

Sex, Drugs and Consent: A Recommendation for Rape Law Reform in Light of Issues Raised by Drug Rape

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I INTRODUCTION

Rape is a terrible crime. For many of us, the word “rape” evokes a strong visceral reaction. Because of the recognition of its inherently invasive and destructive nature, rape has come to be utilized during war as a systematic and deliberate policy to lower the morale and resistance of the enemy side. The fact that both the United Nations¹ and The Hague² have declared this use of rape as being so contrary to human rights that it qualifies as a war crime highlights the horrific nature of sexual violation.

Unfortunately, even in times of peace, incidents of rape are frequent and widespread. The circumstances in which rape occurs are consequently diverse. At one end of the scale is the stereotypical “stranger rape” scenario in which violent force is used to procure sexual intercourse, often from a randomly selected victim. Although this is the scenario that instils the greatest fear in the hearts of protective parents and solitary female joggers, stranger rape is in fact one of the rarest forms of rape.³ It is also legally uncomplicated and represents the small percentage of “easy cases”.

It is the situations that lie at the other end of the scale that cause the most controversy and difficulty in the law. These are the more challenging cases, complicated because the complainant and accused were previously known to one another. Although these cases also involve allegations of coercion, the forms that the coercion takes can be varied and are often less palpable than in the stranger rape scenario. At this end of the scale the line between consent and submission is blurred, and whether or not there was true consent to the sexual intercourse is difficult to determine.

This factual uncertainty necessarily results in legal uncertainty due to the use of the term “consent” in the sexual offence provisions. The approach of looking at whether the complainant “consented” has proved problematic in practice, in that it requires the law to draw black and white distinctions between consent and non-consent where a woman may be under various social, cultural and personal pressures that make her ambivalent,

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1 Rape and abuse of women in the areas of armed conflict in the former Yugoslavia GA Res 50/192, UN GAOR, 50th sess, UN DOC A/RES/50/192 (1995).

2 Bergoffen, “February 22, 2001: Towards a Politics of the Vulnerable Body” (2003) 18 *Hypatia* 116.

3 MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) 81.

indifferent, or just unclear about the sexual intercourse she engages in. The presence or absence of consent is consequently a question that is almost impossible for courts and juries to ascertain with any accuracy.

The law currently attempts to overcome these difficulties by instituting measures that aim to make the concept of consent workable in practice. Some examples include providing statutory presumptions against consent where certain factors are present,⁴ or developing case law that provides legal definitions of consent.⁵ These measures, while sometimes providing real assistance in rape cases, are nevertheless really only intermediary; they are in essence the equivalent of a legal “band-aid”, and fail to address the underlying problems inherent in the concept of consent to sexual intercourse. Despite this failure, the legislature has generally considered major reform of the underlying concept to be unnecessary.

In recent years these inherent problems have been highlighted by a new and disturbing trend. With increasing frequency over the last decade or so, there have been reports of women (and men) whose drinks have been surreptitiously spiked by drugs such as Rohypnol and Gamma Hydroxybutyrate and who wake up, hours later, with the belief (but often not the memory) that they have been sexually violated. This phenomenon has been reported around the world, and has come to be known as “drug rape” or “drug-assisted rape”.

The legal problems raised by drug rape are manifold. First, and most obvious, the lack of memory that often accompanies drink spiking makes offending difficult to detect and prosecute. Second, reports have shown that contrary to popular belief, ingestion of classic “drug rape” drugs does not necessarily produce unconsciousness, but can result in a variety of states ranging from inert unresponsiveness to a mere lack of inhibition.⁶ While unconsciousness will always vitiate claims that a victim “consented”, the law is currently ill-equipped to deal with the range of levels of consciousness between sobriety and drug-induced unconsciousness when genuine consent may or may not have been given.

Where drugs were surreptitiously administered to the complainant by the accused in order to facilitate rape, most agree that some moral culpability should be attributed to the accused.⁷ Other situations are far more problematic in terms of assigning moral (and legal) blame. Examples might include where the accused has taken advantage of the victim of drink spiking by a third party, where the accused spikes the complainant’s drink not to facilitate rape but merely to “loosen her up”, or where the

4 Crimes Act 1961, s 128A [“Crimes Act”].

5 See also *R v Isherwood* (14 March 2005) unreported, Court of Appeal, CA 182-04 and CA 258-04, McGrath, Glazebrook and O’Regan JJ [“*Isherwood*”]; *R v Sturm* (2005) 21 CRNZ 627 [“*Sturm*”]; *R v Lang* (1976) 62 Cr App R 50, 52 per Lord Scarman [“*Lang*”].

6 The reason that people believe the drugs have made them unconscious is because, especially when combined with alcohol, these drugs can cause anterograde amnesia that the brain rationalises as a period of unconsciousness. See Finch and Munro, “Juror Stereotypes and Blame Attribution in Rape Cases involving Intoxicants: the Findings of a Pilot Study” (2005) 45 Brit J Criminol 25, 27 [“*Juror Stereotypes*”].

7 *Ibid* 31.

accused has sex with a complainant who is intoxicated as a result of her own voluntary actions. Further, these complications arise not only where typical “drug rape” drugs are involved, but also in situations involving alcohol, prescription drugs or other illegal substances such as ecstasy.

These new scenarios highlight the difficulties involved in using consent as a determinant of criminal liability. They also draw attention to various other problems that result from the concept. One such problem is that the concept’s uncertainty allows significant scope for jurors’ prejudices to enter into their determinations; another is the undue focus which is placed on the complainant in rape trials.

Instead of undertaking a reform of rape law, however, the courts and Parliament have attempted to deal with these new issues through intermediary measures, including both case law developments and also legislation such as the Crimes Amendment (No. 2) Act 2005.

Other jurisdictions have sought to tackle the problem in different ways. In England, the Sexual Offences Act 2003 now provides a statutory definition of “consent” and includes a section providing a presumption against consent where drugs were administered to a victim without the victim’s consent.⁸ The Sexual Offences Act also includes an offence of administering a substance with intent.⁹

Unfortunately these measures do not provide a satisfactory answer to the problems inherent in the current definition of rape. Case law is slow to develop and can respond only to particular circumstances as they arise, and the current statutory provisions do not cover the wide range of situations in which consent may be absent. Although creating offences that seek to target drug rape offending is helpful, such offences can only cater for a narrow range of circumstances. Ultimately, the majority of these measures fail because they do not seek to move away from the problematic concept of consent.

The development of more such “patches” is inadequate to deal with the underlying issues in the legislation as highlighted by drug rape. Efforts to supplement the existing definition of consent through case law and statutory reform will inevitably be ineffective. Instead, it is necessary to redefine rape by modifying or perhaps eliminating the current concept of “consent” in order to distinguish between criminal and non-criminal conduct. Such reform would leave the law flexible enough to apply to new and unforeseen situations as they arise, and would provide a coherent and policy-based approach to further development in this area.

While no solution is perfect, the changing social circumstances relating to sexual relationships and encounters necessitates a major overhaul of sexual assault legislation in New Zealand.

⁸ Sexual Offences Act 2003 (UK), s 75.

⁹ *Ibid* s 61.

II THE PROBLEMATIC CONCEPT OF CONSENT

A “Defence” to Rape

1 Sections 128 and 128A Crimes Act

The offence of rape in New Zealand is a statutory crime contained in sections 128 and 128B of the Crimes Act, and operates as a sub-category of the broader definition of “sexual violation”.

In order to prove that an accused raped the complainant, three elements must be satisfied:

- (a) that the accused had sexual connection with the complainant by penetrating his or her genitalia with his penis;
- (b) that the complainant did not consent to the connection; and
- (c) that the accused did not believe on reasonable grounds that the complainant consented.

As consent or a reasonable belief in consent are matters of fact for the jury, there is little statutory guidance as to the application of these defences. Section 128A of the Crimes Act, until its amendment in 2005, provided only that a lack of physical resistance did not by itself constitute consent, and that consent would be absent if it were induced by actual or threatened force to the victim or a third party, or a mistake as to identity or as to the nature and quality of the act.¹⁰

2 Case Law

Because of the difficult nature of the concept, the bare statutory provisions contained in sections 128 and 128A of the Crimes Act are supplemented by increasingly complex and subtle common law rules.

In *R v Olugoba*¹¹ the English Court of Appeal held that consent “covers a wide range of states of mind ... ranging from actual desire on the one hand to reluctant acquiescence on the other.” Accordingly, consent that is given reluctantly or hesitantly was nevertheless considered genuine consent so long as it was in fact full, voluntary, free and informed, and there was no suggestion that there was coercion to such a degree that the complainant was not in a position to make a decision of her own free will.¹²

More recently in *R v Isherwood*¹³ the Court held that “[w]hat will ...

¹⁰ This section has been considerably amended by the Crimes (Amendment) Act 2005; however most of the case law has developed under the historical text.

¹¹ [1982] QB 320 (CA).

¹² *Brewer v R* [1994] 2 NZLR 229.

¹³ *Isherwood*, supra note 5, [35].

always be essential for there to be a valid consent is that a complainant has understood her situation and was capable of making up her mind when she agreed to sexual acts.” In *R v C*¹⁴ the Court went so far as to direct the jury that “consent is something positive” — a direction that was upheld by the Court of Appeal.

Against this trend of emphasising the victim’s freedom of choice and ability to refuse, the Court in *R v Karou*¹⁵ offered a word of caution. In that case, the Court held that the serious consequences for the accused following a conviction of rape mean that consent “should be construed on the plain meaning of the words used to construe [it], without recourse to the ambiguities of popular interpretation”.

The case law highlights the constant tension in the criminal law between vindicating victims on the one hand and ascribing criminal liability only to those who truly deserve it on the other. In the rape context, a balance between the interests of the complainant in having her freedom of choice respected and recognized, and the interests of the accused in avoiding inappropriate criminal liability is necessarily integrated into the question of whether the complainant consented to the sexual intercourse.

Submission or Consent?

One of the most significant problems with the concept of consent is the difficulty involved in differentiating “true” consent from mere submission. This difficulty arises primarily as a result of women often being under various social, cultural and personal pressures that make it impossible to draw stark lines between these states of mind. Feminist writers such as Catharine MacKinnon focus on the fact that the relationships between men and women in our society and the inherent lack of true equality between them necessarily make consent and submission virtually indistinguishable.¹⁶

The meaning of “consent” is “inherently tied to a system of unequal sexual relationships in which the man actively initiates the sexual encounter and the woman is relegated to the more passive role of responding to initiatives.”¹⁷ Under these conditions, it is often difficult to ascertain whether a woman truly consented or merely submitted to sexual advances. Ultimately, Catharine MacKinnon concludes that the problem is that “[t]he law of rape presents consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity.”¹⁸ Thus, it is virtually impossible to distinguish true consent from mere submission.

14 [1995] 2 NZLR 330.

15 (1994) 11 CRNZ 691 (CA).

16 See MacKinnon, *supra* note 3.

17 Chamallas, “Consent, Equality, and the Legal Control of Sexual Conduct” (1998) 61 *Sth’n Cal L R* 777, 814, cited in Thomas, “Was Eve merely framed; or was she forsaken? Part I” [1994] NZLJ 368, 369 [“Part I”].

18 MacKinnon, *Toward a Feminist Theory of the State* (1989) 175. [“*Toward a Feminist Theory*”]

Consequent Problems with the Concept of Consent

The problems inherent in the concept of consent and in distinguishing it from mere submission already provide difficulties for courts and juries in rape trials. There are, however, further problems that result from this lack of clarity and render lack of consent as an element of the offence even more unsatisfactory. These problems are discussed below.

1 The Trial's Focus on the Victim

The essence of a trial is to ascertain whether criminal liability should attach to the accused's actions and their resulting consequences. Accordingly, the majority of criminal trials are concerned with the actions (or occasionally omissions) of the accused and his or her state of mind at the time of those actions. The conduct and mental states of others will rarely be the focal point of the trial, nor will they often be a determinative element of the charge.

In contrast, in rape cases the lack of consent on the part of the complainant constitutes an ingredient of the charge that the prosecution must prove. Because of this, and because consent is often the element most easily challenged, it can be the key aspect at issue at trial. Further, the conduct of the complainant can be called into question where the accused claims that he believed on reasonable grounds that the complainant was consenting. Consequently, a detailed inquiry into the complainant's state of mind and her¹⁹ accompanying actions at the time of the alleged offence will often be necessary.

This focus on consent at trial leads to serious detrimental effects on the complainant. It is now widely accepted that victims suffer significant and protracted trauma as a result of rape.²⁰ Because any good defence lawyer will attempt to cast doubt on the complainant's claim that she did not consent to the sexual intercourse, when giving evidence in support of an alleged rape a complainant can feel that she is the one on trial, further contributing to her trauma.²¹

Various legislative developments have sought to protect the complainant in these circumstances. For instance, section 23A of the Evidence Act 1908 now precludes, except by leave of the judge, evidence being led or questions being put to witnesses relating directly or indirectly to the sexual experiences of the complainant with any person other than the accused, or to the reputation of the complainant in sexual matters. In addition, section 185C of the Summary Proceedings Act 1957 provides

19 Although not all rape scenarios fit into the male/female paradigm, for the purposes of this paper I will refer to the victim as female.

20 Thomas, Part I, *supra* note 17.

21 Bronitt, "Rape and the Lack of Consent" (1992) Crim LJ 289, cited in Thomas, Part I, *supra* note 17, 371.

that in preliminary hearings the complainant's evidence is usually given by written statement, although the judge has the discretion to allow the complainant to be cross-examined in depositions in rare cases. Complainants are subjected to rigorous and harrowing cross-examination at trial where consent is at issue and their integrity and credibility will almost inevitably be called into question.

2 *Uncertainty*

The flexibility and malleability of the law's current approach to consent results in significant uncertainty in application. As stated by one commentator, "[t]here is no way of telling in advance of a Court hearing whether in law consent is present or not. In this way the law fails to meet a minimum requirement of clarity, certainty, and comprehensibility."²²

Although the need for certainty and consistency competes with the need to allow flexibility for the law to adapt to novel fact scenarios, a balance must be struck between the two. The current degree of flexibility in the law results in most rape trials where consent is at issue being something of a lottery, the outcome of which depends to a significant degree on the composition and prejudices of the particular jury.

3 *Jury Stereotyping*

A related problem arising from the uncertainty inherent in the concept of consent is its susceptibility to jury prejudices. Different people will inevitably give different meanings to the concept of consent. The uncertainty involved in the application of the rules regarding consent allows the jurors' own conceptions and moral leanings to influence their decision.²³

This is particularly true where alcohol or other intoxicants were involved. Individual jury members' own views on intoxication and the role it plays in social interactions are likely to inform to a great extent the liability they will be willing to impose on the accused for his actions.

In New Zealand, as in many jurisdictions, the principle of jury secrecy prevents any real research into the jury's decision-making process.²⁴ In an effort to review the effects of recent rape law reform in England, Emily Finch and Vanessa Munro conducted a pilot study on this issue, using focus groups and trial simulations to elicit information about the jury's decision-making process in rape trials involving intoxicants.²⁵ Because of the study's restricted scale (involving only two focus groups and one

22 Temkin, *Rape and the Legal Process* (2 ed, 2002) 93.

23 Thomas, "Was Eve merely framed; or was she forsaken? Part II" [1994] NZLJ 426, 429 ["Part II"].

24 Jury secrecy was formerly governed by the common law on contempt of court. Section 76 of the Evidence Act 2006 now prohibits evidence of jury deliberations being given in court except in certain circumstances, and makes passing mention of the public interests in keeping jury deliberations confidential. It appears therefore that although the Evidence Act governs circumstances involving evidence being given as to jury deliberations, the issue is still predominantly dealt with under the common law.

25 Finch and Munro, *Juror Stereotypes*, *supra* note 6.

trial simulation) it is of limited authority. It is likely, however, that similar stereotyping and prejudices to those found in the trial exist in rape trials generally. The study is therefore useful to highlight the areas in which the current law regarding consent is problematic.

After reviewing the responses of the participants, the authors ultimately conclude that the “flexibility that exists with regard to the determination of the presence or absence of consent creates scope for the incorporation of stereotypical views about the relationship between women, intoxication and sexual activity into the decision-making process.”²⁶ These stereotypical views can result in verdicts that bear no relation to the current law.

In particular, where the victim had voluntarily and knowingly ingested either alcohol or recreational drugs, “participants were in broad agreement that she ought to bear some responsibility for the subsequent intercourse.”²⁷ Although the participants recognized that the actual effect of intoxication on the victim is the same whether it was through voluntary ingestion or through her drink being “spiked”, they were nonetheless unwilling to accord moral equivalence to the resulting intercourse in the respective circumstances.²⁸ It was not the victim’s ability to give true consent but the antecedent actions of the victim and offender that were important to the participants.

Participants also differentiated between the morality of “spiking the victim’s drink in order to procure intercourse, and doing so in order to ensure that she ‘loosened up’ and enjoyed the party.”²⁹ This was regardless of whether sexual intercourse ultimately took place.³⁰ Again, the focus is taken away from the victim’s ability to consent at the time of the sexual intercourse. Further, the participants agreed that if the defendant and the victim were equally intoxicated, it would be “unfair” to hold the defendant criminally liable for the intercourse that followed, even where the victim was so intoxicated as to render her ability to consent nugatory.³¹ On the other hand, where the intoxicant involved was not alcohol or some other more “acceptable” drug but was the well-known rape drug Rohypnol, participants were of the view that any intercourse that followed constituted rape, even in the absence of evidence as to the victim’s resulting state.³²

The authors concluded that “[o]ther than in very narrow circumstances based upon an erroneous prototypical construction of drug-assisted rape, jurors are challenged by the breadth of the discretion conferred upon them in relation to consent to intercourse.”³³

26 Ibid 35.

27 Ibid 30-31.

28 Ibid 31.

29 Ibid.

30 Ibid.

31 Ibid 32.

32 Ibid.

33 Ibid.

These findings are alarming given that the issue of consent is left to the jury in New Zealand. The findings show that juries may be influenced by a range of legally irrelevant factors in determining consent.

III DRUG RAPE

As Finch and Munro's pilot study into jury stereotypes shows, where a rape case involves elements of intoxication, the issue of consent becomes even more problematic and the concept more difficult to apply. In order to ascertain the extent to which the current law is equipped to deal with such situations, it is first necessary to define the parameters of "drug rape" and the typical elements involved.

The Drugs

Drug rape is commonly thought of as an incident where a victim's drink is surreptitiously spiked by drugs such as Rohypnol or Gamma Hydroxybutyrate ("GHB"), rendering her unconscious and vulnerable to sexual violation by the offender. Rohypnol and GHB, however, are not the only drugs used to procure sexual intercourse with a victim. Other drugs such as Zopiclone, Dextromethorpine, Prometazine, and Midazolam or alcohol have been used in drug-rape situations.³⁴

A definition of "drug rape" that includes scenarios involving a wider range of intoxicants may be of more assistance. In England, the *2002 Joint Inspection Report into the Investigation and Prosecution of Cases Involving Allegations of Rape*³⁵ defines drug-assisted rape as incidents in which drugs, including alcohol, are purposefully used to secure a sexual assault.³⁶ A different approach is taken by the *Sturman Report into Drug-Assisted Sexual Assault*³⁷ which defines drug rape as "a situation where a person's ability to consent or refuse consent is impaired as a result of drugs."³⁸ The focus in the *Sturman Report* definition is therefore not on the accused's actions or his intentions but rather on the victim's state of mind and ability to give consent.³⁹

As the legal problems raised by drug rape relate to determining whether the complainant consented to the sexual intercourse, the *Sturman*

34 Temkin, *supra* note 22, 104.

35 Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate, *A Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of 2002* (2002) (UK). <<http://inspectors.homeoffice.gov.uk/hmic/inspections/thematic/aor/them02-aor.pdf?view=Binary>> (at 14 August 2007).

36 *Ibid* [6.8], cited in Munro and Finch "Of Bodies, Boundaries and Borders: Intoxicated Sexual Consent under the Law of Scotland and England" [2005] *Jur Rev* 53, 54 ["Of Bodies, Boundaries and Borders"].

37 Sturman, *Report into Drug-assisted Sexual Assault: A Report to the Home Office by DCI Sturman* (2000) (UK) ["*Sturman Report*"].

38 *Ibid* 10.

39 Munro and Finch, *Of Bodies, Boundaries and Borders*, *supra* note 36, 54.

Report and its focus on the victim's state of mind, regardless of the intentions or actions of the accused or the variety of intoxicants involved, appears to give a more useful definition. As discussed below, the victim's ability to consent may be impaired in very similar ways regardless of whether drug rape drugs or alcohol are involved. Further, her capacity to give consent will be affected by intoxicants to the same extent no matter how the victim came to ingest them. The only common element in drug rape scenarios is the victim's ability to give "true" consent.

1 Rohypnol and Gamma Hydroxybutyrate

Despite this wider definition of "drug rape", which includes any form of intoxication on the part of the victim, the drugs most commonly associated with the term are Rohypnol and GHB.

Rohypnol is the trade name for the drug Flunitrazepam. In New Zealand, Flunitrazepam is prohibited as a Class C controlled drug under the Misuse of Drugs Act 1975.⁴⁰ GHB is classified as a Class B controlled drug under the Misuse of Drugs Act 1975.⁴¹ While available as a prescription for sleep disorders in some countries, GHB is banned in other countries because of the dangers associated with its use.⁴²

Both Rohypnol and GHB have found particular favour as drink spiking drugs due to their ability to escape detection. Newer formulations of Rohypnol are salty and do not dissolve completely in order to prevent its use in drug rape. However, older, odourless, colourless and tasteless versions of the drug are still available.⁴³ The effects of the drug are felt almost immediately, peaking at about two hours and wearing off eight to 36 hours after ingestion.⁴⁴ Rohypnol and GHB also leave the body fairly quickly after their effects have worn off.

The symptoms of ingesting these drugs, which can become more pronounced when the drugs are combined with alcohol or other intoxicants, include slurred speech, difficulty in walking, nausea, low blood pressure, difficulty in breathing, dizziness, and amnesia.⁴⁵ The effects of Rohypnol are such that, if taken in large doses together with alcohol, the respiratory reflex centre of the brain may be so depressed that death eventually results.⁴⁶

Despite popular belief, people who have ingested Rohypnol or GHB rarely lose consciousness:⁴⁷

40 Misuse of Drugs Act 1975, sch 3, cl 1.

41 *Ibid* sch 2, cl 6.

42 Project GHB Inc, <www.projectghb.org> (at 19 July 2006).

43 Gorin, "Rohypnol — How the hype tricks women: a rape crisis centre view" (2000) 20 *Canadian Woman Studies* 92(5).

44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 Finch and Munro, *Juror Stereotypes*, *supra* note 6, 27.

Rather, the amnesiac effects of the drugs prevent victims from recollecting events, thus creating a ‘memory void’ that the brain rationalises as a period of unconsciousness. The victim will retain consciousness whilst appearing to the observer to be inebriated but able to act under her own volition Drugs such as Rohypnol and GHB lower anxiety, alertness and inhibition whilst inducing euphoria, passivity and a sense of relaxation, thus increasing the likelihood that the victim will engage in intercourse, even if such behaviour would usually be uncharacteristic.

The victim will still be able to communicate and act to a certain degree; however the ingestion of the drugs may lead to a disassociation between mind and body that renders the victim receptive to sexual activity that she may well have found unwelcome in other circumstances, whilst eroding her ability to recollect events once the drugs have worn off.⁴⁸ For these reasons, Rohypnol and GHB drugs have been described as “a particularly formidable weapon” in sexual assault scenarios.⁴⁹

2 Alcohol

Alcohol is not a drug commonly associated with drug rape. However, a significant number of rape cases involve alcohol consumption on the part of the victim. A recent study in the United States showed that while less than 4 per cent of rape victims whose consciousness had been impaired had been given “drug rape drugs”, in 67 per cent of such cases alcohol had been present.⁵⁰

Consumption of significant amounts of alcohol can lead to a lack of coordination, blurred vision, and blackouts.⁵¹ In rare cases, extreme excess consumption of alcohol can lead to death. In terms of its effects on a victim’s ability to consent to sexual intercourse, alcohol is equally as problematic as drugs such as Rohypnol and GHB.

The Drugs’ Effects on the Victim

The victim may suffer a range of resulting states following ingestion of any or a combination of “drug rape drugs” or alcohol. At one end of the scale the intoxicants render the victim unconscious. Although this is commonly believed to be the typical response, the research on these drugs as outlined above shows that unconsciousness is relatively rare, and if it occurs it does not do so immediately.

A second possibility is that the victim enters a state of inert unresponsiveness. In this state, the victim may be aware of what is

48 Ibid.

49 Ibid.

50 Ibid 28.

51 Seliger, “Alcohol at the Wheel” (1953) 44 J Crim L Criminology & Police Sci 402.

going on around her, but feel physically and mentally unable to resist any sexual advances. The fact that the victim does not communicate a lack of consent does not mean that she consented. As the victim does not lose consciousness, however, there is a possibility that she is consenting.⁵²

Finally, the drugs may merely result in a drug-induced lack of inhibition. In this state the victim is induced by the drugs “to be a willing participant in sexual activity that she would usually refuse or find repugnant”.⁵³ Research on the behavioural and cognitive effects of drug rape drugs found distinct alterations in participants’ thought processes and behaviour. Many participants became indecisive and unusually susceptible to the suggestions of others.⁵⁴ Participants appeared incapable of recognising these alterations, and the majority were adamant that the drugs had no effects whatsoever except for causing drowsiness.⁵⁵ Participants in the research appeared to behave in an uninhibited manner whilst appearing unable to appreciate that such behaviour was uncharacteristic, unusual or inappropriate.

The disinhibiting effects of these drugs are highly problematic where there are subsequent allegations of rape and issues of consent fall to be considered.

IV LEGAL ISSUES RAISED BY DRUG RAPE

Ingestion of the above drugs and their consequent effects on the complainant can have a significant impact on the issue of consent where there is an allegation of a subsequent rape. These issues arise not only in relation to whether there was actual consent on the part of the complainant, but also in relation to the accused’s claim that he had a reasonable belief in consent.

Actual Consent

Where a woman has ingested intoxicants, her ability to make free choices about the acts she engages in may be compromised. In some cases, she will be physically incapable of consent. In others, she may appear to be consenting but her ability to give “true” consent may be impaired. In still other instances, she may be intoxicated but able to exercise free choice and give true consent, even if such consent may not have been forthcoming had she been sober.

The problem of delineating these different states is compounded

52 Finch and Munro, “Intoxicated Consent and the Boundaries of Drug Assisted Rape” [2003] Crim L R 773, 777 [“Intoxicated Consent”].

53 Ibid 776.

54 Ibid 778.

55 Ibid.

because intoxicants can have different effects on different people and in different circumstances. There is therefore no “threshold” of intoxication beyond which it can be said that a person is unable to give consent. Further, unlike with drink driving where the safety of others is at risk, it hardly seems justifiable to impose an artificial threshold of intoxication beyond which a person is deemed incapable of consenting to sexual intercourse. Apart from such a level being completely arbitrary, setting this threshold would also limit the autonomy of competent adults to voluntarily engage in sexual intercourse while intoxicated.⁵⁶

The problem inherent in determining consent in these circumstances is that there is a vast range of circumstances in which the complainant may be too intoxicated to give proper consent, but may be unaware that she is not consenting. Drugs such as GHB augment this as they may also act to arouse women sexually, so they “feel that they are enjoying what is happening.”⁵⁷ Under such conditions it is next to impossible for the law to draw a line between uncharacteristic but consenting sex on the one hand, and rape on the other.

Reasonable Belief in Consent

Intoxication on the part of the complainant also impacts on whether the accused held a reasonable belief that the complainant was consenting.

When determining questions of reasonable belief, the circumstances under which the complainant came to be intoxicated become relevant. For instance, where the accused surreptitiously administers drugs or alcohol to the complainant without her knowledge or consent in order to procure sexual intercourse, it is unlikely that a jury would accept that the accused still had reasonable grounds to believe she was consenting. However, this may again depend on the level of her intoxication. It would be inappropriate to conclude that in every case where intoxicants were administered to the complainant surreptitiously, subsequent sexual intercourse constitutes rape and any belief the accused had in consent was unreasonable. There may be cases where, despite the accused’s actions, the complainant is still able to give true consent, and the accused’s reliance on that consent is reasonable.

The issue becomes even more muddled where intoxicants were surreptitiously administered by the accused to the complainant, not to facilitate sexual intercourse but merely to “loosen her up”. Although the accused’s motives in administering the intoxicants are not necessarily relevant to the question of consent, he may be able to argue that he had no intention of depriving the complainant of her faculty for refusing sex, so any appearance of consent was taken at face value. In the case of alcohol

56 Wetheimer, “Intoxicated Consent and Sexual Relations” (2001) 20 *Law and Philosophy* 373, cited in Munro and Finch, *Of Bodies, Boundaries and Borders*, supra note 36, 57.

57 Temkin, supra note 22, 104.

in particular, social acceptance of its use to make a woman more amenable to sexual relations may inform juries' determinations of the presence of reasonable belief in consent.

In other cases the ultimate "rapist" is not the person who administered the drugs to the victim. In such situations the accused may be knowingly or unknowingly taking advantage of another's actions.

There are a range of factors in the lead-up to the alleged rape itself that impact on whether the accused can rely on the "defence" of a reasonable belief that the victim was consenting.

Balancing Interests

Given the difficulties described above, a reformulation of the legal concept of consent seems necessary. Where the complainant was intoxicated at the time of the alleged rape, it is even more difficult than in regular rape cases to draw a convincing line between consent and mere submission. As a consequence of this increased difficulty, the complainant at trial is likely to be subjected to vigorous cross-examination as to her drinking or drug-taking habits, her propensity to engage in sexual acts whilst intoxicated, and her alleged "sober evaluation". Finally, because drinking and drug-taking can be controversial issues within our society, the way in which the complainant became intoxicated, the type of intoxicant involved, and her subsequent actions may be subject to a vast range of stereotyping and moral judgments by jury members.

It is necessary to develop a new approach to liability for sexual violation, both where drink or drugs are involved, and also where there is no victim intoxication but where the presence of consent may be a contentious issue.

A new approach to this issue will need to accommodate the two competing interests at stake. First, there are the interests of the victim to consider. As discussed, rape is a particularly invasive crime. Its effects can be felt by victims for the rest of their lives. Although ensuring the offender is convicted only goes a fraction of the way towards redressing the wrongs suffered by the victim, it is one of the few things that can be done to help. For some, having their suffering vindicated by a court of law can make an enormous difference, a realization that has led to a huge victims' rights movement in the last few decades.⁵⁸

Competing against the victim's interests in having her suffering vindicated and convicting the offender, of course, are the interests of the accused. While any sex that is not completely consensual should be denounced, it is not necessarily the case that every accused should consequently be labelled a rapist. The majority of criminal offences require

58 See generally Crawford and Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (2000); Rock, *Constructing Victims' Rights: The Home Office, New Labour, and Victims* (2004). See also Victims Rights Act 2002 and associated commentary.

the presence of a concurrent “guilty mind”, which ensures that only truly morally reprehensible behaviour is branded criminal. For rape also, only those truly deserving of conviction should be found guilty.

Ultimately, approaches to the issue will be informed by who the State thinks should bear the burden of moral blame in the circumstances.

V ATTEMPTS TO ADDRESS THE ISSUE OF CONSENT IN DRUG RAPE

In New Zealand and elsewhere, the emergent trend of drug rape has necessitated legal responses to its novel requirements.

New Zealand Case Law

Because consent is a question of fact for the jury, higher court decisions discussing the applicable legal concepts in determining intoxicated consent are rare. The English case of *R v Lang*, subsequently adopted in New Zealand, was one of the first to consider the question of consent where victim intoxication was involved. The Court in that case held:⁵⁹

We have no doubt that there is no special rule applicable to drink and rape. If the issue be, as here, did the woman consent? the critical question is not how she came to take the drink, but whether she understood her situation and was capable of making up her mind.

The case reflects the principle that consent is purely a question of fact for the jury. It is not to be determined by reference to other external factors such as the prior conduct of the victim and the accused.

The issue of victim intoxication was raised in the New Zealand case of *R v Isherwood*.⁶⁰ The Court confirmed that the jury is required to assess the actual state of mind of a complainant in deciding whether or not the complainant truly consented.⁶¹

The extent to which she was intoxicated by drugs or liquor, and how she came to be intoxicated, may well be important parts of the surrounding circumstances that assist the jury in reaching that decision but they are not determinative in themselves.

Accordingly the approach to be taken to consent in cases involving victim intoxication is the same as for all cases of rape: the jury must consider all the circumstances and determine whether, as a matter of fact, the victim

⁵⁹ *Lang*, supra note 5, 52 per Lord Scarman.

⁶⁰ *Isherwood*, supra note 5.

⁶¹ *Ibid* [36].

consented to the sexual intercourse. Unlike in *Lang*, however, where the focus was directed away from the circumstances under which the complainant came to be intoxicated, under *Isherwood* the jury is encouraged to take into account all the surrounding circumstances, including the complainant's and accused's actions prior to the alleged rape.

The issue of intoxicated consent was discussed in obiter by the New Zealand Court of Appeal in the case of *R v Sturm*.⁶² The Court recognised the complexity and difficulty of the issue of consent in such cases and stated:⁶³

In [drug rape] cases an apparent consent may not be a true consent in that once the drug has taken effect on the mind of the person, the ability to form an informed and voluntary consent will have been impaired to a greater or lesser degree.

The Court went on to hold that whether or not there was consent is ultimately a question for the jury. The jury would, however, have been assisted by a direction that it was open to them to convict if they were satisfied beyond reasonable doubt that:

- (a) the accused had administered or provided a drug;
- (b) with the intention that it would induce in the complainant receptiveness to engaging in sexual activity with the accused;
- (c) which the accused knew the complainant would not otherwise have engaged in; and
- (d) the complainant did not take the drug voluntarily and with awareness that it was likely to lead to sexual activity with the accused.

This approach appears to shift the focus of the inquiry away from the complainant's actual consent and towards asking whether the accused's antecedent actions in surreptitiously administering a drug necessarily precluded consent by the complainant. Accordingly, under *Sturm* a jury could convict for rape without an express finding as to the presence or absence of consent.

As this issue was not ultimately decided in *Sturm*, it is debatable whether this approach will be followed in New Zealand. This is especially so given its potentially drastic effects on the current fairly settled approach to rape cases, which requires a finding of a lack of actual consent in each case.

Whether or not *Sturm* is followed in the future, it can be seen that developing the law in this area by incremental case by case analysis can

⁶² *Sturm*, supra note 5.

⁶³ *Isherwood*, supra note 5, [44].

lead to unsatisfactory and ad hoc results. A further obstacle to development through case law is that, as consent is a question for the jury, a court can only rarely visit the issue on appeal on the narrow point of the appropriateness of jury directions given by the trial judge. As the Crown cannot appeal a question of fact but only a reserved question of law, and as consent is purely a question of fact for the jury, consideration of the underlying principles of consent by a higher court are likely to be rare.

Finally, any developments that may result in this area will only occur in relation to the particular set of circumstances operative in that particular case. This will necessarily result in an unstructured approach to the issue of intoxicated consent, as demonstrated by *Sturm* where the direction relates only to circumstances where drugs were surreptitiously administered, and not to the myriad of other possible circumstances resulting in victim intoxication.

Developing the case law in relation to intoxicated consent in this manner is unsatisfactory and legislative changes are necessary.

The Crimes (Amendment) Act 2005

Such legislative changes have been attempted by the New Zealand legislature. In 2003 the Crimes (Drug Rape) Amendment Bill⁶⁴ (“the Bill”) was introduced into Parliament by Labour Party member Dianne Yates. The Bill was not passed, but some of the matters it raised were addressed by an amendment passed by Parliament in 2005.

The 2005 Amendment Act had the effect of completely overhauling a number of provisions in the Crimes Act relating to sexual offences.⁶⁵ As well as redefining “sexual violation” to make it gender-neutral and incorporating various other consequential amendments, the 2005 Amendment Act also sought to:⁶⁶

... provide greater protection for people who are vulnerable because of their mental health condition and/or due to the extent of their physical and/or intellectual impairment, and for people who have been drugged in order to remove their ability to give proper consent to or reject sexual advances.

Parliament through this reform aimed essentially to codify the common law position.⁶⁷ The 2005 Amendment Act also introduced an extensive list of additional factors the presence of which would be presumed to vitiate consent and inserted a new section, 128A(4), into the Crimes Act, which provides:

64 2003 No 67-1.

65 The Crimes (Amendment) Act 2005 was referred to prior to enactment as the Crimes Amendment Bill (No 2) 2004. However, for ease of reference I will refer to it both before and after enactment as “the 2005 Amendment Act”.

66 Explanatory Note to Crimes Amendment (No 2) Government Bill [“Explanatory Note”].

67 *Ibid.*

A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

The Law and Order Committee's recommendations on the 2005 Amendment Act considered that a new offence involving stupefying or rendering unconscious with intent to commit sexual violation, as proposed by Dianne Yates's Bill, was unnecessary, as sections 191 and 197 of the Crimes Act and section 6 of the Misuse of Drugs Act 1975 can all be used to deal with drug rape scenarios.

The Law and Order Committee also recommended against including a statutory definition of "consent" in the Crimes Act. This was because "consent is defined (as meaning "full, voluntary, free and informed") by the common law, which has developed slowly over the years in defining and refining what does, and does not, amount to consent." The Committee noted that although other jurisdictions had sought to provide a statutory definition, codifying or changing the difficult and "elusive" concept of consent would only add further complexity.⁶⁸

Therefore the only new Crimes Act provision that appears to specifically address the problems raised by drug rape is section 128A(4). Unfortunately, as noted by the New Zealand Law Society, "these additions [to section 128A] will make little difference to the operation of the law with regard to factual decisions about the existence of consent."⁶⁹ In practice, section 128(4) will probably only apply where the victim is so affected by alcohol or some other drug that she is physically incapable of consenting. It will likely not apply where the victim is still capable of acting but may be too intoxicated to give "true" consent. Commentators note that this has been the effect of similar legislative developments in England, where the law still effectively requires "intoxication to the point of incapacity or unconsciousness before the victim is deemed incapable of giving valid consent to intercourse."⁷⁰

Although the statutory amendments in New Zealand were well-intentioned, they do not satisfactorily address any of the problems raised by drug rape. In addition to requiring a high level of intoxication to vitiate consent, section 128A(4) will not apply where the victim is willing to engage in sexual activity only as a result of the effects of a surreptitiously administered drug.⁷¹ Problems arising in relation to uncertainty in application and the consequent potential for juror prejudices to inform decisions about consent remain. A further failing of the recent amendments is that the additions to section 128A have done nothing to alleviate the

68 Ibid 9.

69 Women's Consultative Group of the New Zealand Law Society, *Submissions on Crimes Amendment Bill (No 2) 2004*, <[http://www.lawyers.org.nz/general/submissions/Crimes%20Amendment%20\(No2\)2003%20WGC.htm](http://www.lawyers.org.nz/general/submissions/Crimes%20Amendment%20(No2)2003%20WGC.htm)> (at 28 August 2007).

70 Finch and Munro, *Intoxicated Consent*, supra note 52, 784.

71 Ibid 786.

position of the victim at trial.⁷² The victim still remains the focus and must be subjected to difficult cross-examination by defence counsel.

The Sexual Offences Act 2003 (UK)

In England, recent statutory reform has completely overhauled the previously existing law in relation to rape.

1 Steps Taken by Accused to Ascertain Consent

Prior to the Sexual Offences Act 2003, a person accused of rape in England could escape criminal liability by relying on a belief that the victim was consenting even though there might have been no reasonable grounds for that belief.

Under the new provisions, not only does the accused have to show that his belief in consent was reasonable, section 1(2) also provides that whether a belief is reasonable is to be determined having regard to all the circumstances, *including any steps the accused has taken to ascertain whether the victim is consenting.*

This approach is, perhaps, the most radical and effective method adopted in order to develop the law in this area. The provision does not expressly change the concept of consent, nor does it go so far as to require the accused to have taken positive steps to avoid criminal liability, but it does shift the focus toward the accused's actions rather than concentrating solely on the complainant's.

By incorporating into a determination of reasonable belief in consent a suggestion that in certain circumstances an accused ought to take certain steps to ascertain consent, the Sexual Offences Act 2003 makes an incremental move toward ascribing criminal liability for an omission on the part of the accused. While criminal liability attaching to omissions is far from new,⁷³ it is still fairly rare. Criminal liability for omissions ordinarily requires stringent standards to be met, and will not be imposed lightly. The English legislation does not go so far as to hold the accused liable for omitting to take reasonable steps to ascertain consent. Any steps taken or not taken by the accused are only one factor to be considered in all the circumstances.

The effect of this new provision is that offenders may no longer be able to rely on passive acquiescence by the victim as a basis for a reasonable belief in consent. This may become highly significant where the victim was intoxicated at the time of the intercourse and the accused did nothing to ascertain whether she was consenting. In such circumstances, it may now be more difficult for the accused to rely on a defence of reasonable belief.

⁷² Thomas, Part II, *supra* note 23, 429.

⁷³ Compare Crimes Act 1961, ss 151 and 152, creating offences for failure to provide necessities of life, etc.

While a lack of consent on the part of the complainant must of course still be proved by the prosecution, the new provision can also be seen as a move toward redefining the core concept of consent. Several writers have advocated a more mutual concept of consent than that currently provided for in the law.⁷⁴ Requiring the accused to have taken some positive steps to ascertain consent may be a step toward such a concept.

This is advantageous in a number of respects. First, in terms of proving a charge of rape, although most cases will still involve only the complainant and accused as witnesses, proving the steps the accused took or did not take to ascertain the complainant's consent may be far easier than proving the complainant's subjective state of mind. Secondly, by taking some of the focus away from the complainant, this approach may reduce the adverse effects suffered by the complainant in a rape trial. Thirdly, by requiring more concrete evidence to support a claim of consent, although the issue is still a matter of fact for the jury, this approach may provide more guidance and accordingly more certainty in this area. It is likely that such an approach will to some degree alleviate the problems with regards to consent in drug rape cases.

One criticism of the new provision, however, is that by including a reference to "all the circumstances" that are to be considered when determining whether the accused's belief in consent was reasonable, the law invites the jury to "scrutinise the complainant's behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent."⁷⁵ The Act therefore fails to challenge society's norms and stereotypes.⁷⁶ However, the positive effects of these legislative developments appear largely to compensate for this potential criticism.

Given the emphasis on any positive steps the accused took to ascertain consent, and the inclusion of the concept of "reasonable" belief, the message sent by the new provision seems to be that the accused's belief must be determined objectively in regard to the prevailing social norms. Further, anything the complainant might have done to foster a reasonable belief in consent is offset against any steps the accused took to ascertain that consent.

2 Offence of Administering with Intent

Another measure, adopted in England in an attempt to deal with the issues raised by drug rape, is to provide that it is an offence to administer a drug with intent to have sexual intercourse with the victim.⁷⁷

74 See Thomas, Part II, *supra* note 23.

75 Temkin and Ashworth, "The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent" [2004] *Crim L R* 328, 342.

76 *Ibid.*

77 Sexual Offences Act 1956 (UK), s 4; Sexual Offences Act 2003 (UK), s 61.

Section 61 of the Sexual Offences Act 2003 provides:

61 Administering a substance with intent

- (1) A person commits an offence if he intentionally administers a substance to, or causes a substance to be taken by, another person (B) —
 - (a) knowing that B does not consent, and
 - (b) with the intention of stupefying or overpowering B, so as to enable any person to engage in a sexual activity that involves B.

The section does not require that the victim be stupefied in fact — only that the accused intended to stupefy or overpower the victim. Further, section 61 applies regardless of whether the accused intended to commit an offence, and only looks to whether there was an intention to facilitate any sexual activity with the victim. Questions of consent and consequent criminal liability will be irrelevant to a section 61 offence.

The main arguments in favour of this section are that it has the advantage of catching third parties, and does not rely on a rape actually taking place.⁷⁸ Where a person is made insensible by drink or drugs outside of the circumstances envisaged by section 61, the sexual intercourse would constitute rape and therefore also be catered for by the legislation.⁷⁹

While it is true that these are important advantages, it is still the case that some incidents of “drug rape” will fall through the gap between section 61 and the law of rape as it currently stands. One example is where the drug is not intended to stupefy or overpower the victim, but merely to make her more responsive to sexual advances in a way that she would not be but for the surreptitious administration of the drug. While the current law regarding consent will not be likely to render this rape, neither will the conduct fall under section 61. Further, although the section covers the actions of third parties, it may be that the ultimate “rapist” goes unpunished as a result of the current rape law. Accordingly while the offence of administering with intent is useful where the facts fit, it only caters for a narrow range of circumstances and as such is inadequate to address the overarching problems presented by consent and victim intoxication.

In New Zealand, the Crimes Act leaves even larger gaps in criminal liability. Currently, section 191 of the Crimes Act provides that a person who stupefies or renders unconscious any other person with intent to commit or facilitate the commission of any crime is criminally liable.

⁷⁸ UK Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences Volume 1 (2000)* [2.19.2] [“Home Office Report”].

⁷⁹ *Ibid.*

Section 197 provides for criminal liability for “every one ... who, wilfully and without lawful justification or excuse, stupefies or renders unconscious any other person”. Both sections 191 and 197 require the victim to be actually stupefied or rendered unconscious, and the more serious offence contained in section 191 requires that the accused stupefied or rendered the victim unconscious with an intent to commit a crime. The New Zealand sections are accordingly much narrower in their application than is the English section 61.

Even where the victim is stupefied, it is conceivable that the requirement of an intent to commit a crime under section 191 will not be satisfied where the accused intends to procure sexual intercourse with the victim, but with her consent. Under section 191 the person committing the intended crime must be the accused. Where the accused stupefies the victim knowing that it is likely she may be subsequently violated by a third party, section 191 will not apply, unless an argument can be made on party liability under section 66 of the Crimes Act.

For these reasons the current provisions in the Crimes Act are ill-equipped to deal with most drug rape scenarios. Even if New Zealand were to adopt an approach in relation to sexual offences similar to that in the English Sexual Offences Act 2003, the law would still contain gaps through which persons deserving of criminal liability may fall. The solution to drug rape appears not to lie in the creation of new offences. Such provisions will necessarily fail to cover the full range of offending in this area.

A Statutory Definition of “Consent”

Recognising that it is almost impossible to eliminate notions of consent from the law of rape, other jurisdictions have sought to provide a statutory definition of “consent”. In Canada, consent is defined as “the voluntary agreement of the complainant to engage in the sexual activity in question”.⁸⁰ In Victoria, Australia, it is defined merely as “free agreement”.⁸¹ In England, a person consents “if he agrees by choice, and has the freedom and capacity to make that choice.”⁸²

The English Home Office considered that a statutory definition of consent would assist in the application of the concept.⁸³

Clarifying the meaning of consent in statute would enable judges to be able to explain what the law said and for juries to understand just what is meant by consent. It would also enable Parliament to consider and recommend what should and should not form acceptable standards of behaviour in a modern society.

80 Canadian Criminal Code, s 153.1(2).

81 Crimes Act 1958 (Vic), s 36.

82 Sexual Offences Act 2003 (UK), s 74.

83 UK Home Office, Home Office Report, supra note 78, [2.10.3].

The Home Office also supported the introduction of a statutory definition of consent on the basis that it was necessary to make clear that the term “consent” did not imply an imbalance of power between the parties. In other words, there was concern that consent was something that could be seen as being agreement by a subordinate. Defining consent as something more like free agreement implied a negotiation between equal partners.⁸⁴ A statutory definition of consent was therefore included in section 74 of the Sexual Offences Act 2003.

Interestingly, the legislature chose to retain the word “consent” in the offence provision and provide a definition of consent later in the Act, rather than replacing the word “consent” with “free agreement” or some similar term throughout. Although technically this ought to assist juries to better understand the concept of consent as the more mutual concept of free agreement, it is debatable whether this goal can be reached when the word “consent” and its associated connotations remains an element of the offence provision. One possible explanation for retaining the word “consent” is that the English definition of consent, incorporating concepts of “choice”, “freedom”, and “capacity” is more complex than mere “free agreement” and cannot be conveniently encapsulated in an easy-to-use phrase within the offence provisions themselves.

In any case, according to the learned authors Finch and Munro, the incorporation of the definition of consent in section 74 has the potential to offer more than semantic clarification:⁸⁵

In requiring that a person must have the freedom and capacity to make the relevant choice, this provision directs attention to the context in which consent is given or refused. In turn, this promotes a less one-dimensional understanding that acknowledges the reality that the outcome of the consent binary cannot be radically divorced from the circumstances under which the relevant choice is made.

The UK Parliament also felt it necessary to include in the Sexual Offences Act 2003 a further section assisting the determination of the presence or absence of consent.⁸⁶ Section 75 provides that there will be certain situations in which a victim is deemed not to have consented and that the accused will be presumed not to have had a reasonable belief in such consent unless evidence to the contrary is adduced.⁸⁷ In particular, under section 75(2)(f) consent will be presumed to be absent in any situation in which any person has administered or caused to be taken by the complainant, without the complainant’s consent, a substance which,

84 Ibid.

85 Finch and Munro, “The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited” [2004] Crim L R 2004 789, 790 [“The Sexual Offences Act 2003”].

86 Sexual Offences Act 2003 (UK), s 75. Two of the circumstances listed give rise to a conclusive evidential presumption that there was no consent. The balance of the listed provisions gives rise to rebuttable presumptions.

87 Finch and Munro, *The Sexual Offences Act 2003*, supra note 85, 793.

having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.⁸⁸

It is clear that s 75 thus affects the operation of proof in terms of both the actus reus (whether the victim consented) and the mens rea (whether the defendant reasonably believed that the victim consented) of rape.

As section 75(2)(f) is a rebuttable presumption, it does not necessarily preclude the victim having given valid consent after ingesting such substances.⁸⁹ This is important in terms of preserving a person's sexual autonomy even after having ingested intoxicants. On the other hand, the approach is somewhat problematic as it invites the court to engage in complex debates about the effects of "particular drugs on particular people in particular ... circumstances."⁹⁰

It is evident that defining "consent" or replacing it with another term such as "free agreement" through statute may be helpful, but cannot overcome all the problems associated with the concept of consent. There will still need to be various additional provisions defining what does and what does not constitute consent. Where the word "consent" is still used in the offence provision, it is debatable whether defining it elsewhere as "free agreement" or as requiring "freedom and capacity" to make a choice will overcome the problem of the word "consent" being associated with an inherent imbalance of power.

In New Zealand, Parliament has adopted the Law and Order Committee's recommendation not to include a definition of consent in relation to sexual offences in the Crimes Act. The Committee's report on the Crimes Amendment Act 2005 stated:⁹¹

We ... question whether defining consent in statute will assist the fact-finder in coming to grips with the fundamental issue of when a victim agrees, consents, or chooses to engage in sexual activity. This is evidenced by the fact that all three jurisdictions mentioned above [Canada, Victoria and England] have had to insert lengthy lists of what does not constitute consent alongside the statutory definition of consent.

Summary

Set out above are some of the methods utilized by various jurisdictions to overcome the problems raised by the advent of drug rape. While the

88 Ibid.

89 Ibid 794.

90 Ibid.

91 Law and Order Committee, *Crimes Amendment Bill (No 2) Government Bill 2003 No 104-2 Commentary* (2004), <http://www.brookers.co.nz/bills/enacted_bills/b031042.pdf> (at 20 August 2007).

previous section in no way canvasses the entirety of the methods utilized, it does highlight most of the key approaches taken by, or open to, the New Zealand courts and Parliament.

It can be seen that changes in this area cannot satisfactorily be instigated by the courts through case law. As discussed above, case law is slow to develop, and when it does it does so in an ad hoc and unprincipled manner that deals only with the specific issues and circumstances raised in the cases before the court, and only where such issues can be the subject of appeal. Further, the courts are always constrained by the wording of the offence provisions.

The approach taken by the New Zealand legislature in the Crimes (Amendment) Act 2005 sought to tackle the problem of drug rape by inserting section 128A(4). However, this is inadequate to address all the possible circumstances and consequent issues involved in drug rape, and it is debatable whether it imposes any notable change on the pre-existing law.

In England, Parliament has sought to redefine the concept of consent by shifting the focus in the direction of the accused and the steps he took to ascertain the complainant's alleged consent. Further, the Sexual Offences Act 2003 attempts to promote a more mutual form of "consent" by defining it as a choice that the complainant had the freedom and capacity to make. Although these approaches fail to completely satisfy the needs of the law in relation to drug rape, they appear to be the most successful in addressing a number of the issues that arise. The focus of the trial is shifted away from the complainant by inquiring as to the steps the accused took to ascertain consent, alleviating some of the pressures felt by the complainant at trial.

The United Kingdom's legislative definition of consent may eliminate some of the uncertainty involved in its application by the jury, particularly in drug rape scenarios. Finally, although the new legislation does not assist to eliminate jury prejudices, by trying to move away from the word "consent" and its suggestions of an unequal relationship, the Sexual Offences Act 2003 may promote changes to generally accepted norms about sexual relationships.

The approach taken in England appears to be the most promising of those currently applied in the various jurisdictions.

VI OTHER OPTIONS

While the previous section sets out some of the approaches actually taken to date by various jurisdictions, there is a vast range of other approaches suggested by various commentators over the years.

A More Mutual Concept of Consent

One approach, advocated by a number of commentators,⁹² is to develop a more mutual concept of consent, one that more appropriately reflects values of equality of power between men and women in sexual relationships. As many of the problems associated with consent and highlighted by drug rape involve the blurred line between consent and submission in circumstances of unequal power, it may be necessary to attempt a major overhaul of this core concept. Arguably, the moves made by jurisdictions such as England and Victoria in defining consent as “free agreement” or some similar concept are a step in this direction. Some authors have, however, explored more controversial changes in this area.

One possibility discussed, although ultimately dismissed, by Byrnes is to define consent as “a verbal manifestation by the woman of her desire for intercourse”.⁹³ Byrnes discusses whether it is better to require a woman to have said ‘yes’ for an accused to be absolved of rape, or whether she must have said ‘no’ for him to be convicted.⁹⁴ He concludes that society would not be likely to dictate how sex must occur and consequently that the law must require a ‘no’ to sheet home criminal liability.⁹⁵ If it were otherwise, he argues, this approach would effectively make sexual intercourse criminal with an available defence where the woman says ‘yes’.

In an area of human interaction as sensitive as sexual relations, clearly such an approach would be unacceptable. As Honore points out:⁹⁶

Negotiations for sex are not carried on like those for the rent of a house. There is often no definite state on which it can be said that the two have agreed to sexual intercourse. They proceed by touching, feeling, fumbling, by signs and words which are not generally in the form of a Roman stipulation.

Further, where two people are in a long-term sexual relationship, it would be inappropriate for the law to require the woman to say ‘yes’ every time the couple wanted to engage in sexual intercourse. Of course, where a couple are in a healthy long-term relationship, it is unlikely any allegations of rape will result, no matter how the sexual intercourse occurs. However, it is far from desirable to require a verbal affirmation of consent from the woman in order for the man to feel secure in the knowledge he will not be subjected to future criminal prosecution.

With respect to drug rape, however, such a verbal affirmation

92 See Thomas, Part II, *supra* note 23; Byrnes, “Putting the Focus Where it Belongs: *Mens Rea*, Consent, Force, and the Crime of Rape” (1998) 10 *Yale J L & Feminism* 277.

93 Byrnes, *supra* note 92, 290.

94 *Ibid.*

95 *Ibid.*

96 Honore, cited in MacKinnon, *Toward a Feminist Theory*, *supra* note 18, 171.

appears much less controversial. Often, the complainant and accused will have previously been strangers, and even in cases where they were known to one another, it is unlikely there will have been a longstanding sexual relationship. Of course, a prior sexual relationship can never give rise to a presumption of consent, but the standards required to show a mutual sexual encounter could be tailored to require more in the way of an express affirmation by the complainant where there is no prior relationship and particularly where intoxicants are involved. Because of the problems associated with drugs having a disinhibiting effect on complainants, it may be necessary also to make a detailed inquiry into the circumstances under which the complainant came to be intoxicated.

A less controversial and problematic possibility may be to replace the requirement for lack of consent in the offence provisions with something akin to a “lack of free agreement” or other similar phrase that avoids the connotations inherent in the word “consent”. Because, as discussed above, “consent” appears to indicate a form of submission to male sexual advances, it will always be difficult to separate true consent from unwilling submission. By replacing “consent” with “free agreement”, it may place the emphasis of the inquiry more on the woman’s desire to engage in sex rather than her acquiescence to it. Shifting the focus in this way might also alleviate some of the problems associated with rape trials currently where the complainant is subjected to the greater part of the attention through cross-examination. It may also be possible to provide more certainty in application by moving away from the indistinct line between consent and submission. Further, it may make it more difficult for an accused to rely on a reasonable belief in consent in circumstances where the victim is evidently intoxicated and merely acquiesces to sexual intercourse.

If such a course were to be taken, it may be advisable to replace the term “consent” in the offence provisions altogether, as opposed to retaining the word and defining it elsewhere as has been done in Canada, Victoria and England. Replacing the word altogether would prevent courts and juries from falling back on the old conception of “consent” to inform their decisions about criminal liability for rape.

A Different Standard of Reasonableness

Another option may be to change the requirements for a claim of reasonable belief in consent. Although this will not address the complex issue of whether there was actual consent in a rape case, it may narrow the circumstances in which an accused can effectively plead ignorance of the circumstances to escape criminal liability.

A possible option is to extend the approach taken in England in the Sexual Offences Act 2003, by inserting a provision in the Crimes Act to the effect of requiring an accused who seeks to rely on a reasonable belief to show that he took all reasonable steps to ascertain consent *taking into*

consideration all the circumstances, including any previous relationship with the complainant, the circumstances under which they met, any intoxication on the part of either party, and any other relevant factors. While this would still leave the jury considerable discretion to import their moral views and preferences into the determination of consent, it would assist in shifting the focus to the accused's actions in determining whether he had a reasonable belief in consent.

Shifting the focus in this manner would prevent the complainant from becoming the sole focus of the trial. It would also provide more guidance for juries in applying the reasonableness standard. In particular, it would provide jury members with concrete factors to look for when determining whether there was consent where the complainant was intoxicated. It may even inform jurors' consideration of whether there was actual consent on the part of an intoxicated complainant. Overall, amending the reasonableness standard in this way would be a move toward achieving a more equal balancing of interests between the complainant and accused at trial. It would also provide more certainty in the application of the law in drug rape cases, as the jury is required to look to concrete evidence of what the accused did or did not do in the circumstances, rather than being required to assess only the victim's private state of mind.

Onus of Proof Determined by Antecedent Fault

Another possible alternative that goes particularly to the problems involved in drug rape (rather than the underlying concept of consent) is to change the evidential onus of proof regarding consent depending on the parties' prior actions. For instance, where drugs were surreptitiously administered by the accused, he should bear the burden of proving on a balance of probabilities that the alleged victim consented. Alternatively, where the complainant became intoxicated through her own voluntary actions, the onus is on the Crown to establish that there was a required lack of consent.

Of course, difficulties under such a system would arise in relation to factual determinations of what happened, which will likely in many circumstances be compounded by loss of memory by the complainant or a lack of corroborating witnesses. However, the majority of trials involve such factual determinations, and this approach appears to align itself with people's moral views on liability:⁹⁷

The extent of the defendant's contribution to the victim's intoxicated state seems a sound basis for a moral delineation ... that could be used to translate moral blameworthiness into legal liability thus providing assistance in determining the appropriate boundaries of drug-assisted rape.

97 Ibid 783.

One drawback to this approach is that it does not address the underlying problems associated with consent. Even where the onus is shifted onto the accused to prove that the complainant did consent despite her unintended ingestion of intoxicants, jury members may still be confused by the wide discretion given them and may still be susceptible to their own prejudices. On the other hand, where the onus is reversed, the complainant will avoid becoming the sole focus of the trial, as it will be more likely the accused will have to give evidence to support a claim that the complainant consented. Thus, while it is not a perfect solution and it cannot hope to address the myriad of circumstances that might arise under the rubric of “drug rape”, it may go some way towards addressing some of the difficulties now experienced by the Crown and complainants seeking to prove a lack of consent where intoxicants are involved.

Develop Statutory Directions Requirements

One final option often raised by commentators is to develop statutory directions requirements for judges presiding over rape trials.⁹⁸ As can be seen from the fairly radical jury directions suggested by the Court of Appeal in *Sturm*,⁹⁹ leaving jury directions up to individual judges in individual cases results in an inconsistent approach to development in this area. Advantages to providing statutory directions would include supplying this otherwise lacking consistency, as well as giving more guidance for juries in particular cases where they are called upon to determine whether or not there was consent.

In Australia, the Model Criminal Code has recommended the following provision, based on the enactment of similar provisions in Victoria and the Northern Territory:¹⁰⁰

5.2.43 Jury directions on consent

- (1) In proceedings for an offence against this Part, the judge must, in a relevant case, direct the jury (if any) that a person is not to be regarded as having consented to a sexual act just because:
 - (a) the person did not say or do anything to indicate that she or he did not consent; or
 - (b) the person did not protest or physically resist; or
 - (c) the person did not sustain physical injury; or

98 See UK Home Office, Home Office Report, supra note 78, [2.11.2]; Model Criminal Code Officers Committee, “Chapter 5: Sexual Offences Against the Person” in *Australian Model Criminal Code* (1999) 263 [“*Australian Model Code*”].

99 *Sturm*, supra note 5.

100 Model Criminal Code Officers Committee, *Australian Model Code*, supra note 98, 263.

- (d) on that or an earlier occasion, the person consented to engage in a sexual act (whether or not of the same type) with that person, or a sexual act with another person.
- (2) In proceedings for an offence against this Part, the judge must, in a relevant case, direct the jury (if any) that in determining whether the accused was under a mistaken belief that a person consented to a sexual act the jury may consider whether the mistaken belief was reasonable in the circumstances.

The UK Home Office in its 1999 Report also recommended enacting standard directions along similar lines to the Australian Model Code.¹⁰¹

Although the Australian Model Code was based predominantly on the wording of the Victorian legislation, which aimed to “shift focus away from the victim’s mind in the determination of whether there was consent”,¹⁰² the writers of the Australian Model Code were concerned that the focus not be shifted from the state of mind of the victim. They opined that an inquiry into the presence or absence of consent necessarily entailed a detailed consideration of the victim’s state of mind at the relevant time.¹⁰³

In New Zealand, it is unlikely that such an approach will be taken. The proposed provision in the Australian Model Code appears to add very little to section 128A of the New Zealand Crimes Act, which already provides for various circumstances under which consent will be presumed not to have been given. It is questionable whether codifying these into mandatory judicial directions to juries in rape cases will provide any real assistance to juries. This is especially so given the fact that these provisions will most likely have already been drawn to the jurors’ attention during the course of the trial.

As the current law regarding consent stands it is likely that more assistance can be given to juries by judges tailoring their directions to the specific needs of the instant case. Of course, the requirements for proving consent in cases where drugs are involved will need to be clarified. However, once the applicable law is clear it should be left to individual judges to give specifically tailored directions to assist jury members in the particular cases concerned. Although this approach might make a guilty verdict more vulnerable to appeal, on balance the interests of justice in each particular case are likely to be better served by refraining from imposing a blanket directions requirement on all rape cases.

Summary

There are a huge range of further alternatives that could not be discussed

101 UK Home Office, Home Office Report, *supra* note 78, [2.11].

102 Model Criminal Code Officers Committee, *Australian Model Code*, *supra* note 98, 265.

103 *Ibid.*

within the scope of this paper. The options set out above, however, appear to be those most appropriate for the New Zealand system.

While it may be inappropriate for the law to require an accused to show in every case that he received an express affirmation of consent from the complainant before sexual intercourse, the law may be improved by substituting the word “consent” and its associated connotations with a more mutual concept such as “free agreement”. Whether there was free agreement will depend on the circumstances of each particular case, but by changing the concept in this manner some of the uncertainties currently present in attempting to determine a complainant’s subjective state of mind may be ameliorated. This would be especially helpful if it were accompanied by additional provisions indicating a differing scale of affirmative indications required to be given by the alleged victim depending on the familiarity of the parties, the level of intoxication of the alleged victim, and any other factors that might be relevant to such a determination.

Another approach that might work well in conjunction with changing the terminology of the offence provision is to change the standard of reasonableness in relation to the accused’s belief in the complainant’s free agreement. In keeping with a requirement that the complainant give more of an express affirmation of consent where the parties have no prior relationship, and in any case where intoxicants are involved, the law could require the accused to show that he took reasonable steps to ascertain consent. These reasonable steps would be more onerous where the complainant was intoxicated or the parties had no prior sexual relationship. While care will need to be taken to ensure that such an approach does not imply that a prior sexual relationship gives rise to a presumption of consent, it seems appropriate that in the majority of cases a couple in a long-term sexual relationship should not be required to voice a “yes” each time they engage in sexual intercourse.

Finally, to address the concerns raised particularly by drug rape, the offence provisions could be amended to reverse the onus of proof where drugs are surreptitiously administered to the victim by the accused. In such cases, the ultimate motive of the accused in administering the drugs would be irrelevant, as anyone who undertakes such surreptitious activity should be held accountable for any direct consequences. Of course, this will not cover situations where the victim is intoxicated as a result of her own actions, or as a result of the actions of a third party, but it would alleviate the problems associated with a lack of memory or uncharacteristic behaviour in a number of drug rape cases. Further, it would shift the focus of the inquiry from the victim to the accused, which would lessen many of the adverse consequences experienced by complainants at trial. It would also reduce the potential for jury prejudices regarding the victim to inform their decisions about whether to hold the accused criminally accountable.

Although several jurisdictions have determined it of assistance to provide mandatory directions requirements for judges in rape cases, it is

debatable whether such an approach is necessary in New Zealand. Juries will, of course, benefit from clear instructions from the judge, but section 128A of the Crimes Act 1961 already provides the sort of guidance that is envisioned by the mandatory directions requirements recommendations of England and Australia. It may also be more beneficial to allow judges to tailor their directions to the particular case at hand.

None of the approaches discussed above is sufficient to tackle the problems raised by drug rape on its own. A carefully formulated combination of some of these approaches, however, might succeed in addressing both the problems raised by drug rape and the underlying problems associated with the concept of consent.

VII CONCLUSION

When dealing with issues of human interaction and conflict there can, perhaps, never be a perfect legal solution. Each approach has its advantages and its drawbacks. In relation to the law regarding rape, however, the current New Zealand position falls unacceptably short of a perfect solution. This shortfall is particularly apparent where rape trials raise issues of victim intoxication and consent.

It has been said that “[t]he law can only do so much. It can redefine rape, but it cannot reshape attitudes. The law can promote intellectual consistency, but it cannot ensure that all crime victims are treated fairly. Ultimately, rape law reform is an intellectual exercise.”¹⁰⁴ Legislative reform, however, has the potential to do more. Although in the majority of cases our moral views determine the scope of criminal liability in any given area, in some instances our sense of what is right and wrong can be guided — if not necessarily dictated — by what the law deems acceptable. Further, whether or not the initial offending is deterred, changes in the law can provide real relief for victims who are subjected to the criminal justice process.

The concept of consent has always been problematic. Many of these problems are due to the fact that men and women still live in a society where their relationships are often unequal, and where women feel various social, personal and psychological pressures to engage in sexual intercourse they might not necessarily want. The problems are exacerbated by the fact that because of these various pressures, women themselves are often unsure of whether they truly “consent”.

In New Zealand, attempts have been made to address these problems through case law and various statutory provisions. These measures, however, have not sought to tackle the underlying difficulties in using the

104 Byrnes, *supra* note 92, 277-278.

term “consent” in the first place. Accordingly they cannot hope to provide a satisfactory answer. This can be seen by the fact that with the advent of drug rape, many of these problems — including the disproportionately adverse effects suffered by the complainant at trial, a lack of certainty in application of the law, and the huge potential for jury prejudices to inform decisions regarding consent — have once again risen to the fore. It is evident that a more comprehensive restructuring of the law in this area is necessary.

While the New Zealand courts and Parliament have both attempted to develop the law in this area, it appears that the approach currently taken in England might be more effective. The English provisions, however, still do not go far enough. An approach that incorporates the spirit of those provisions but takes it slightly further would more successfully address the issues at hand.

The author recommends that the word “consent” in the offence provisions be replaced with a phrase such as “free agreement” that connotes a more mutual sexual interaction. In addition, the standard of reasonableness required for an accused to rely on a belief of consent should be amended to require the accused to have taken reasonable steps in the circumstances to ascertain consent. These two changes will assist juries to be able to draw a clearer line between consent and non-consent, by moving further away from the blurred boundaries of unwilling submission. Further, they will aid certainty in applying the law, because juries will be able to look to concrete actions on the part of the complainant and the accused in determining both whether there was actual consent, and whether there were reasonable grounds to believe the complainant was consenting. By changing the focus of the inquiry in this way, the complainant will also be spared some of the attention at trial, and the consequent adverse effects currently suffered by many complainants. Finally, by looking more to concrete steps the accused took to ascertain consent, and by shifting the understanding of “consent” to a more mutual one, juries may be deterred from bringing their own personal prejudices so heavily to bear on the complainant’s conduct.

The author further recommends that in order to directly address the phenomenon of drug rape, a provision should be inserted in the Crimes Act reversing the onus of proof regarding consent where the accused surreptitiously administered disinhibiting drugs to the complainant before an alleged rape.

While these measures are by no means perfect, they have the potential to go a long way to alleviating some of the problems currently posed by the law on rape, in particular in relation to drug rape. While the law cannot reshape attitudes, it is hoped that by amending the law to more accurately reflect the prevailing views on the moral issues associated with sexual relationships, rape law reform will be shown to be much more than a mere intellectual exercise.