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THE CONCEPT OF CONSENT UNDER THE SEXUAL OFFENCES ACT 2003

Jacqueline Scott

Abstract

The concept of consent is fundamental in considering the crime of rape under the Sexual Offences Act 2003 (SOA). Consent was placed on a statutory footing for the first time by the SOA which defines consent alongside evidential and conclusive presumptions under sections 74-76, respectively. This article explores the position that unfortunately, neither significant clarity nor enhanced protection appears to have been embraced or achieved by the incorporation of consent.

Keywords: Rape, consent, evidential presumptions, intoxication, HIV disclosure

Introduction

This article examines the issue of *consent* in the context of sexual offences law, specifically the Sexual Offences Act 2003 (SOA) which has now been in force for over six years. This choice was inspired by the controversial and sensitive nature of the issues and provisions encompassed by the SOA alongside the lack of academic consensus and current guidance. The law on consent prior to the SOA was governed by case law but was deemed unsatisfactory by the Home Office in 1999. This resulted in the report *Setting the Boundaries*¹ which has been largely well received in terms of its research, consultation process and comprehensive recommendations. The predominant and most widely accepted proposal of *Setting the Boundaries* was to introduce a statutory definition of consent, a clear rejection of the previous

¹ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* vol.1 (2000, Home Office).

Olugboja 1981² approach. The proposals were based upon a number of principles previously established in case law. Consent is an essential element in determining whether a defendant is guilty of a sexual offence. It is therefore fundamental that it is defined meticulously to enable the judiciary to interpret the law correctly and in turn provide adequate direction to juries.

The consent provisions are contained within sections 74-76 SOA. This article will consider some primary issues that consent entails namely, HIV disclosure, intoxication and consent provided by individuals with mental disorders. The adequacy of the sections dealing with these issues will be analysed.

Overall, sections 74-76 have consolidated much of the earlier law, giving the précis that clarification has been found and the aims of *Setting the Boundaries*, achieved. However, on further analysis it appears that since its enactment this statutory definition has not delivered the desired clarity expected. A primary example of this can be seen within section 74 which provides the general definition of consent: 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.' Temkin and Ashworth state that this provision 'positively sprouts uncertainties.'³ Card et al acknowledge that the terms *freedom*, *choice* and *agreement* are 'complex and ambiguous concepts, which defy precise definition.'⁴ Thus the previous problems of interpretation and clarity are therefore by no means resolved by section 74.

1 HIV Disclosure, Consent and Rape

Currently, liability for HIV transmission through sexual intercourse arises under the Offences Against the Person Act 1861 (OAPA). The complexities of the issue of consent to sexual intercourse mean that potentially a case can be made out for rape to be a preferred charge. This is a highly contentious subject and one that many academics, particularly Herring, consider the law to have taken an unsatisfactory and restrictive approach so far.

² *R v Olugboja* [1981] 3 All ER 443.

³ Temkin, J., and Ashworth, A., 'The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent', (2004) *Criminal Law Review* at p.339.

⁴ *Ibid.*

R v Dica [2004],⁵ the primary authority in this area, confirmed that section 20 OAPA, inflicting grievous bodily harm, is 'the most appropriate ground for convicting a reckless transmission of the HIV virus through sexual intercourse.'⁶ While the Court of Appeal discussed issues regarding fraud and consent, Lord (now Chief) Justice Judge stated that consent to sexual intercourse gained fraudulently remained valid for the purposes of rape. The women consented to the act of sexual intercourse and consent could not be subsequently retracted, the general rule is that it remains a consensual act.

GBH requires a harm element. To be satisfied, all the layers of the skin must be broken. In *R v Chan-Fook*, Hobhouse LJ held that an infection resulting from an assault was an internal injury sufficient to meet this requirement.⁷ Section 20 is therefore an appropriate offence to charge in some instances, for example, where the HIV status was intentionally withheld from the complainant or they were deceived or mistaken about it. In such situations it is suggested that the offence should more suitably constitute rape. An alternative prosecution route is section 18, wounding with *intent* to cause GBH. It is conceivable that a defendant aware that he is carrying the disease transmits it intentionally. This intention would have to be proven by satisfying the *Woolin* [1998]⁸ test of intent; meaning transmission of the disease through sexual intercourse would have to be considered virtually certain.

Herring argues that 'Agreement obtained by deception is woefully insufficient. Informed and free consent, at least, is required.'⁹ To a certain extent this position has been entrenched in *R v Konzani* [2005]¹⁰ where the Court of Appeal extended *Dica*, holding that for consent to be present and valid it must have been an *informed* consent. Konzani was convicted of section 20 GBH for inflicting HIV upon three women after having unprotected sexual intercourse with them. The Court recognised the principle of sexual autonomy, in accordance with the SOA. Judge LCJ stated that concealment of HIV status by a defendant:

⁵ *R v Dica* [2004] EWCA Crim 1103.

⁶ Ramage, S., 'The criminal offence of causing infection of HIV virus', (2008) 187, *Criminal Lawyer* p.2.

⁷ Ramage, 'Causing infection of HIV virus,' p.4.

⁸ *R v Woolin* [1998] 4 All ER 103.

⁹ Herring, J., 'Human rights and rape: a reply to Hyman Gross', (2007) *Criminal Law Review* p.229.

¹⁰ *R v Konzani* [2005] EWCA Crim 706.

...almost inevitably means [the complainant] is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant... Silence in these circumstances is incongruous with honesty, or with a genuine belief that there is an informed consent.¹¹

This suggests that a complainant unaware of a defendant's HIV status cannot provide informed consent, nor can the defendant reasonably believe in their consent. Accordingly, a defendant placing himself in such a situation should be liable for rape. Section 74 of the SOA states that a person provides consent if they agree by choice and have the freedom and capacity to make that choice. It has been argued that HIV status, in particular deception of it, can affect this choice. As Leigh states:

It is difficult to see how a person can be said to agree by choice when a matter relevant to choice (as will certainly be the case where the victim has raised the issue of HIV status) is misrepresented to her.¹²

This provides further authority that any misrepresentation of HIV status should affect the requisite consent of a complainant.

Evidently, there are valid arguments for complainants to make a plausible claim for rape where a defendant fails to disclose his HIV positive status. Unfortunately, the case law does not support this as *R v B* [2006]¹³ made clear. With regard to section 74, Latham LJ in the Court of Appeal stated:

...as a matter of law, the fact that the appellant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under Section 74 in relation to the sexual activity in this case.¹⁴

The Court also held that consent to sexual intercourse is not vitiated by ignorance of the defendant's HIV status. The case makes it clear that failure by a defendant to disclose the fact that he has a sexually transmissible disease is irrelevant to the issue of consent under section 74. Elvin acknowledges that despite the clarification the case provided, it is a 'contentious decision and it does not provide comprehensive guidance about which mistakes vitiate consent.'¹⁵

¹¹ *Ibid.*, at para 4.

¹² Leigh, L., 'Two cases on consent in rape,' p.7.

¹³ *R v B* [2006] EWCA Crim 2945.

¹⁴ *Ibid.*, at para 21.

¹⁵ Elvin, J., 'The Concept of Consent under the Sexual Offences Act 2003,' (2008) 72 *Journal of Criminal Law* p.519.

There are various arguments suggesting that HIV transmission should alter consent under section 76(2)(a), by reason that the complainant is deceived and/or the nature or purpose of the act is altered or unknown to the complainant. Deception is a common issue in HIV cases, but section 76 only provides for deception as to the *nature or purpose* of the act. It can be suggested that sexual intercourse with a HIV positive defendant changes the nature of the act from a safe one to a contrastingly dangerous and potentially life threatening one. Leigh considers that such deception as to HIV status 'goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy), to a potential sentence of disease or death.'¹⁶

This indicates that deceptive HIV transmission vitiates consent and that the preferred offence should be rape. Despite this, Miles recognises in reference to *R v B* that:

Although the court did not explore the issue expressly in these terms, it may be said that a mistake regarding the HIV status is not one that goes to the "nature or purpose" of the act...for the purposes of s.76.¹⁷

Loveless favours the approach taken in the Canadian case *R v Cuerrier* [1998],¹⁸ which held that deception regarding health went to the very nature of the act and vitiated consent. Loveless states: 'it should be rape,'¹⁹ and proposes that a more thorough evaluation of consent is required in order to give effective meaning to sexual autonomy; the underlying principle of the SOA.

Deception as to impersonation of another is governed by section 76(2)(b). This deception is comparable to one regarding HIV status as both are carried out with the intention to induce the complainant to engage in sexual intercourse. In both instances the defendants are aware that if it was not for their deception, the complainant would not have consented. As Temkin asserts:

A person who expressly lies about HIV status deliberately places the life of the deceived party at risk. Neither fraud by impersonation nor fraud as to the nature or purpose of the act can compare in terms of the potential seriousness of the outcome.²⁰

¹⁶ Leigh, L., 'Two cases on consent in rape,' p.9.

¹⁷ *R v B* at 21.

¹⁸ *R v Cuerrier* [1998] 127 CCC (3d) 1.

¹⁹ Loveless, J., *Criminal Law, Text, Cases and Materials* (2008: Oxford University Press) p.529.

²⁰ Temkin, J., *Rape and the Legal Process* (2002: Oxford University Press) p.106.

This statement questions why impersonation of another is included in the SOA and amounts to rape whereas the more dangerous circumstance of transmitting HIV does not. The judicial view does not reflect the preferred position of academics, and rarely have deceptions other than those specifically stated in the SOA been held to alter consent.

One exception in respect of a deception to change the nature or purpose of a sexual act is *R v Tabassam* [2000].²¹ This case did not involve HIV transmission but is informative in respect of deception and consent. The defendant deceptively gained consent to touch the breasts of three women by telling them that the touching was being done for medical purposes. He was convicted of indecent assault. The Court of Appeal held that the women 'were consenting to the nature of the act but not its quality'; therefore there was no consent for the purposes of sexual offences. Selfe notes that the reference in section 76 to *nature and purpose* is not qualitatively different to the common law *nature or quality* test²².

R v Jheeta [2007]²³ involved a defendant embarking upon what the Court of Appeal described as a 'bizarre and fictitious fantasy'²⁴ of deception which pressurised the complainant into having sexual intercourse with him more frequently than she would have otherwise. The focus of the court was upon the deception and whether it vitiated consent. It was held that certain deceptions are capable of vitiating consent but these deceptions were narrowly construed. Emphasis was placed upon the phrase 'nature and purpose of the *relevant* act' under section 76, which in the context of rape is sexual intercourse. The Court of Appeal thought that the only deception in this case was the fictitious situation that was created to secure the complainant's frequent participation in sexual intercourse. There was no deception as to the nature or purpose of the act. The case law clearly illustrates that if the nature or purpose of sexual intercourse is not directly altered as a result of deception, no liability for rape will attach to a defendant.

Nor does the law support rape claims on the basis of a silent mistake, despite persuasive arguments to the contrary. Herring believes that such mistakes can

²¹ *R v Tabassum* (2000) 2 Cr App R 328.

²² Selfe, D., 'The meaning of consent within the Sexual Offences Act 2003', (2008) 178 *Criminal Lawyer* p.4.

²³ *R v Jheeta* [2007] EWCA Crim 1699.

²⁴ *Ibid.*, at 28.

undermine consent, and more specifically that there is no valid consent: 'if at the time of the sexual activity a person: i) is mistaken as to a fact; and ii) had s/he known the truth about that fact would not have consented to it.'²⁵ In analysing HIV transmission in this context, once more it appears there is no valid consent. Where a complainant may be mistaken in believing the defendant to be free of the sexually transmittable disease it can be presumed that if they thought otherwise they would not have consented. Herring argues that his suggestion enhances sexual autonomy and gives 'due respect to the parties' understanding of what the act means.'²⁶ A contrasting approach is voiced by Hyman Gross who states that the criminal law is not in place to protect people 'against the disappointments and humiliations of their bad judgment, their gullibility, or their too trusting nature'²⁷ and therefore believes that strict limits should be placed on what mistakes vitiate consent. The Hyman Gross view is reflected in the SOA and judicial reasoning that mistakes as to HIV status do not give rise to a rape claim.

Non-disclosure of HIV does not negate consent at law as firmly decided in *R v B*. The Court of Appeal stated:

Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act.²⁸

Miles believes the law has taken a step backwards with the removal of section 3 of the Sexual Offences Act 1956: *procuring a woman by false pretences*, as deceptions about HIV status would have more chance of fulfilling this criterion.²⁹ Ramage provides justification for the strictness of the consent rules stating that 'People take risks all the time in this modern age and to criminalise the consensual taking of risks is unrealistic in terms of enforcement.'³⁰ This is a logical justification but the position of the law currently opposes the arguments of the majority of academics who still consider the laws on this matter to be controversial and unsatisfactory.

2 Intoxication and Capacity to Consent

²⁵ Herring, J., 'Mistaken Sex' (2005) *Criminal Law Review* 511 at p.517.

²⁶ *Ibid.*

²⁷ Gross, H., 'Rape, Moralism, and Human Rights' [2007] *Criminal Law Review* 224–5.

²⁸ *R v B* at 17.

²⁹ Miles, J., 'Sexual offences: consent, capacity and children', (2008) 10, *Archbold News* p.7.

³⁰ *Ibid.*, p.3.

Intoxication has also proven to be a significant issue in the context of consent. This is reflected by statistics acknowledging that a substantial 35% of rape complaints have been evidenced to be alcohol related.³¹ Section 75(2)(f) provides protection for those complainants who have been intoxicated against their will and subsequently engaged in presumably non-consensual intercourse. This protection is limited in comparison to the proposed provision by the Government in *Setting the Boundaries*³² that anticipated the inclusion of a circumstance where a complainant was *too affected by alcohol or drugs to give free agreement*.³³ This was not adopted by the following consultation paper, *Protecting the Public*,³⁴ prompting Temkin and Ashworth to recognise that section 75(2)(f) is 'considerably narrower since it relates only to situations where [the complainant's] intoxication is patently blameless'³⁵ i.e. where a complainant had a substance administered to them or caused to be taken by them. Temkin and Ashworth also consider that the concept of *contributory negligence* influenced the Government's thinking since it seems that voluntarily intoxicated complainants are placed in a different moral category from complainants who have alcohol or drugs surreptitiously administered to them.³⁶ This accommodates the explanation provided by the then Home Secretary:

I have rejected the suggestion that someone who is inebriated could claim that they were unable to give consent...on the ground that we do not want mischievous accusations.³⁷

Not only is the provision limited in its disregard for voluntary intoxication, it incurs further concerns and ambiguity. For instance, Tadros states: 'Notice the lengths that this provision goes to contort itself to make an evidential provision out of something that ought to be constitutive of the offence.'³⁸

This highlights that there is neither adequate explanation nor logic for why the administration of stupefying substances constitutes a rebuttable presumption and not an irrebuttable presumption. A further issue is that *stupefaction* is not defined

³¹ Fears over alcohol link to rape, *BBC News*, 21 December 2005.

³² Home Office, *Setting the Boundaries* vol.1.

³³ *Ibid.*, para.2.10.9.

³⁴ Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences* (2002: Home Office).

³⁵ Temkin and Ashworth, 'The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problem of consent', p.339.

³⁶ *Ibid.*

³⁷ Finch, E., and Munro, V., 'Intoxicated consent and the boundaries of drug assisted rape', (2003) *Criminal Law Review* citing the Home Secretary at p.785.

³⁸ Tadros, V., 'Rape without consent', (2006) 26(3), *Oxford Journal of Legal Studies* p.528.

within the SOA. Given that the provision was aimed primarily at date rape drugs, which often do not have the effect of unconsciousness, it can be assumed that the provision covers situations where the complainant retains consciousness. This implies acceptance that the ability to consent can depreciate or completely disappear before a complainant reaches unconsciousness. It is therefore questionable why voluntarily intoxicated complainants are not protected unless they are rendered unconscious. Tadros suspects also that the level of intoxication to satisfy section 75(2)(f) is 'problematically high'³⁹ placing further doubt upon the level of protection offered.

In summarising the provision, Temkin and Ashworth acknowledge that:

The many women who get raped when they are drunk and whose inebriation is more or less voluntary will have to take their chances in the legal process without the benefit of evidential presumptions.⁴⁰

Evidently, a complainant failing to meet the restrictive requirements of section 75(2)(f) is left with protection only under the general definition of section 74 unless they are so intoxicated as to render themselves unconscious under section 75(2)(d). This section presumes that consent is absent where the complainant was asleep or unconscious. The circumstances leading to the unconsciousness are irrelevant, meaning voluntarily intoxicated complainants are protected. This seems a controversial approach given the intentional exclusion of voluntarily intoxicated complainants by section 75(2)(f). A void still remains between sobriety and excessive voluntary intoxication causing unconsciousness. Complainants drinking moderately in between these two extremes are left unprotected whereas more irresponsible complainants drinking themselves into unconsciousness gain the protection of the SOA. Currently, complainants falling outside the restrictive sections 75(2)(d) or (f), are left to be considered under section 74 and its prevailing issue of capacity.

Section 74 requires a complainant to have the *freedom and capacity* to make a choice about whether they consent to sexual intercourse. Capacity is an elusive concept and an essential factor in considering intoxication. The problem in the context of the SOA is that no definition of capacity is provided to accompany its inclusion in section 74. Despite the courts recognising it is sought after, no

³⁹ Ibid.

⁴⁰ Temkin and Ashworth, 'The Sexual Offences Act 2003', p.339.

comprehensive guidance has yet been provided for the interpretation of capacity. It is the task of the trial judge to provide direction to juries in each individual case. The reason no comprehensive direction has currently been offered may be indicative of the fact that 'trial judges may need detailed guidance about how properly to address their task in such cases.'⁴¹

The only guidance that can be construed on the interpretation of capacity comes from the current case law. There are two significant cases, post SOA, giving insight into the level of intoxication required for a complainant to be lacking capacity to consent. First is *R v Dougal* [2005]⁴² which involved a highly intoxicated student. She claimed to have been raped in a corridor after being carried home. She had only vague recollections of the incident but maintained that she would not have consented to sex in a corridor. The judge firmly stated that a 'drunken consent is still consent'⁴³ and instructed the jury to find the defendant not guilty even if they disagreed. The complainant's capacity to consent was not considered and any level of intoxication did not seem to negate consent in the judge's opinion. The latest and most authoritative case on intoxication and consent is *R v Bree*. Both the complainant and the defendant had been drinking heavily. The complainant was intoxicated to the point of vomiting and had a 'very patchy'⁴⁴ recollection of the night in question. She also agreed that she did not say 'no' to sexual intercourse and in moments that she could not recall she admitted she could not be sure whether she responded to the defendant's advances. The defendant maintained that the complainant consented and further, that he reasonably believed she consented. The Court of Appeal quashed the defendant's conviction for rape on two main grounds. Firstly, it was held that the trial judge failed to properly direct the jury on the meaning of capacity and its significance to consent where intoxication is involved. Lord Justice Judge confirmed that:

the jury should have been given some assistance with the meaning of *capacity* in circumstances where the complainant was affected by her own voluntarily induced intoxication, and also whether, and to what extent, they could take that into account in deciding whether she had consented.⁴⁵

Secondly, the conviction was quashed as the change of prosecution route from *unconsciousness* under section 75(2)(d) to *lack of consent due to incapacity* under

⁴¹ Elvin, 'The Concept of Consent under the Sexual Offences Act 2003', p.519.

⁴² *R v Dougal* [2005] Swansea Crown Court unreported, Guardian, 24 November 2005.

⁴³ *Ibid.*

⁴⁴ *R v Bree* [2007] EWCA 256 at 9.

⁴⁵ *Ibid.*, at 39.

section 74, was not explained to the jury. Neither was the fact that the intoxication could have caused the complainant to act with fewer inhibitions hence the defendant's belief in consent may have been reasonable.

Capacity was discussed at length by the Court and has been subsequently analysed by academics. It was thought that on proper construction of section 74, clear conclusions could be drawn regarding capacity and it was asserted that:

If, through drink, (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting...However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape.⁴⁶

In concluding this, the Court of Appeal confirmed that as a matter of 'practical reality...capacity to consent may evaporate well before a complainant becomes unconscious.'⁴⁷ This is accompanied by recognition that capacity is fact specific. Individuals vary in their tolerance to alcohol and this provided the reasoning of the Court of Appeal for not finding it possible to provide a generally applicable definition of capacity. Loveless recognises that in light of individual tolerances, 'to provide a rigid definition may infringe individual autonomy'⁴⁸ therefore, case-to-case, it is still a matter of interpretation. Rumney and Fenton accept that:

given the general complexities of the area the court could not have been expected to produce a definitive statement. However, some indication of the factors to be considered by judges when directing rape juries...would have been useful.⁴⁹

On the other hand, Miles asserts that 'The law on this is now probably as clear as it can be', given the complexities of the concept of capacity.⁵⁰ Overall, Elvin believes *Bree* to have done 'little, if anything, to increase consistency in this area of law'⁵¹ and that it arguably 'raised more questions than it answered.'⁵² The case illustrates the difficulties in this area of law, in particular with determining capacity.

⁴⁶ *Ibid.*, at 34.

⁴⁷ *Ibid.*

⁴⁸ Loveless, *Criminal Law*, p.522.

⁴⁹ Rumney, P., and Fenton, R., 'Intoxicated consent in rape: *Bree* and juror decision-making', (2008) 71(2) *Modern Law Review* p.228.

⁵⁰ Miles, 'Sexual offences: consent, capacity and children'.

⁵¹ Elvin, J., 'The Concept of Consent'.

⁵² *Ibid.*

In deciding cases on their individual facts, intoxication also becomes an issue with evidence provided by a complainant. It has been found that a worrying 13% of intoxicated complainants were uncertain if they had even been raped.⁵³ Card recognises that:

Where [the complainant] was clearly intoxicated at the time of the alleged offence, evidential difficulties may arise as to whether any reliance can be placed on [the complainant's] account of events.⁵⁴

Such difficulties were present in *R v Hysa* [2007]⁵⁵ where it was initially held that there was no case to answer given the complainant's vague recollections of the incident. The Court of Appeal allowed an appeal against this decision, reinstating the fact that consent, or lack of it, is an issue for the jury to determine. It is difficult to comprehend how a jury can ever be satisfied beyond all reasonable doubt when a complainant's recollections are incoherent due to intoxication.

A study conducted by Amnesty International found that 30% of people in the United Kingdom believe that a woman is partially or completely to blame for being raped if she has been drinking.⁵⁶ This is reflected by the current law since a voluntarily intoxicated complainant is largely unprotected under the SOA. *Hysa* confirmed that there is no need for a complainant to say 'no' in order for consent to be absent. It is apparent though that this point needs to be emphasised to juries. Hallett LJ only went as far as stating the case was 'yet another sad example of what can happen when young people roam the streets of our cities vulnerable through drink and/or drugs.' The issue of whether a complainant is culpable for being raped whilst intoxicated was not addressed. Elvin believes Hallett LJ's characterisation of the events is worrying as 'it brings to mind the empirical research that suggests that some jurors think that women are totally responsible when they are raped while intoxicated.'⁵⁷ Academics agree that trial judges need to provide sufficient guidance to remove such preconceptions held by jurors. It surely cannot be the law's intention to leave intoxicated complainants unprotected, but without express provisions making this clear to a jury, or further guidance provided by judges, jurors will continue to interpret the law in this incorrect way.

⁵³ Fears over alcohol link to rape, *BBC News*, 21 December 2005.

⁵⁴ Card, et al., *Sexual Offences* p.53.

⁵⁵ *R v Hysa* [2007] EWCA Crim 2056.

⁵⁶ Statistics presented in: Fears over alcohol link to rape, *BBC News*, 21 December 2005.

⁵⁷ Elvin, 'The Concept of Consent'

Leigh concludes that in *Bree*:

The Court's affirmation that want of capacity to consent may be established before the victim reaches a state of stupefaction appears to meet, at least in part, concerns expressed in academic and other writings.⁵⁸

On the contrary she recognises that the 'judgment gives no comfort to those who would require a complainant virtually to act as an insurer of her own sobriety and thus bodily integrity.'⁵⁹ The *Bree* judgment provides the most extensive guidance thus far and the general rule seems to be clear that a drunken consent is still consent. It is useful to note Simester and Sullivan's comments in 2004 whereby they acknowledged the phrase 'a drunken intent is nevertheless an intent'⁶⁰ and thought that the same phraseology should not be used in the sense that a drunken consent is still consent.⁶¹ It is evident that some academics may find the position of the law towards intoxicated complainants unsatisfactory, however as Judge stated in *Bree* the phrase 'a drunken consent is still consent' is only suitable as a shorthand overview of the law's position.

3 Mental Disorders and Capacity to Consent

Under Article 8 European Convention of Human Rights (ECHR), each individual has a right to a private life, which *Dudgeon v UK* (1981)⁶² confirms to include a private sex life. During another European case, *X and Y v Netherlands* (1985),⁶³ the European Court had to consider the requirement for a correct balance between the right to sexuality and the right to protection from sexual abuse. It was held that Member States have an obligation to provide such balanced protection, in particular when vulnerable persons such as those with mental disorders are involved. Herring notes that:

On the one hand [the law] should respect the rights of those with mental disorders to engage in consensual sexual activity, while on the other it should safeguard them from sexual abuse.⁶⁴

In accordance with the ECHR, striking this balance was presumably the aim of the SOA. Maher recognises the difficulties with attempting to strike this balance given the

⁵⁸ Leigh, 'Two cases on consent in rape', p.8.

⁵⁹ Ibid.

⁶⁰ *Kingston* [1995] 2 AC 355 at 369.

⁶¹ Simester, A., and Sullivan, G., *Criminal Law: Theory and Doctrine* (2004 2nd ed Oxford University Press).

⁶² *Dudgeon v UK* (1981) 4 EHRR 149.

⁶³ *X and Y v Netherlands* (1985) 8 EHRR 235.

⁶⁴ Herring, J., 'R v C: sex and mental disorder', (2010) 126 *Law Quarterly Review* p.36.

‘considerable diversity of people with mental impairment in terms of extent of impairment, living circumstances, and sexual interests and knowledge.’⁶⁵ This highlights the diverse nature of mental disorders, each having a different and somewhat unpredictable effect upon each individual. Issues inevitably arise through the difficulties in comprehending whether a complainant with a mental disorder, be it permanent or transitional, had the capacity to consent to the sexual activity at the material time.

Sections 30-44 SOA are specific provisions covering the protection of persons with mental disorders. The relevant offences in the context of consent are those contained in sections 30 and 31 which cover Sexual activity with a person with a mental disorder impeding choice, and Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity, respectively. The consent provisions contained in sections 74-76 are not applicable here. Essentially, consent under sections 30 and 31, is dealt with by subsection 2 of each provision. The sections use the phraseology that an offence is only committed if the individual with a mental disorder impeding choice (‘complainant’) is *unable to refuse because of or for a reason related to a mental disorder*. This is the equivalent to absence of capacity to consent to sexual activity as required by section 74.

The offences also hold a defendant liable under subsections 1(d) of the relevant provisions if he ‘...knows or could reasonably be expected to know that [the complainant] has a mental disorder and that because of it or for a reason related to it [the complainant] is likely to be unable to refuse.’

This test should be applied taking into consideration the defendant’s knowledge and understanding of the relevant mental condition alongside his own mental abilities. It contains a subjective element that lends itself well to the characteristics of complainants and offers a high level of protection. However, in comparison to the equivalent test under the sexual offences in sections 1-4 which require only that a defendant had reasonable belief in consent, it is a more stringent test for the prosecution to satisfy. It is not enough for the defendant to simply have believed in consent if there were factors that may have suggested to him that the complainant was suffering the effects of a mental disorder. Stevenson et al recognise that this is more readily established by the prosecution where the defendant is a carer for the

⁶⁵ Maher, G., ‘Rape and other things: sexual offences and people with mental disorder’, (2010) 14(1), *Edinburgh Law Review* p.131

complainant or has professional experience working with people with mental disorders. In other cases it is not so easy to determine:

that [the defendant] could reasonably be expected to have the relevant knowledge, especially in cases where there are no external distinguishing features that might indicate mental disorder and [the defendant] has no pre-existing knowledge of [the complainant].⁶⁶

A defendant must have some awareness of the mental disorder present, as well as being aware that it may affect the complainant's ability to refuse. A successful prosecution is consequently much more likely where the complainant's mental disorder is one more obvious to a layperson.⁶⁷

The use of the term *unable to refuse* in the offences is arguably vague however; subsections 2 of the relevant provisions do provide a definition. A complainant is unable to refuse if:

- (a) he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason),
or
- (b) he is unable to communicate such a choice to A.

Card et al, describe the subsection as providing a 'comprehensive definition'⁶⁸ as to what is meant by *unable to refuse*. Notice the use of *capacity* in (a). The lack of a definition of capacity in the SOA has proven to be problematic in cases of intoxication. The problems with the concept here are considerably reduced as subsection 2(a) provides guidance for its application. It requires that a person having capacity to choose whether to agree to the touching must have *sufficient understanding of the nature...of what is being done*. This is interpreted to mean that a complainant must appreciate the sexual nature of the material act. Card asserts that the understanding of sexual nature test can be satisfied by a relatively low level of knowledge and understanding.⁶⁹ Subsection 2(a) also requires appreciation of *reasonably foreseeable consequences* of the sexual activity for capacity to be present. These consequences are assumed to be pregnancy and sexual disease

⁶⁶ Stevenson, K., et al., *Blackstones Guide to the Sexual Offences Act 2003* (2004: Oxford University Press) p.92.

⁶⁷ Ibid.

⁶⁸ Card, et al., *Sexual Offences*, p.199.

⁶⁹ Ibid., p.200.

transmission. Appreciation of these complements an understanding of the nature of the material act. The subsection also states that capacity can be lacking *for any other reason*. This provides for encompassing a wide range of circumstances in which a person suffering from a mental disorder may be protected. On the other hand, it leaves the concept of capacity in an indefinite state. In respect of subsection 2(b), Toulson J in *Hulme v DPP* (2006)⁷⁰ provided a useful explanation; a person is *unable to communicate a choice* if they are physically able to speak but unable to effectively do so in the way that someone of his age and not suffering from his disabilities would have done in similar circumstances. This is a logical interpretation, providing further assistance in the process of determining whether a person is *unable to refuse*.

In terms of the protection offered to complainants in conjunction with the recognition of sexual autonomy, Ormerod believes the offences 'represent a marked improvement on the pre-Act position,'⁷¹ but also reviews them as 'broad, unduly complex, [with] numerous alternative elements creating various permutations of the offence[s].'⁷² *R v C*⁷³ is the most authoritative case in this area with the House of Lords providing further guidance and interpretation of the offences. The complainant suffered from a schizo-affective disorder, a low IQ and a history of harmful use of alcohol. The defendant was convicted of section 30 for sexual activity with the complainant who was held to be *unable to refuse* due to a mental disorder whilst the defendant could reasonably have known this. The defendant's appeal was successful and the case progressed to the House of Lords where a 'very welcome judgment'⁷⁴ was provided.

There were three questions certified for the consideration of the House of Lords. Firstly, it was to be evaluated whether the correct position of the law was that for the purpose of section 30, *lack of capacity to choose* should not be *situation* or *person* specific. The House of Lords thought that the *lack of capacity to choose* depended upon the complainant's state of mind and understanding of the specific act at the material time. Baroness Hale made this clear:

⁷⁰ *Hulme v DPP* (2006) 170 JP 598 at 15.

⁷¹ Ormerod, D., 'R v C: sexual offences: Sexual Offences Act 2003 s.30(2) – sexual touching – complainant suffering from mental disorder', (2010) *Criminal Law Review* p.77.

⁷² *Ibid.*

⁷³ *R v C* [2009] UKHL 42.

⁷⁴ Herring, 'R v C: sex and mental disorder', p.36.

One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so.⁷⁵

A complainant's capacity is therefore *situation* and *person* specific, making it a suitably flexible test by covering a vast range of situations and complementing the diverse nature of mental disorders.

The complainant in *R v C* submitted to have engaged in the act in question only as a result of becoming panicked and afraid. The second certified question was consequently whether an irrational fear could amount to a lack of capacity to choose. More specifically whether it could be encompassed by the phrase *any other reason* under section 30(2)(a). The House of Lords concluded that the phrase was to be interpreted as capable of encompassing a wide range of circumstances;⁷⁶ a contrast to the Court of Appeal's approach. Baroness Hale stated that such circumstances were to include compulsions, delusions or irrational fears,⁷⁷ clarifying that irrational fears do amount to a lack of capacity to choose.

The third question centred upon section 30(2)(b). The Court of Appeal held that the section was only capable of covering *physical* inability to communicate a choice – a restrictive approach.⁷⁸ The House of Lords disagreed and held that the inability to communicate referred to any disability, be it physical or mental as caused by, or related to, a mental disorder. This interpretation furthered the protection offered to complainants than that provided previously by the Court of Appeal. Maher described the whole point of *R v C* to be that:

it simply cannot be said that all people with any mental disorder lack capacity to consent to sexual activity. The focus is always on a particular person at a particular time in respect of a particular act.⁷⁹

It seems that after the interpretation in *R v C*, section 30 is now 'an effective tool'⁸⁰ in providing sufficient and balanced protection. Herring suggests that 'the judgment is a welcome recognition of the rights of those with a mental disorder.'⁸¹ On the other

⁷⁵ *R v C*, at 27.

⁷⁶ *Ibid* at 25.

⁷⁷ *Ibid*.

⁷⁸ Miles, 'Sexual offences: consent, capacity and children', p.9.

⁷⁹ Maher, 'Rape and other things', p.132.

⁸⁰ Herring, 'R v C', p.37.

⁸¹ *Ibid.*, p.38.

hand, there is an alternative prosecution route under the SOA which cannot be overlooked, making it questionable whether the mental disorder offences are truly necessary.

Most defendants who are convicted under section 30 could also be convicted of rape under section 1, and this was in fact the position in *R v C*. It was held that compulsions, delusions or irrational fears, are capable of amounting to a *lack of capacity to choose*. It follows logically that a complainant suffering any of these characteristics lacks the capacity to consent. Evidently, they fall neatly under section 74's definition of consent and given the lack of capacity, they have provided no valid consent to the material act. If consent is absent, the sexual intercourse amounts to rape. The defendant could in this instance be given a maximum sentence of life imprisonment, as opposed to 14 years imprisonment under section 30. In this respect the mental disorder offences seem neither necessary nor capable of offering maximum protection.

Ormerod believes that the fact that rape and section 30 in respect of a mentally impaired complainant are interchangeable does not mean that section 30 is superfluous.⁸² In *R v C*, Baroness Hale gave two explanations as to why the section 30 offence may be preferred to one of rape. Firstly, in charging section 30, 'the prosecution has only to prove the inability to refuse rather than that the complainant actually did not consent.'⁸³ In essence this is suggesting that the actus reus is easier to establish. By the same means, the second explanation was that the mens rea may also be easier to ascertain. Under section 30 it is sufficient that the defendant knows or should reasonably have known that the complainant had a mental disorder likely to make them unable to refuse, as opposed the defendant not having reasonable belief in consent. Herring believes neither of these explanations to be entirely convincing and further points out, 'it is hard to think of a case where a defendant would be guilty of an offence under s.30, but not be guilty of the offence of rape or sexual assault.'⁸⁴

Despite their questionable necessity the mental disorder provisions, combined with the judgment of *R v C*, appear to be well constructed and interpreted to provide comprehensive protection. Stevenson et al believe that the:

⁸² Ormerod, 'R v C: sexual offences, p.78.

⁸³ *R v C* at 32

⁸⁴ Ibid.

substantive offences are likely to produce a much better balance of the need to protect the rights of vulnerable persons to understand and exercise their sexuality with their right to be protected by the law from sexual abuse and exploitation.⁸⁵

This coincides with the aim of the SOA: to remove the approach that assumed all mentally impaired individuals lacked capacity and consequently denied them autonomous choices⁸⁶.

Conclusion

The primary issue with the definition of consent under section 74 appears to be the ambiguity of the terms used. In particular, *capacity* is left without definition and its interpretation has proven problematic. The main issues with the consent provisions contained within sections 75-76 have been highlighted to be their restrictive content and lack of significant addition to the previous law. Controversially, transmission of sexual disease through sexual intercourse has been confirmed by *R v B*⁸⁷ not to affect consent. Herring strongly opposes this position:

We need to move away from the simplistic question, “did the victim say yes or no”. Instead we should be asking how the victim understood the act that she was consenting to.⁸⁸

Academics do not fully concur and arguments are put forward on various grounds, highlighting the uncertainty of what the current preferred position may be and why. It has been suggested that ‘the question of how to deal with the problem of STIs and the place of the criminal law is one which the Law Commission might well wish to explore.’⁸⁹ This would ideally provide additional protection or alternatively, an explanation as to why such a horrific, deceptive and potentially life threatening experience that occurred through sexual intercourse cannot currently be accepted to amount to rape.

Intoxication has proven a difficult contributory factor to determining consent. Section 75 only provides protection where a complainant is involuntarily intoxicated or so drunk as to be rendered unconscious. This leaves the remainder of cases to fall

⁸⁵ Stevenson, *Sexual Offences Act 2003*, p.92 .

⁸⁶ Ormerod, ‘*R v C: sexual offences*’, p.77.

⁸⁷ *R v B* [2006] EWCA Crim 2945.

⁸⁸ Herring, J., ‘Mistaken sex’, (2005) *Criminal Law Review* p.514.

⁸⁹ Leigh, ‘Two cases on consent in rape’, p.9

under section 74. Wallerstein acknowledges the drastic interpretation that is required of section 74 to determine the capacity of a voluntarily intoxicated complainant. She criticises the poor conviction rates and believes that if the problem 'is not being rectified by the courts, it is necessary for the legislature to intervene and give more specific guidance.'⁹⁰

The sexual autonomy of individuals with mental disorders is protected by the SOA sufficiently. Guidance is provided on the interpretation of *unable to refuse*, making its application more straightforward than the general definition of consent and its inclusion of capacity. The offences have been praised for striking the correct balance between protecting the sexual autonomy of persons with a mental disorder at the same time as protecting them from sexual abuse. Further praise can be given for their wide application. Considering that an individual's mental disorder may have unpredictable effects and durability in different scenarios, the current law seems effective. Despite the perceived success of the sections, the issue still persists that the sections may not truly be necessary and a more serious non-consensual crime such as rape or sexual assault could be rightly charged.

The primary issues combine to conclude that a number of grey areas still remain unresolved and the consent provisions are not completely comprehensive in providing protection. It is arguable that as this is the first time an attempt at a definition of consent has been made and in attempting to define the complexities of such a concept, room for improvement is inevitable. On the other hand, in dealing with such sensitive issues and considering the extensive research and promising recommendations of *Setting the Boundaries*, it seems fair to expect an unambiguous extension to the protection previously offered on the first attempt.

In answer to whether the SOA will improve justice for the complainants of rape Loveless asserts 'that it is too soon to say.'⁹¹ The SOA has been in place for over six years, however, with such complex and broad issues it may take time for the courts to embrace its interpretation and provide guidance, despite the recognition from many academics that before such a time, protection is in a lesser state than it should be for victims.

⁹⁰ Wallerstein, S., 'A Drunken consent is still consent' – Or is it? A critical analysis of the law on a drunken consent following *Bree*', (2004) 73 *Journal of Criminal Law* p.318.

⁹¹ Loveless, J., *Criminal Law: Texts, cases and materials*, (2008), p.537