot give or withhold permission to being sexually handled or exercise any control over what happens to her body while she lies sleeping[73]. When kissed by a stranger, while barely conscious, her body yields to the embrace. It is this intuitive, physical surrender to a stranger's sexual initiation that allows *Sleeping Beauty* to be read as a tale of romantic seduction and not sexual assault.

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[71] Heyes, C. (2016) 'Dead to the World: Rape, Unconsciousness and the Social Media', *Signs: Journal of Women in Culture and Society*, Vol.41 No.2.

[72] Perrault, C. (2010) *The Complete Fairy Tales*, Oxford: Oxford University Press, reprint edition. Sleeping Beauty is a classic fairy tale involving a beautiful heroine, a sleeping enchantment and a handsome suitor who is really a prince. The fable that is associated with the Brothers Grimm was based on the tale published by Charles Perrault in *Histoires ou contes du temps passé* in 1697. This in turn was based on earlier version of older folk tales; see *The Original Folk and Fairy Tales of the Brothers Grimm*: *The Complete First Edition*, Princeton University Press, reprint edition 2016.

[73] The archetypal fable of the sleeping woman 'wakened' into sexual adulthood has been understood as a "metaphor for the initiation rites of both biology and society and, of course, for the passive acceptance with which women have been expected to greet them"; see Roberts, D. (2006) 'Sleeping Beauties: Shakespeare, Sleep and the Stage', *The Cambridge Quarterly*, 35(3) 231, p. 232. Roberts suggests that, in this context, sleep symbolises "not merely social passivity but … an elusive sanctuary of the mind that transcends the vagaries and violence of the desiring observer", p.233. For feminist readings of fairy tales, see Zipes, J. (2011*) Fairy Tales and the Art of Subversion*, London: Routledge.

The judicial construction of events in *Patterson* echoes and reproduces elements of this folk tale by allowing for the appellant's belief in the complainer's willing submission while she lay half-asleep. It illustrates the anomalous position of women within a narrative of romantic seduction; that even when a woman remains silent and inert, her body may be seen as speaking a language of consent[74]. Such cultural narratives may help explain, in part, how consent can be read into the passivity of a woman's body in the absence of any shared communication or prior intimacy between the parties, even when she is not fully aware of what is happening. Accounts of consent that draw on such narratives reflect and reproduce conventional, asymmetric gender roles within heterosexuality based on male assertion/female passivity and do not distinguish between submission and consent.

The judicial account of events in *Patterson* overlooks one telling fact: the complainer testified that she experienced pain when she awoke and found the appellant having intercourse with her while she was lying on her side. Her account was very similar to that given by the complainer in *Spendiff*, who also spoke of her pain when intercourse took place "at an unnatural angle" as she lay asleep on her side[75]. In *Spendiff*, the court recognised "real injury" in the complainer's description of pain and inferred the use of force by the appellant[76]. In *Patterson*, the same account - of being woken by the pain of intercourse - was not recognised by the court as amounting to injury or the use of force. This untidy fact, which is disregarded in judicial reasoning, creates a discordant note in the court's account of events.

Through the judicial reconstruction of what happened in *Patterson*, the silence and passivity of the complainer in her borderline state of awareness allowed for the appellant's honest belief that she was consenting. On this basis, the trial judge's misdirection on *mens rea* was deemed material. The court concluded, somewhat tentatively, that "we are unable to accept the contention that there was no miscarriage of justice"[77].

[74] An analysis of woman's position within the romance narrative is developed in Bordo's seminal work: Bordo, S. (1993) in *Unbearable Weight: Feminism, Western Culture and the Body*, London: University of California Press, p.6.
[75] *Spendiff* 2005 par.12
[76] *Patterson* 2005 par.3
[77] *Patterson* 2005 par.9.

Trying it on

My analysis of judicial discourse in the previous cases focused on the use of reasoning and narrative since these most clearly demonstrated how consent was constructed. I turn now to consider the use of language in *McNairn v HMA*[78], where the complainer also alleged she was raped while she was asleep. I will also refer to the cases of *GM v HMA*[79] and *Melville v HMA*[80]. In *McNairn*, the Crown relied on the colloquial meaning of a slang expression used by the appellant for corroboration of the complainer's account. At appeal, the court considered whether the appellant's remark provided a basis from which to infer criminal intent. In my analysis of *McNairn*, I consider the cultural connotation of language in judicial discourse.

The case of *GM* was appealed on grounds of insufficient evidence. At trial, the Crown led evidence of the appellant's police interview, in which he admitted having consensual intercourse with the complainer. Since this interview took place without the benefit of legal advice, the issue raised at appeal was whether there was sufficient evidence to warrant conviction if the interview was inadmissible[81]. The defence submitted that, without the interview, the only possible corroboration of intercourse came from a witness's testimony that the appellant said he had "slept with" the complainer[82]. The defence argued that this remark did not necessarily indicate sexual intercourse and that "the meaning that the appellant had intended was a matter of speculation"[83]. The Crown submitted that, "whatever other interpretations of those words might have been possible", the appellant's comment "could bear the meaning that [he] had had intercourse with the complainer"[84]. The court accepted the Crown's argument and considered that this submission for the appellant was "misconceived"[85]. Judicial reasoning was explicit: "the question is not whether the words 'slept with' are capable of more than one meaning. It is whether one of the meanings of which they are capable is that sexual intercourse took place"[86]. Although the appeal was upheld on an

[78] *McNairn v HMA* 2005 S.L.T. 1071.
[79] *GM v HMA* [2011] HCJAC 112.
[80] *Melville v HMA* 2006 S.C.C.R 6;
[81] In pre-*Cadder* days, the Crown relied on evidence gained from police interviews where the accused had not been offered legal advice. At the appeal in *GM*, the Crown was awaiting the decision of the Supreme Court in the cases of *Jude and Others v HMA* 2011 S.L.T. 722 as to whether such evidence was admissible in circumstances where the accused had waived his right to legal advice or where the evidence gained had been led without objection.
[82] *GM* 2011 par.17.
[83] *GM* 2011 par.17.
[84] *GM* 2011 par.19.
[85] *GM* 2011 par.21.
[86] *GM* 2011 par.21.

unrelated ground, the court accepted that formal sufficiency was provided where, on one interpretation, the evidence was capable of supporting the complainer's account[87].

Similarly in *Melville v HMA*[88], the Crown also relied on the sexual connotation of a slang expression that had been used in a witness's statement: that he had seen the appellant "touching up" the complainer while she lay sleeping[89]. The appeal court accepted that the phrase meant that the appellant had acted "in a sexual manner" towards the complainer[90]. While in *GM* and *Melville*, the court accepted the colloquial meaning of a slang expression and deemed it capable of supporting the complainer's account, the court in *McNairn* applied a different approach.

In *McNairn*, the complainer and appellant were on friendly terms as neighbours. On the evening of the offence, the complainer went to the appellant's flat where they chatted and consumed some alcohol. Later that evening, the appellant suggested that the complainer could sleep overnight in his flat. He said that she could sleep in the bed and that he would sleep on a camp bed in the same room. The complainer agreed. When she went to the bedroom, she undressed "to the extent of removing her trousers" and got into bed[91]. While there was some discrepancy as to whether the complainer claimed to be asleep or whether she had woken just before intercourse, there was common agreement that, after she woke, the complainer feigned sleep. While she lay asleep or apparently asleep, the appellant got into bed and had intercourse without her consent. Afterwards, she got dressed and went to the flat of a male friend, arriving in a distressed state in the early hours of the morning. On being interviewed by the police, the appellant maintained that the complainer was awake at the relevant time and that she was a willing party to intercourse.

At trial, the Crown led evidence of the complainer's distress witnessed by two friends who observed her soon afterwards. The Crown also relied on witness testimony by Rennie, a friend of the appellant, regarding a conversation they had shortly after the appellant was arrested for rape. In his evidence to the court, Rennie stated that the

[87] The court applied the *dicta* in *Fox v HMA* 1998 JC 94; that is, in order to provide corroboration, circumstantial evidence need not be incriminating but should, on one interpretation, be capable of confirming the complainer's account of the event.
[88] *Melville v HMA* 2006 S.C.C.R 6; I will discuss the case more fully later in the chapter.
[89] *Melville* 2006 p.2.
[90] *Melville* 2006 par.2.
[91] *McNairn* 2005 par.2.

appellant told him that "he did try sleeping with her"[92]. When asked what he had understood the appellant meant by this, Rennie replied "that he had tried it on"[93]. In cross-examination, it was put to Rennie that "he could not really tell the court the words used by the appellant"[94]. He replied "I cannae remember exactly what he said but from what he said, that is what I had taken it he meant … [that] he had tried it on"[95].

At the close of the Crown case, the defence made a submission of 'no case to answer' on grounds of insufficient evidence of the appellant's criminal intent. In response, the Crown relied on evidence of the complainer's distress and Rennie's testimony of his conversation with the appellant. The trial judge directed the jury that it was Rennie's evidence that was capable of providing corroboration: "you cannot use [the complainer's distress] to corroborate her but you can use, depending upon the view you come to about it, the evidence of Rennie, the friend … that the accused tried it on, in other words, that he did something very much without thinking, recklessly … If you don't accept his evidence and the meaning attached to it, then [the appellant's *mens rea*] simply isn't corroborated … and if you are left in any reasonable doubt about any of these [matters], then of course you have to acquit"[96].

The case was appealed on grounds that the trial judge erred in repelling the submission of 'no case to answer' and that he misdirected the jury by stating that Rennie's evidence could provide corroboration. The defence argued that, in the absence of any allegation of force or threat, there was insufficient evidence of criminal intent. The defence cited the complainer's own evidence that she had "pretended to be asleep … [and] had at no stage protested or resisted"[97]. According to the defence, neither the words attributed to the appellant by Rennie nor Rennie's interpretation of them were capable of supporting the complainer's account.

The Crown argued that Rennie's evidence entitled the jury to conclude that the appellant "made an admission which went further than one of an attempt to sleep with the complainer"[98]. The Crown submitted that Rennie's statement should be considered

[92] *McNairn* 2005 par.5.
[93] *McNairn* 2005 par.5.
[94] *McNairn* 2005 par.5.
[95] *McNairn* 2005 par.5.
[96] *McNairn* 2005 par.7.
[97] *McNairn* 2005 par.9.
[98] *McNairn* 2005 par.10.

in the light of relevant circumstantial factors; the absence of any prior sexual relationship between the parties and the "absence of words or of affectionate conduct between the parties before, during, or after the sexual intercourse"[99]. When the appellant's comment was placed in this context, it could be understood colloquially as meaning that he had "taken a chance", "pushed his luck" or "done something which he was not entitled to do"[100]. According to the Crown, such an interpretation was consistent with Rennie's understanding of the comment (that the appellant "had tried it on") and supported the complainer's account that the appellant knew she was not consenting (because she was asleep or appeared to be asleep).

The appeal court accepted that, even if intercourse had taken place while the complainer was feigning sleep, "an inference could be drawn that the appellant was at least reckless as to whether she consented to that intercourse"[101]. The "essential question" was whether the trial judge misdirected the jury by stating that corroboration of the appellant's *mens rea* "could be found, and could be found only, in Rennie's evidence"[102]; that is, whether "the appellant in his remarks to Rennie disclosed from his own mouth his mental attitude at the relevant time"[103].

To provide corroboration, Rennie's evidence - on one interpretation - had to be capable of supporting the complainer's account that the appellant knew she was not consenting. In assessing the evidential value of his testimony, the court considered the various meanings that could be attached to Rennie's evidence. As in *GM*, the court accepted that, in the context of "an enquiry as to what had [led] to the appellant being arrested on an allegation of rape", the term 'sleeping with' meant "having sexual intercourse with" the complainer[104]. The difficulty identified by the court was how to understand the phrase when it was prefaced by the word 'try' ("did try sleeping with her") and Rennie's interpretation of the phrase as meaning he "had tried it on". In considering the meaning of these phrases, the court focused on a literal interpretation of "the words, on their face"[105]. For example, the court understood 'try' as conveying "an attempt, whether by verbal persuasion or by physical encouragement, to have

[99] *McNairn* 2005 par.10.
[100] *McNairn* 2005 par.10.
[101] *McNairn* 2005 par.12.
[102] *McNairn* 2005 par.11.
[103] *McNairn* 2005 par.12.
[104] *McNairn* 2005 par.13.
[105] *McNairn* 2005 par.13.

sexual intercourse with the complainer"[106]. Alternatively, the court considered that 'try' might "somewhat fancifully … be understood in the sense of 'experiment with'"[107].

The court accepted that Rennie's evidence was "suggestive of the use of devious means" by the appellant and his recourse to "persuasion or physical encouragement" in having intercourse with the complainer[108]. However, no inference was drawn from this as to the appellant's state of mind at the time of the intercourse. Having settled on the literal meaning of 'try', judicial opinion was that Rennie's evidence could not "reasonably bear the interpretation that the appellant did something very much without thinking, recklessly"[109]. Despite the appellant's admission that there was full intercourse, the court decided that the "slang expression 'try on' seems to point to no more than an unsuccessful attempt … [and] point away from sexual intercourse having actually been achieved"[110]. Although the connotation of "he had tried it on" suggests a quite different meaning in the context of everyday speech, the judicial conclusion was that Rennie's evidence offered "no support either to the complainer's or the appellant's account of what happened"[111].

Juxtaposed with the judicial discussion of the language used in witness testimony is the court's own use of language in narrating the sexual encounter between the complainer and appellant. In the judicial portrayal of the event, the disparity between the agency of the appellant and complainer appears to be inverted through the particular pattern of language used:

> The complainer lived in a flat above that occupied by the appellant. They were on friendly terms. There was some inspecific evidence that she pestered him from time to time and wrote him notes. On the evening of 22 May the complainer went to the appellant's flat at about 8pm. Drink was taken and she decided to stay at his invitation. She undressed to the extent of removing her trousers and got into bed. The appellant remained in the same room, lying initially on a camp bed there. According to the trial judge's report, the complainer's evidence was that she fell asleep and was awakened to find the appellant having sexual intercourse with her. The intercourse, she testified, lasted for 20 minutes. Throughout that time, she pretended to be asleep, as she was afraid of him. When intercourse finished, the appellant lit a cigarette and left the room.

[106] *McNairn* 2005 par.13.
[107] *McNairn* 2005 par.13.
[108] *McNairn* 2005 par.13.
[109] *McNairn* 2005 par.14.
[110] *McNairn* 2005 par.13.
[111] *McNairn* 2005 par.13.

> The complainer then got dressed and left the flat. She went to the flat of a male friend. She arrived there about 5.00 am (my emphasis)[112].

By examining this representation of the event, it is possible to demonstrate how the agency and responsibility of each of the parties is inscribed in judicial discourse. While the grammatical construction of each statement in the passage might appear unexceptional, the pattern of language used serves to accentuate the complainer's role and behaviour while marginalising or obscuring that of the appellant. As I will show, this is achieved through the narrative focus and selection of detail, the grammatical positioning of the participants, and through the process of nominalisation.

In the judicial account of the rape, the inclusion of particular factual elements and details shapes the narrative backcloth to the event and the particular role played by each of the parties. For example, in establishing the background and relationship between the parties, no information is provided about the appellant and the only information offered in relation to the complainer is that she "pestered [the appellant] from time to time and wrote him notes". The depiction of the complainer as pestering the appellant (rather than, for example, seeing, meeting or visiting him) has a pejorative connotation, where the complainer is positioned as assertive and intrusive and the appellant is constructed as the object of the complainer's unwanted attention. Although the evidence for such 'pestering' is explicitly qualified as "inspecific", it is this narrative detail which frames the judicial account of the rape.

In this account, the complainer is framed as the primary actor and the narrative is propelled by her actions and decisions, which achieve prominence by being placed at the beginning or within the main clause of a sentence: "the complainer lived …"; "she pestered him … wrote him notes", "the complainer went to the appellant's flat"; "she decided to stay"; "she undressed … removing her trousers … got into bed"; "she pretended …"; "she fell asleep …"; "the complainer got dressed"; "she went to the flat"; "she arrived there". Through the pattern of grammatical construction, the complainer is positioned as the subject who initiates action or takes decisions and, in this way, her role and agency are enhanced. By contrast, the appellant is positioned as the object of the complainer's action ("she pestered him"; "[she] wrote him notes") and his actions

[112] *McNairn* 2005 par.2. The account of what took place is described in this one paragraph.

are either implied ("drink was taken"), compressed ("at his invitation") or simply excluded. There are only two sentences where the appellant features as the subject of any action: the appellant "remained in the same room, lying initially on a camp bed there" and, after intercourse, "the appellant lit a cigarette and left the room". These actions are innocuous and peripheral to the rape. The critical decisions and behaviour of the appellant - his decision to get out of the camp bed and into the bed where the complainer lay sleeping, and what he does to the complainer before he lights his cigarette - are absent in this account. Through the grammatical positioning of the appellant - in subordinate clauses, as the object of the complainer's action or by the compression or deletion of his actions - his agency is diminished and marginalised.

In the judicial construction of the rape, the appellant's sexual behaviour is confined to a minor clause at the end of a sentence ("… she fell asleep and was awakened to find the appellant having sexual intercourse with her"). Through the use of nominalisation, an action process (the appellant's sexual behaviour towards the complainer while she lay asleep or feigning sleep) is replaced by a noun which then functions as the subject of action in the following sentences; it is "the intercourse" which lasted 20 minutes and "the intercourse" which subsequently finished. Nominalisation is a common linguistic device which can elide social agency by removing or obscuring a sense of causation or the specifics of an action[113]. Here, the appellant's behaviour is implied but any sense of causal agency or responsibility is obscured through the process of compression and simplification. The narrative construction of the sexual assault allows the appellant to be virtually eliminated and has the effect of naturalising his behaviour as "having intercourse". As I explained in Chapter Two, such discursive effects are achieved irrespective of any conscious choice or authorial intention.

In *McNairn*, as in *Patterson*, the gross disparity between the appellant's sexual aggression and the inertia of the sleeping complainer is not explicitly recognised in judicial discourse and appears to be viewed as normative in the context of conventional gender roles within heterosexuality. The sense of gender asymmetry is also inverted in *McNairn* through a narrative portrayal of events that accentuates the complainer's agency and naturalises the appellant's role and behaviour. While the court recognised

[113] As I explain in chapter 2, the use of nominalisation in a text may be significant because replacing a process of action with abstract nouns may contribute to such processes appearing common-place or self-evident; it is, therefore, one of the ways in which events or processes become naturalised. I also discuss its use in Chapter Four.

that the appellant's remark to Rennie was suggestive of "devious means", "persuasion" and "physical encouragement", its evidential value was not accepted[114]. The court held that the trial judge's misdirection to the jury, that corroboration could be found in Rennie's evidence, amounted to a miscarriage of justice. On this basis, the appeal was upheld. Ultimately, the meaning that could reasonably be attached to Rennie's statements was not a question of fact to be decided by the jury but was subject to judicial determination.

An amorous pursuit

In assessing the appellant's intentions towards the complainer, the court may consider his prior behaviour if it has a bearing on his state of mind at the relevant time. In the cases of *Melville v HMA* and *Cinci v HMA*, the appellant had some form of unwanted sexual contact with the complainer prior to the alleged rape[115]. In *Melville*, this took place while the complainer lay sleeping and, in *Cinci*, the complainer was manifestly unwell through intoxication and required assistance in fending off the appellant's sexual advances. In both cases, the conviction of rape was appealed *inter alia* on grounds of insufficient evidence of the appellant's criminal intent. In assessing the appellant's state of mind and the relevance of his prior sexual behaviour towards the complainer, the judicial characterisation of his conduct determined its evidential value.

In *Melville*, the complainer was asleep when the appellant had intercourse with her and she continued to feign sleep when she subsequently awoke. At appeal, there was common agreement that sexual intercourse had taken place without the complainer's consent. The question facing the court was whether there was sufficient evidence to corroborate the complainer's account that she was asleep and that the appellant would have known, therefore, that she was not consenting. Corroboration came from a witness H who had earlier observed the appellant "touching up" the complainer as she lay dozing on a couch[116]. The defence argued that the connection between this incident and the intercourse that took place later the same evening was "too remote to provide the necessary corroboration"[117].

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[114] *McNairn* 2005 par.13.
[115] *Melville v HMA* 2006 S.C.C.R. 6; *Cinci v HMA* 2004 S.L.T. 748.
[116] *Melville* 2006 p.2. As I discussed earlier in this chapter, the court accepted the sexual connotation of this term.
[117] *Melville* 2006 par.3.

At trial, the judge explained to the jury that, since H's evidence "related to a different stage of events", it could not provide "direct confirmation" of the fact that the complainer was asleep at the time of the intercourse[118]. However, he stated that the evidence "was capable of … confirming that the accused's state of mind was that he knew there was no consent to sexual activity on the part of the complainer"[119]. The trial judge directed the jury that, while H's testimony provided a formal sufficiency of evidence, they were "of course entitled to look at it not as a matter of law but as a matter of fact and see whether you do in fact find that [H's testimony] was supportive of the evidence that suggested that the complainer was giving every sign of being asleep at the time of the alleged intercourse"[120].

At appeal, the court focussed on the evidential value of H's testimony that the appellant touched the complainer in a sexual fashion while she lay asleep on a sofa in the living room. When the complainer awoke, she went to a bedroom where she had again fallen asleep. The court accepted that the incident witnessed by H and the later event "must have been separate"[121]. Judicial opinion was that the first incident demonstrated "inappropriate behaviour" by the appellant: the complainer "could not have consented to what was going on" and, consequently, the appellant would have known she was not consenting[122]. The court considered that this incident was "so similar in character, and so related in time and place to what happened later, that it could be regarded as indicative of the appellant's attitude at the material time of the rape"[123]. The judicial conclusion was that "we have no difficulty in accepting … that the evidence of what happened earlier was, in our view, clearly capable of providing the necessary corroboration" that the appellant was aware the complainer was not consenting to intercourse[124].

Judicial reasoning in *Melville* appears to rely on the language and thinking more commonly associated with application of the *Moorov* doctrine[125]; that is, whether the evidence provided by multiple complainers is sufficiently similar in time, place and circumstance to provide mutual corroboration of their accounts. While it was not

[118] *Melville* 2006 p.2.
[119] *Melville* 2006 p.2.
[120] *Melville* 2006 p.2.
[121] *Melville* 2006 par.2.
[122] *Melville* 2006 par.3.
[123] *Melville* 2006 par.3.
[124] *Melville* 2006 par.3.
[125] *Moorov v HMA* 1930 J.C. 68; the requirements of this doctrine are discussed in more detail in Chapter Four.

explicitly stated, judicial reasoning seems to have been that the appellant's behaviour in the first incident indicated his willingness to engage in sexual activity with the complainer knowing that she was asleep and unable, therefore, to consent[126]. This incident confirmed, therefore, that the appellant was prepared to act as he did without an honest belief that there was consent. Accordingly, the court refused the appeal, holding that there was sufficient evidence that "the appellant was aware that he did not have the complainer's consent to having sexual intercourse with him"[127].

In *Cinci,* there was also evidence of unwanted sexual contact between the appellant and complainer prior to the alleged rape. In this case, the complainer and appellant were among a group of young foreign tourists on a tour of the highlands. On the day of the allegation of rape, a considerable amount of alcohol was consumed on the bus, including whisky, beer and wine. When the bus reached its destination, a youth hostel in Oban, most of the group were "drunk"[128]. The complainer, who had never drunk whisky before, was described as "extremely drunk" and was carried upstairs to bed in the female dormitory[129]. When the tour guide checked on her shortly afterwards, her bed was "covered with vomit"[130]. He physically assisted the complainer to walk to a communal shower area where she could wash herself. At this point, the appellant appeared and made sexual advances towards the complainer, attempting "to go into the shower with her"[131]. The appellant was "rebuffed by the complainer" and the tour guide "pushed [him] away, as did the complainer"[132]. The tour guide warned the appellant "in no uncertain terms, to go away and leave the complainer alone" and that "she already had a boyfriend"[133]. He then left to allow the complainer to clean herself up in private.

When the hostel manager went to check the shower area soon afterwards, she found one cubicle door was locked with "mumbling sounds" coming from inside[134]. The manager called out, asking if everything was okay. A male voice answered "yes" and a

[126] In a case commentary, the author questions how the prior incident could prove that the appellant "was aware that [the complainer] was asleep in another place at another time, even if place and time are closely related?" Considering the reasoning which underpinned the judicial decision, the author suggests that it might have been "sufficient to prove that [the appellant] was prepared to behave as he did without forming any genuine belief that the woman was awake and consenting, which is all the Crown required"; see *Melville* 2006 S.C.C.R., p.8.
[127] *Melville* 2006 par.3.
[128] *Cinci* 2004 par.16.
[129] *Cinci* 2004 par.16.
[130] *Cinci* 2004 par.16.
[131] *Cinci* 2004 par.16.
[132] *Cinci* 2004 par.16.
[133] *Cinci* 2004 par.16.
[134] *Cinci* 2004 par.16.

female voice said "no - help me!"[135]. The manager unlocked the door and found the naked complainer "scrunched up in the corner of the shower" with the appellant "also naked … standing or leaning over her[136]. The complainer was "very upset and crying" and she told the manager "he raped me", indicating the appellant[137]. The manager told the appellant to "get the fuck out of there" and contacted the police[138]. The complainer kept asking for help and remained visibly distressed. When the police surgeon examined her, DNA tests confirmed the presence of the appellant's semen in the complainer.

At trial, the complainer said she had "no memory of the events"[139]. She explained that she was not attracted to the appellant, that she had a boyfriend and "could not think of any reason for having sex with him"[140]. In his evidence to the court, the complainer's boyfriend said that when he reached the showers he heard "someone screaming 'help me!'"[141]. He found the complainer lying naked on the floor of the shower cubicle, "in deep shock", repeating in Swedish "help me! help me"[142]. The complainer told him in Swedish that "he put his willy into me", referring to the appellant[143].

The case was appealed on multiple grounds, including insufficient evidence of the appellant's criminal intent and misdirection by the trial judge. The defence submitted that the trial judge erred in admitting the complainer's statement ("he raped me") as evidence of the crime. Even if it was admissible, the jury should have been directed to consider it with caution, in the absence of the complainer's testimony of rape (due to memory loss). The defence also argued that the complainer could provide "no direct evidence at all as to *mens rea*" and the evidence relied on by the Crown did not give rise to any inference as to the appellant's state of mind[144]. At appeal, the Crown identified three sources of evidence that indicated the appellant's criminal intent: the complainer's statement that the appellant had raped her, evidence of the complainer's

[135] *Cinci* 2004 par.16.
[136] *Cinci* 2004 par.16.
[137] *Cinci* 2004 par.16.
[138] *Cinci* 2004 par.16.
[139] *Cinci* 2004 par.16.
[140] *Cinci* 2004 par.16.
[141] *Cinci* 2004 par.16.
[142] *Cinci* 2004 par.16.
[143] *Cinci* 2004 par.16.
[144] *Cinci* 2004 par.22.

extreme distress after the event and circumstantial evidence, including the prior incident where the complainer rejected the appellant's sexual advances[145].

The first source of evidence was the complainer's statement to the hostel manager that the appellant raped her. According to the rules of evidence, this is admissible as proof of the crime only if it is considered part of the event[146]. However, it was unclear "how long an interval had elapsed between the conclusion of the intercourse and the opening of the shower door"[147]. The evidential value of the complainer's statement depended, therefore, on how broadly or narrowly the event was defined. While the trial judge accepted that the complainer's words were either part of the event or "so closely related … to the central event that they could be regarded as … part of [it]"[148], the appeal court considered that "when the complainer spoke, that event was plainly over"[149]. Even if the event had not ended, it "would have been a matter for the jury, not the trial judge, to decide"[150]. Since the jury were not asked "whether or not in their view the critical event had ended", there was no corroborative value in the complainer's statement[151].

The second source of corroboration was the complainer's distress after the event. The hostel manager found her "in the corner of the shower, very upset and crying … [she] kept asking for help and remained visibly distressed"[152]. The complainer's boyfriend described the complainer as "quite incoherent … screaming … and repeating … 'Help me! Help me!'"[153]. As the court explained in *Drummond,* the complainer's distress after the event may support the inference that "[distress] existed shortly beforehand at the

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[145] *Cinci* is a complex case with multiple grounds of appeal and the court considered various legal issues. My discussion in this chapter focuses on judicial assessment of *mens rea* and circumstantial evidence from which the appellant's state of mind might have been inferred. I will discuss the issues relating to the complainer's ability to consent later in this chapter.

[146] The hostel manager's evidence of what she heard the complainer say was hearsay; that is, the complainer's statement was not provided by the complainer herself but the hostel manager. It was not, therefore, 'best evidence'. The aim of the hearsay rule is to restrict evidence given by a witness in court as to what she perceives to be a matter of fact. However, if the statement was made contemporaneously with the event by a person present at that event – that is, if it was considered part of the actual event, the '*res gestae*' – then it would be admissible as proof of its content and available as corroboration.

[147] *Cinci* 2004 par.19.

[148] *Cinci* 2004 par.19; the trial judge's approach reflects a line of authority derived from judicial thinking in the early case of *O'Hara v Central SMT Co Ltd 1*941 SC 363. Here, evidence given by a witness in the immediate aftermath of an accident was considered by the majority of the court to be part of the *res gestae*: "words and events may be so clearly interrelated that the truth can only be discovered when the words accompanying the event are disclosed. But it is not essential that the words should be absolutely contemporaneous with the events", p.381. In *Cinci,* the court doubted this approach and the decision taken in *O'Hara*; par.12.

[149] *Cinci* 2004 par.10.

[150] *Cinci* 2004 par.21.

[151] *Cinci* 2004 par.21.

[152] *Cinci* 2004 par.16.

[153] *Cinci* 2004 par.16.

relevant time" and establish not only the absence of consent but the fact that it would "have been clear to the accused that [the complainer] was not consenting to intercourse, hence the distress"[154]. This was the reasoning adopted by the trial judge in *Cinci* in her directions to the jury: "you may find evidence of distress helps you to draw inferences as to the circumstances surrounding the event that caused the upset and distress, including the state of mind of the accused, namely whether he knew she was consenting to intercourse or was reckless as to whether she was consenting or not"[155]. As in *McKearney* - an appeal held at the same time as *Cinci* – the appeal court doubted whether any relevant inference could be drawn from the complainer's distress as to the appellant's state of mind[156].

Having excluded the probative value of the complainer's statement and her post-event distress, the only other evidence of criminal intent related to the surrounding circumstances and, in particular, the prior sexual incident between the parties that was witnessed by the tour guide. The tour guide testified that, just before the complainer got into the shower, the appellant made unwelcome sexual advances towards the complainer that she clearly rebuffed. He also issued a warning to the appellant to go away and leave the complainer alone. It was shortly after this that the appellant returned to the same location and proceeded to have intercourse with the complainer while she was still washing herself in the shower[157].

The appeal court did not accept the evidential value of this incident: "the appellant's earlier advances cannot allow any inference as to the circumstances at the time of the offence"[158]. However, the improbability of the complainer changing her mind in such a short period of time, while she was still in the shower washing vomit off her body, points to a logical flaw in judicial reasoning. Assessed by the standard of an honest belief in consent, it is implausible - at least to this reader - that the appellant could have genuinely believed that the complainer, while unwell and having just refused and pushed him away, was willing to have intercourse with him minutes later. It might be argued that the appellant, who was also intoxicated, may have lacked the self-control

[154] *Drummond* 2015 par.16; see also *Spendiff v HMA* 2005 1 J.C. 338. I discuss judicial reasoning about distress more fully in Chapter Five.
[155] *Cinci* 2004 par.4.
[156] As in *McKearney*, the court in *Cinci* held that "it is unnecessary for us to decide the appeal on the point", par.4. Since the *McKearney* and *Cinci* appeals, the court has adopted a broader application of the evidential value of distress.
[157] The appellant was sent away by the tour guide as the complainer was about to go into the shower. The appellant returned minutes after the tour guide left, while the complainer was still in the shower.
[158] *Cinci* 2004 par.17.

that he would have had when sober. However, the appellant's behaviour is not excused in law by the fact that he may have been too intoxicated to appreciate the complainer was not consenting. A drunken intent to have intercourse, reckless as to the complainer's consent, is still an intent to rape.

In the account of events in *Cinci*, the appellant was described as pursuing the complainer "in an amorous fashion"[159]. This was the phrase used by the tour guide in his evidence at court. It was cited by the trial judge in his report to the appeal court and was included in the appeal court's own account of the events. While the phrase may appear innocuous - that is, merely factual and descriptive - it frames the appellant's sexual behaviour towards the complainer within a romantic paradigm. An interpretation of the appellant's actions as amorous - a benign romantic infatuation - was consistent with judicial reasoning that he may have honestly believed the complainer was consenting to his advances when he returned to the shower area. In this way, the appellant's intentions towards the complainer - despite her prior resistance and the warning given by the tour guide - appear to have been normalised within a paradigm of romantic pursuit or seduction.

In *Cinci*, the appeal court was asked to rule on a number of legal questions, including whether there was sufficient evidence of the appellant's criminal intent. In upholding the appeal, the court drew tight boundaries around the event and the evidence it considered relevant in establishing the appellant's state of mind. According to judicial opinion, this was a case where "there was no direct evidence at all that the complainer refused to consent" or that "the accused had the necessary *mens rea* to constitute the crime of rape"[160]. In *Cinci*, the court's willingness to accept the possibility of the appellant's honest belief in consent was, in part, a product of judicial interpretation of the appellant's amorous pursuit of the complainer.

Intoxication and sexual availability

In *Cinci* and *Mutebi*[161], the question of consent arose in the context of the complainer's borderline or fluctuating state of awareness due to the effects of her intoxication. In

[159] *Cinci* 2004 par.16.
[160] *Cinci* 2004 par.21.
[161] This case was discussed in Chapter Three.

Cinci, the complainer remained conscious although she had no memory of what happened. In *Mutebi*, the complainer had periods of unconsciousness at the time of the alleged rape. While *Cinci* was held prior to 2009, *Mutebi* was heard after the 2009 Act, which states that a person is incapable of consent while unconscious[162] and that free agreement is absent where she is incapable due of the effects of alcohol[163]. In each case, consent was constructed in circumstances where the complainer's functioning was severely impaired due to extreme intoxication.

As we have just seen, in *Cinci* the complainer had drunk quantities of whisky on the tour bus and was described as "extremely drunk"[164]. At the time of intercourse, she had just vomited, she lacked control of her movements and could barely walk or stand unaided. In *Mutebi*, the complainer had been drinking at a friend's house all evening and continued drinking with friends at a nightclub "until the early hours of the morning"[165]. CCTV footage from the club showed the complainer "sitting on the pavement outside … apparently dropping her mobile phone and scrabbling around to recover it from the ground … [then] setting off in the street outside the nightclub, unsteady on her feet"[166]. She described periods of unconsciousness when she reached the flat and, at the time of intercourse, her cognitive functioning was impaired to the extent that she was oblivious of the fact that she was "menstruating at the time" and "wearing a tampon"[167].

In *Cinci*, the complainer had no recall of the events and, in *Mutebi*, the complainer's memory of what happened was patchy. What she did remember was "coming to" in bed, naked, with the appellant, also naked, lying on top of her having intercourse with her[168]. In cross-examination at trial, the complainer accepted it was "possible" that she had consented at the outset since she "could not remember one way or the other"[169]. In each case, the memory loss experienced by the complainer was not recognised as evidence of the extent of her impairment and adversely affected the prosecution case as there was no direct testimony of the rape.

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[162] Under s.14(2).
[163] Under s.13(2)(a).
[164] *Cinci* 2004 par.16.
[165] *Mutebi* 2013 par.2.
[166] *Mutebi* 2013 par.2.
[167] *Mutebi* 2013 par.6.
[168] *Mutebi* 2013 par.2.
[169] *Mutebi* 2013 par.2.

Since *Cinci* was heard prior to the 2009 Act, there was no legal requirement to consider the effects of alcohol on the complainer's ability to give consent. Under the 2009 Act, which applied in the case of *Mutebi*, free agreement is deemed absent in circumstances where the complainer is incapable of consent due to the effects of alcohol, although what amounts to incapability is not defined in the Act[170]. Whether a complainer is intoxicated to the point of being incapable involves an assessment of the facts and circumstances of the case. Although it is difficult to define incapability in abstract terms, Cowan suggests that such an assessment could be based on the presence of a cluster of symptoms associated with severe impairment; for example, being unable to stand or move, carry on a conversation, becoming ill or unresponsive, vomiting, memory loss, periods of unconsciousness, or lacking awareness of the immediate circumstances[171]. There was evidence, in both *Cinci* and *Mutebi*, that the complainer was disabled by such symptoms.

In *Cinci*, the complainer's ability to consent was assumed in circumstances where she remained conscious throughout the event. In *Mutebi*, the appellant was charged with raping the complainer while she was "unconscious and incapable of giving or withholding consent, and after she had regained consciousness"[172]. However, these words were deleted from the indictment when the jury convicted the appellant. In *Mutebi*, there was no explicit judicial consideration of the complainer's capability in the context of the 2009 Act, suggesting that the court may have accepted that the matter was determined by the jury. However, as we have seen in earlier cases[173], the court is willing on occasions to recast what was regarded as a question of fact at trial as a matter of law at appeal so that it becomes subject to judicial determination. In both *Cinci* and *Mutebi*, the complainer appeared to be caught in a 'catch 22' position because of the effects of intoxication. Although her rudimentary functioning was severely impaired at the time of intercourse, the degree of impairment was not sufficient to amount to incapability. However, due to the memory loss caused by her incapability, the complainer's account of rape lacked credibility.

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[170] Under s.13(2)(a).
[171] Cowan, S. (2011) 'The Trouble with Drink: Intoxication, (In)Capacity and the Evaporation of Consent to Sex', *Edinburgh School of Law Working Paper Series*, University of Edinburgh, p.8. Cowan makes the point that while gradations of intoxication are routinely made in everyday conversation (the distinction, for example, between being merry and tipsy as opposed to being blind drunk, wasted, or completely out of it) such gradations are not recognised in law, *op.cit.,* p.12.
[172] *Mutebi* 2013 p.142.
[173] Such as *Patterson v HMA* 2005 HCJAC 57 (whether the complainer was asleep) and *Mackintosh v HMA* 2010 S.C.L. 731 (whether the complainer was detained).

It was not that the effects of intoxication were overlooked or disregarded in judicial discourse but, rather, the inferences drawn from the complainer's intoxication supported an account of consensual drunken sex. This is conveyed in the dominant narrative account of the event which, in each case, was presented by the defence and provided the basis for judicial reasoning at appeal. This account focused on the impact of intoxication on the complainer's behaviour and, in particular, her sexual disinhibition. In each instance, the complainer became a protagonist in the narrative construction of her rape through the salience attached to particular facts which suggested that, through her disinhibition, the complainer may have drunkenly consented (and forgotten) or allowed the appellant to believe that she was willing to have sex[174].

For example, in *Mutebi*, the complainer accepted that, although the appellant was someone "whom she did not know", she had drunkenly kissed him outside her flat[175]. She also said it was "possible that she had admitted the appellant to the flat using her own key"[176]. The complainer's lack of recall as to what happened once they entered the flat, in conjunction with sexual behaviour towards the appellant outside the flat, allowed for the possibility that she may have agreed to intercourse. The appeal proceeded on this basis; that, in her intoxicated state, the complainer had initially consented to intercourse with the appellant but had forgotten [177].

In *Cinci*, the events were portrayed against the backcloth of a "Highland Romp", the name of the particular tour the group were on[178]. The trial judge's report, cited at length by the appeal court, describes the evidence presented at trial of the complainer's disinhibited behaviour while drunk, her sexual experience and her attitude towards sex. For example, while she was on the tour bus the complainer was observed "asking [the tour guide] to kiss her"[179]. The complainer's boyfriend described the complainer's sexual attitudes: she was not "a girl who went in for one night stands" and she would "wait for three weeks in a relationship before having sex"[180]. Even then, she would

[174] The standard of the appellant's belief was that of an honest belief in *Cinci* and a reasonable belief in *Mutebi*.
[175] *Mutebi* 2013 par.5.
[176] *Mutebi* 2013 par.5.
[177] As we saw in chapter 3, in *Mutebi* the question of the complainer's consent substantially narrowed at appeal and focused only on the period of time after the complainer had withdrawn her 'consent'.
[178] *Cinci* 2004 par.16.
[179] *Cinci* 2004 par.16.
[180] *Cinci* 2004 par.16.

"only have sex if the boy had had a clear HIV test first"[181]. In the defence account, this evidence was interpreted as demonstrating that the complainer "was used to having sexual intercourse" and that, on the bus that day, her behaviour indicated that she "was out for sex"[182]. According to the trial judge, this "was not a view acceded to by the jury"[183].

Although there was no evidence of consent in either *Cinci* or *Mutebi*, an account of consensual sex appeared consistent with the portrayal of the complainer's drunken behaviour and lack of recall. The predominant themes in judicial discourse are of female intoxication and sexual disinhibition. The same themes can be identified in contemporary social discourses about young people and intoxication, where heavy drinking is equated with sexual availability[184]. The equation of intoxication with casual sex in such discourses has been understood as particularly pernicious for women because it connects two powerful stereotypes; that women lack the ability to directly communicate their sexual choices and that they become more promiscuous under the influence of alcohol[185]. By displaying flirtatious behaviour when intoxicated, young women may be seen as inviting sexual activity; that is, when they are drunk, they are more likely to want sex and, since alcohol loosens their inhibitions, it is easier to get it from them whether they want it or not[186]. The conventional myth that women are 'asking for it' or 'leading men on' can still be constructed within a scenario involving female intoxication because drinking is associated with sexual disinhibition, which can be (mis)interpreted as indicating a willingness to have sex[187].

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[181] *Cinci* 2004 par.16.
[182] *Cinci* 2004 par.16.
[183] *Cinci* 2004 par.16..
[184] See Meyer, A. (2010) 'Too drunk to say no: Binge drinking, rape and the Daily Mail', *Feminist Media Studies*, Vol. 10, No.1; Finch, E. and Munro, V. (2007) 'The Demon Drink and the Demonized Woman: Socio-sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants', *Social & Legal Studies*, Sage Publications, Vol.16(4); Measham, F. and Brain, K. (2005) 'Binge drinking, British alcohol policy and the new culture of intoxication', *Crime Media Culture*, Sage Publications, Vol.1(3); Benedet, J. (2010) 'The Sexual Assault of Intoxicated Women', 22 *Can.J. Women & L.* 435; Goodman, C. (2009) 'Protecting the Party Girl', *BYU L. Rev*. 57.
[185] The equation of drinking and sexual availability applies to both sexes but, according to Meyer (2010) *op.cit*., it is more forcefully claimed for women because women may be perceived as lacking the ability to directly communicate their sexual desires and choices.
[186] As McGregor puts it, "women who drink are perceived to be more promiscuous, more available and they are perceived by men to be easier to get sex from since alcohol depresses reaction time and loosens their inhibitions"; see McGregor, J. (2005) *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously*, Hampshire: Ashgate, p.149.
[187] See Meyer, A. (2010) *op.cit.*, p.23. While young women may demonstrate sexually disinhibited behaviour when drunk, it does not necessarily indicate a desire for sex. According to Finch and Munro, studies indicate that that, while subscribing to the general belief that intoxication increases sexual arousal, women do not in fact report increased sexual arousal and this finding "sits significantly at odds with the way in which … observers tend to interpret women's sexual inclinations when drunk, or when drinking"; see Finch. J. and Munro, V. (2007) *op.cit.,* p.594.

In each case, it was not just the complainer but also the appellant who was - or claimed to be - intoxicated[188]. In *Cinci*, the police found the appellant "on the floor of one of the toilets, deeply asleep … [having] vomited"[189]. The police could not wake him and he was admitted to hospital "for observation for a short period", where he regained consciousness around three to four hours later[190]. In *Mutebi*, the appellant claimed that he and the complainer "were both drunk" although, in this instance, there was no independent evidence of his intoxication[191]. While both parties may have been intoxicated, there was a manifest disparity in their functioning in each case, although this was not recognised in judicial discourse. While in *Cinci* the complainer could barely walk or stand without help, the appellant retained a high degree of physical functioning. He was able to walk unaided, follow the complainer from the female dormitory to the shower area and retrace his steps after the tour guide sent him away. In *Mutebi*, there was no evidence of any impairment in the appellant's functioning, while the complainer was insensible of the fact that she was menstruating and wearing a tampon. Both appellants retained sufficient physical capability to consummate the act of intercourse, while the complainer remained largely inert[192]. One possible reading of these cases is that, in the context of joint intoxication, the disparity of functioning was rendered invisible through a misplaced assumption of gender equivalence with regard to the effects of alcohol.

In each case, the court was asked to determine whether there was sufficient evidence of the appellant's criminal intent. No inference of criminal intent was drawn from the presence of circumstantial factors accepted as relevant in other cases; for example, the particular events leading to intercourse, the nature of the relationship between the parties (particularly where they came into contact shortly beforehand), and the time

[188] Finch and Munro point to a double standard in perceptions of responsibility in sexual assault cases where both parties are intoxicated, whereby the voluntarily intoxicated victim attracts greater opprobrium than the perpetrator, who is viewed as less blameworthy than his sober counter-part, see Finch, J. and Munro, V. (2007) *op.cit.,* p.591. Goodman suggests that alcohol is an attenuating factor for the intoxicated perpetrator while the intoxicated woman bears greater responsibility for being raped; see Goodman, C. (2009) *op.cit*., p.77.

[189] *Cinci* 2004 par.16.

[190] *Cinci* 2004 par.16.

[191] *Mutebi* 2013 par.5.

[192] The differential impact of intoxication on the appellant and complainer in these cases is consistent with research findings on the gendered effects of alcohol in cases of sexual assault. Finch and Munro suggest that alcohol tends to "reduce men's inhibitions against violence, provide an excuse for sexual aggression and reduce women's ability to resist assault", see Finch, J. and Munro, V. (2007) *op.cit.,* p.592 According to Goodman (2009), "intoxicated males [become] less aware of whether the female consents and [they] may become more sexually aggressive than when sober" while "less force is needed to get [an intoxicated victim] to succumb and less resistance is possible given the effects of alcohol … [However] the lack of resistance ends up being used as evidence of affirmative consent"; see Goodman, C. (2009) *op.cit.,* p.83-4. Lovett and Horvath identify a process of 'alcohol myopia', where alcohol enhances sexual behaviour and aggression in men while "intoxication may reduce the likelihood of resistance [of women] and diminish the ability to try and alter the situation", 'Alcohol and drugs in rape and sexual assault'; see Lovett, J. and Horvath, M. (2009) *Rape: Challenging Contemporary Thinking*, Devon: Willan Publishing, p.128.

and location of intercourse. As we have seen, the evidential value of such factors was accepted in *Spendiff*[193], *Burzala*[194], *Kim*[195], *Wiles*[196] *and Wright*[197]. In *Cinci*, no inference of criminal intent was drawn from the location or immediate circumstances in which intercourse took place (the shower cubicle where the complainer was washing off vomit from her body) or from the appellant's determined pursuit of the complainer despite her earlier refusal and the tour guide's warning to leave her alone. In *Mutebi*, by his own admission, the appellant stole the complainer's mobile phone as well as £170 in cash from the complainer's handbag, which had been left at the bottom of the bed. The appellant also appeared to leave the flat in a hurry, leaving the door open[198]. No relevant inference was drawn from these events. In neither case did the court explicitly consider the possibility of the appellant's sexual exploitation of the complainer's vulnerability.

In each case, the court's assessment of the appellant's intentions towards the complainer focused on the moment of intercourse without consideration of the surrounding circumstances in which intercourse took place or the appellant's actions before or afterwards. Judicial evaluation of the appellant's state of mind was based on atomistic reasoning, whereby each aspect of evidence was considered separately as an entirely distinct element, existing in its own time frame outside of a broader narrative picture. In this way, judicial assessment of the appellant's intentions towards the complainer was denuded of all meaningful context. By applying a mode of atomistic reasoning, rather than a more holistic approach, the overall picture and the relationship *between* various strands of evidence was not fully considered by the court.

Similar themes can be identified in judicial discourse in both *Cinci* and *Mutebi*: the salience attached to the complainer's intoxication and her sexual disinhibition, the lack of credibility attached to the complainer's account due to her incomplete recall, the use of atomistic rather than holistic reasoning, and an implicit notion of gender equivalence or comparability where both parties were (or claimed to be) intoxicated. Through the

[193] There was "ample independent evidence", *Spendiff* 2005, par.20; this case is discussed in Chapter Three and earlier in this chapter.
[194] The jury "would be entitled to rely on … the whole circumstances disclosed in the evidence", *Burzala* 2008, par.15; this case is also discussed in Chapter Three.
[195] "In these circumstances" there was no defence of honest belief, *Kim* 2005, par.10; this case is discussed in Chapter Three.
[196] The evidence was "ample", *Wiles* 2007, par.2.
[197] The evidence was "sufficient to provide confirmation or support" of the complainer's account, *Wright* 2005, par.11; this was discussed earlier in this chapter.
[198] However, since the lock on the door was faulty, it was also considered possible that the door could have been left open accidentally.

discursive connections between female intoxication, disinhibition and sexual availability, the narrative construction of events supported the appellant's honest belief in consent (in *Cinci*) and what the court accepted as a reasonable belief in consent (in *Mutebi*), despite the appellant's clear disregard for the complainer as an equal party to the sexual activity.

Conclusion

How insensible does a complainer have to be before she is incapable of giving consent? Assessing the ability to consent involves more than an appraisal of her mental and physical functioning at the time. It is also a value-based judgement as to how impaired the complainer *should* be before she is afforded protection in law. My analysis suggests that courts struggle to articulate a threshold for capability short of complete non-responsiveness. While the 2009 Act recognises that intoxication may equate to lack of consent, it seems that in practice incapability requires a particularly high degree of intoxication to the point of unconsciousness, which is covered separately in the Act. Even where there is evidence of considerable impairment, the complainer's consciousness - albeit much diminished and impaired - appears to substitute for her ability[199]. The complainer's ability to give consent in circumstances where she is emerging from sleep is not always considered in judicial discourse. Where the appellant and complainer are both drunk, their joint intoxication may belie the differential impact of alcohol on their functioning. Focusing on intoxication and its disinhibiting effects on the complainer obscures other evidence of non-consent and the exploitative nature of the appellant's behaviour. Particularly where the complainer cannot provide direct testimony of rape, proof of *mens rea* depends on inferences drawn from the surrounding circumstances. Yet circumstantial factors, even where they tend to incriminate, may not be seen as relevant.

Although there is no legal requirement for the complainer to expressly refuse the appellant's demands, consent may be read into the non-resisting body of the complainer when she is waking from sleep or extremely intoxicated. The implicit

[199] In England, voluntary intoxication leading to incapacity but falling short of sleep or unconsciousness is not covered by an evidential presumption of non-consent under the Sexual Offences Act 2003. In her analysis of English cases involving intoxication, such as *R v Dougal* [2005] Swansea Crown Court, unreported, and *R v Bree* [2007] EWCA 804, Cowan (2011) draws the same conclusion; that courts recognise incapacity only in relation to unconsciousness and that 'drunken consent is still consent' *op.cit.*, p.14.

message, here, is that the appellant cannot be blamed for getting it wrong in situations where the complainer remains silent and passive. The problem is that, in such circumstances, the absence of effective performance by the complainer reflects the degree of her impairment rather than her consent to sex. When consent is assumed in these circumstances - or the appellant's belief in consent is regarded as reasonable - the concept of consent is stripped of its defining characteristics; that is, its moral force and transformative value. Unless the complainer is deemed incapable of consent because she is asleep or unconscious, the gross disparity between the ability and functioning of the parties is not recognised in judicial discourse. Rather, it appears to be understood as part of a relational dynamic within a conventional discourse of gender asymmetry within heterosexuality; that is, of male assertion/female passivity. In this way, the construction of differentiated gender roles continues to provide a cultural framework for supporting the appellant's claim that he believed the complainer's passivity signalled her willingness to have intercourse.

Conclusion

Judicial discourse is rarely subject to critical scrutiny. This study has examined one important aspect of judicial discourse, the construction of consent in case reports of rape. Through a qualitative approach, the study illuminates the nature of judicial discourse, its diversity and evolution in the context of the 2009 Act. Applying a methodology based on discourse analysis has provided a detailed, nuanced understanding of how consent is understood and determined in a range of circumstances by appeal court judges. In this final chapter, I consider the significance of the study, what it tells us about the construction of consent, the nature of judicial discourse, and its development over the time-line of the cases.

This study makes an original contribution to legal and feminist scholarship in the area of sexual consent and rape in a number of ways. This is the first applied study of a group of 'consent' cases in Scots law. It is a distinctive study in that it provides a broad analysis of judicial discourse of consent and examines a range of issues relating to consent that arise in case reports of rape. By applying a textually-oriented approach to analysis that is linguistically and contextually sensitive, I have shown how consent is shaped through different elements of judicial discourse. In bringing these elements of discourse to the fore, my analysis illuminates aspects of judicial practice that are rarely subject to analysis: for example, the implicit assumptions contained in judicial discourse, the way meaning is shaped through narrative construction, how courts use and interpret language, how legal outcome is often dependant on the mode of reasoning that is applied, and the way in which judicial discourse draws on broader social ideas and discourses. Focusing on judicial discourse rather than legal doctrine has allowed me to consider how consent is constructed through judicial handling of the facts as well as the application of law. By advancing our understanding of judicial decision-making about consent, the study contributes to the development of knowledge in the area of sexual consent and rape.

How is consent constructed in judicial discourse? Judicial discourse moves between different conceptions of consent; for example, between 'yes' and 'no' models of consent and between a performative and more contextual approach to consent. How consent is

understood and applied by the court is rarely made explicit in legal judgements. The factual circumstances, in which the question of consent arises, are frequently subject to judicial reconstruction in ways that shape the meaning of the event and the behaviour of the parties. Judicial determination of consent depends, to a great extent, on the inferences the court is prepared to draw from its version of the event and the relevant circumstances. In assessing consent, particularly in the earlier cases, the judicial field of vision is often limited to consideration of the immediate circumstances and the behaviour of the parties just before intercourse. The same circumstantial factors, which are found in many of the 'consent' cases - such as the complainer's earlier refusal, the lack of prior intimacy between the parties, the disparity in the capability and functioning of the parties, the apparent detainment of the complainer, issues of sexual exploitation - are frequently understood by courts in different ways. Judicial determination of consent also relies on particular conceptions of human behaviour, motivation, emotion and responses to trauma that do not always reflect contemporary knowledge or empirical evidence.

My study reveals a complex picture of an evolving discourse and heterogeneous ideas about consent. It provides an insight into the diversity of judicial discourse as well as its evolution in the context of important legal changes introduced by the 2009 Act. The seeds of this progressive development can be identified in the judicial conception of an 'active consent', which was proposed in the *Lord Advocate's Reference (No 1 of 2001)*[1], and applied in pre-2009 cases of *Spendiff*[2], *Wright*[3] and *Burzala*[4]. However, there is a greater fluidity and richness in judicial thinking about consent in the context of the 2009 Act. At the same time, my study confirms some of the concerns raised in academic literature about the application of a consent-based definition of rape; in particular, the relentless scrutiny of the complainer's role and behaviour, assumptions about the ability of the intoxicated complainer to give consent, and reading consent into the silence and passivity of the complainer. As I will go on to explain, entrenched ideas about gender and sexual behaviour persist and my study also identifies the emergence of new problems in the wake of the 2009 Act.

[1] *The Lord Advocate's Reference (No 1 of 2001)* 2002 S.L.T. 466
[2] *Spendiff v HMA* 2005 1 J.C. 338.
[3] *Wright v HMA* 2005 S.C.C.R. 780.
[4] *Burzala v HMA* 2008 S.L.T. 61.

Judicial discourse is not stable and homogeneous; rather, it is creative, resistant, adaptive and diverse. This is evident across the 'consent' cases as a whole, as well as those held before and after the 2009 Act[5]. The diversity of judicial discourse of consent is generated, in part, through the exercise of discretion and interpretation in relation to both the facts and the law. As Scheppele observes, the interpretation of law and fact are not easily separable and they operate simultaneously in the process of adjudication[6]. In more conventional doctrinal research, only one side of this equation tends to be addressed, namely the interpretation, application and the scope of law. However, as my study demonstrates, judicial authority claims an interpretative role in relation to both. This is reflected in judicial readiness to dispute the facts determined at trial, sometimes reconstructing them within new narratives or recasting what was deemed a matter of fact at trial as a question of law at appeal, which then becomes subject to judicial determination[7].

There is a push and pull quality to judicial discourse. This is, in part, a product of the type of reasoning adopted by the court or the particular approach taken in applying legal doctrines, such as mutual corroboration or corroboration through *de recenti* distress. Determining the sufficiency of evidence[8] often depends on establishing the value and relationship between different elements of evidence and this, in turn, is contingent on the mode of reasoning that is adopted. For example, applying a holistic approach in assessing evidence is critical in understanding the broader narrative picture, establishing important links between different strands of evidence, and identifying relevant patterns of behaviour from which criminal intent may be inferred. Similarly, the availability of corroboration often depends on the particular approach taken by the court in applying mutual corroboration or corroboration through *de recenti* distress. The availability of corroboration is often contingent on a flexible 'living instrument' approach in interpreting these doctrines, rather than a narrower, more mechanistic approach.

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[5] Compare the reasoning in the earlier cases between *McKearney v HMA* 2004 J.C. 87 and *Spendiff v HMA* 2005 1 J.C. 338, and between the later cases of *Mutebi v HMA* [2013] HCJAC 142 and *Keaney v HMA* 2015 S.L.T. 102.

[6] Scheppele, K. (1992) 'Just the facts, Ma'am', Sexualised Violence, Evidentiary Habits and the Revision of Truth', *N.Y.L.Sch.L. Review* 37 123, p.125.

[7] Examples can be found in *Dodds v HM Advocate* 2002 S.L.T. 1058; *McKearney v HMA* 2004 J.C. 87; *Mackintosh v HMA* 2010 S.C.L. 731; *Patterson v HMA* 2005 HCJAC 57; *CJLS v HMA* 2009 S.C.L. 1255.

[8] While this is usually a question for the trial court, cases appealed on the basis of the trial judge's failure to uphold a 'no case to answer' submission by the defence at trial requires the appeal court to reconsider whether there was a sufficiency of evidence.

My study demonstrates a judicial willingness to expand the scope of these doctrines over the time-line of the cases. For example, in the application of mutual corroboration, there is an increasing recognition of relevant patterns of abusive behaviour within intimate relationships and the overlapping nature of sexual and non-sexual coercion in the context of domestic abuse. The same broad trend can be identified in the evidential value attached to the complainer's *de recenti* distress. Compared to *McKearney*[9], where the court expressed considerable scepticism as to whether evidence of distress could provide corroboration in cases where force was not alleged, there is greater judicial willingness to accept the corroborative value of distress, including in cases where force is not alleged. In *Lennie*[10] and *Drummond*[11], the court sets out the process of inferential reasoning that establishes the relevance and value of the complainer's distress.

The evolution of judicial discourse is most evident in the broader conception of consent and coercion in the post-2009 cases. I identify a general shift in judicial discourse from a narrow, performative 'no' model of consent applied in the earlier cases[12], which focuses on the absence of refusal, to a richer, more contextual approach in the later cases[13], which considers the complainer's behaviour, her likely state of mind and the circumstances and events leading to the rape. While there is a notion of 'active consent' in a few early cases[14], a positive model of consent is more confidently asserted in judicial discourse after the statutory definition of consent as free agreement comes into force[15]. At its richest, the judicial conception of 'true consent' in *Keaney*[16] comes close to the contextual model proposed by Cowan, who argues that judicial assessment of consent should combine a state of mind and performative approach with a much wider angle of vision[17].

What amounts to relevant force has expanded from a narrow assault-based model of violence which was applied in *McKearney*[18] to a broader conception of coercion, found

[9] *McKearney v HMA* 2004 J.C. 87.
[10] *Lennie v HMA* [2014] HCJAC 103.
[11] *Drummond v HMA* [2015] HCJAC 30.
[12] For example, in *McKearney v HMA* 2004 J.C. 87, *McNairn v HMA* 2005 S.L.T. 1071 and *Patterson v HMA* 2005 HCJAC 57.
[13] For example, in *Drummond v HMA* [2015] HCJAC 30, *HMA v Hutchison* [2013] HCJAC 91 and *Dalton v HMA* [2015] HCJAC 24.
[14] For example, *Spendiff v HMA* 2005 1 J.C. 338, *Wright v HMA* 2005 S.C.C.R. 780 and *Burzala v HMA* 2008 S.L.T. 61.
[15] Under s.12 of 2009 Act. See my discussion in Chapter Three of judicial discourse in *Keaney v HMA* 2015 S.L.T. 102, *Dalton v HMA* [2015] HCJAC 24, and *Drummond v HMA* [2015] HCJAC 30.
[16] In *Keaney v HMA* 2015 S.L.T. 102, the court considered there was no true consent by the complainer despite her lack of dissent, because of the impact of the appellant's violent behaviour towards the complainer on prior occasions.
[17] A contextual hybrid model of consent is discussed in Chapter One.
[18] *McKearney v HMA* 2004 J.C. 87.

in *Dalton*[19], *Drummond*[20] *and Keaney*[21], that recognises the relevance of prior force and a pattern of coercion within an intimate relationship. Since the introduction of the 2009 Act, judicial discourse reflects an increasing awareness of the effects of violence and the overlapping nature of different forms of coercion on a woman's agency. The requirement of immediate force in *McKearney*[22] has been displaced by judicial recognition of the enduring effects of violence on the complainer over a longer period of time; this is articulated in *Keaney*[23], *Dalton*[24] and *Drummond*[25]. The shift from a subjective assessment of the appellant's belief in consent[26] to a more objective evaluation of the reasonableness of such a belief means that the appellant is now expected to be aware of the impact of his violent or coercive behaviour on the complainer[27]. This represents a considerable change in judicial thinking since *McKearney*[28] when a violent attack on the complainer just hours prior to intercourse was insufficient to establish criminal intent, given the complainer's passivity at the relevant time.

My analysis suggests that two provisions of the 2009 Act - the application of consent as free agreement and assessment of the reasonableness of the appellant's belief in consent - are beginning to curtail the ease with which tacit consent is read into the complainer's silence and passivity at the time of the rape[29]. These provisions have the potential to be more effective in constructing sexual encounters where there is no positive agreement - verbal or otherwise - as rape. They serve to challenge an implicit presumption of consent, particularly where there is a history of prior intimacy or a continuing sexual relationship between the parties. A more affirmative model of consent, which focuses on the presence of consent rather than the absence of refusal, combined with an objective assessment of the appellant's claim that he acted in the belief there was consent, may go some way in addressing the long-standing difficulties of relying on the legal construct of *mens rea* as determinative of rape.

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[19] *Dalton v HMA* [2015] HCJAC 24.
[20] *Drummond v HMA* [2015] HCJAC 30.
[21] *Keaney v HMA* 2015 S.L.T. 102.
[22] *McKearney v HMA* 2004 J.C. 87.
[23] *Keaney v HMA* 2015 S.L.T. 102.
[24] *Dalton v HMA* [2015] HCJAC 24.
[25] *Drummond v HMA* [2015] HCJAC 30.
[26] As in *McKearney v HMA* 2004 J.C. 87, *Mackintosh v HMA* 2010 S.C.L. 731 and *CJLS v HMA* 2009 S.C.L. 1255.
[27] Under s.16 of the 2009 Act.
[28] *McKearney v HMA* 2004 J.C. 87.
[29] For example, in *Dalton v HMA* [2015] HCJAC 24, *Drummond v HMA* [2015] HCJAC 30 and *Keaney v HMA* 2015 S.L.T. 102.

In assessing a reasonable belief in consent, the 2009 Act also provides that "regard is to be had" as to whether the accused had any knowledge of consent or took any steps to ascertain that there was consent[30]. By explicitly directing attention to the accused's role and responsibility to establish that there is consent, this provision would appear to provide some much-needed balance against the relentless focus on the complainer's role and behaviour in the events leading to rape. However, there is little indication from the post-2009 cases I examined that courts are routinely considering the 'knowledge' and 'steps taken' provision in assessing a reasonable belief in consent[31]. Particularly in *Mutebi*[32], for example, it would not have been unreasonable to expect the appellant to check whether the intoxicated complainer was in fact consenting. While the court cited the provision, it then appeared to disregard it; at least, there was no explicit consideration of its relevance in this case.

The legal judgements of *CJN*[33] and *Mutebi*[34] provide a cautionary warning against an overly optimistic or simplistic account of the development of judicial discourse. In each of these cases, consent was constructed in circumstances where there was no evidence of any positive agreement by the complainer to have intercourse with the appellant. The 'knowledge' and 'steps taken' provision was not explicitly applied in either case. The court failed to find corroborative value in evidence of the complainer's immediate distress in *CJN*[35]. In *Mutebi*[36], the court was unwilling to infer criminal intent from the immediate circumstances, including the appellant's exploitation of the complainer's inebriated state through the theft of her mobile and cash from her purse. In this case, judicial assessment of criminal intent came closer to the subjective standard of the old common law test of an honest belief, rather than an objective evaluation of whether such a belief was reasonable.

Both *CJN* and *Mutebi* involved the intoxication of the complainer. In circumstances where the complainer's functioning is impaired through extreme intoxication, her ability to give consent appears to be interpreted restrictively as a question of *actual*

[30] Under s.16 of the 2009 Act.
[31] Under s.16 of the 2009 Act, consideration may be given to whether the accused had any knowledge of consent or took any steps to ascertain whether there was consent. The only case where this was explicitly considered by the court was in *Drummond v HMA* [2015] HCJAC 30.
[32] *Mutebi v HMA* [2013] HCJAC 142.
[33] *CJN v HMA* [2012] S.C.L. 18.
[34] *Mutebi v HMA* [2013] HCJAC 142.
[35] *CJN v HMA* [2012] S.C.L. 18.
[36] *Mutebi v HMA* [2013] HCJAC 142.

consent. While a minimum requirement for the capability to consent is consciousness, courts exercise considerable latitude in determining what amounts to consciousness in borderline or fluctuating states. Although the 2009 Act recognises that intoxication may equate to incapability[37], in practice it seems to require a particularly high degree of intoxication to the point of unconsciousness, which is covered separately in the Act[38]. Even where there is evidence of a substantial deficit in basic functioning, the complainer's consciousness - albeit much impaired - substitutes for her ability to consent. In such circumstances, the disparity between the functioning of the parties augments a gender imbalance of power and raises the question of sexual exploitation of the complainer's vulnerability. However, issues of gender disparity, power and exploitation are not recognised in the absence of force and tend to be treated in two distinct ways in judicial discourse. In cases of joint intoxication, the sense of disparity is erased through misplaced assumptions of gender equivalence with regard to the effects of alcohol, although such assumptions vanish when other contextual factors are brought into focus. Alternatively, such disparity is understood in the context of a relational dynamic within a conventional discourse of gender asymmetry in heterosexuality of male assertion/female passivity. While it is difficult to articulate a 'bright line' standard of incapability, it is not impossible. Cowan suggests, for example, that such an assessment could be based on a cluster of symptoms that indicate substantial impairment of basic cognitive and physical functioning[39].

While there is a general shift towards a more positive conception of consent after the introduction of the 2009 Act, sedimented ideas deriving from historic practices and discourses of rape persist in judicial discourse. Although there is no longer any formal requirement to establish the use of force (or the complainer's resistance to it), there is a continuing focus on force and resistance as ghost elements of rape. Any indication of physical coercion - whether immediate or recent - provides the unequivocal evidence that courts seem to seek. One concern, here, is that the value attached to force continues to reflect and reinforce the paradigm of rape as involving the element of violence. In cases where the use of force is not alleged, other than in the act of non-consensual penetration, courts appear unwilling to accept corroboration through

[37] Under s.13(2)(a) free agreement is deemed absent when a person is incapable of consent due to the effects of alcohol or any other substance.
[38] Under s. 14(2) a person is incapable of consent while asleep or unconscious.
[39] Cowan (2011) 'The Trouble with Drink: Intoxication, (In)Capacity and the Evaporation of Consent to Sex', *Edinburgh School of Law Working Paper Series*, University of Edinburgh, p.8.

inferences drawn from circumstantial evidence, even where such evidence tends to incriminate. This is apparent not only in the earlier cases of *McCrann*[40], *Cinci*[41] and *McNairn*[42] but the later cases of *CJN*[43] and *Mutebi*[44]. In such cases, it would appear that juries are more willing to accept the corroborative value of circumstantial factors than the appeal court.

The value attached to the complainer's *immediate* response to rape reflects sedimented ideas deriving from historic constructions of the 'genuine' victim and archaic practices such as the raising of the hue and cry, through which the legitimacy of the claim of rape was established. The remnants of these ideas remain embedded in the judicial expectation that the complainer will report the rape or inform others about it soon afterwards *and* that she will manifest some distress. This demonstrates a limited awareness of the range of normative responses to rape as well as the various factors that mediate the expression of distress after a traumatic event. The value ascribed to immediate, uncontrollable emotion seems to stem from the need to exclude a feigned response by the complainer. This continues to reflect stereotypical and prejudicial assumptions about rape victims. Such thinking is underpinned by a mechanistic conception of emotion, where distress is understood as an automatic response to rape and more complex or ambivalent emotional responses are regarded as suspect. While the corroboration requirement remains in force, the judicial focus on the complainer's reaction to rape is unlikely to change given the evidential value of distress in confirming her account. However, attaching weight to the initial response and display of extreme emotion operates against a category of complainers who may not immediately appreciate that they have been subject to rape or believe they are in some way responsible and is, therefore, contributing to a skewed validation of particular reactions to rape.

My analysis also identifies the emergence of new problems in the wake of the 2009 Act. There are three principal areas of concern: the binary divisions that structure judicial discourse, judicial focus on a communicative approach to consent, and the lack of attention paid to broader social factors that impact on free agreement.

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[40] *McCrann v HMA* 2003 S.C.C.R. 722.
[41] *Cinci v HMA* 2004 S.L.T. 748.
[42] *McNairn v HMA* 2005 S.L.T. 1071.
[43] *CJN v HMA* [2012] S.C.L. 18.
[44] *Mutebi v HMA* [2013] HCJAC 142.

As regards the first of these, despite judicial recognition in *Keaney*[45] that the crime of rape is not divided into different types, a hierarchical construction of rape is emerging along two intersecting axes; forcible/non-forcible rape and non-consent/withdrawal of consent. Rape appears to be classified according to the presence of force. This is most explicit in determining sufficient similarity in cases involving mutual corroboration, such as *Dodds*[46], *KH*[47] and *Livingstone*[48]. However, the categorisation of rape on the basis of force can be identified more broadly in judicial discourse across the 'consent' cases. This is problematic for a number of reasons. It undermines the intention behind the decision taken in the *Lord Advocate's Reference (No 1 of 2001)*[49], confirmed in the statutory definition provided by the 2009 Act, that rape involves the absence of consent not the presence of force. The boundary between the presence and absence of force is blurred through diverse conceptions of force and a process of conceptual stretching, so there is no clear line that demarcates the use of force. The distinction between forcible and non-forcible rape is also meaningless for the complainers in the 'consent' cases who clearly experienced the act of non-consensual penetration as an act of violence in itself. From this perspective, all rape is necessarily forcible regardless of whether it involves prior assault or not. The problem with regard to proof is that cases involving force are seen as evidentially strong and there is little difficulty in securing sufficiency of evidence (although an appeal may succeed on another basis). However, cases that do not allege the use of force are regarded as evidentially weak and, here, there are very real difficulties establishing formal sufficiency and corroboration. My study shows that this is not due to *lack* of evidence but, rather, the judicial attitude towards the available evidence. It is the lack of weight and value attached to circumstantial factors that renders these cases weak.

Rape is also classified on the basis of non-consent and prior consent. Cases in which the complainer initially consents to intercourse but then withdraws her consent appear to be regarded as a different and less serious kind of rape than cases where there is no prior consent. In part, this is because the use of force is not always recognised in such circumstances, even where it leads to injury[50]. For example, the use of antecedent force

[45] *Keaney v HMA* 2015 S.L.T. 102.
[46] *Dodds v HM Advocate* 2002 S.L.T. 1058.
[47] *KH v HMA* 2015 S.L.T. 380.
[48] *Livingstone v HMA* 2014 S.C.L. 868
[49] The *Lord Advocate's Reference (No 1 of 2001)* 2002 S.L.T. 466.
[50] The complainer's account of the appellant's persistence in intercourse despite her withdrawal of consent was not recognised as a forcible rape in *KH v HMA* 2015 S.L.T. 380 despite medical evidence of injury, although the use of force and injury was recognised in similar circumstances in the earlier case of *Spendiff v HMA* 2005 1 J.C. 338.

may not be seen as relevant if the complainer voluntarily agrees to intercourse. The construction of 'rough sex' may also mask the use of force during intercourse in an intimate relationship. Similarly, any intrinsic or implied force through the act of non-consensual penetration, or use of superior body weight or strength to pin the complainer down, is unlikely to be recognised in circumstances where the complainer initially consents to intercourse. Although the 2009 Act explicitly allows for consent to be withdrawn at any time during intercourse[51], there is a suggestion in judicial discourse that some time may be allowed for the appellant to appreciate "the fact that consent has been revoked" and react to it[52]. If so, it will be difficult to establish lack of a reasonable belief in a 'prior consent' case.

Classifying rape according to force/non-force or prior consent/non-consent reconstructs historic, outmoded conceptions of rape in new discursive forms. Such constructions reflect and reproduce a hierarchy of harm by distinguishing between different types of harm and placing physical violence and injury above personal violation and the attack on sexual autonomy. Conceptualising rape in this way also has significant implications for proof, particularly in light of the increasing use of mutual corroboration in both historic and non-historic offences of rape[53]. The availability of mutual corroboration relies on the comparability of accounts of rape by multiple complainers based on sufficient similarity of the appellant's behaviour and the unity of his intention. The use of binary divisions in classifying different types of rape limits judicial perception of what constitutes similar conduct by the appellant and his intention towards the complainers. The extent to which judicial discourse is structured by such binary divisions will determine whether corroboration is available in some cases.

The study also highlights a judicial focus on the communicative aspect of consent and a corresponding lack of attention to broader social factors that have a bearing on free agreement; this is most evident in *CJN*[54] and *Mutebi*[55]. I have already outlined earlier in this chapter the benefits associated with a general shift in judicial discourse from a 'no'

[51] Under s.15(3) of the 2009 Act.
[52] *Mutebi v HMA* [2013] HCJAC 142, par.8.
[53] Case building practices by police in pursuing allegations of domestic violence, including sexual violence, now routinely involve seeking out previous partners to identify other possible victims of abuse by an accused. Corroboration of multiple single complainers of sexual and physical abuse often depends on the availability of mutual corroboration, D.S. Louise Raphael, '*Investigating rape: a journey',* Janette De Haan Annual Memorial Lecture, on 8/1/2016.
[54] *CJN v HMA* [2012] S.C.L. 18;
[55] *Mutebi v HMA* [2013] HCJAC 142.

model of consent to a 'yes' model. However, issues of consent are not reducible to the way in which a woman expresses her wishes. In 'yes' models as with 'no' models of consent, the critical gaze is directed towards the role and behaviour of complainer and the burden of any ambiguity falls on her. The progressive component in conceptualising consent as free agreement is the *freedom* of such agreement rather than its mode of expression. However, there is some hesitation in judicial discourse in assessing whether such freedom exists in circumstances where force is not alleged. Focusing exclusively on the communicative aspect of consent - that is, how consent or non-consent is articulated by the complainer - rather than the freedom to give consent marginalises relevant social factors and, in this way, restricts judicial evaluation of the validity of any agreement that may have been given.

The transformative value of consent is diminished in circumstances where broader social factors undermine a woman's autonomy. My study suggests there is little recognition in judicial discourse of such factors; for example, factors relating to sexual exploitation (in *Cinci*, *Dodds*, *Mutebi* and *CJN*), the relational dynamics of power and vulnerability within a relationship (in *Mackintosh*), or broader socio-economic factors associated with homelessness, drug dependence and street prostitution (in *Mackintosh* and *CJLS*). All these factors, which can be readily identified in the evidence considered by the appeal court, may constrain a woman's agency as effectively as any form of physical coercion. However, the relevance of such factors falls outside the field of judicial vision. To some extent, this may reflect the limitations of an individualistic conception of consent and a narrow interpretation of what amounts to *active* consent or *free* agreement. The lack of attention to broader social factors also reveals the difficulties of transcending entrenched norms in both the private sphere of relationships as well as the commercial sphere; for example, the salience attached to differentiated gender roles within heterosexuality, and viewing prostitution in purely commercial terms within a market model.

Like all institutional discourses, judicial discourse evolves slowly. To assume that significant change would result from the enactment of a statutory provision might be somewhat optimistic. Nevertheless, key provisions of the 2009 Act have fostered a richer, more meaningful account of consent. While the worst aspects of discriminatory practices and attitudes to rape may have been dismantled by legal changes, sedimented

ideas deriving from historic practices and discourses persist. My study highlights the evolution of judicial discourse in the context of some entrenched beliefs about gender and sexual behaviour and new problems emerging in the shadow of the old ones. How can judicial discourse be stretched to accommodate the reality of women's experiences and responses to rape? The challenge lies in continuing to expand the concept of consent to take greater account of the range of impediments to women's agency that derive from the particularities of the context. This requires recognition of broader socio-economic factors, as well as factors in the immediate circumstances, and an awareness of the dynamics of power and vulnerability in a relationship, particularly where there is a manifest disparity in the ability and functioning of the parties. The impetus for further change will come, as it always has, from continued feminist engagement and scrutiny of the application of law.

Appendix 1 Bibliography

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Appendix 2 The 'consent cases'

KH v HMA 2015 S.L.T. 380

Drummond v HMA [2015] HCJAC 30

Dalton v HMA [2015] HCJAC 24

Keaney v HMA 2015 S.L.T. 102

Livingstone v HMA 2014 S.C.L. 868

Lennie v HMA [2014] HCJAC 103

Mutebi v HMA [2013] HCJAC 142

HMA v Hutchison [2013] HCJAC 91

CJN v HMA [2012] S.C.L. 18

S v HMA [2011] HCJAC 125

GM v HMA [2011] HCJAC 112

Hopton v HMA 2010 S.C.L. 652

Mackintosh v HMA 2010 S.C.L. 731

CJLS v HMA 2009 S.C.L. 1255

F v HMA [2009] HCJAC

Y v HMA [2009] HCJAC 53

Burzala v HMA 2008 S.L.T. 61

Anderson v HMA [2007] HCJAC 50

Wiles v HMA 2007 S.C.C.R. 191

Melville v HMA 2006 S.C.C.R. 6

Wright v HMA 2005 S.C.C.R. 780

McNairn v HMA 2005 S.L.T. 1071

Kim v HMA 2005 S.L.T. 1119

Blyth v HMA [2005] HCJAC 110

Spendiff v HMA 2005 1 J.C. 338

Patterson v HMA 2005 HCJAC 57

Gordon v HMA 2004 S.C.C.R. 641

McKearney v HMA 2004 J.C. 87

Cinci v HMA 2004 S.L.T. 748

McCrann v HMA 2003 S.C.C.R. 72

Dodds v HM Advocate 2002 S.L.T. 1058