

BDSM and the legal imaginary

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I am prepared to accept in your favour that she instigated this. It seems to me that this act was not unlawful, notwithstanding that it did in fact injure her... you chose to do something which even though not unlawful, carried a high degree of risk. (R v John Broadhurst Birmingham CC sentencing remarks)

In England and Wales, BDSM sexual practice has an antagonistic relationship with the criminal law. Following the foundational case of *R v Brown* [1994] 1 AC 212, it remains impossible for people to consent to violence which causes injury which is more than transient or trifling. This is confirmed in s 65 (2) of the Domestic Abuse Bill 2021. This makes certain forms of BDSM practice *de facto* unlawful. And yet, as Edwards (2015), Yardley (2020) and the campaign We Can't Consent to This (2020) have noted, the past two decades have seen a significant rise in the number of cases coming to trial for murder or manslaughter in which the defence that what took place is a consensual sex game gone wrong is mobilised¹. More than this, we have seen how this consent defence has worked to reduce a murder charge to one of manslaughter; acted as mitigation in sentencing; enabled a jury to find a defendant not guilty of murder but guilty of manslaughter; or resulted in a not guilty verdict being returned² (Edwards, 2020: 294). The case of Broadhurst - cited above - in which the defendant killed his partner following a drug and alcohol fuelled violent sex session illustrates part of this antagonism.

These cases suggest that something understood as BDSM is recognised as a legitimate sexual practice and as a potential defence. Making space for the legitimacy of marginalised sexual practices to be recognised might a progressive step towards recognising individuals' sexual autonomy and freedom within the contemporary neoliberal framework in which these cases play out. Campaigners against the judgement in *Brown* make this clear (The Spanner Trust, n.d). Yet, BDSM practice has also been mobilised to justify or diminish the significance of sexualised violence against women (Harman and Garnier, 19th July 2019) and to give rise to a new form of femicide (Edwards, 2015; Monkton Smith, 2020). This chapter navigates the line between these two concerns to interrogate the ways in which BDSM is interpreted and understood in courts themselves; to uncover how it appears in the legal imaginary. To do this, I respond to the recent rise in criminal cases where women have been killed or injured by men as part of an alleged sex game 'gone wrong' by analysing three recent cases where this defence was mobilised. I begin by outlining how consensual BDSM might be characterised by practitioners of BDSM. After a methodological discussion, the discussion turns to an analysis of three cases in which this defence was deployed. I conclude by suggesting that strategic alliances across both sides of the debate might help to de-pathologise BDSM practice, shed more nuanced light on this subculture, and nurture better socio-legal

¹ 17 cases in England and Wales up to 2001, 40 between 2001-2021

² According to We Can't Consent to This, of the 57 cases brought to trial, only 37 were found guilty of murder.

responses to consent claims that are made in cases where 'sex games' which have apparently 'gone wrong'.

What is a sex game gone wrong?

Before uncovering how sex games, or rough sex are figured as defences in criminal cases, it is helpful to crystalise further how we might understand BDSM and what might be being invoked when a 'sex game gone wrong-style' defence is mobilised. BDSM – an umbrella acronym standing for bondage, discipline, dominance, submission, sadism, and masochism – can comprise eroticised power play, intense physical and psychic sensations, role play, and sexual stimulation (Dunkley and Brotto, 2020; Sheff, 2021). BDSM can also sometimes be known as 'kinky sex' (Sheff, 2021), serious play (Sagarin et al, 2015), or edgework (Newmahr, 2010). In this chapter, I refer to BDSM to describe all these practices. As Weinberg et al (1984) have noted, a key feature of BDSM is that it is recognised as BDSM by the practitioners involved. People who have rough sex may or may not consider this to *be* BDSM, thus in this chapter, I also refer to BDSM-adjacent practices to describe BDSM-type practices undertaken by people who may not recognise these practices as BDSM but who nonetheless finish by depending on something like BDSM to mobilise their defences.

One thing which distinguishes BDSM – which can comprise hitting, cutting, and asphyxiation amongst other potentially violent acts – from abuse is that it is a practice universally characterised by scholars and practitioners of BDSM as consensual (Jozifkova, 2013; Pitagoria, 2013; Weiss, 2011). Even consensual non-consent – where BDSM play creates the impression of being non-consensual rests upon consent to operate (Tsaros, 2013). BDSM has a history of pathologisation: consensual BDSM practice has only recently been removed as a paraphilic disorder from the Diagnostic and Statistical Manual of Mental Disorders (5th ed. DSM-5 APA 2013). BDSM remains a marginal practice which is not always fully understood more widely, despite the penetration of some elements of BDSM into what we might call the mainstream (see Fanghanel, 2019; Tomazos et al, 2017; Weiss, 2006). And as Sheff notes, the mainstreaming of certain elements of BDSM means that some of its foundational tenets – including the importance of consent – might be lost (2020:763). Meg Barker (2013) and Angelika Tsaros (2013) have both identified how this misunderstanding bleeds into the mainstream through the popularisations of contemporary cultural texts such as *50 Shades of Grey*, for instance.

Consent – as I have described elsewhere – describes a sense of 'con sentir': feeling together (Fanghanel, 2020). As such, it evokes a meeting of the minds and perhaps, heart or spirit. It describes a complicity and deeper intersubjectivity between consenting parties. Though consent negotiations are fluid and the way in which consent is established, negotiated and renegotiated is not monolithic, its presence takes up space in the BDSM encounter. For Williams et al (2014), consent is something that is established between participants both explicitly and implicitly throughout the sexual encounter: through advance negotiation; post-play debriefing; the use of safe words; of 'traffic light systems'; or though 'knowing' someone wants to go further, or has had enough. Because an element of BDSM practice involves a pushing of boundaries, or of playing at the borderlines of what might have been agreed, there are also grey areas to the way that

consent it negotiated and established; between agreeing what someone says their limit is – in terms of intensity, perhaps, or duration, place, context – and what their limit really might be. Playing with the complexity of this grey area makes BDSM a nuanced and complicated practice to undertake and to understand, also requiring an opening up to the possibility that someone might want their consent to be violated, and that this violation would still be consensual (and pleasurable) (Plant, 2007; Pitagoria, 2013).

Alongside this emphasis on consent, BDSM practice is characterised by the development of skills and expertise in some of the riskier or edgier elements of sexual practice; breath play – or erotic asphyxiation – might be one of these. People who practice BDSM may not themselves be in ‘a BDSM community’, but to enhance their practice they might attend workshops or reading groups, or consult community-orientated blogs, social media or other reference materials: there is a strong pedagogic element in BDSM practice. This emphasis on developing expertise and skills is once more what makes BDSM more akin to extreme sports or edgework than something that is abusive (Newmahr, 2010; Sheff, 2021).

Alternatively, Sagarin et al (2015) suggest that BDSM is like an ‘extreme ritual’ such as fire walking or piercing. They suggest this based not only on the skill required to be able to conduct such rituals safely, but also because the physical and psychic stress participants experience when they play, and the altered state of consciousness that participants report experiencing during and beyond a BDSM encounter. Understanding BDSM in this way illuminates not only why people consensually choose to pursue it, but also helps to distinguish this practice from intimate partner violence or abuse³. Given the intricacy of how these elements of BDSM practice come together, it is not necessarily surprising that some elements get left behind when cases enter the court room.

Researching consent cases

In order to better explore how BDSM or BDSM-adjacent activity is understood and addressed in cases where consent to such activity is mobilised as a defence, I analysed the summing up of these types of cases. To identify cases of interest, I used the LexisNexis and Westlaw databases to search for cases using the key words ‘sex game’, ‘rough sex’, ‘somasochism’, ‘SM’ and ‘BDSM’. Though these databases cover several jurisdictions, I limited my search to cases tried under English and Welsh law and this is where the law set out by *Brown* and the Domestic Abuse Act 2021 apply. The limitation of using these databases for this type of research is that they only list cases that have been sent to the Court of Appeal or beyond. For this to happen, a Crown Court needs to have found a defendant guilty of a crime. As such, it does not capture cases where defendants are found not guilty, or where cases do not, for whatever reason, go to appeal. During this project, I also noted that when examining issues of consent, sexual violence and BDSM, the Court of Appeal transcripts are less useful than those of the Crown Courts which are more explicit on the points of each case. Indeed, the Court of Appeal does not revisit the question of whether

³ Certainly, there is abuse in BDSM communities and relationships, and this should not be overlooked, though this is not the focus of the discussion here. Not all practitioners of BDSM are in recognisable BDSM communities, and people’s experiences of BDSM, consent, abuse, and access to justice are inflected by intersectional politics (Sheff and Hammers, 2011, Fanghanel, 2019)

there was consent in any of these cases, or what this looks like, taking the judgements of the Crown Court at face value (the function of the Court of Appeal in criminal cases is to examine specific points of law, or procedural issues, so this is not in itself surprising, though it emphasises why it is the Crown Court transcript that must be the focus of analysis).

To mitigate this gap, I also conducted searches of media reporting of 'sex game gone wrong' and 'rough sex gone wrong' also using the LexisNexis news database. Here, the criteria for inclusion were cases where women were complainants or victims, and men were defendants. From this search it became clear that men as well as women die or are injured in a sex game gone wrong or as part of consensual BDSM, but that the defendants are nearly always men. Media searched enabled me to identify cases where a defendant was found not guilty, or otherwise was not captured by legal database search. It also allowed me to triangulate information on the cases found through database searches. Of course, this misses cases which are not reported in the press. I supplemented my searches with data from the action group We Can't Consent to This, though unlike this group, I limited my search to cases which take place in England and Wales.

Finally, because my intention has been to analyse the wording of the transcripts of the summing up of the cases, I also had to limit my search to cases from 2010 onwards. This is because it was not possible to obtain transcripts of cases which were tried before 2010. The limitation of this is, of course, that it provides only a partial picture of how attitudes towards BDSM have evolved in the legal imaginary, excluding cases from before 2010 and also excluding cases where data was lost by the courts, or where permission to obtain transcripts was not granted. Notwithstanding these difficulties, 25 cases were identified and met criteria for inclusion in terms of date, jurisdiction, and use of consent as a defence for violence occurring during sex. 13 of these are cases of violence, battery, assault, or rape. In 12 cases, women died and men were tried for murder or manslaughter. For the methodological reasons outlined here, these 25 cases cannot provide a systematic overview of how BDSM and BDSM-adjacent activities have been encountered in criminal cases, but they do provide valuable insight into a number of relevant elements in cases of this sort. As Milne (2021) also notes, the methodological difficulties of undertaking this sort of research demonstrate the barriers that are in place for garnering insight into how subcultural concepts or stigmatised practices are understood and operationalised in a judicial context, which should be a cause for concern for scholars of criminological matters more broadly.

Three cases

The cases which were analysed as part of this project are some in which sexualised acts of violence have claimed as a defence that this violence was consensual. Often these cases evoke, or make claim to, a BDSM or BDSM-adjacent activity and ask the court to recognise the autonomy and agency - the rights - of appellants and defendants to participate willingly in sexual practices that carry heightened levels of risk.

To explore what this consensual sexual practice looks like I will compare three similar cases which had different legal outcomes. In each of the cases, women were strangled until they died using hands, a belt, or a rope. In case one, the defendant was found guilty

of murder, in case two he was found not guilty of murder but guilty of manslaughter and case three, he was found not guilty of all charges. In this section, I will outline the facts of these cases and will then analyse how BDSM or BDSM-adjacent activity has been articulated. I chose these three cases as they reflect both a heterogeneity of justice outcomes and a similitude in the ways that BDSM is imagined.

Case One:

On 2 March 2012, Marcus Coates was acquitted of murder but found guilty of the manslaughter of Jennie Banner. He was imprisoned for public protection because of his history of committing violent sex crimes. Summing up, the judge noted that one of Coates's favourite sexual practices was asphyxiation for the purpose of sexual gratification. He had experience of this sexual practice, used it in foreplay, and evidence was provided from one of his former partners that he routinely took a dominant role in sexual interactions. On 14th August 2011 a belt was put around Banner's neck and she was asphyxiated until she died. Banner, we are told, had been a sex worker and was drug addicted. Both Coates and Banner were using drugs together when she died. She had lived a troubled life and was getting back on her feet when she met Coates. We are told that she was 'impulsive', but that she also did not like to have her neck touched, or indeed have any interest at all in paraphilia, bondage, or asphyxiation.

The defence claimed that what happened was at the deceased's own hand and purely accidental or suicide. They did not have sex because, Coates explained, he could not get an erection. No sex toys or bondage equipment was found in her room, though drugs paraphernalia was.

Case Two:

In the morning of 23rd February 2018, Charlotte Teeling was killed in the home of Richard Bailey whom she had just met the night before. Bailey was convicted of her murder in September of the same year, having squeezed her neck until she died. Teeling and Bailey met each other in the early hours of the morning of a cold February night, and various CCTV images of them show them buying cigarettes and beer from a shop, taking a taxi together, kissing and being intimate together, and finally buying some drugs to consume together at his flat that he shared with other tenants in a form of sheltered housing. Bailey's defence was that what had happened was an accident which occurred as they had rough consensual sex at her behest. At some point during their sexual activity, Bailey's social worker knocked on his bedroom door which startled him. In his surprise, he lost concentration, and went to look at the door to see who was there. When he turned back, Teeling was dead. He said it was an accident. He didn't mean to kill her. When interviewed by the police he made the following comments:

Q: Would you say she was able to consent to sex.

A: That's right, yes, yes. She wasn't that drunk that she wasn't able to give consent

Q: How long were you choking her for?

A: I am not a hundred percent I am not sure . I weren't really timing it.

Q: How did you know how much force to use?

A: I didn't did I? I was quite worried because I hadn't quite... It's hard to gauge and know your strength and you know, you've got to be a careful man.

Q: Were you careful?

A: God knows. Clearly not

Q: Do you think that by choking her you could have killed her?

A: Well obviously the sex played a part in it. I don't... me not being able to do resuscitation quick enough didn't help the matter.

Q: At what point did you put your hand on her mouth?

A: In the sexual stuff we were doing.

Q: At any point did you knowingly try and smother her mouth with her hand?

A: Not to my knowledge no.

Q: Did you kill Charlotte?

A: No I never killed her. Well she's just passed away but I didn't intend to kill her or murder her, if that is what you mean. (p53)

Bailey was sentenced to a minimum of 29 years in prison for Teeling's murder.

Case Three:

In the evening of 13th April 2013 the body of Dawn Warburton was found hanging from the window frame in her bedroom. She had been involved in a sexual relationship with her cousin Mark Pickford which involved explicit discussions of 'rough sex or nasty sex' and indulged in sexual activity which also involved asphyxiation. Both took alcohol and drugs on the occasion of her death and their sexual relationship included much sado-masochistic text chat. Messages detailing these sado-masochistic desires were read out to the court as part of the summing up:

I'm gonna knob you daft, then make your face all sticky and jizzle on your titties, mouth and hair. Want to tie you up and sex slave you up as well". Her reply, a short while later, "You tie me up and rape me at knifepoint. We will need some gapping tape n I will beg you for it.... [his reply:] Oh yeah, now you're talking. Kick your fucking head in, use and abuse you". She responded a minute later, "Use me and abuse me while I drip candle wax all over you before we have a gagging sesh". (p25)

The judge noted that:

what people do in the privacy of their homes and providing there is consent is entirely a matter for them. The law is not concerned with sexual preferences or the way that people wish to live their lives. That is for them in a free society. The law is here to protect individuals. Not govern morality...each to his or her own sexual preference. There is no doubt that Dawn had a varied sexual experience

and there is much evidence to suggest that she liked what had been termed rough sex, or what I shall call SM. She is not alive to explain why or what she liked. (p5)

Somehow during their drug and alcohol-fuelled weekend, a rope was obtained from the boot of Pickford's vehicle that he used for haulage work. The rope was used to suspend Warburton by the neck. She was found kneeling on the bed facing his sleeping body. The defence denied any sado-masochism took place and stated that Pickford was asleep through whatever she did to herself; that this is a self-inflicted accident, or suicide. Pickford was found not guilty of manslaughter or of assault.

These cases tell three similar stories about an apparently consensual sex game that has resulted in the death by asphyxiation of three women. Across the cases there are common themes that emerge to demonstrate how this consensual sexual practice appears to be constructed and mobilised within juridical discourse. Together they work to demonstrate how BDSM and BDSM-adjacent practices are understood.

The troubled woman

The notion that the desire to participate in BDSM practice comes from an individual pathology is a historically ingrained one dating back to the originary works on this matter by Krafft-Ebbing (1965[1903]). Scholars have critically interrogated how BDSM has been conceptualised as a response to past trauma (Barker and Langdrige, 2007) and how people participate in BDSM practices as a way to heal, or come to terms with this trauma (Hammers, 2019). The accompanying presumption in these instances is that a person who participates in BDSM – an in particular who adopts a submissive role within a BDSM encounter - is in some way damaged or already traumatised. In the cases outlined above, we see this play out too. In the case of Coates, Banner was described as:

Someone who had, in the past, suffered from anxiety and depression, being an up and down person who could be impulsive (p11) Sadly, we know that she had her problems with drug addiction and prostitution (p12).

Her work as a sex worker, or 'known prostitute', or 'working girl' is mentioned seven times over the course of the summing up. A picture is built up of someone who had a troubled past and who may 'have taken her own life' to get away from some of the pressures she was under (p11).

In the case of Bailey, we are told that it is an 'agreed fact' that Teeling was a former 'webcam girl' (p2-3) and that:

it may plainly be of relevance to know that she, acting as a webcam girl, filmed herself inserting a sex toy into her anus on several occasions. (p3)

Her drug addiction is also mentioned in the summing up as is her time living in a hostel with her children. Of the night of her death, the judge stated:

She went out on the night... with a real degree of uncertainty as to where she was going to end up at the end of the night. (p5)

The summing up goes into detail about her night out alone in Birmingham which was captured on CCTV; the night club that she went to alone, where she was the only patron,

the CCTV of her dancing alone and drinking tequila shots alone serve to create an image of someone perhaps reckless as to where she would finish her night, but also somewhat lonely. Whilst these are by no means pathologies, they contribute to the creation of a troubled figure who, because of this trouble, might have been the sort of person who enjoys 'rough sex'.

The case of Pickford echoes many of these themes. The drug-taking that Dawn Warburton engaged in is mentioned, as is the fact that she:

seemingly gave sexual favours for either money or drugs. It appears the defendant had no problem with knowing his cousin was indulging in this lifestyle. (p5-6)

Once more, a reference to Warbrton's mental health problems and estrangement from her family help to paint a picture of a troubled past. Her pervious suicide attempt and suicidal thoughts are also mentioned in the summing up. Her history of self-harming and of her 'unhappy lifestyle' also help to paint this figure of the tragic, troubled woman (p21).

These histories work to paint a picture which accounts for why these sexual practices might have been consensual. They mobilise a mythic trope of the troubled woman who has developed deviant desires, who is morally permissive (as evidenced through her sex work), and unreliable (as evidence through her drug use). This becomes part of the constituent feature of BDSM in the legal imaginary; that it starts with the troubled woman.

Against his will

The notion that what took place in these encounters happened against the wishes of the defendant is one that reappears in many of the cases analysed as part of this project, including the three presented here. This is achieved in two ways; on the one hand, women are presented as lascivious, promiscuous, the driving force behind the encounter, and on the other hand, men present themselves as frightened, disturbed, and unwilling in the encounter. Remembering that one of the principal tenets of BDSM activity is the notion of consent – of coming together to feel – the presentation of this dynamic should encourage a calling into question of how far such an activity was consensual. In the case of Coates, the defence stated that:

He went round to Jennie's, she asked him to put a belt round her neck. He called her a weirdo in a laughable way. He put the belt round her neck and sat down. She said she'd tell him when to take the belt off, and just smiled at him. He sat down and when he looked at her, she was going blue and he tried to get the belt off her neck (p15)

and in his own words:

She invited me to put her belt around her neck as she told me she likes it kinky...When we first met, we tried to become fuck buddies but she didn't really do anything for me sexually. We have had oral sex but she again couldn't get me hard (p19)

Banner is presented as a sexually adventurous woman (who 'likes it kinky') and who is not shy about expressing her desires. Agentic, proactive, she appears as the instigator in this encounter: asking him to tie a belt around her neck. Coates distances himself from complicity with this encounter by calling her a 'weirdo' for having this desire. Once more this situates this BDSM desire within the pathological. A notion that is compounded by Coates's lack of desire for Banner. Not only is he not attracted to her, but she cannot 'not get [him] hard' which discursively points to a further way in which her femininity might be pathologized.

These twin manoeuvres which paint a sexual encounter as something that the defendants did not want to do is even more explicit in case two where Bailey's interview with the police is discussed at length. Here, Bailey explains that they had anal sex which was not '[his] cup of tea' (p24). He said that she asked him to be rough with her:

"Question: She asked you to be rougher?

"Answer: Yes.

"Question: Were those her exact words?

"Answer: Yeah, 'Do it harder. Fuck me harder,' this, that.

"Question: So, that's what I'm saying, so was that her? Tell me what her exact words was?

"Answer: They were that, they were that.

"Question: Tell me again.

"Answer: 'Fuck me harder. Pull my hair,' yeah, 'And choke me,' this. That I can, 'Choke me. Be rougher.'

"Question: Choke me?

"Answer: Yeah, but I didn't or I dunno. I dunno what happened. (p28)

Later Bailey explained that 'Seemed to be enjoying herself' and 'She initiated it. She was enjoying it' (p28). She kept 'wanting it harder' (p29), which he said made him 'nervous' (p29). He 'would have done as she asked' he continues, meanwhile, she was calling him a 'pussy': 'she actually - calling me a pussy. 'Do it harder, you pussy,' this, that'. (p39). Meanwhile, he was 'scared' (p8). Once more, the notion that Teeling was the active agent in this encounter is placed at the centre of his account. Not only does she demand that he is more and more violent with her, but she tries to sexually humiliate him when he does not manage to use the force that she demands. At the same time, she enjoys herself. He, on the other hand is scared and nervous in the encounter, painting a passive picture of himself as someone who is only at the service of this woman and her violent desires.

In Pickford's case, the textual interactions between the defendant and the deceased indicate a strong desire between the two of them to have violent and sadomasochistic sex:

it appears Dawn Warburton had interests in sadomasochist sexual activity which included tying up and choking and other similar activities including sexual asphyxiation, see, for example the text messages and the belt that was found under the bed afterwards. You remember, it was that item that looked somewhat similar to an elaborate dog lead. (p22)

He, on the other hand, only participated in the discussions because he was drunk:

She had an interest, it would seem, in sadomasochist sex. He has told you he did not. (p18)

It was spoken about in the texts but the actual sex did not take place. It was a highly sexual relationship", he said. "These were drunken sex messages. I drank every night". (p26)

Warburton's sexual history is exposed at length in support of the evidence that she was assertive, even aggressive in some of her sexual desires. Previous partners called her 'sex mad' (p23) and said what she desired 'put them off' (p23); all of which contributes to the construction of the deceased as a libidinous and deviant individual who pushed limits with her sexual desires; desires which were not reciprocated by many of the people in her past, including Pickford. Casting Warburton in this light rehearses the same rape myths that constitute victim-blaming narratives in crimes which target women in many other contexts including rape, assault, and intimate partner violence (Edwards, 2017; Busby, 2012). The image of the unwilling male partner achieves an elastic figuration of the operation of power; that the women in these cases are so demanding, so full of power in their sexual demands, that men are powerless to resist exerting their own power to kill them. Coupled with the myth of the troubled woman, here women are simultaneously vulnerable and powerful, and the male participants in these encounters are passive vessels through which they enact their desires.

Who knows what they are doing?

A final theme to note in these discussions of BDSM as it appears in the legal imaginary is that of expertise. Of course, as we have already noted, expertise is a significant feature of consensual BDSM practice (Weiss, 2011; Newmahr, 2010). Having expertise becomes a way to build esteem within a BDSM community, it becomes a way to demonstrate skill at practice, which in turn becomes a way to demonstrate one's membership and place of belonging within this subculture (Fanghanel, 2019). Expertise also comes to play a part in criminal cases with BDSM or BDSM-adjacent elements, but rather than used to demonstrate knowledge or risk-awareness of a particular practice, it is put to work to demonstrate different levels of discursive (and in sometimes legal) culpability for crimes that might take place. In the case of Coates, the courts heard that 'the defendant knew the do's and don'ts of this particular practice' (p8) and that this was relevant to understanding his actions once the belt was around Banner's neck. She, on the other hand had no experience of this sexual practice and had always expressed a dislike of it (p14-15). In case two, we are told nearly nothing⁴ about Teeling's experiences of 'rough sex',

⁴evidence of her sexual past is presented, as mentioned above, but no evidence for interest in rough sex is mentioned.

but Bailey was asked if he had conducted these practices before. Bailey answers: 'vaguely'. When asked again about whether he had ever strangled anyone he repeats again:

No, I don't remember. I don't remember. Vaguely, I remember what happened with this chick in Leicester, but I was scared.

"Question: Have you ever been rough in terms of when you've been having sex with a female?

"Answer: Yeah, I have a bit. A bit, but they've initiated it all, believe me. (p43)

Bailey's claim to a lack of expertise here even though he seems also to have conducted some of these practices before is used to demonstrate how practices can 'go wrong', that he is always responding to a partner's desire for rough sex and that he is, once more, scared when he does it.

Finally, in the case of Pickford, as we have already seen, Warburton is the expert. Many witnesses of her sexual desires are called to present evidence to this effect. For him, it was just fantasy talk and nothing he knew anything about. As scholars of BDSM have identified, BDSM practice takes practice. It requires the establishment of a certain level of expertise. Though of course even experienced and experimented practitioners of BDSM get things wrong from time to time – participants may go too far, or may fail to read the signs that their partner(s) has had enough, they may misinterpret the tone of the encounter or in some other way cause harm for cases such as these to be considered as potential cases of consensual BDSM sex gone wrong, expertise should come to be seen as an indicator of thing less likely to go wrong than the other way around.

Encountering BDSM in the legal imaginary

These three cases demonstrate how something understood as BDSM comes to exist within a legal discourse in the time/space of the court room. Through mobilising the trope of the troubled yet lascivious woman and over-interpreting expertise as culpability, an imaginary of BDSM and BDSM-adjacent practices comes to be forged. This has implications for people injured or killed during a sexual encounter, regardless of whether they are deliberately undertaking a BDSM practice or not. Not least because it misrepresents BDSM practice and continues to nurture an imaginary of BDSM that is pathological and depraved. But also, because it enables something understood as BDSM to masquerade as an excuse for acts of violence.

As Newmahr (2010) and Weiss (2011) amongst others have demonstrated, people practicing BDSM do not need to be traumatised or otherwise from pathological positionalities to willingly participate in this practice. Yet, as with other rape myths that circulate within the treatment of sex crimes, the myth of the troubled woman becomes a prevailing backdrop to the way that BDSM is fathomed within the legal imaginary. BDSM practice is premised on a sense of complicity and consent – a coming together to feel – between the actors which suggests a form of intimacy that is absent in these cases. Not all BDSM happens between people who are in established relationships, but where the

relationship is very new – as in the case of Bailey for instance - even more efforts to establish consent and to negotiate what will take place might be expected.

Scholars of BDSM will report that despite outward appearances, the practice is an egalitarian one (Califia, 1994). Even if a power exchange takes place, it cannot do so without permission from the participant who gives over that power. In these cases, there is no equality in the interaction between the defendants and the deceased. It is not just, as Yardley (2020) notes, that fact that men use their physical strength and overpower these women which makes it an uneven playing field, or that men rely on systemic sexism to try to get away with it, but also that by their own accounts, the men do whatever they do *unwillingly*. A consensual BDSM encounter is one that can be expected to be enthusiastically participated in by all parties. That these defences mobilise the reticent actor as part of their discourse of BDSM signals that this is not BDSM, but rather femicide which tries to pass as BDSM.

There is no right way to do BDSM, but there are many wrong ways to do it. This chapter does not suggest a model or template to follow to identify a ‘real’ BDSM encounter where consent might be relevant from a mockery of one (nor do I think that it might be desirable to forge one), but it points to some important considerations that are overlooked in cases where women have died or been injured as part of a so-called sex game gone wrong. It does not matter that this defence does not always work to exonerate or reduce a charge of murder to manslaughter or affect the sentence passed. What matters is that this figuration of BDSM exists in the legal imaginary in the first place. BDSM activists and scholars must work to create more space between BDSM practices and practices which present as BDSM but which are not. Similarly feminist activists campaigning against the so-called sex game gone wrong defence need to harness awareness of this distinction to draw attention to the insidious ways that this subcultural practice is put to work against women in mainstream legal spaces. By building strategic alliances between these different sides of the argument the systemic rape culture which underpins this dynamic might better be seen, countered, and contested.

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