

‘She seemed to be having fun’: Construing Consent in the Sex Game Gone Wrong

Alexandra Fanghanel, University of Greenwich

Abstract

This chapter interrogates the phenomenon of the sex game gone wrong to examine how it is figured in the court room. By analysing court transcripts of 3 recent criminal cases in which a woman has died as a result of a so-called sex game gone wrong, the chapter explores the role of consent, and how it is evidenced in the court room. Even though consent to sexual violence which is more than transient or trifling is impossible in law, as confirmed by *R v Brown* [1993] UKHL 19, [1994] 1 AC 212 and s. 71 of the Domestic Abuse Act 2021, cases where this defence is mobilized have proliferated over the past few decades (17 reported cases in England and Wales up to 2001, 40 between 2001-2021 (We Can’t Consent to this, 2021)). This indicates that consent to sexual violence continues to play a part in socio-legal praxis. Through thematic and discourse analysis of these cases, the chapter explores how consent is figured and how consent is evidenced. In doing so, it critically interrogates what consent is said to look or sound like in order to enhance contemporary understanding of the ways that knowledges about consent are constructed in the socio-legal imaginary.

Introduction

Over the past 20 years there has been a proliferation of cases tried in court in which women (usually) have died or been injured by men (nearly always) as part of a so-called sex game which has gone wrong. The phenomenon of the sex game gone wrong is not in itself new but increasing prevalence of these cases is indicative of a social-cultural evolution within the criminal justice landscape. This evolution marks the emergence of, or increased acceptance of, the possibility that sexual violence might be consented to within these ‘sex games’. Even though consent to sexual violence which is more than transient or trifling is impossible in law, as confirmed by *R v Brown* [1993] UKHL 19, [1994] 1 AC 212 and s. 71 of the Domestic Abuse Act 2021, the increase in cases where this defence is raised indicates that consent to sexual violence continues to play a part in socio-legal praxis and imaginary. The phenomenon of the

sex game which has gone wrong, or consensual rough sex, intersects with bondage and sado-masochistic practices in that these centralise the possibility that some elements of sexual violence might be consented to, notwithstanding the legal impossibility of this. This chapter interrogates how consent is figured in cases of sex games that have gone wrong. In order to do this, I will outline some of the complexities of consent within sadomasochistic encounters. Despite these complexities, consent is intrinsic to sadomasochistic encounters and it is an intrinsic component in these cases. I then establish how research into consent in these cases was conducted before detailing and analysing three cases where consent to rough sex is claimed in court. The chapter concludes by highlighting rape myths that run through contemporary constructions of consent in these cases.

Construing consent

What distinguishes sadomasochism from acts of sexual aggression or unwanted violence, is the role of consent in the encounter (Weinberg et al, 1984; Newmarhr, 2011; Weiss, 2011, Pitagoria, 2013). Within sadomasochistic sexual practice, not only is consent of central importance, but discussion about consent, how it emerges, and its nuances, abound. Consent emerges in a number of ways. It emerges through an active practice of negotiating consent – what people say they want – what people will agree to within the time-bound context of a scene or of ‘play’, and at an intersubjective level – the unspoken iterations of consent- what people really want, how far they really want to go, including whether they actually want their consent to be violated (see Williams et al, 2014). Though consent discussions are at the forefront of sadomasochistic practice – indeed, consent practices could be said to be intrinsic to the practice of building a sadomasochistic community - the practicalities of consent are complex (Fanghanel, 2019). Part of the pleasure of sadomasochistic sexual practice is in the risk-taking that is also inherent to it (Newmahr, 2011). This interplay with risk as pleasure may emerge in the practices that sadomasochists participate in – beating, branding, sensory stimulation, humiliation or other forms of power play – which all in themselves carry an element of risk to the self, whether physically or psychologically, and also in the pushing of the boundaries of consent itself.

For some practitioners of sadomasochistic sex, pushing up against the boundaries of what has been agreed to is part of the pleasure of sadomasochism. To engage in this sexual practice is, in any iteration of it, to put one's body, and one's sense of self under pressure that would not usually be encountered in sexual practice that does not comprise sadomasochistic elements. Challenging the self in this way is one of the appealing elements of sadomasochistic practice, as a form of auto-poiesis, or creation of the self (Fanghanel, 2019). The pushing of boundaries around consent can plunge questions of consent into a grey area where acts which have not been agreed to may happen but that happening has, in itself, been agreed to. How do practitioners of sadomasochism then know where the lines of consent lie over their play? Partially through practice and by acquiring knowledge and experience of sadomasochism and its specific culture and community norms. In part, this is also acquired through the interplay between risk and trust; an interplay which is heightened through intimacy, verbal and non-verbal communication, and connectedness: 'knowing' what people want to do, how far they want to go. Forging – and normalising – consent as an ethical praxis, as something that practitioners actively attend to and do is ongoing work within sadomasochistic contexts (Fanghanel, 2019: 282). Consent work is work that is inexact, and it is one that can be tacit, and it is one that can go wrong, but in some form, it is a presence and not an absence or passive affect.

How do these consent complexities help us to understand the phenomenon of the sex game gone wrong? In these cases, we encounter women who have been killed by men during sex as part of what is claimed is a consensual sexual encounter which had forceful, violent elements to it. The increase in proliferation of cases coming to trial where consent is mobilised as a defence to explain injury or death demonstrates that something that looks like consent is operationalised, or certainly is operationalizable. In order to excavate what is going on in such cases, it is important to examine what this consent looks like and how it emerges. As demonstrated above, and elsewhere in sadomasochistic cases where consent is at stake, it can be hard to identify what consent looks like and where it emerges. But though it is hard, and sometimes it is ambiguous even to those who participate in sadomasochism themselves, there are shadows or spectres of consent which can show us how consent might have emerged. What I want to do here is explore how defendants who claim that certain sex acts

or sex games were consensual evidence that consent. What does consent look like in the sex game gone wrong?

Considering consent

In 2020-1, I acquired the transcripts of 10 cases in which a defence of consent is raised in an incident where a sex game had gone wrong. To identify cases of interest, I used the LexisNexis and Westlaw databases to search for cases using the key words 'sex game', 'rough sex', 'sadoomasochism', 'SM' and 'BDSM'. Though these databases cover several jurisdictions, I limited my search to cases tried under English and Welsh law. 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.

To mitigate this, 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 searches enabled me to identify cases where a defendant was found not guilty, or otherwise was not captured by legal database searches. It also allowed me to triangulate information on the cases found through database searches for analysis. 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, although unlike this group, I limited my search to cases that take place in England and Wales.

Once cases had been identified and the judge's summing up or sentencing remarks acquired, I conducted a thematic and discourse analysis of the text. In doing this, I coded specific areas

where consent was mentioned either directly using the word 'consent' or cognate terms 'she said yes', 'it was at her request', for instance. Occasionally very little discussion of how consent was established appeared in the transcripts beyond merely stating that a certain act had been consensual. To enrich my analysis here, I examined the elements around the statement of consent in order to excavate more information about *how* consent was established, and how parties to the sexual practice *knew* that it had been established. By looking at these elements, a picture of what consent looks like in these cases begins to emerge. I analyse three of these cases here. I chose these cases to present here as though the cases have different outcomes, each case reveals similarities about how consent is construed within these contexts.

Case 1:

This is the case of Marcus Coates who, in August 2011 strangled Jennie Banner to death in her flat. They had taken drugs and alcohol and had engaged in sexual activity together. We are told that 'she had many difficulties in her life and was a drug user and prostitute' (p12). Coates was accused of tying a belt around Banner's neck and tightening it, fracturing her thyroid cartilage and killing her. He said that she had tightened the belt for her own sexual pleasure, and that he had nothing to do with her death; what she did, she did to herself as an act of auto-erotic asphyxiation or suicide. The prosecution claimed that he tightened the belt for his sexual gratification, that paraphilic practice was of no interest to her and that moreover, she hated to have anything, even jewellery, around her neck. He, on the other hand, had an established practice of tightening a collar around his former partner's neck as part of consensual foreplay (p7). Though he had been charged with murder, he was found guilty of manslaughter.

Case 2:

In February 2018, Richard Bailey met Charlotte Teeling just before she died. She had been out in Birmingham, UK until the early hours of the morning. It was a cold night. After the nightclub closed, she wandered around the city before meeting Bailey. Together they bought drugs and alcohol and went back to his apartment to consume these and to have rough sex. At her

request, he choked her and slapped her. She died. He said it was an accident because he was surprised by someone knocking at his bedroom door. He didn't mean to kill her. He was found guilty of murder.

Case 3:

In this case, Jason Gaskell, pleaded guilty to the manslaughter of Laure Huteson who died in February 2018: 'he's accepted that he deliberately held a knife to her neck during sexual intercourse. The knife passed through her skin and into the soft tissues of her neck, reaching a branch of the jugular vein and a branch of the carotid artery, and she died from the substantial blood loss caused in that way' (p2). Because Gaskell pleaded guilty the comments from this case are taken from sentencing remarks as opposed to the judge's summing up, as guilt does not need to be determined. The pair had met just a few hours before her death and had, according to the judge, enjoyed pleasurable and consensual sex at the home that Gaskell shared with two friends. In this case, the sexual encounter between Gaskell and Huteson was presented as consensual, and her death an unintended consequence of the knife play.

In each of these cases, consent to sex that is rough, that is kinky, or that is otherwise non-normative is offered up as an explanation for how the women in these cases died. Though the claims that sex was consensual do not always work, what emerges is that something akin to consent is offered up as a potential mitigation for acts of violence which led to the deaths of women. How is this consent evidenced?

Coates:

In case one, Coates's defence was that the whatever happened to Banner was committed by her, herself as an act of suicide or a 'tragic accident' (p8). They had a casual sexual relationship which also principally involved using drugs together. To evidence her consent to the strangulation, the defence explain 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. (p8)

Affixing the belt to Banner's neck, we are told here, is at her behest. She asked him to do it. Even though he thought she was 'a weirdo' for wanting him to, he did put the belt around her neck. She smiles to him as she dies. Later another iteration of these events is presented:

She had been a working girl, she asked him to put a belt round her neck, he said no. She then put a belt around her own neck. He noticed that she started to turn a funny colour, he attempted to get the belt off her neck but couldn't do so. He said he didn't have sex with her as he couldn't get an erection. He categorically stated he did not put the belt around her neck and that she put the belt around her own neck. (p17)

She asks and then, following his refusal now, attaches the belt to her neck herself. This section of the summing up also aligns the encounter between Coates and Banner with deviant sexual practice. Even though, as we are told here, they did not have sex, it is explained that she was a 'working girl'. In the summing up, Banner is referred to as a 'prostitute', or 'known prostitute' four times throughout. Though her status as a sex worker does not directly infer consent, what it does is to discursively associate sexual deviancy in one context (sex work) with sexual deviancy in another (interest in erotic asphyxiation). A further detail that is notable in terms of this deviancy, is in Coates's inability to get an erection. In his own words:

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 (pp19-20)

Here, responsibility for not being 'able to get [him] hard' falls to Banner who does not 'really do anything' for him in terms of desirability. Deviant constructions of desire, heteronormative sexual practice and masculinity and femininity abound in these short phrases. Banner, not only a sex worker but also one who cannot excite the arousal of her companion, evinces a flawed heteronormative femininity that presents her as outside of normative conceptions of desirability. Cast as a 'weirdo' (p8), a 'working girl' who 'didn't really do anything sexually' for

the defendant, her apparent non-normative desire to have a belt tied around her neck becomes packaged within this deviancy:

We both smoked crack. She also took heroin later. She invited me to put her belt around her neck as she told me she likes it kinky.... (p17)

And later:

Reference is made to the belt she called her kinky belt: "She then asked me to put the belt round her neck. I thought it was a joke and laughed, but I put it round her neck. It was already formed as a noose but none of the holes had been engaged by the metal prong. She herself then tightens the belt around her neck. I then put another rock on the pipe and she was still talking and said she would let me know when to release the belt. I smoked the rock and remember looking at her and she was smiling at me....Although Jennie talked about having rough sex, we never did it, and apart from the day in question, never used ropes or any other form of restraint." (p20)

These repeated images of a 'kinky' belt, 'liking it kinky', and talking about 'rough sex' as something that is laughable or weird, or not shared by the defendant furthers this impression that consent, if it exists, emerges because she is an outsider, or someone who has desires that he does not identify with. Throughout, Banner is cast as the active agent; she asks for the belt, she either ties it herself or it is tied at her request, she smiles, she talks about having rough sex. Evidence of consent here is offered up in the form of direct requests but also in ancillary evidence around sexual practice, desire, and deviancy. Indeed, non-consent – which also tells us what consent looks like – is evidenced elsewhere by the prosecution:

There were no sex toys or bondage equipment found in Jennie Banner's flat. Drugs paraphernalia were found, such as spoons to cook up drugs and syringes were also found. (pp17-18)

We are also told that Banner had no interest in BDSM and asphyxiation, and she hated having her neck touched even by her mother. The lack of sex toys and lack of interest in paraphilia

would seem to contest the likelihood that Coates's version of events took place. At the same time, what if there were sex toys in her flat? What if she was interested in some forms of non-normative sex? The presence of these would not infer consent to the practices that eventually unfolded, but that they are offered up in the negative – as proof that she did not consent to any asphyxiation – discursively suggests that this might have been the case. This observation rehearses rape myths about promiscuity. If Banner did have an interest in non-normative sex, the use of sex toys, or forms of bondage, would this have made it harder to believe that she did not consent to this asphyxiation?

Bailey:

In this case, Bailey was found guilty of the murder of Teeling. As part of his defence, however, Bailey suggested that she had died as a result of an accident during consensual rough sex. The details of the consensual sadomasochistic encounter are detailed through the police interview undertaken with Bailey. A considerable amount of this was repeated in the judge's summing up of the case:

"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.

"Question: What did you actually do when she was telling you that?

"Answer: Pulled her hair a bit.

"Question: And how did you pull her hair?

"Answer: Not very hard. I was too -- it was too, probably, too scared.

"Question: What part of her hair did you pull? The side? The back?

"Answer: I think so.

"Question: Yeah, and apart from pulling her hair, how did she react when you were pulling her hair?

"Answer: I don't know. Seemed to be enjoying herself anyway.

"Question: What makes you say that?

"Answer: I don't know, I don't know. She initiated it. She was enjoying it.

"Question: Mm, and when she said about being rougher, what did you do as a result of that, other than pulling her hair?

"Answer: I tried to go as she said. (p28)

In this extract Bailey posits that whatever he did to Teeling was at her request to 'be rougher' and to 'do it harder'. She asks to be choked and to have her hair pulled. When pressed by the interviewer about the choking, Bailey linguistically steps away from what he says: 'I dunno. I dunno what happened'. He pulls her hair 'a bit', and 'not very hard'. He 'tried to go as she said'. All of this casts Bailey as an unwilling participant in whatever Teeling was saying she wanted. Whereas he was 'scared', she 'seemed to be enjoying herself'. This imbalance of their desire for what they were participating in mirrors the imbalance of power in their interaction; she is submissive but willing, he is dominant but reluctant. This dynamic plays out in his accounts of engaging in similar practices with other women:

"Question: You've mentioned that Charlotte seems to be the driving force of this. She's asking you to do these things. Have you ever done anything like that before with any other female?

"Answer: Vaguely, but I was a bit scared. I met this girl and I was a bit scared, bit worried to what she was asking to do, and I actually asked her, 'Why have you not got a boyfriend cos you're every man's dream.' She says, 'Cos they run a mile, basically.' So, no, not really well, yeah.

"Question: You've had experience before of another female asking you to do those things?

"Answer: Worse this one female was asking to do, but I was just too scared to do anything like that.

"Question: So, you've never choked a female in sexual intercourse before?

"Answer: 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)

Here, Bailey demonstrates that he has a history of unwillingly engaging – 'vaguely' - in rough sex with women but that on each occasion it scared him. In this extract of his police interview, Bailey expresses six times that he was scared of what women were asking him to do. Each time, he was only 'a bit' rough; each time it was they who initiated 'it all'.

The other noteworthy observation in this extract is the construction of the girls who were asking Bailey to do things that he found scary. He says she is 'every man's dream' for what she wanted to engage with as part of sexual practice, to which she responds that men 'run a mile' meaning that even as might be imagined to be 'a dream' she is also repulsive to men who might want to be romantically involved with her. She is not the victim in this case, and is only mentioned by Bailey in passing, but these observations work to cast women who engage willingly in this form of sexual practice – practice that scares Bailey – as flawed, difficult, and otherwise undesirable.

In these two extracts, Bailey attempts to demonstrate consent firstly through the requests made by willing women (so far, so consensual) but also through his reluctance and fear. How does he know that they like it? They seemed to be enjoying it. Consent is read off the body as part of the intersubjective encounter but this is also accompanied by considerable reluctance on his part. If there is consent to participate in this rough sex, it certainly does not seem to be on his part.

Gaskell

The case of Gaskell details the death of Hutson following some consensual knife play. As Gaskell pleaded guilty, what we have are the sentencing remarks as opposed to arguments

about the facts of what unfolded. This means that the consensual nature of the sexual practice is not interrogated. Nonetheless, indicators of consent are alluded to through the judge's comments:

It's a sadness to report that she became a little distant from her parents. She had fallen into drug use herself and into what might be thought of by some as "bad company", and she was a little vulnerable to the extent that she had an unhappy history of harming herself and being harmed by partners. She was a victim of domestic abuse. (p1)

As with Keeling and Bailey, Huteson met Gaskell on the same day that she died, so they did not have a pre-existing relationship. Huteson's background is explained by the judge perhaps as evidence of why, or how she found herself involved with Gaskell, engaging in a consensual act of sadomasochism. None of these facts – from the drug use, to the estrangement from her family, to her past victimisation – are offered as evidence of her consent (as, of course, they cannot be) but the offering up of these facts in the sentencing remarks works to paint a picture of the sort of person who might engage in this practice. Her background does not have any causal bearing on her death, yet in presenting it here, the judge's comments start to make this discursive link.

Consent was more explicitly considered in the context of Gaskell's history:

QC: the defendant will accept that he has a practice, as it were, of taking risks during sexual intercourse, engaging in – in rough sex which----

JUDGE: I mean, is the right – right way to label is, it's a form, this – the sort of activity that he indulges in – is a form of sadomasochist sex, I mean?

QC: Well, there's an element of force used which----

JUDGE: Yes.

QC: -- from which----

JUDGE: It's consensual but it's – that's, I suppose, the appropriate label.

[...] simply indulging in sadomasochistic sex doesn't necessarily involve a criminal act----

QC: No.

JUDGE : -- but here, where you've got the knife involved, it's grossly dangerous.

QC: Yes. It may be one of those hybrid-type cases. Holding a knife to somebody's throat is – is an unlawful act potentially. But where she consents to that---

JUDGE: Well, I think you can consent to that because you're not actually being physically hurt. (pp3-4)

Consent to having a knife held against her throat is asserted and assumed on Huteson's behalf in this extract. We do not have any further evidence of Huteson's consent than these statements that the knife play was consensual. Unlike in the case of Coates or of Bailey where there appears to be a specific request for whatever sexual practice to take place, here we are not told how this knife play was negotiated or how consent was expressed and understood. Instead, because we are looking for signifiers of consent in these cases, we turn to different evidence which might suggest that practice was consensual:

[the pathologist] found marks on Laura's neck consistent with rough sexual activity. There was no bleeding into the eyes or petechia of that type to suggest that it had been extreme force used around the neck, but there were marks on her neck consistent with rough sexual activity (p4)

[the pathologist] said that [the knife] would have passed through the remaining tissue, once through the skin, with relative ease. There were no other injuries, no defence injuries, no other recent signs of serious trauma above and beyond those patchy bruises seen on Laura's neck. (p8)

Lack of evidence of defensive injuries or use of extreme force is offered as evidence and we are told elsewhere that 'the prosecution do not contend that what followed was not consensual sexual activity in his bedroom' (p7). The lack of defensive injury partially evidences this; absence of struggle might be used to demonstrate consent, though it is not put to work in the service of this here, because consent is a priori always-already assumed in this case. Elsewhere we are told that the sounds coming from the bedroom and heard by the neighbours were 'consistent with sexual activity, no obvious sounds of distress' (p7).

Lack of distress and lack of injury are used to support claims that Gaskell and Huteson engaged in consensual sadomasochism:

QC: And the consensual element, which is apparent here, it's not reluctant consensual activity and it was straight consensual activity----

JUDGE: Yes.

QC: -- presents other difficulties when one starts to consider the unlawful act aspect.

JUDGE: Yes. This was a knife used, in a sense, both ways; to present that degree of – of danger and, in a sense, you are dealing with circumstances, because consensual, within the privacy of somebody's own – own home. That does not make it lawful in the context of this case. That's not suggestion plainly. But it does present a difficulty which you would not ordinarily face but will have a significant impact so far as the final sentence passed. (p14)

The consensual aspect of the encounter is 'straight' and 'not reluctant' and will have a bearing on the sentence that Gaskell receives. The appeal to the privacy of a home as the rightful place in which such encounters are consensual bears attending to. The significance of the home as a place that is not rightfully the jurisdiction of the courts in which to intervene echoes the judgement in the Court of Appeal case of Wilson in 1996. That case concerned a married couple who enjoyed participating in consensual sadomasochism. On one occasion, as part of this play, Mrs Wilson asked her husband to brand his initials onto her buttocks. She presented to her doctor after the branding became infected and this was reported to the police. He was charged with assault occasioning actual bodily harm. His conviction was quashed at the Court of Appeal in part because it was held that 'consensual activity between husband and wife, in the privacy of the matrimonial home, was not a proper matter for criminal investigation, let alone prosecution' ([1996] 4 LRC 747 at 750). In part, this accounts for what appears to be the possibility for consent to emerge as a potential defence to sadomasochistic sex.

What does this consent tell us?

Scholars of sadomasochism have long campaigned for consent to function as a defence in encounters between sadomasochistic actors that are wanted by all parties, however that consent is negotiated, or emerges. As Haley (2015: 640) suggests, sexual expression and intimate relationships are a 'liberty right' meaning that people should have the right to lead intimate lives without interference from the state. It is certainly the case that in England and Wales much sadomasochism remains criminalizable, and that this sex negative, moralistic approach might have implications for social justice for people practising sadomasochism, which is, by virtue of the fact that it *is* sadomasochism, consensual. Anything other than consent (notwithstanding the complexity of consent (Weinberg et al, 1984)) is an offence against the person (Dunkley and Brotto, 2020). Maybe it is encouraging that courts appear to be shifting parameters to accommodate a certain acceptance that consent might be a possible defence. However, if we look at what consent looks like in each of the cases outlined here, we can see that the similarities between the ways that consent is construed are not unproblematic. In case one and two – that of Coates and Bailey – we are told that whatever happened to Banner and Keeling happened *at their request*. They were explicitly asking for it; for the belt to be tied around their neck, for it to be pulled, for the sex to be harder, to be choked. In each of these two cases, the men situate themselves as the unwilling and passive participants in a situation that the women are driving forward. The men are scared, or they find what they are being asked to do 'weird'. Just as the men are passive and the women active in the encounter so too are all the men dominant and the women submissive. This power dynamic certainly does exist in sadomasochistic relationships and encounters, but these are not usually accompanied by such explicit reticence on the parts of the dominant actors.

Moreover, alongside this active/submissive female and passive/dominant male dyad is the background context given about the women in each of these cases. All three – Banner, Keeling and Huteson – are painted by the court as troubled; drug addicted, estranged from their families, victims of intimate partner violence, sex workers. Living marginal lives and involved in subcultural or deviant practices does not act as a proxy of their consent but it is offered up as an explanation of how these women ended up in these circumstances. It is not a balanced, normatively successful woman who is engaged with these practices. It is a woman who is otherwise vulnerable. Casual sex, sex work, or drug use are never presented

in these cases as practices that women would rightly choose for themselves, so the liaison that is made discursively here is that consent might be present here, because of the otherwise disadvantageous circumstances these women have found themselves in.

Additionally, pathological evidence is used in the case of Bailey and that of Gaskell to demonstrate that no defensive marks were found on the bodies of the women. Lack of struggle and no sounds of distress are used to allude to the consensual nature of the encounters.

It is interesting to note that in the case of Gaskell – the only case in which a guilty plea was entered – Huteson's consent is the least well excavated. We are simply told that she consented and that this was consensual sadomasochism that went wrong, and that is that. No evidence of, perhaps, her interest or engagement in sadomasochism as a subculture is offered, no evidence of her knowledge of the practice, or how they discussed what would happen, what might happen, and what the limits might be. Consent is taken as a given here without interrogating any element of what this consent might have looked like.

What we might also note is how far these evidences of consent - damaged women, who are rapacious in their desire for consensual violent sex with reluctant men, and who do not fight back - echo contemporary rape myths. The construct of sex-crazed woman who literally asks for it, and who has made bad choices with her life along the way, fold into contemporary neoliberal discourses about the ideal victim of rape; promiscuous, troubled, deviant. The lack of evidence of resistance or fighting back is also a well-rehearsed rape myth about what 'real' sexual violence looks like.

Conclusion

Though case law and statutes are clear that there is no defence of consent to a sadomasochistic encounter or rough sex, the rise in cases where such a defence is raised – no matter how transiently – demonstrates that at a discursive level, something like consent emerges in the socio-legal imaginary. Although consent defences do not always work in cases where men have killed women in sex (e.g. Bailey) in other instances, consent works

either to add doubt to intention to kill (e.g. Coates) or to claim that what happened was an accident (e.g. Gaskell). This means that consent *does something* in these cases. And even where it does nothing, the potentiality that it might exist remains fertile.

This does not, however, signal a shift towards a more sex positive approach to engaging with these cases (Kaplan, 2014; Wodda and Panfill, 2020). Instead, where consent is evidenced, it is shrouded in rape myths that enshrine a rape culture that normalises gendered violence (Fanghanel, 2019). Evident in some of these cases (of which Gaskell is one) is also lack of curiosity about consent. Instead, we find courts merely stating that consent is present in a particular encounter.

Awareness about sadomasochism and consensual rough sex are increasingly penetrating the mainstream (Weiss, 2006, Tomazos et al, 2017). And yet, what is clear is that these are only rarefied versions of sadomasochistic subcultures which do not take account of the subculture in all of its complexity (Weiss, 2006; Wilkinson, 2009). This is not the move towards sadomasochistic acceptance that Pa (2001), Dunkley and Brotto (2020), and Haley (2015) posit might be possible. Rather, alongside a rarefied vision of sadomasochism, we also evince an under-developed conception of consent, how it emerges, and how encounters that might otherwise be figured as sadomasochistic, or as consensual rough sex, unfold.

Within criminological and socio-legal discourse more broadly, more nuanced understanding of consent, rough sex, BDSM and pleasure are needed, alongside continued awareness of rape culture which enables femicide that is dressed up as sadomasochism to emerge.

References

- Dunkley, C. R., & Brotto, L. A. (2020). The role of consent in the context of BDSM. *Sexual Abuse*, 32(6), 657-678.
- Fanghanel, A. (2020). Asking for it: BDSM sexual practice and the trouble of consent. *Sexualities*, 23(3), 269-286.
- Haley, D. (2014). Bound by law: A roadmap for the practical legalization of BDSM. *Cardozo JL & Gender*, 21, 631.
- Kaplan, M. (2014). Sex-positive law. *NYUL Rev.*, 89, 89.

Newmahr, S. (2011). *Playing on the edge: Sadomasochism, risk, and intimacy*. Indiana University Press.

Pa, M. (2001). Beyond the pleasure principle: The criminalization of consensual sadomasochistic sex. *Tex. J. Women & L.*, 11, 51.

Pitagora, D. (2013). Consent vs. coercion: BDSM interactions highlight a fine but immutable line. *The New School Psychology Bulletin*, 10(1), 27-36.

Tomazos, K., O'Gorman, K., & MacLaren, A. C. (2017). From leisure to tourism: How BDSM demonstrates the transition of deviant pursuits to mainstream products. *Tourism Management*, 60, 30-41.

Weinberg, M. S., Williams, C. J., & Moser, C. (1984). The social constituents of sadomasochism. *Social problems*, 31(4), 379-389.

Weiss, M. (2011). *Techniques of Pleasure: BDSM and the Circuits of Sexuality*. Duke University Press.

Weiss, M. D. (2006). Mainstreaming kink: The politics of BDSM representation in US popular media. *Journal of homosexuality*, 50(2-3), 103-132.

Wilkinson, E. (2009). Perverting visual pleasure: Representing sadomasochism. *Sexualities*, 12(2), 181-198.

Williams, D. J., Thomas, J. N., Prior, E. E., & Christensen, M. C. (2014). From "SSC" and "RACK" to the "4Cs": Introducing a new framework for negotiating BDSM participation. *Electronic Journal of Human Sexuality*, 17(5), 1-10.

Wodda, A., & Panfil, V. R. (2020). *Sex-positive criminology*. Routledge.