

# The Law: Sexual Harassment, Sexual Offending and Related Issues

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#Its not okay: Sexual Violence Awareness Mini Conference – 11<sup>th</sup> February 2022

## Civil Law – Criminal Law

The distinction is often blurred

Note – with criminal law we refer to D (defendant) and C – complainant

# Civil Law : sexual misconduct

The **Equality Act 2010** protects people from discrimination in certain settings.

These include:

- At work
- In places where goods and services are provided, such as hospitality venues and shops
- In healthcare settings
- In places of education
- When using transport

The discrimination must be in relation to a 'protected characteristic':

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

One of the four types of discrimination is 'harassment', and because 'sex, sexual orientation and gender reassignment are protected characteristics, this includes 'sexual harassment'.



**Sexual harassment** is unwanted sexual behaviour/attention that violates someone's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment for a person... whether this is intended or not.

It includes touching, spoken or written words or abuse and offensive social media communications and gestures.

A person who is sexually harassed in one of the relevant settings listed above, can pursue a claim in the **civil county court** (and if at work, also an **employment tribunal**).

The remedy awarded is 'damages' (monetary compensation) including for pain and suffering.

# Criminal law – sexual misconduct/related

## Harassment (max 6 months – 14 years if C caused fear of violence)

There is also a criminal offence of harassment under s.2(1) Protection from Harassment Act 1997.

This is committed where a person pursues a course of conduct which amounts to harassment of another, which they know or ought to know amounts to harassment of the other (and this can include harassment of a sexual nature).

A course of conduct requires conduct on two or more occasions and must be linked, for example, by the same motive.

The course of conduct results in 'harassment' if it causes alarm or distress. Where the conduct is stalking behaviour, the crime of stalking will be charged.

### *Kelly v DPP* [2003]

- D made 3 threatening and abusive mobile calls to C within 5 minutes of each other around 3am
- It is not necessary for there to be alarm caused in relation to each of the incidents
- The course of conduct taken as a whole must amount to harassment

## Stalking – s.2(a)(1) PFHA 1997- max 2 years

Harassment – plus .... course of conduct amounts to stalking

There is no legal definition of 'stalking', but examples of acts /omission associated with stalking are:

- Following a person
- Contacting, or attempting to contact, a person by any means
- Publishing any statement or other material relating or purporting to relate to a person, or purporting to originate from a person
- Monitoring the use by a person of the internet, email or any other form of electronic communication
- Loitering in any place (public or private)
- Interfering with any property in the possession of a person
- Watching or spying on a person

## Domestic abuse

*Note – the DAA 2021 does not include a domestic abuse offence...but does include a definition of domestic abuse*

### Controlling or coercive behaviour in an intimate or family relationship - s.76 Serious Crime Act 2015- max 5 years

D person who is personally connected to another (C), engaged in behaviour towards C that was controlling or coercive and repeated or continuous, where it had a serious effect on C and the D knew or ought to have known that the behaviour would have a serious effect on C

### Coercive behaviour:

A continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish or frighten their victim ( including sexual abuse).

### Controlling behaviour

A range of acts designed to make a person subordinate and/or dependant by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Includes humiliation, isolation, intimidation, controlling finances, monitoring time, dictating clothes, hair, friends....

“Serious effect” on C = it causes C to fear, on at least two occasions, that violence will be used against them.....or..... it causes them serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities.

The offence has similarities with harassment and stalking:

- 1) COC/repeated or continuous behaviour
- 2) Alarm and distress/serious alarm and distress....

So when to charge D with harassment and when to charge the accused with C&C behaviour in an intimate or family relationship?

The distinction is a grey area, but it seems harassment and stalking are to be used for non-relationship/ex relationship scenarios such as neighbours, work colleagues, acquaintances, strangers..... and C&C behaviour for relationships/ex relationships



## Offences motivated by hostility ('hate crime')

The Crown Prosecution Service (CPS) and the police define 'hate crime' as:

*“Any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice based on a person’s race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender.”*

There is no criminal offence called 'hate crime' (and no law requires proof of hate!)

Different strands of legislation...the person will be charged with an existing offence, such as criminal damage or assault.

However, if the offence is **motivated by hostility in one of the ways mentioned**, the court must treat this as an aggravating factor when sentencing. This includes crimes motivated by hostility re: **sexual orientation** or perceived sexual orientation or by **transgender** or perceived transgender.

Offences motivated by **misogyny and sexism** do not currently attract higher penalties.

In **December 2021** the **Law Commission** decided that **sex or gender** should not become 'hate' characteristics. The **Hate Crime (Misogyny) Bill** is proposing this, but it won't become law. What the Law Comm has proposed is a separate offence of **public sexual harassment whether offline or online**.

There are also **incitement offences**, which include '**stirring up**' hatred on the grounds of **sexual orientation**...the Law Comm propose extending this to transgender and gender diverse.

## Sexual Offences - Sexual Offences Act 2003 –

There are 71 sexual offences in the Act, including:

- Rape (s.1)
- Assault by penetration (s.2)
- Sexual assault (s.3)
- Child rape and other offences, including grooming
- Abuse of trust offences
- Offences against those with mental disorders affecting choice
- Familial offences
- Prostitution
- Exposure
- Voyeurism
- Offences involving animals and corpses

Jimmy Savile OBE - DJ, television and radio personality who hosted Top of the Pops - raised an £40 million for charities...

After his death in 2011 hundreds of allegations of sexual abuse were made against him....

'Operation Yewtree' (OY)- 450 alleged crimes involved Savile..

Wider scope of OY.....December 2012 – the police announced that 589 alleged victims had come forward regarding offences committed by Savile and others...

Of the alleged victims, 82% were female and 80% were children or young people



Recent global high-profile cases....



Harvey Weinstein - American former film producer and convicted sex offender. Co-founded Miramax ( Pulp Fiction, Gangs of New York, Kill Bill, Scream, Shakespeare in Love( won Oscar)

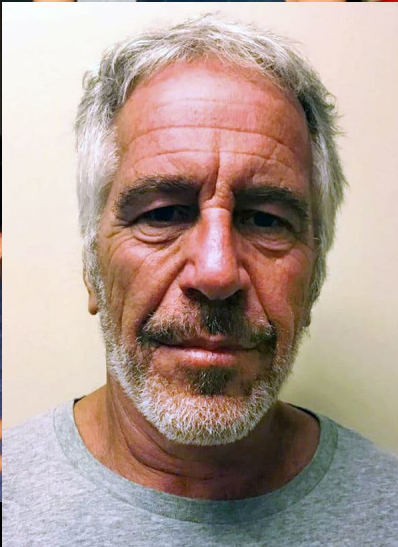
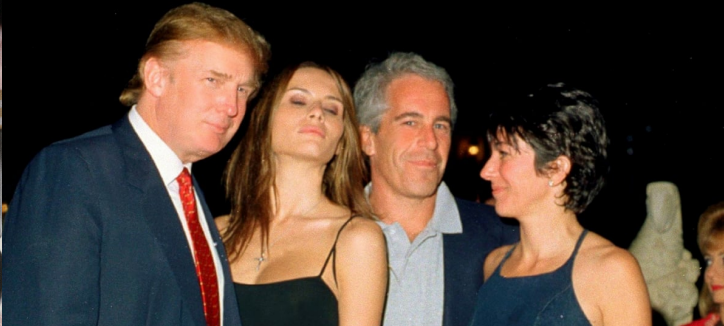
2017 – 87 women had made allegations against Weinstein by October 2017- many famous actresses

The allegations sparked the #MeToo social media campaign and many sexual abuse allegations against powerful men around the world; the "Weinstein effect"

February 2020 – convicted of 5 counts of sexual assault and rape against 2 women - sentenced to 23 years in prison

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Jeffrey Epstein - 2019 – arrested and waiting trial for sex trafficking girls as young as 14 - died in cell (suicide?)

Ghislaine Maxwell - 2021 Daughter of late media tycoon – Robert Maxwell - convicted of 5/6 recruiting and trafficking young girls to be sexually abused by Epstein

Sentence June 2022 – facing 65 yrs



Virginia Giuffre – alleged she was the victim of sex trafficking and abuse by Jeffrey Epstein and his rich associates when she was a teenager..

She was working as a locker room attendant at Donald Trump's Mar-a-Lago resort in Palm Beach, and says Ghislaine Maxwell offered her an interview for the chance to train as a massage therapist

2022 - brought a civil action against Prince Andrew –over 3 allegation of counts sexual assault when she was 17

Prince Andrew's lawyers asserted false memory  
Settled out of court



## Rape (s.1) SOA 2003 - max – life imprisonment

D penetrates the vagina, anus or mouth of C with his penis, without C's consent. The penetration is intentional, and D lacks a reasonable belief in consent.

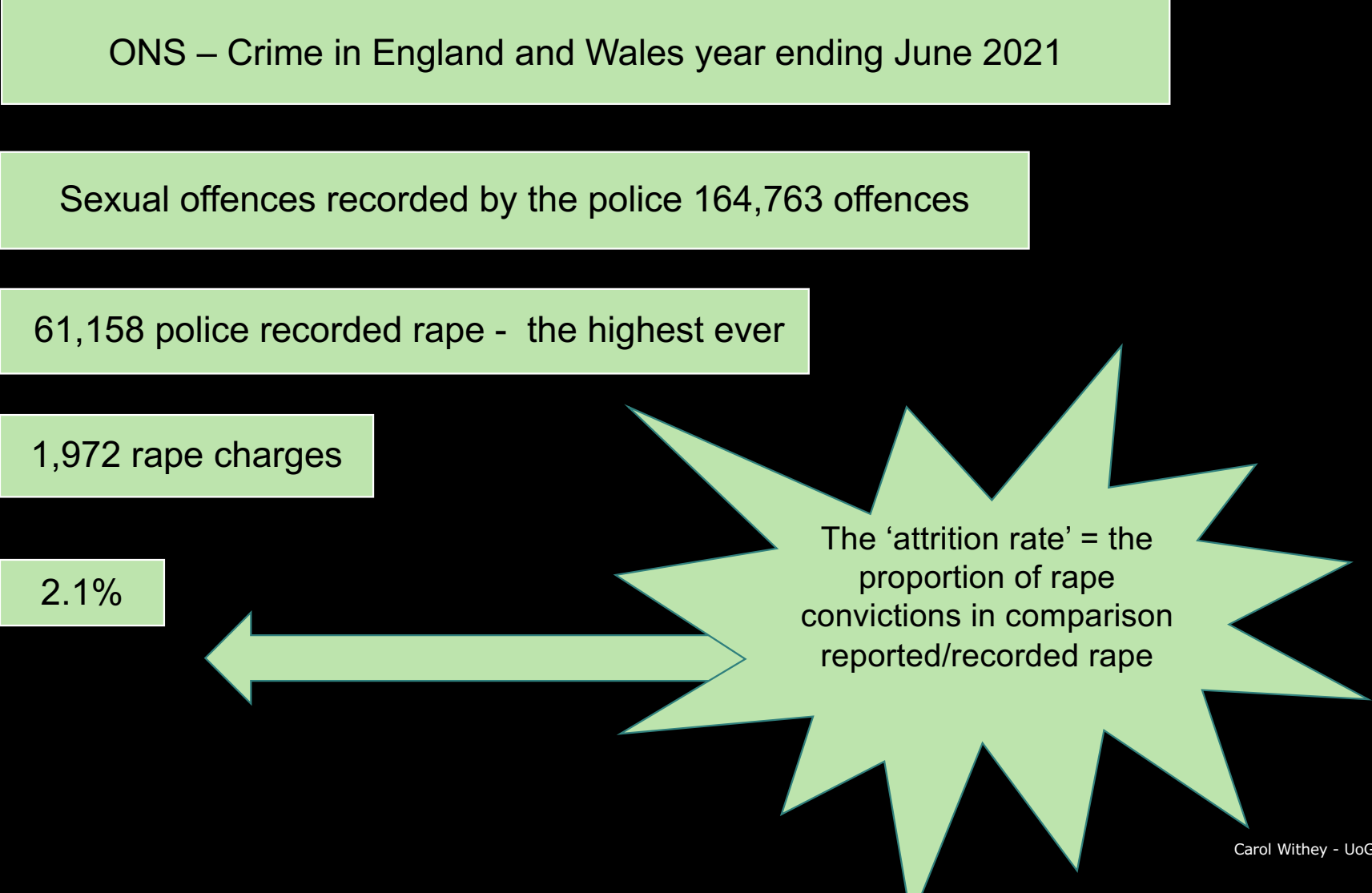
## ONS – Crime in England and Wales year ending June 2021

Sexual offences recorded by the police 164,763 offences

61,158 police recorded rape - the highest ever

1,972 rape charges

2.1%



The 'attrition rate' = the proportion of rape convictions in comparison reported/recorded rape

Which are  
rape  
myths?

Rape is  
about lust  
and sex

Rapists are  
usually  
strangers

Rape  
necessarily  
involves  
force/violence

Accepting a  
gift, like a meal  
paid for in a  
restaurant  
signals consent

Sex  
workers  
can't be  
raped

Past sexual  
relations with  
D means C  
consented

A person who  
does not fight  
back /cry has  
not been raped

A person who  
reports rape  
after delay is  
probably  
making it up

Most rape  
occurs  
outside at  
night

People who wear  
certain provocative  
clothes consent/ are to  
blame

Rapists and  
sexual offenders:  
there is a 'type'

A person who  
consents  
cannot change  
their mind

Both men and  
women can  
commit rape

Someone who flirts,  
makes the first move,  
comes on to D  
consents/is to blame

Promiscuous  
people cannot  
be raped

Saying 'no'  
often  
means  
'yes'

A person who  
does not say  
'no' has not  
been raped

## (A) Penetration

Re: penetration of the vagina, loss of virginity not required.

No requirement for ejaculation.

Slightest penetration suffices: *JF [2002]* - some penetration, however slight...  
beyond threshold of private parts.....

## (B) By the penis

Rape myth = a woman can commit rape

No, she really can't!! – a woman can commit the offence of causing a person to engage in non- consensual sexual activity – s.4 SOA 2003.

A transgender person who has had reassignment surgery can commit rape – s.79(3) refers to “surgically constructed” penis.

Rape myth = rapists are a type.

The only common feature is that all rapists have a penis (not a prosthetic one/ strap on dildo)

Rape myth – rape is about lust and sex.

Rape is predominantly about control.

## (C) Of the vagina, anus or mouth of C (SC)

### Vaginal penetration

Gender reassignment surgery to a surgically constructed vagina - C can be raped.

### Penetration of the mouth

*Gaston* [1981] this was not rape until the 2003 Act.





## Anal penetration

1994 Criminal Justice and Public Order Act amended the law to include anal rape

.....so a man can rape a man (around 12,000 recorded cases per year).

January 2020 Reynard Sinaga sentenced to 30 years for more than 150 offences, including 136 rape, committed against 48 men. Police believe he committed sexual offences against 206 men.

December 2020 the sentence was increased to a minimum of 40 years.

He is the UK's most (known) prolific rapist.

Rape myth - rapists are usually strangers  
Rape myth- most rape occurs outside at night

90% of cases are acquaintance rape.

Marital rape

*R v R* [1991] - a husband can rape his wife.

## (D) Without C's consent

Too often we talk of consent, when the offence requires a lack of consent.

It almost always occurs in private. Therefore, cases often turn on 'credibility' (who the jury believe) and to this end, cross examination can be brutal.

Section 74 SOA 2003 gives a definition of consent...

C consents if C....

*Agrees by choice, and has the freedom and capacity to make that choice"*

This question of consent is decided at the time of the relevant act ....

For rape this is at the time of the act of penile penetration in the vagina, anus of mouth of C

Therefore the following are **rape myths** because they do not relate to the act at the time

- Someone who flirts, makes the first move or comes on to D signals consent
- Someone who wears certain sexy or revealing clothing signals consent
- C had past sexual relations with D so consents on the occasion in question
- C's acceptance of a gift, like a meal paid for in a restaurant, signals consent
- Promiscuous people consent

Rape myth – C cannot change their mind...

Suppose C consents to the penetration but at a later stage withdraws consent,...

...If D continues to penetrate C without a reasonable belief that C is still consenting...

...D can be found guilty.

## *Evidence of lack of consent....*

Rape myth – C must say “no” and/or fight back

### *Malone [1998]*

- D appealed against his conviction for raping a 16-year-old drunken girl in her bedroom.
- C said she did not physically resist and did not verbally protest, as the drink had disabled her from doing either.
- D argued that C must demonstrate lack of consent by resistance, either by speech or by physical conduct.
- CA rejected this argument: but there must be some evidence of lack of consent.

Rape myth – where C does say “No” it really means “yes.”

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The issue of 'no consent' may be decided by reference to certain **statutory presumptions** .....The law expressly states that in some situations there is no consent ...

Some relate to lack of capacity

Some to the concept of choice

Some to whether there was freedom

## (A) Conclusive Presumptions (irrebuttable) – s.76(1)

There are two circumstances that give rise to a conclusive presumption.....

D intentionally deceives C as to the nature of the penetration - s.76(2)(a)

D intentionally deceives C by impersonating a person known personally to her - s.76(2)(b)

*D intentionally deceives C as to the nature or purpose of the act (of penetration)*  
*s.76(2)(a)*

Here C is unaware what sex is....

*Williams* [1923]

D choirmaster deceived C (16) into believing that sexual intercourse was an act which would improve her breathing, and therefore her singing voice.

Conviction upheld because of the deception *vitiated* consent.

*D intentionally deceives C who thinks that D's purpose is something other than sexual gratification*

E.g. C knows what sex is, but is deceived by a cult leader who says she must have sex to save her soul (and not for sexual gratification)

*D intentionally deceives C by impersonating a person known personally to them - s.76(2)(b)*

## (B) Evidential presumptions (rebuttable) – s.75(1)

Some presumptions are rebuttable with evidence to the contrary.....

s.75(2)(a) and (b) Any person at the time of the penetration or immediately before it, used violence against C or caused C to fear the immediate use of violence .....or on another

Rape myth – rape requires force/violence

All that is required by D is penetration where C does not consent ....we should stop referring to “sexual violence”

....But if there is violence/ threat of immediate violence this presumption applies...

This affects C's freedom to consent.

The presumption may be rebutted by? ....

Sado masochism.

Some countries do require violence/intimidation for rape..

This included Spain until July 2021.

The law was changed following several cases that caused public outrage where violence was not used, leading to convictions for the lesser offence of sexual abuse.

One case was the **Wolf Pack case** - 5 men were acquitted of gang-raping a teenager because C was unconscious and violence was not used.

Following public outcry – increased to rape conviction.

*\*Also see #MeToo*



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s.75(2)(c) C was unlawfully detained at the time of the penetration

*David T* [2005] - C's ex- partner kidnapped C and sexually assaulted her.

The presumption might be rebutted by?

Sado-masochism/bondage.

Stockholm Syndrome?..... = a condition in which hostages develop a psychological bond with their captors.



s.75(2)(d) C was asleep or otherwise unconscious at the time of the penetration

This affects C's capacity to consent.

*Fotheringham* [1988] – D raped babysitter who was asleep.

Many cases involve Cs who are unconscious due to alcohol.

*Garvey* [2004] *Blacklock* [2006] (both cases of digital penetration).



Jason McIntyre, was found guilty of raping a sleeping woman. He was sentenced to 5 ½ years.

Watford Evening News

Travis Gotting sexually assaulted 2 women and raped a third (one of the women was in bed with her boyfriend).



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Live.com

s.75(2) (e) Because of C's physical disability C would not have been able at the time of the penetration to communicate consent to D

We have seen that the absence of consent does not have to be verbally communicated to D; *Malone* [1998]...

..... but this presumption recognises cases where communication is not possible because of physical disability.

s.75(2)(f) Any person has administered, or caused to be taken by C without C's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling C to be stupefied or overpowered at the time of the penetration



Drugfree.org



This presumption deals with alcohol and 'date rape' drugs like GHB and Rohypnol where C has been administered a drug unknowingly, or is deceived into taking the drug / alcohol.

D must know / be aware that the substance has the said capacity.

Increasing use of needles to inject date rape drugs.

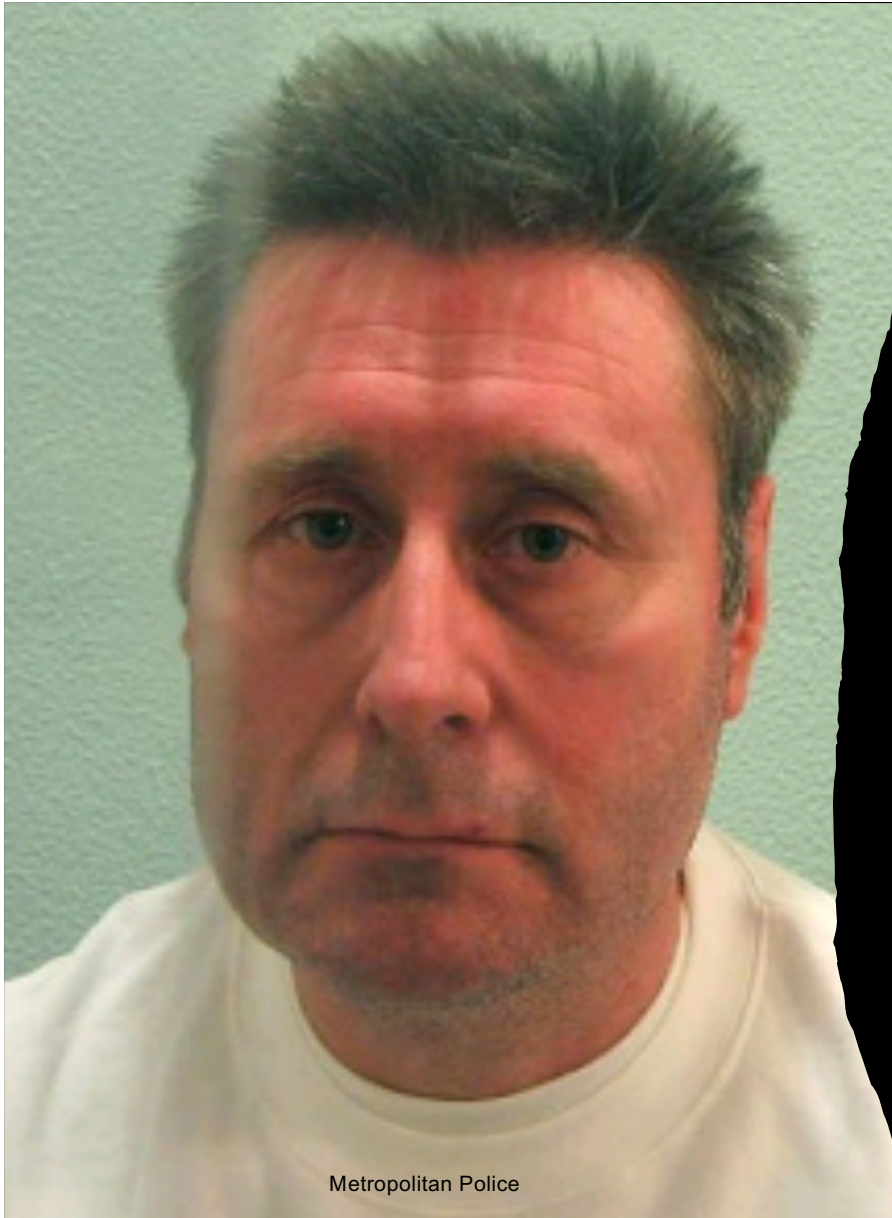
HEMERA TECHNOLOGIES VIA GETTY IMAGES  
Syringe with needle



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Monkey Business Images/Shutterstock



Metropolitan Police

### *Worboys* [2009]

D black cab driver was found guilty of 19 charges including one rape – he used date rape drugs.

In 2019 D was sentenced to two additional life sentences for attacks on 4 more women.

Police believe D committed 105 sexual offences against women.

In February 2021 D lost his appeal against the 2 additional life sentences he received in 2019.



Reynhard Sinaga used drinks laced with GHB to make his victims unconscious before he attacked them.



When the presumptions do not apply.....

Jury have to decide the issues of consent by considering the definition in as per s.74

“Agrees by choice, and has the freedom and capacity to make that choice”

Other relevant types of evidence that might point to lack of consent.....



C was drunk/drugged but not unconscious

Rape myth – drunken consent is still consent.

Here the problem is that lack of consent must be proven beyond reasonable doubt.

Where C is very inebriated and cannot recall the events for certain it leaves the issue uncertain.



### *Dougal* [2005]

- D had sexual intercourse with a student in a corridor after escorting her home from a party.
- C was so intoxicated that she could not remember if she had consented.
- The case was withdrawn from the jury and it was said that “drunken consent was still consent”.

## Bree [2007]

- D and C had both consumed large amounts of alcohol.
- C had removed her own pyjamas and had responded to a question as to whether she had a condom.
- D's conviction was quashed because C had remained capable of choosing whether or not to consent, the fact that she might have regretted her decision did not invalidate her consent.
- In other words, her drunken consent was still consent....
- However... *Dougal* was criticised....
- The capacity to consent can evaporate well before unconsciousness occurs..
- Each case should be decided on its own facts.

## *Evans (Chedwyn) [2012]*

- C had been drunk, falling over etc, before meeting E one night.
- C went with E to a hotel and had sex.
- E phoned D footballer friend and told D to come to the hotel to have sex with C.
- D did and others who were with D filmed it on a mobile.
- C awoke alone the next morning, had urinated and remembered nothing about the encounter with D.
- D was convicted.
- On appeal in 2016, sexual history evidence about C was adduced that should not have been.
- D was acquitted.

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Getty/SWNS





## Deceptions regarding use of a condom/withdrawing

### *Assange v SPA [2011]*

- When deciding if JA could be extradited to Sweden for rape allegations, it had to be decided if there was a rape committed under our law
- Held : where D tells C that sex will be protected, but then fails to use a condom, or removes or breaks it, this can mean there is no consent
- D could have committed rape and could be extradited

## Deceptions regarding ejaculation

*R (on the application of F) v DPP* [2013]

- C was in an abusive marriage with D
- C did not want another child and as she could not take contraception, they agreed D would use a condom or withdraw
- On one occasion D did not withdraw and ejaculated
- C became pregnant
- Held: C was deprived of choice – no consent

*Note- each cases decided on its facts!!!*

## Deception regarding a vasectomy

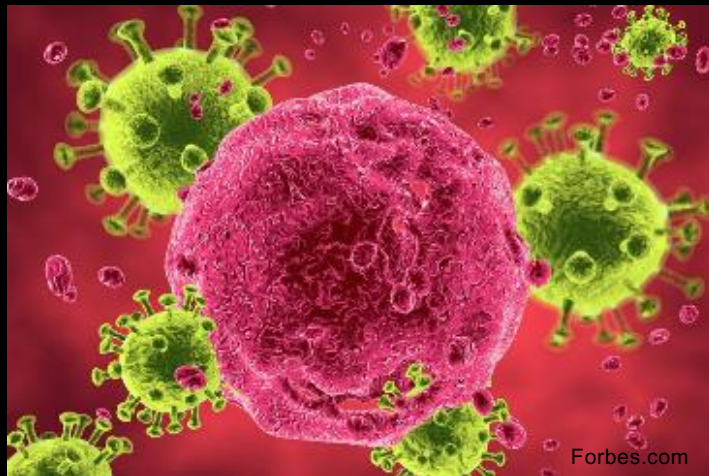
*Lawrance* [2020]

- D met C on a dating app
- D lied and told C that he had had a vasectomy
- On this basis they had sexual intercourse twice without contraception
- C discovered she was pregnant and underwent a termination
- D convicted of rape but his appeal was allowed as C had given a valid consent....
- D's deception that the ejaculate would not contain sperm was insufficiently connected to the act of penetration



## Deceptions regarding sexually transmitted infections and diseases (STI/STD)

Gonorrhea



HIV



Syphilis





*Dica* [2004]

D passed on the HIV virus to sexual partners knowing he had it

This can be GBH if D is aware he has the virus...

But....D not guilty of rape as no deception regarding the act of penetration

*B* [2006] confirmed if D fails to reveal his infected status when asked, still not rape



Getty Images

## Rowe [2018]

- D had HIV
- D infected at least 5 men and exposed 5 more to the virus
- D then taunted his victims with texts: e.g... *"I have HIV LOL"*
- D convicted of intentional GBH and attempted GBH
- D jailed for life (minimum 12 years)
- D not charged with rape

However, an active lie might now lead to rape where D knows/is aware he has the STI.....this is a very grey area...

## Deception re: job/employment

*R (on the application of Monica) (Claimant) v DPP and Boyling* [2018]

- An undercover officer lied to infiltrate political group and had sex with C
- Not rape

## Other deceptions

Deceptions as to wealth, celebrity status, religion ...do not vitiate consent

Deception as to relationship (even bigamy) do not vitiate consent , even though C may see these as fundamental in the decision to have sex.

*Zafar* [1992] - reluctant sex and regretted consent do not vitiate a consent given.....

### Submission cases

#### (a) Where C submits through fear of violence

Where C is scared (but no actual threat of violence) this may be seen as a case of 'submission'

#### *Olugboja* [1981]

- D and his friend met Cs at a disco.
- Ds drove Cs to a bungalow.
- C1 was raped in the car.
- C2 was raped in the bedroom after D1 told her to take down her trousers.
- C2 had not been threatened, but submitted through fear.
- This was submission but not consent.

*(b) Where C submits due to undue influence, power and control exerted over C, or grooming...*

Grooming?.....

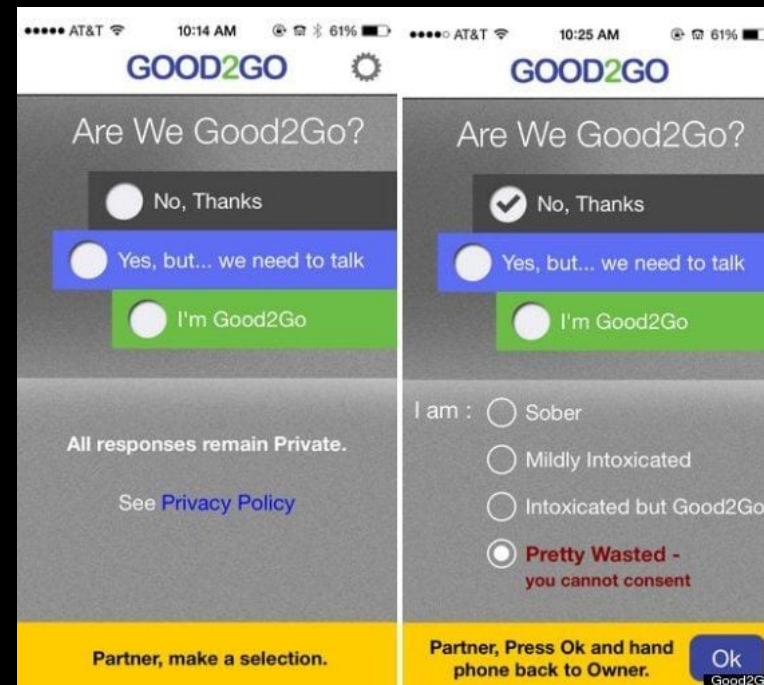
*Ali [2015]* D groomed young girls from troubled backgrounds

Held:...the level of manipulation can confuse C and exploitation is a factor that the jury can consider when assessing consent.

The nature of power imbalances will be relevant here: reference Harvey Weinstein, Jeffrey Epstein and other grooming cases/gangs.

Consent apps?

The main criticism is  
that a person can  
change their mind at  
any time...



## The guilty state of mind for rape?

Intentional penetration – s.1 (1)(a)

Sleepwalking? (Sexsomnia).

*Bilton* [2005] D was acquitted.

## D does not reasonably believe that C consented (s.1(1) c)

The previous law.....

SOA 1956 -D would be acquitted if he honestly believed C was consenting ....even if such a belief was unreasonable.

This allowed rape myths to play a part: where the jury believed D when he said that he honestly (but unreasonably) believed C consented on the basis that....

- C wore provocative or sexy clothes
- C made the first move/flirted
- C went back to D's home or D went back to C's home
- C kissed and/or cuddled D
- C had past sexual relations with D



## The 2003 Act...

Now all that is required is proof that D **lacked a reasonable belief in consent**

An unreasonable but honest belief in consent will no longer lead an acquittal if it is not also a reasonable belief.

What if D is inebriated ? Does he have the guilty state of mind?

Rape myth – a drunken or drugged man cannot commit rape because he does not have a guilty state of mind

*Grewal* [2010] if D is drunk/drugged D lacks a reasonable belief in consent....so drunken/drugged men can commit rape even if very inebriated and no memory

## Assault by penetration (s.2) - max – life imprisonment

D intentionally penetrates the vagina or anus of C with part of the body or anything else, where the penetration is sexual, and C does not consent to the penetration. D lacks a reasonable belief in consent.

Examples:

Penetrating someone's vagina with a vibrator

Penetrating someone's anus with fingers

## Deceptions regarding biological sex ( where there has been no gender reassignment surgery)

### *McNally* [2013] (assault by penetration case)

- D and C teenagers developed a sexual relationship, but D pretended to be a boy (including use of a strap-on dildo)
- C girl subsequently discovered that D was also a girl, as in no penis
- D was convicted
- On appeal, D argued that C had consented and that a deception as to having a penis could not invalidate consent
- C had chosen to have sexual encounters with a boy and her freedom to choose had been removed by D's deception
- D guilty of rape

## Sexual Assault (s.3) - max 10 years

D intentionally touches C, where the touching is sexual and where C does not consent to the touching. D lacks a reasonable belief in consent.

Both men and women can commit the offence and be the victim of an offence.

Sexual touching? It is either unambiguously sexual ( e.g. tongue on genitals)...or... a jury might think it is sexual and decide that it is sexual because of D's intention or the circumstances

Examples:

A person touches a woman's breasts in a sexual way

A woman kisses another person in a sexual way

## Causing sexual activity without consent (s.4) - max 10 years

A person intentionally causes another person to engage in sexual activity, where the other person does not consent, and the accused lacks a reasonable belief in consent.

Examples:

A woman makes a man have sex with her against his will

A man causes another man to masturbate in front of him

## Voyeurism (up-skirting) (s.67) – max – 2 years

Operating equipment or recording an image beneath a person's clothing to take a voyeuristic photograph without their consent (where the genitals, buttocks or underwear of that person would not otherwise be visible).

It is not confined to victims wearing skirts or dresses and equally applies when men or women are wearing kilts, shorts or trousers.

**\*\*Proposal for breast feeding situation too**

## Exposure – s. 66 - SOA 2003- max 2 years

D intentionally exposes his or her genitals intending C to see them to cause them alarm or distress

**Cyber-flashing-** to become an offence – max 2 year

D sends a photo or film of a person's genitals, for the purpose of their own sexual gratification or to cause C humiliation, alarm or distress



## 'Revenge Porn' (s.33 CICA 2015) – max 2 years

The official name for this offence is 'disclosing private sexual photographs and films with intent to cause distress.'

It is committed when a person intentionally discloses a private sexual photograph or film, without the consent of an individual who appears in the photograph or film, intending to cause that individual distress.

## Rough Sex

If violence during sex is not consensual it would be rape...

But what about rough sex that is consented to that goes wrong and C suffers physical harm ...Does D commit an offence against the person?

s.71(2) of the Domestic Abuse Act 2021 enacted the rule that where D causes serious harm for sexual gratification, C cannot consent to that serious harm and there will be an offence

This 'new' law simply enacted the common law judgment from *Brown* [1994]

A further question is where V dies as a result of rough sex...

- Campaign group “*We can't consent to this*”, catalogued more than 60 cases where the killers of women had used the ‘rough sex’ excuse
- Of the 30 deaths linked to “rough sex” in the last decade, 17 resulted in men being convicted of murder, 9 to manslaughter convictions and 2 ended in acquittals

December 2020- Grace Millane – New Zealand killer *Jessie Kempson* said it was rough sex gone wrong – found guilty of murder and sentenced to 17 years at least



Were the Ds who were acquitted, acquitted due to a 'rough sex' defence?

No!! They were acquitted as they did not have the guilty state of mind for murder...which is an intention to kill or cause serious harm

Could it be manslaughter?

The **DAA 2021**, introduced a new offence of **strangulation or any other act** (e.g. suffocation) that affects V's ability to breathe

V can consent to the act, unless it results in serious harm, where D intended to cause serious harm or was aware they might cause serious harm

If it then results in death, D is guilty of manslaughter

# The Law: Sexual Harassment, Sexual Offending and Related Issues

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Carol Withey - UoG -2022

#It's not okay: Sexual Violence Awareness Conference – UoG - 11<sup>th</sup> February 2022