

Queering Judgment: The Case of Gender Identity Fraud

INTRODUCTION

This article is a response to a series of recent and successful sexual offence prosecutions brought against transgender and other gender non-conforming people for gender identity fraud in the UK,¹ and specifically to Leveson LJ's judgment in the English Court of Appeal decision of *R v McNally*.² The decision is now the leading authority on sexual fraud generally, and gender identity fraud specifically, under English law. The response will take the form of an academic judgment, in this instance a dissenting or counter-judgment. The article will proceed as follows. First, it will present the facts of the *McNally* case. Second, it will provide some detail regarding the developing jurisprudence of the courts regarding sexual fraud. This will be kept to a minimum given that the counter-judgment will deal with relevant law at length. Third, it will preface the counter-judgment with an explanation of why an exercise in academic judgment-writing is valuable. In this regard, the article will draw significantly on feminist judgment-writing projects. Fourth, the article will consider a queer approach to law, and will detail some queer principles around which the counter-judgment will be organised, while at the same time highlighting tensions between queer theory and engagement with law and judgment. Finally, the article will present the counter-judgment which will suggest *McNally* was wrongly decided.

THE FACTS OF THE CASE

The complainant and defendant met online through a social networking game. At this point, McNally, who used the name 'Scott Hill,'³ was 13 and the female complainant 12. Over three years later, during which time they continued their cyber relationship, the parties met in person and on several occasions. At this stage, McNally was 17 and the complainant 16. On two of these occasions McNally digitally and orally penetrated the complainant. Subsequently, the complainant 'discovered' McNally's gender history and claimed to feel physically sick.⁴ The defendant was charged with six counts of assault by penetration,⁵ convicted and sentenced to three years detention in a young offender institution.⁶ The complainant's consent to sex was found to have been vitiated due to the defendant's 'active deception' regarding her gender identity. That is, McNally had presented as male, while the court found her to be female. In addition to her male gender performance, the court found active deception to reside in, among other things, a series of statements she made to the complainant, mainly concerned with what she wanted to do to the complainant sexually and how she imagined their future together. The court's finding of deception presupposes lack of

¹ *R v Barker* [2012] Guildford Crown Court, unrep; *R v Wilson* [2013] Edinburgh High Court, unrep; *R v McNally* [2013] EWCA Crim 1051; *R v Newland* [2015] Chester Crown Court, unrep; *R v Lee (Mason)* [2015] Lincoln Crown Court, unrep; *R v Staines* [2016] Bristol Crown Court, unrep. All defendants, except Wilson and Lee (Mason), received custodial sentences and all were placed on sex offenders registers.

² *McNally* op. cit., n 1.

³ *McNally* op. cit., n 1 at para 3.

⁴ *McNally* op. cit., n 1 at para 10.

⁵ s. 2 Sexual Offences Act 2003.

⁶ On appeal, the sentence was reduced to 9 months suspended for 2 years (*McNally* op. cit., n 1 para 2).

knowledge on the part of the complainant regarding the defendant's gender history. This finding that the complainant believed the defendant to be a cisgender man, proved possible despite the parties spending considerable time together and engaging in penetrative sex on multiple occasions, and despite the fact that the defendant has breasts, a voice within the female range, and has not benefited from the masculinising effects of male hormones. It is curious that the Crown Prosecution Service, the trial judge and the Court of Appeal all appeared to accept so readily a claim so apparently antithetical to common sense. These issues, and the Court of Appeal's interpretation of the facts, will be considered in detail in the counter-judgment.

The parties in *McNally* might be described as a cisgender⁷ female complainant and a transgender man respectively. However, there is uncertainty regarding the precise nature of the defendant's gender identity, a fact that served to undermine the efforts of McNally's counsel before the Court of Appeal. Whether Justine McNally is transgender is perhaps a moot point. She is certainly a gender non-conforming person. However, there was evidence to suggest that she believed herself to be a transgender man at the time of sexual intimacy with the complainant, albeit she asserted a female gender identity at the time of plea and subsequent appeal. It is because of this latter fact that female pronouns will be used throughout this article. Nevertheless, the authenticity of McNally's assertion of a male gender identity, prior to and at the time of sexual intimacy between the parties, goes to the heart of the case because it is at this time, and not subsequently, when criminal liability arises

SEXUAL FRAUD LAW

Since the enactment of the Sexual Offences Act 2003, which, informed by feminist advocacy and the *Setting the Boundaries Report*, placed greater emphasis on the complainant's right to sexual autonomy⁸ we have witnessed an expansion of the law pertaining to sexual fraud. While this might be viewed as consistent with the aim of achieving substantive equality for cisgender women, it appears to have had the opposite effect for transgender and other gender non-conforming defendants. Prior to this legislation, prosecutions for sexual fraud were essentially limited to two particular types of circumstance, ones long-recognised at common law, namely *fraud in the factum* and *fraud in the inducement*. The former refers to scenarios where the fraud went to the sexual act itself and appears to have been confined to a handful of cases involving naive young women who were apparently unaware they were engaging in sexual intercourse due to some false representation made by the defendant⁹ or who had been deceived into believing it was a medical procedure.¹⁰ The latter referred to the scenar-

⁷ The complainant is also *cissexual*, that is, a person 'who ha[s] only ever experienced their subconscious and physical sexes as being aligned' (J. Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (2007) 33). The related term *cisgender* refers to those cissexual people who are comfortable with gender expectations that are socially constructed to follow from the fact of cissexuality. Some cissexual people, for example, queer identified people, do not identify as cisgender, and it is cisgender, rather than cissexual, complainant status that is likely to be the better indicator of whether a gender identity fraud complaint will be made.

⁸ Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, vol 1 (2000) para 2.10.2.

⁹ *R v Williams* [1923] 1 KB 340.

¹⁰ *R v Case* (1850) 4 Cox CC 220; *R v Flattery* [1877] 2 QBD 410.

io where a male defendant had sex with a woman through deceiving her into believing he was her husband.¹¹

Prior to 2003, these categories exhausted the possibility of prosecuting sexual offences on the basis of fraud. Beyond these categories, fraud was considered consistent with consent, a matter going only to surrounding circumstances or to an attribute of the defendant.¹² The legislation placed both these types of fraud on a statutory footing as conclusive presumptions. Fraud in the factum was expanded to include fraud as to the ‘purpose’ as well as the ‘nature’ of the sexual act,¹³ and fraud in the inducement became uncoupled from its prior gendered and marital restrictions.¹⁴ However, and despite some academic emphasis on the wider scope for criminalisation offered by s. 76(2)(a),¹⁵ the courts have generally¹⁶ avoided relying on provisions which remove a defence of reasonable belief, preferring instead to expand the law through the general consent provision found in s. 74.¹⁷

In expanding liability under s. 74, the courts have, through a series of cases, established a distinction between non-disclosure of information and active deception.¹⁸ Thus, in addition to a normative finding that fraud relates to a ‘material’ fact, for the courts have long viewed numerous deceptions to be too trivial to vitiate consent,¹⁹ it would appear that ‘a certain degree of knowledge or intentionality has been injected into s. 74.’²⁰ In *McNally*, the Court of Appeal found deception as to gender identity to be deception as to a ‘material’ fact and located *McNally* on the active side of the act/omission distinction. In relation to mens rea, it was established that, in addition to being actively deceptive, *McNally* lacked a reasonable belief in consent.²¹ These findings will be addressed in the counter-judgment, as will the court’s choice not to distinguish the *McNally* facts from those of existing authorities.

THE VALUE OF COUNTER-JUDGMENT WRITING

While the judgment to be offered is more properly described as queer, and while its aim is to queer or trouble *R v McNally*, it shares much with the approach taken by feminist legal scholars who have attempted to imagine, and express in judgment form, what a judgment might look like if it were animated by a desire to achieve substantive

¹¹ *Advocate v Montgomery*, (Scot.) [1926] *Justiciary Cas.* 2; *R v Elbekaay* [1995] *Crim LR* 163 (CA). This category of sexual fraud was put on statutory footing by s. 1(2) of the Sexual Offences Act 1956.

¹² *R v Richardson* [1998] 2 *Cr App* 200.

¹³ s. 76(2)(a) Sexual Offences Act 2003.

¹⁴ s. 76(2)(b) Sexual Offences Act 2003. This provision requires ‘impersonation’ of ‘a person known personally to the complainant.’ None of the cases to have been decided by the courts since the Act fit this situation, and certainly not in relation to gender identity fraud.

¹⁵ J. Herring, ‘Mistaken Sex’ [2005] *Crim. L.R.* 511; J. Herring, ‘Human Rights and Rape: A Reply to Hyman Gross’ [2007] *Crim. L.R.* 228.

¹⁶ A notable exception to this trend is *R v Devonald* [2008] *EWCA Crim* 527.

¹⁷ s. 74 defines consent as ‘agreement by choice where a person has the freedom and capacity to make that choice.’

¹⁸ *R v EB* [2006] *EWCA Crim* 2945; *Assange v Swedish Prosecution Authority* [2011] *EWHC* 2849 (Admin); *R (on the application of F) v DPP* [2013] *EWHC* 945 (Admin); *McNally* *op. cit.*, n 1.

¹⁹ The courts have taken the view that some deceptions do not vitiate consent as a matter of ‘common sense’ (*R (on the application of F)* *op. cit.*, n 18 per Judge CJ at para 26). Thus, in *McNally* *op. cit.*, n 1, Leveson LJ noted that deceptions as to wealth do not invalidate consent (para 25).

²⁰ K. Laird, ‘Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003’ (2014) 7 *Crim. L.R.* 492-510, 505.

²¹ s. 2(1)(d) Sexual Offences Act 2003.

equality, overcome gender bias, privilege context over abstraction, avoid (at least non-strategic kinds of) essentialism and further other feminist principles.²² In a similar fashion, the counter-judgment to be offered, a kind of queer missing voice, will constitute an act of ethical reimagination, one that aims to centre-stage the experiences and perspectives of gender non-conforming people, accommodate their differences and address their historical disadvantage. As Erika Rackley has put it, such judgments aim to ‘challenge the majority’s story and weaken its hold on our collective imagination.’²³

Writing a queer or feminist judgment, or indeed a judgment informed by some other set of alternative ethical principles, involves the writer in ‘a kind of hybrid form of critique and law reform project.’²⁴ As Rosemary Hunter observes, engaging in such a task is ‘not done simply as an academic exercise or for an academic audience.’²⁵ Rather, the aim is to have the counter-judgment ‘taken seriously,’ to influence activists, lawyers and judges, and therefore, if indirectly, ‘to change the law or at least to contribute to its development.’²⁶ More specifically, the aim is to demonstrate that, at the time a case was decided, it could, and should, have been decided differently.

Of course, in adopting legal judgment-writing as a particular form of praxis, legal form or legal method go essentially unchallenged.²⁷ From feminist or queer perspectives this obviously raises some difficulties, ones which I will address below. However, for present purposes, it is important to emphasise that in order for counter-judgment to be taken seriously and therefore have legal and political purchase, external critique must be circumscribed. While weaving external critique into counter-judgment is essential if the exercise is not to become pointless, the degree and extent to which this can be done must be limited by fidelity to precedent, to judicial custom and to the practices of judges in the English appellate courts.

Thus, the re-writing of *R v McNally* will be a constrained exercise. That is, the counter-judgment offered will be one that might actually have been written while remaining faithful to existing legal principles, including the need not to go beyond the issues actually raised in the case.²⁸ It will stretch legal principle, but only within the confines of its own elasticity. In this respect, counter-judgment ‘remind[s] us that law is a process of decisions, actions, choices, relationships and values, and not simply a set of abstract or hypostatised doctrines.’²⁹ In the present instance, it opens up new possibilities for queer advocacy and intervention. It promises to write gender non-conforming people into law as intelligible subjects.

²² R. Hunter, ‘An Account of Feminist Judging’ in R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist Judgments: From Theory to Practice* (2010) Chp 2.

²³ E. Rackley, ‘The Art and Craft of Writing Judgments: Notes on the Feminist Judgments Project’ in *Feminist Judgments* op. cit., n 27, Chp 3, p. 33.

²⁴ R. Hunter, ‘The Power of Feminist Judgments?’ (2012) 20 *Fem. L.S.* 135-148, 137.

²⁵ *id.*

²⁶ *id.*

²⁷ R. Hunter, C. McGlynn and E. Rackley, ‘Introduction’ in *Feminist Judgments* op. cit., n 22, pp. 5-6.

²⁸ A. Paterson, *The Law Lords* (1982) p. 127.

²⁹ M. Davies, ‘Feminism and the Idea of Law’ (2011) 1 *feminists@law* 1, 6.

Another benefit that judgment-writing offers ‘lies in the discipline of putting one’s theoretical insights into judgment form.’³⁰ This not only serves to convey the practicality of theoretical arguments, it also ‘works to validate and give authority to the arguments deployed in reaching the alternative decision.’³¹ As Erika Rackley notes, an academic argument may be seen ‘as stronger, or more persuasive, *for being presented in judgment form.*’³² This is because a legal judgment ‘must, without exception, not only come to a conclusion but also in the process leave “no room for doubt, and no room for argument, about what has been decided and why.”’³³ Of course, this ‘definitive moment’ is confined to an immediate set of facts. It remains subject to possible appeals and the revisiting of the relevant legal issues by appellate courts in the future.

Moreover, and importantly, in order to be properly effective, a judgment should be ‘a combination of judicial rhetoric and persuasion which ensures that the reader arrives at the same conclusion as the judge.’³⁴ Judicial rhetoric, narrative style and tone are important as techniques of persuasion, as means of establishing affective relations between judge and reader. They are matters to which the counter-judgment will pay attention. Judges clearly have different writing styles ranging from the technical to lucid prose. It is important however, especially when writing with the marginal in mind, to write in a style that draws on the reader’s sense of pathos and empathy, that is, in a style that strikes an emotional chord. As Benjamin Cardozo recognised long ago, a judgment ‘need[s] persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness of proverb and the maxim. Neglect these allies, and it may never win its way.’³⁵ Whether judges always recognise the significance of these features, one or more of them are often present, demonstrating the importance of, amongst other things, the relationship between cultural imagery and judicial rule choice.³⁶ They can be deployed in ways which either further or hinder progressive social change.

Returning to the theme of fidelity to the law, it is noted that judicial judgment-writing often, and increasingly, draws on context and extraneous material. This might appear to conflict with the earlier observation that appellate courts should confine themselves to matters raised by the parties at trial or before them on appeal, and should not consider matters upon which the parties have not had an opportunity to comment.³⁷ However, a judge can introduce material of her own motion. To do so, she must rely on the doctrine of ‘judicial notice.’ This doctrine permits judges to have regard to ‘matters which are so notorious, or clearly established, or susceptible to demonstration by reference to a readily obtainable and authoritative source, that evidence of their existence is unnecessary.’³⁸ Judicial notice may also be taken of principles of international law and courts are bound to have regard to European human rights law. Moreover, ‘it is

³⁰ E. Rackley, ‘Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales’ (2012) 24(2) *Can. J. Women & L.* 389-413, 397.

³¹ *id.* p. 398.

³² *id.*

³³ *id.* Rackley quotes from Baroness Hale’s judgment in *OBG Ltd v Allan, Douglas v Hello! Ltd (No. 3), Mainstream Properties Ltd v Young and others* [2007] UKHL 21 at para 303.

³⁴ *id.* p. 400.

³⁵ A. Rodger, ‘The Form and Language of Judicial Opinions’ (2002) 118 *LQR* 226, 240.

³⁶ D. Kennedy, *A Critique of Adjudication: Fin de Siecle* (1997) p. 405.

³⁷ Hunter *op. cit.*, n 22, p. 39.

³⁸ Archbold, *Criminal Pleading Evidence and Practice* (2010) principle 10-71.

also permissible for a judge to make inquiries and consult sources “to which it is proper to ... refer.”³⁹ It is unclear how wide such an ambit might be, though it certainly appears to cover ‘sources which are publicly available, reasonably widely known, and unlikely to be the subject of serious dispute.’⁴⁰ Accordingly, it would, for example, be appropriate for a judge to refer to well-documented patterns of discrimination and violence experienced by transgender and other gender non-conforming people⁴¹ and to exceptionally high rates of suicide within transgender communities.⁴²

Finally, judgment-writing responds, in one particular way, to the criticism that feminist, queer and other critical legal scholars are removed from the struggles of marginalised communities, and to the charge, or at least the perception, of irrelevance.⁴³ Of course, in taking up judgment-writing as a form of resistance to heteronormativity and cishnormativity,⁴⁴ it is not pretended that the authority acquired in doing so is that of an appellate court judge. Obviously, academic judgment-writing does not operate in the same ‘field of pain and death’⁴⁵ as that of the judiciary. Its power therefore ‘lies not in its manifestation of authority,’⁴⁶ but in its demonstration of the contingency in the way that judges arrive at judgment and in ‘the degree to which the [academic] judge is able to push the boundaries of legal convention.’⁴⁷ Ultimately however, value lies in offering a more ethically palatable solution to the controversy at hand and emphasising not only the fact that a case could have been decided differently, but that it ought to have been decided differently.

A QUEER APPROACH

In approaching legal judgment-writing from a queer theory perspective it is necessary to confront the charge that such an endeavour, as an engagement with law, is distinctly unqueer. As Fineman et al note, queer legal theory is ‘something of a paradox given the tension between “queer” and “legal.”’⁴⁸ This is a matter I will turn to shortly. First, however, it is important to outline the approach to be taken. A queer approach assumes that judgment-writing is guided by what might be described as an important set of queer principles. These include, challenging dominant and binary understandings of the categories of sex, gender and sexuality, deconstructing ideas of normalcy and deviance, defending desire,⁴⁹ and placing at the centre of analysis and critique,

³⁹ Hunter op. cit., n 22, p. 39. She quotes from Lord Sumner’s judgment in *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 (HL) para 212.

⁴⁰ *id.*

⁴¹ S. Whittle, L. Turner and M. Al-Alami, *The Equalities Review: Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality & Discrimination* (2007).

⁴² K. Clements-Nolle, R. Marx and M. Katz, ‘Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization’ (2006) 51(3) *J. Homosex.* 53-69. The counter judgment will not rely on a discrimination argument as one was not put before the court.

⁴³ Rackley op. cit., n 30, p. 401.

⁴⁴ *Heteronormativity* assumes heterosexuality to be the normal or preferred sexuality through which society ought to be organised, and in the absence of clarity, the default sexuality. *Cishnormativity* operates in a similar fashion, assuming people to experience harmony between their gender identity and their anatomy, and privileging those who do (Serano op. cit., n 7).

⁴⁵ R. Cover, ‘Violence and the Word’ (1986) 95 *Yale L.J.* 1601.

⁴⁶ Rackley op. cit., n 30, p. 408.

⁴⁷ M. Davies, ‘The Law Becomes Us: Rediscovering Judgment’ (2012) 20 *Fem. L.S.* 167-181, 175.

⁴⁸ M.A. Fineman and A.P. Romero, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) p. 190.

⁴⁹ F. Valdes, ‘Afterward & Prologue: Queer Legal Theory’ (1995) 83 *Cal. L. Review* 344, 368-370.

those located at the sexual and gender margins. The queer approach is indebted to postmodern philosophical approaches to notions of power, knowledge and the subject, and especially the writings of Michel Foucault,⁵⁰ as well as to sociological theories that also foreground social constructionism in accounting for identity categories.⁵¹ It deploys these various theories, and insights that might be derived from them, specifically on the terrain of gender and sexuality.

In terms of an explicitly queer theoretical approach, it can perhaps be dated to the writings of Judith Butler⁵² and Eve Sedgwick,⁵³ though a queer corpus has expanded considerably since.⁵⁴ The approach has also been taken up within legal scholarship.⁵⁵ A queer approach is of particular value in the present instance, because the counter-judgment to be written is one that must deal with a set of facts where questions of sex, gender and sexual identity lie at the heart of any legal resolution. That is, Justine McNally's personal story crosses sexual and gender lines. It does so in the sense that she 'performed' straight masculinity.

However, we need to be careful here. First, it must be acknowledged that, while queer theory and trans theory overlap significantly,⁵⁶ and while one can be both transgender and queer, there are tensions existing across this theoretical and political divide. In particular, there has been resistance to queer theory's emphasis on gender 'performance' and its frequent failure to take the materiality of the body, seriously. Thus, Jay Prosser, has argued that queer theory '[elides] the experience of "trans" embodiment,⁵⁷ the way in which "[t]he body is crucially and materially formative of the self.'⁵⁸ This problem is perhaps especially troublesome given that queer has tended to take trans to be emblematic of its theoretical position. As Prosser has put it, in his critique of Judith Butler's *Gender Trouble*,⁵⁹ trans has been presented 'as the concrete example' of the 'performativity of gender.'⁶⁰

However, my focus in re-writing *McNally* remains queer for two related reasons. First, not all of the gender non-conforming defendants in the gender identity fraud cases identify as transgender and, in the case of Justine McNally, as already noted, she later countermanded her earlier male gender identification. It should also be noted that in relation to those who do, none had commenced hormones or undertaken any somatic changes prior to the time of the alleged offences. Second, and, more importantly, especially in the context of criminal prosecution and sanction, it is desirable to approach judgment in a way which does not diminish or render inauthentic the ex-

⁵⁰ M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (1980) p. 81; See also M. Foucault, *The History of Sexuality Vol 1: An Introduction* (1981).

⁵¹ P.L. Berger and T. Luckmann, *The Social Construction of Reality* (1966).

⁵² J. Butler, *J. Gender Trouble: Feminism and the Subversion of Identity* (1990); J. Butler, *Bodies That Matter: On the Discursive Limits of Sex* (1993).

⁵³ E. Sedgwick, *The Epistemology of the Closet* (1990).

⁵⁴ For example, J. Halberstam, *Female Masculinity* (1998); M. Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (2000).

⁵⁵ R. Robson, *Lesbian Outlaw: Survival Under the Rule of Law* (1992); C.F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (1995); A. Zanghellini, 'Queer, Antinormativity, Counter-Normativity and Abjection' (2009) 18(1) Griffith L.R. 1-16; Fineman and Romero op. cit., n 48.

⁵⁶ K. Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us* (1994).

⁵⁷ J. Prosser, *Second Skins: The Body Narratives of Transsexuality* (1998) p. 6.

⁵⁸ *id* p. 65.

⁵⁹ Butler op. cit., n 52.

⁶⁰ Prosser op. cit., n 57, p. 28.

periences of gender non-conforming people, irrespective of whether they identify as transgender or not.

In thinking of gender as *performative* in the Butlerian sense, that is, as ‘a reiteration of a norm or a set of norms’ which conceal ‘the conventions of which it is a repetition,’⁶¹ the notion of a deceptive performance immediately becomes problematic. After all, how can there be fraud if represented gender has no ontological referent? However, while we *all* perform gender, some performances are more likely to be read as artificial or as drag in contradistinction to the ‘natural’ genders of others, for whom they act as mirror or ontological prop. This is, of course, given dominant ideologies of heteronormativity and cisnormativity, more likely for those who perform their genders at odds with birth-designated scripts. This issue is important because a claim of gender deception goes to the heart of the prosecution case and tends to reinforce the notion that while gender movement can be legally recognised (at least in the case of some transgender people),⁶² gender ‘authenticity’ depends on, if not total stasis, then a one-off relocation within a binary gender system. This raises difficulties for many of the defendants in the gender identity fraud cases prosecuted. In relation to *McNally*, any attempt to overcome a hegemonic reading of gender, and therefore gender deception, becomes immediately complicated by the fact that Justine, having initially identified as male, subsequently asserted a female gender identity from the time of plea. In writing a counter-judgment, I will, though constrained by the nature of the judicial exercise, attempt to render legible the complexity, variance and fluidity of this category we call gender identity.

I now turn to addressing the concerns of those who would refuse a queer/law nexus. In trying to stage an encounter between queer and law, and perhaps especially so in the context of legal judgment-writing where, as already noted, one necessarily proceeds into the fray with one hand tied behind one’s back, such are the demands of the legal exercise, it is understandable that some queer, feminist and other critical legal scholars might adopt a position of scepticism. Nor is such scepticism an idle affair. The danger that law will reproduce, and thereby entrench, the very problem to which queer theory is now offered as partial solution, or at least strategic intervention, is acknowledged. It is, of course, a danger emphasised long ago by Carol Smart in the context of feminist engagements with law.⁶³ As she put it, law cannot ‘provide the solution to the oppression that it celebrates and sustains.’⁶⁴ Certainly, an encounter with law is always a risk or wager. This is true both in the sense of adverse instrumental outcomes and in terms of law’s representation of those at the sexual and gender margins. Ultimately, for Smart, law’s power to construct ‘truth’ and the consequent power-effects of its ‘truth’ claims, make law a risk not worth taking.

This suspicion of law is one many queer legal scholars share. Yet, as Zanghellini argues, queer legal theoretical scholarship must transcend a preoccupation with the ‘conceptual’ at the expense of the ‘normative’ in mapping out jurisprudential space.⁶⁵

⁶¹ Butler (1993) op. cit., n 52, p. 12.

⁶² The Gender Recognition Act 2004 makes provision for legal recognition of gender identity subject to particular medico-legal conditions. These include a diagnosis of ‘gender dysphoria’; a period of living in gender role; and a stated intention to live in the acquired gender until death (s. 2(1)).

⁶³ C. Smart, *Feminism and the Power of Law* (1989).

⁶⁴ *id* p. 49.

⁶⁵ Zanghellini op. cit., n 55.

As he explains, while counter-normativity, ‘the repudiation of dominant norms,’ is important, it should not succumb to antinormativity, which would commit us to a ‘renunciation of prescriptive projects.’⁶⁶ Rather, ‘the primary motor of queer incursions into conceptual jurisprudential ground ... must be political in nature - in the sense of its connection with a concern for justice for sex and gender outsiders.’⁶⁷ While some might view such an approach to be anything but queer, it remains a truism to say that it is ‘the normative commitments from which they proceed’ that make queer critiques ‘ultimately worthwhile.’⁶⁸

Thus, while it is important to chart disciplinary power and its normalising effects, it is equally, if not more, important to recognise how they ‘constrain personal autonomy’⁶⁹ and counter diversity. Moreover, and importantly, despite queer’s anti-humanist rhetoric, one tends to find, as Zanghellini contends, ‘a general commitment to liberal humanist values ... such as ideas of respect, value pluralism and personal autonomy.’⁷⁰ Thus, while queer, influenced by poststructural thought as it is, conceives of the concepts of power, epistemology and ontology and their interrelationship, differently than liberalism, broader values of tolerance, pluralism and respect for agency (a queer and feminist version of liberal autonomy), belie some common and worthwhile ground. Moreover, as Sandland notes, deconstruction and law reform are not mutually exclusive, that is, the latter might be accomplished by the former.⁷¹ Ultimately, ‘[t]he question of whether some forms of resistance are more effective than others is a matter of social and historical investigation and not of a priori theoretical pronouncement.’⁷²

What we must do however, in approaching law from a queer perspective, is ‘be prepared to consider our evaluative and prescriptive analysis potentially provisional and always capable of being revised or superseded.’⁷³ While judgment-writing requires finality, at least in relation to present facts, subject to appeal, it is important to construct a judgment, to the maximum extent possible, in such a way that sexual and gender futures are not foreclosed. I do not pretend this to be an easy task. And, no doubt, any attempt at judgment-writing will fall short of this ideal. Ultimately, while justice is a concept which is perhaps unattainable in any pure sense, we ought nevertheless to move toward it, towards its horizon. Moreover, if queer (or feminism) renunciate judgment, then the space of judgment will continue to be monopolised by the judiciary and therefore is likely to be animated by hegemonic discourses. The judgment that follows will attempt to write into legal existence transgender and other gender non-conforming people in a manner that qualifies their knowledge and experience as legitimate.

⁶⁶ *id* p. 1.

⁶⁷ *id* p. 4.

⁶⁸ *id* p. 6.

⁶⁹ *id*.

⁷⁰ *id* p. 8. See also S. Seidman, *Difference Troubles: Queering Social Theory and Sexual Politics* (1997) p. 157; C.A. Ball, ‘Sexual Ethics and Postmodernism in Gay Rights Philosophy’ (2002) 80 N. Carolina L. Rev. 371, 457-458.

⁷¹ R. Sandland, ‘Between “Truth” and “Difference”’: Poststructuralism, Law and the Power of Feminism’ (1995) 3 Fem. L.S. 3-47, 28.

⁷² J. Sawicki, *Disciplining Foucault: Feminism, Power and the Body* (1991) p. 26.

⁷³ Zanghellini op. cit., n 55, p. 11.

A DISSENTING JUDGMENT

[COURT OF APPEAL]

REGINA V McNALLY

2013 June 27

SHARPE J.

Introduction

1. I have had the benefit of reading in draft the judgment of Leveson LJ. However, I reach an entirely different conclusion based on my reading of the facts. As Oscar Wilde observed, ‘[t]he truth is rarely pure and never simple’ (*The Importance of Being Earnest*, Act I). This certainly seems to be true in this case, in which young love appears to have gone awry.

2. On the 4 December 2012, the defendant was convicted of six counts of assault by penetration contrary to s. 2 of the Sexual Offences Act 2003, and on 21 March 2013, was sentenced to three years in a young offender institution. In relation to sentence, Leveson LJ recommends reducing the sentence to a term of 9 months, suspended for two years, together with a suspended sentence supervision order. While sentence reduction is, in my view, to be welcomed, I do not intend otherwise to address the question of sentence because I consider the conviction to be unsafe for reasons I shall detail.

3. It appears from the evidence that the complainant was significantly and detrimentally affected by discovering that the object of her affections, whom she apparently believed to be a boy, was in fact a girl. It was precisely this discrepancy, and the ‘deception’ implicit therein, that led the trial judge, His Honour Judge Patrick, to consider that the elements of the offence were made out. In his judgment, Leveson LJ rightly pointed out that if, on any version of the facts, the elements of the offence were not made out, the appellant’s conviction would undeniably be unsafe and would fall to be quashed even though she had pleaded guilty (see *R v McReady and Hurd* [1978] 1 WLR 1376). I state from the outset that I am not satisfied the Crown discharged this burden on the basis of the facts presented. My concerns relate both to the actus reus and mens rea elements of the offences prosecuted, though I shall base my conclusions on a failure to establish the latter under current law.

4. It is important also to emphasise the vulnerability and marginality of the appellant as a gender non-conforming person, considerations which, in my view, received insufficient attention before the trial judge and Leveson LJ in their treatment of the issues. In particular, there appear to be considerable dangers associated with ‘coming out’ as transgender in our society. These include high rates of violence, discrimination and suicide (see Whittle, S, et al, *The Equalities Review: Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality & Discrimination*, 2007). I do not draw my conclusions on the basis of these observations, though they do provide some colour and context to the general approach I adopt.

The facts of the case

5. The facts of the case are detailed by Leveson LJ and can be summarised here, though whether they are ‘undeniably unusual,’ as he contends, is perhaps more properly an empirical question. In this respect, I note only that dating, and other forms of social interaction, are increasingly occurring through the internet, and that this is perhaps especially true for young people. Another difficulty with viewing the facts as ‘unusual’ is that it presumes young people struggling with gender identity to be few in number and secrecy or reticence concerning disclosure of their birth-designated gender to be unjustifiable. It appears to me that the first presumption has, in recent years, been shown to be demonstrably false. Indeed, a study by the Gender Identity Research and Education Society has put the UK transgender population at 300,000 (B. Reed et al, *Gender Variance in the UK: Prevalence, Incidence, Growth and Geographic Distribution*, 2009, p. 13). In relation to the second presumption, it is important to reiterate the serious problem of prejudice faced by transgender and other gender non-conforming people in our society, a problem, sadly, that only a cursory acquaintance with our daily newspapers attests.

6. Turning to the facts, the appellant, who lives in Scotland, met the complainant, who lives in London, on the internet through the social networking game, ‘Habbo.’ She used the male name ‘Scott’ for the purposes of her online presence. At the time of first meeting, the appellant was aged 13 years, while the complainant was a year younger, aged 12-13 (there appears to be uncertainty on this point). In using female pronouns in referring to the appellant, I am simply respecting her assertion of a female gender identity at the time of plea and subsequently. For reasons I will make clear however, this does not serve to preclude the alternative legal conclusion that I have arrived at regarding the claim of deception.

7. The internet relationship developed over the following three and half years with the parties considering themselves boyfriend and girlfriend. They communicated, mainly by the online messenger service, MSN, and spoke of getting married and having children. They also communicated by mobile phone and the complainant saw the appellant as ‘Scott’ on a web cam. As the couple moved further into adolescence, their interest in one another became increasingly sexual and they settled on an exclusive romantic relationship. They engaged in phone sex and spoke of what they wanted to do to each other sexually. Shortly after the complainant’s 16th birthday in March 2011 the parties met in London at the complainant’s home. The appellant, who by this time was aged 17 years, presented as a boy. Under her trousers, she wore a penile prosthesis. In the months that followed, the appellant visited the complainant on four subsequent occasions.

8. On the second visit, they watched a movie together and they kissed. They then went to the complainant’s bedroom. In the dark, the appellant rubbed the complainant’s vagina with her fingers and performed cunnilingus. The complainant then went to get condoms which she purchased for the purpose of sexual intercourse. The appellant remained dressed and refused the complainant’s offer to perform fellatio. On the third visit the appellant orally and digitally penetrated the complainant on multiple occasions. On the fourth visit the parties spoke about having sex but did not do so, partly because they were experiencing some relationship difficulties. On the final visit in November 2011, the complainant’s mother confronted the appellant and insisted ‘Scott’ was really a girl. At this point, according to her own evidence, the complainant felt devastated and physically sick after having being ‘lied’ to for four years. At this stage, the appellant spoke of a desire to undergo gender reassignment surgery. This

latter piece of evidence was, in my view, not given proper regard or weight in considering the broader issues.

9. After this final visit the relationship ended, though there was some limited communication between the parties thereafter. The complainant's mother made a complaint to the appellant's school and the police became involved after she admitted to her head teacher that sexual acts had taken place. On 30 November 2011, the complainant made a full statement to the police detailing the alleged offences. While some of her answers were perhaps equivocal, the substance of her statement was essentially that she viewed herself as heterosexual, and had only consented to sexual acts with 'Scott' because she believed the appellant to be a boy.

10. For her part, the appellant offered the following account to the police by way of a prepared statement. She met the complainant through the internet using the avatar 'Scott.' She claims to have done so because she felt more comfortable presenting as male. She also claimed that as early as December 2009, the complainant discovered or at least suspected that she had been designated female at birth, and that this led to an argument. According to the appellant they started speaking to each other again after this point and the relationship continued. In his judgment, Leveson LJ expressed the view that the claim that the complainant knew or had suspicions regarding the appellant's birth-designated gender was inconsistent with the evidence presented.

11. He did so, not because of its later retraction and the appellant's subsequent guilty plea, but because he appears to have interpreted two pieces of evidence as pointing to only one conclusion. Thus he expressed the view that the appellant's claim regarding complainant knowledge or suspicion was incompatible with the alleged argument, and with the complainant's subsequent purchase of condoms at the time of the second visit. I do not share Leveson LJ's view that complainant knowledge or suspicion is necessarily or logically inconsistent with the occurrence of an argument or indeed the complainant's purchase of condoms. I will provide reasons for so concluding but at this stage simply note the existence of alternative interpretations that are open on the evidence, ones which raise difficulties for the view that the appellant necessarily acted deceptively.

Grounds of appeal

12. Counsel for the appellant raised three grounds of appeal against conviction: (1) the appellant's legal advisors failed to advise her correctly on matters which went to the heart of her plea because (2) the elements of the offence were not made out and the appellant could not have been convicted with the result that (3) the appellant's plea was equivocal. In his judgment, Leveson LJ has dealt in detail with each of these interrelated grounds of appeal. I propose to focus on (2), which if correct, as counsel for the appellant asserts, leads logically to (3). In my view, and on the basis of the evidence, I do not think it can be said that the elements of the offence were made out. For this reason I agree with counsel's claim that the appellant's plea was equivocal. I also note in this regard, that the appellant stated before this court that, at the time of signing witness statements, she 'just wanted it to be over.'

13. However, before turning to consider the second ground of appeal, I will address the first ground and to that extent proceed in the same manner as Leveson LJ. However, unlike Leveson LJ, I would uphold this ground of appeal. My reasons are specific, but linked to the more substantive objection raised by counsel under the second

ground. In the first place, Mr Thomas, the appellant's barrister prior to appeal, while insisting that he did not tell the appellant she had no defence and that she should plead guilty, made the following statement before this court: 'In view of [the appellant's] replies I was satisfied in my own mind she (and her parents) knew all the constituent elements of the offence *and that these were made out*' (my emphasis).

14. In my view, and for reasons to be provided in my consideration of the second ground of appeal, it is not at all clear on the basis of the evidence that the prosecution case was made out. Further, Mr Thomas appears to have drawn the same conclusion as Leveson LJ regarding the significance of the complainant's purchase of condoms, and in terms emphasising the difficulty of the appellant's position. He also stated that the versions of events provided by the complainant and appellant 'could not live in the same world,' a claim I consider to be over-blown, at least in some respects and, more importantly, that 'it would be clear to the jury who was telling the truth.' While the appellant may have lied about some matters, and although her case possesses some obvious evidential weaknesses, the difficulty I have with the legal advice she received lies in the fact that it failed, in my opinion, to recognise that the appellant may have had a good defence had the central issue of her gender identity at the time of legal liability been properly addressed.

15. Indeed, one of the central difficulties of this case is the fact that several pieces of evidence used to support a conclusion of deception are also entirely consistent with the view that the appellant actually believed herself to be male at the time of the alleged offences. This possibility appears to have been discounted because of the fact that the appellant subsequently, that is, at the time of plea and this present appeal, asserted a female gender identity. In other words, the question becomes: must gender identity be static in order to be authentic? In my view, it is the assumption that it must that goes to the heart of this case. It is perhaps the elephant in the room and, in my view, failure to recognise it as such places gender non-conforming people at great peril within our criminal justice system. I now turn to the second ground and therefore to the substance of this appeal, where I will flesh out some of the concerns to which I have alluded.

The substantive legal issues

16. Counsel's second ground of appeal is that the elements of the offence were not made out. In relation to the offence of assault by penetration, three things must be proved: (i) sexual penetration occurred (ii) the complainant did not consent, and (iii) the appellant possessed the necessary mens rea. In this case (i) is an agreed fact. It is (ii) and (iii) to which I shall devote attention, and consideration of (iii) upon which I shall base my judgment. However, before proceeding further, it is necessary to recognise that in relation to proving mens rea it is not sufficient for the Crown to establish only that the appellant lacked a reasonable belief in consent. This is because the present case involves not a claim of coercive sex, but deceptive sex. In relation to the latter, the Court of Appeal has made clear that there is no obligation to disclose personal information, even in circumstances where a defendant is aware that a complainant would not consent to sexual intimacy if she knew this information. Rather, the mens rea for sexual fraud is to be established by proof also of some form of 'active deception' (see *R v EB* [2006] EWCA Crim 2945, *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), *R v Bingham* [2013] EWCA Crim 823, *R (on the*

application of F) v DPP [2013] EWHC 945 (Admin)). In my view, this is the central issue and difficulty for the prosecution.

17. Unfortunately, the matter is more complicated still because the Court of Appeal in earlier decisions, and Leveson L.J. in this case, have muddied the waters of actus reus and mens rea. Thus, the notion of ‘active deception,’ while clearly an element of mens rea, also appears to have been imported into the actus reus element of non-consent so that consent, amongst other things, turns on whether deception is considered to be of an active kind. In my view, this development of criminal law doctrine is regrettable and is reminiscent of the ‘wrong turn’ taken by the House of Lords in *R v Morris* [1984] AC 320 (HL) (dicta of Lord Roskill not applied in *R v Gomez* [1993] AC 442 (HL); *R v Hinks* [2001] 2 AC 241 (HL)). In my view, proof of actus reus and mens rea elements should be kept analytically separate. That is, whether a defendant deliberately deceived the complainant and whether he did so in an active manner ought to be matters considered only in the context of establishing mens rea. However, if proof of non-consent now requires proof of active deception, which the authorities suggest it does, then my conclusion that active deception is not made out would also mean that there has been a failure to establish non-consent. Before turning to the mens rea, where I will consider the concept of active deception and its application to the facts, I will first consider the actus reus element of non-consent where, for the reasons already stated, I will chart the emergence of a distinction between non-disclosure of information and active deception.

Non-consent

18. This case appears to be one in which two young people who had reached the age of consent participated in desire-led intimacy on multiple occasions. The claim that consent was absent is based on s. 74 of the Sexual Offences Act 2003 which provides that:

For the purposes of this Part, a person consents if he agrees by choice and has the freedom and capacity to make that choice.

It was made clear by the Crown that the evidential presumptions to be found in s. 75 are not relevant on the facts and that the conclusive presumptions in s. 76 are not relied on. While intentional fraud as to ‘the nature and purpose of the sexual act’ might be considered relevant under s. 76(2)(a), the Court of Appeal has proved extremely reluctant to find consent absent on this basis (in particular see, *R v EB* [2006] EWCA Crim 2945, *R v Jheeta* [2007] EWCA Crim 1699, *R v Bingham* [2013] EWCA Crim 823, *R (on the application of F) v DPP* [2013] EWHC 945 (Admin)), though it has done so on occasion (*R v Devonald* [2008] EWCA Crim 527, though in *R v Bingham*, judicial notice was taken of academic criticism of the case (para 14)). This general reluctance is due to what the presumption conclusively concludes in addition to an absence of consent, namely, ‘that the defendant did not reasonably believe that the complainant consented to the relevant act.’ This is an approach I wholly endorse.

19. In cases of sexual fraud, it is clear that a finding of non-consent under s. 74 presupposes that deception pertains to a fact that is considered legally material. The courts have long considered some deceptions to be so trivial that consent is deemed valid. In his judgment, Leveson LJ offers the example of deception as to wealth, and notes that this ‘will obviously not be sufficient to vitiate consent.’ Accordingly, the courts have taken the view that sexual autonomy, while an important right, is not an

unlimited one, at least not in fraud contexts. Thus, the language of s. 74 and, in particular, the words ‘choice’ and freedom,’ are not understood in some philosophically pure sense, but rather as circumscribed in normative terms, or as Lord Judge CJ put it in *R (on the application of F) v DPP* [2013] EWCA 945 (Admin), they ‘must be approached in a broad commonsense way’ (26). In contexts of desire-led, as opposed to coerced intimacy, it is clearly important to set limits to the reach of the criminal law, lest it become uncoupled from the community in which it is to take root. Such an approach not only accords with basic liberal principles, but also with the need to recognise the special vulnerability of some individuals in our society due to widespread prejudice and discrimination. The present case, dealing with a young gender non-conforming person as it does, is a case in point. While I have every sympathy for the complainant in this case, and for other women in her position, there are other interests at stake, as well as important public policy considerations that must be taken into account.

20. In saying this, I do not mean to suggest, as a matter of law, that deception as to gender be considered a trivial affair. In this respect, I stop short of endorsing counsel for the appellant’s contention to that effect. As Leveson LJ stated, ‘depending on the circumstances, deception as to gender can vitiate consent.’ While it is unclear from his judgment which kinds of deceptions as to gender would vitiate consent and which would not, I accept that if a defendant, prior to intimacy, deliberately deceived a complainant about his gender identity, knowing that gender status was fundamental to her consent, then consent would be invalid. At some point in the future, being a man or woman might cease to possess such importance. If so, deception as to gender identity might be more readily analogised to Leveson LJ’s example of fraud concerning wealth. For the present however, the view that being a man or woman is important in sexual contexts is one which accords with community sentiment. However, while Leveson LJ appears to leave the matter open, I do not consider facts about gender to be legally material beyond the immediate fact of gender identity. To treat them as such would be to imbue transgender people’s bodies and histories with legal significance. It might be argued that all sorts of facts relating to gender are material, including chromosomes, past and present genital status, legal gender status and gender socialisation experience. However, to my mind, a line in the sand must be drawn between gender identity and such other matters. Failure to do so would, in effect, be to confer on a non-transgender person a right to determine a transgender person’s gender identity. It would also come perilously close to subverting the very act/omission distinction on which the Court of Appeal has founded liability.

21. In the present case, the view that consent is lacking is based on the claim that the complainant was unaware of the appellant’s ‘true’ gender identity and that this was due to active deception perpetrated by the appellant. That is, the complainant claimed that she believed the appellant to be the boy, ‘Scott,’ the appellant had represented herself to be. This question of representation is one I will address in some detail when considering mens rea. However, I express reservation concerning the apparent ease with which the Crown Prosecution Service, prosecuting counsel and His Honour Judge Patrick accepted that the actus reus element of non-consent was met.

22. The concern I have here pertains to the way in which the complainant’s claim of ignorance regarding the appellant’s birth-designated gender resonated so easily despite the following facts: the parties spent considerable time in each other’s company; had penetrative sex on multiple occasions; the appellant has breasts, a voice within

the female range and presumably skin softer to the touch than a man's; and although expressing a desire for gender reassignment surgery (a point to which I shall return), the appellant had not benefited from the masculinising effects of male hormones. In other words, accepting the complainant's account, not something a jury were called on to do, seems to require, to quote one of England's great poets, Samuel Taylor Coleridge, that we 'suspend our disbelief' (*Biographia Literaria*, 1817, chp xiv), and in my view, to a quite extraordinary degree.

23. I also note that the Crown Prosecution Service's *Code for Prosecutors* requires prosecutors to 'consider whether there are any reasons to question the reliability of the evidence, including its accuracy or integrity' and 'whether there are any reasons to doubt the credibility of the evidence' (para 4.6). Further, the Code states that a case that does not meet these tests 'must not proceed, no matter how *serious* or *sensitive* it may be' (para 4.4) (my emphasis). I would encourage the Crown Prosecution Service to look again at the Code and especially in relation to transgender and other gender non-conforming suspects.

24. Having expressed these reservations, I now turn to providing a summary of relevant case law decided under s. 74. For reasons already given, this will entail reference to the concept of active deception. In considering the scope of this legal concept, I will suggest that existing authorities might be distinguished from the present facts. The interpretation of s. 74, as it applies to sexual fraud, as opposed to sexual coercion, has been considered in a series of cases beginning with *R v EB* [2006] EWCA Crim 2945. In this case, counsel for the prosecution suggested that a failure to disclose HIV positive status prior to sexual intercourse served to vitiate consent. The suggestion was roundly rejected by the Court of Appeal. While consent would be vitiated in such circumstances in relation to charges brought under the Offences Against the Person Act 1861, Latham LJ insisted that non-disclosure of HIV positive status was 'not relevant to the issue of consent under s. 74.'

25. In the later case of *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), the Divisional Court emphasised that *EB* 'goes no further than deciding that a failure to disclose HIV infection is not *of itself* a relevant consideration under s. 74' (my emphasis). In other words, the court left open the possibility that, for example, lying about HIV status might be a relevant consideration. In hearing the extradition case brought against Julian Assange, the court found that consent would be lacking if a jury accepted the complainants' evidence that the defendant had sexual intercourse without a condom, or continued sexual intercourse after removing, damaging or tearing a condom, after it had been made clear to him that consent was conditional on condom use.

26. In the more recent decision of *R (on the application of F) v DPP*, a case which involved judicial review of a decision by the Crown Prosecution Service not to prosecute, the court found ejaculation in the defendant's wife's vagina to be inconsistent with consent under s. 74 in circumstances where she had made clear to him that sexual intercourse was conditional on non-ejaculation, and ordered a review of the case.

27. It is important, in my view, to make a number of observations about these cases, observations I consider relevant in determining the boundaries of consent under s. 74. In the first place, the cases of *Assange* and *R (on the application of F) v DPP* involved an express condition. That is, consent was subject to condom use in *Assange* and non-

ejaculation in *R (on the application of F) v DPP*. There was no express condition in the case before us and any suggestion that a condition was or ought to be implied would raise difficulties for the Crown because to give legal effect to an implied condition would be tantamount to criminalising non-disclosure of personal information. This would clearly be at odds with the developing jurisprudence of this court. It would also potentially conflict with legal obligations under European and international law. Certainly, criminalisation of non-disclosure of information may conflict with privacy rights protected under Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights. Indeed, the *Yogyakarta Principles 2007*, which articulate principles on the application of international human rights law in relation to sexual orientation and gender identity, state that:

[t]he right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others (principle 6).

In relation to Article 8, the Law Commission has expressed reservation concerning its compatibility with prosecution of transgender people for non-disclosure of their gender history:

an apparent agreement to a sexual act by another should not be disregarded merely because it is given under the impression that the other is male whereas the other is in fact female [sic], or vice versa, where the other has undergone sex reassignment surgery (Law Commission, *Consent in Sex Offences: A Policy Paper: Appendix C of Setting the Boundaries*, 2000 vol 2, para 5.32).

Indeed, and putting to one side the Law Commission's clumsiness in describing transgender people's actual gender identities, since the Gender Recognition Act 2004 and the Equality Act 2010, nothing now hinges, if it did previously, on whether a person has undergone gender reassignment surgery or has had a Gender Recognition Certificate conferred upon them. This is entirely consistent with a right to privacy and with recognising the importance of self-determination.

28. With the exception of *R v Devonald* [2008] EWCA Crim 527, a case where a father pretended to be a 20-year old woman on the internet in order to seduce a young man to masturbate in front of a webcam as revenge for what he believed to have been the boy's mistreatment of his daughter, other cases that have come before the Court of Appeal, and through which legal liability for sexual fraud has been expanded, involve the element of coercion. Thus in *R v Bingham* EWCA Crim 823, the defendant, having created false identities on a social media website, blackmailed a female victim into engaging in sexual activity through the threatened use of sexually explicit photographs shared between the parties. In the earlier case of *R v Jheeta* [2007] EWCA Crim 1699 the Court of Appeal came to the same conclusion in relation to a fabricated threat of police sanction against the complainant. I note that the present case does not involve any element of coercion. *Devonald*, a case which, it should be noted, did involve deception as to gender identity, can also be distinguished from the present facts. While there was neither coercion nor an express condition insisted on by the com-

plainant, the interaction between the parties occurred entirely online and therefore an opportunity to verify the defendant's credentials was more limited. Moreover, unlike the present facts, the deception in *Devonald* was unequivocal and the representation of female gender identity, trivial.

29. In my view, and in accordance with these authorities, it is open to this court to conclude that vitiation of consent for the purposes of sexual fraud requires, not only active deception, but also either an express condition or the element of coercion, at least in circumstances where the parties meet face to face. Indeed, I favour such an approach, which has the virtue of limiting criminal liability in relation to sexual relations which are desire-led and where alleged harm consists in the retrospective reimagining of pleasure. However, I do not base my decision on such a demarcation of consent.

Active deception

30. I now turn to what I consider to be the crux of the case and, correspondingly, to my reasons for allowing the appeal. In order for the Crown case to be made out *mens rea* must be established. This requires proof not only that the appellant lacked a reasonable belief in consent but also that she acted deceptively. In view of the evidence put before His Honour Judge Patrick and this court, it would appear that the claim of deception refers, in the main, to a series of allegedly false representations made by the appellant: the appellant's use of the male pseudonym, 'Scott Hill,' both as an online avatar and subsequently in face to face meetings with the complainant; the appellant's expression of a desire to marry and have children with the complainant; the appellant's stated desire to 'put it in' the complainant, which the complainant took to mean a reference to the appellant's penis; and the appellant's use of female pronouns in her witness statements. In addition to these representations, legal significance also appears to have been attributed to the fact that the appellant expressed 'gender confusion' and to the fact that the complainant purchased condoms.

31. If any of the representations constitute 'active deception,' as opposed to mere non-disclosure of information, it is because they deliberately and actively misrepresent the appellant's gender. In my view, it is, on the basis of the evidence, more than possible to conclude that they do not. I shall deal with each of these matters separately.

32. First, the use of the male pseudonym, 'Scott Hill,' while deceptive in the sense that this was not the appellant's legal name, was not necessarily deceptive in terms of the appellant's gender identity. Indeed, the name is entirely consistent with a male gender identity and it is perhaps understandable that a transgender or gender non-conforming person would, or at least might, adopt such a name.

33. Second, the appellant's assertion that she wanted to marry and have children with the complainant was not necessarily false. Marriage to the complainant would be possible if the appellant obtained a Gender Recognition Certificate and the couple would be able to have children either through adoption or in vitro fertilisation. The notion that the appellant might be transgender might seem surprising, and perhaps misplaced, given her present articulation of a female gender identity. However, and this goes to the heart of the case, the moment of legal liability arises not at the time of plea or this appeal, but at the time of the alleged offences, and there is evidence at this time to suggest the appellant identified as male. I shall come to this important evidence shortly.

34. Third, it appears to have been assumed that the appellant's statement to the complainant, that she wanted to 'put it in' the complainant, referred to a penis and is therefore deceptive. Yet, it is not deceptive as to gender as men are not defined by this anatomical part. If they were, legally recognised transgender men would not be considered men, nor, for example, would some of our injured soldiers returning from conflict zones. However, there is also an issue as to whether the statement is deceptive at all. The fact that the complainant appears to have assumed that the statement referred to a fleshy penis should not equate with the view that this was the appellant's intent. Perhaps the appellant was referring to a prosthetic penis, which the evidence showed she possessed, and perhaps she experienced this device as other men would a fleshy penis. A serious difficulty I have with what appears to have been the treatment of this piece of evidence is the tendency to approach it, and questions of gender and embodiment more generally, from a perspective alien to the appellant.

35. Fourth, the appellant's use of female pronouns in witness statements does not necessarily establish deception for legal purposes. This is because the appellant may have been referring to her birth-designated gender rather than her actual gender at the time. In any event, and despite the appellant's present assertion of a female gender identity, there was evidence before His Honour Judge Patrick and this court, evidence I shall detail shortly, to conclude that the appellant did in fact identify as male at the time when criminal liability crystallises.

36. Turning to the other evidence which might be considered to support a conclusion of deception, the appellant's expression of 'confusion' regarding her gender identity did not take the form of a statement made to the complainant, and indeed only surfaced subsequent to the alleged offences. In any event, given the prejudice and misunderstandings gender non-conforming people face in our society, confusion may not be uncommon. I certainly do not think that confusion should lead to a conclusion of fabrication. In relation to the final piece of evidence listed above, the complainant's purchase of condoms assumed importance because purchase was considered inconsistent with the appellant's (later retracted) statement that the complainant either knew or suspected that the appellant's birth-designated gender was female. Yet, this interpretation of the evidence, from which inferences appear to have been drawn regarding the appellant's veracity, is not the only interpretation available. Thus, the complainant may have purchased condoms, not because she assumed the appellant to have a fleshy penis, which appears to have been what the Crown argued, but out of a concern over hygiene in the context of the intended use of the appellant's prosthetic penis. Of course, we cannot know which interpretation is true. What appears clear however, is that all of these pieces of evidence can be interpreted in ways other than as supporting a claim of deception, and this raises the possibility, if not the likelihood, that a jury would have struggled to have been persuaded beyond reasonable doubt.

37. In drawing attention to these possible alternative interpretations of the evidence, which, in my view, would be open to a jury, I recognise they depend on evidence that the appellant actually believed herself to be male, a transgender man that is, prior to and crucially at the time of the alleged offences. Evidence for this is not insignificant. Thus, the fact that the appellant presented as male, both online and throughout her face to face meetings with the complainant, and therefore for a period of some three to four years, might be viewed as consistent with a male gender identity, rather than as evidence of gender inauthenticity or fraud.

38. Further, the appellant had stated that she felt ‘more comfortable’ in the male gender role and, prior to her assertion of a female gender identity before His Honour Judge Patrick, had stated an intention to undergo gender reassignment surgery. I note that according to recent medical studies, children continuing to express a gender identity opposite to their birth-designated gender after adolescence are highly likely to persist with their gender identification (T.D. Steensma, R. Biemond, F. de Boer and P.T. Cohen-Kettenis, ‘Desisting and Persisting Gender Dysphoria after Childhood: A Qualitative Follow-Up Study’ (2011) 16(4) *Clinical Child Psychol Psychiatry* 499-516). While we cannot know why the appellant now asserts a female gender identity, it is possible it is associated with criminal prosecution as well as the negative media portrayal that, sadly, appears to attend coverage of the lives of transgender people caught up in our criminal justice system and more generally. In other words, I express concern that the appellant may have, so to speak, retreated into a cocoon of ‘normality.’ However, I do not base my judgment on evidence that the appellant is a transgender man.

39. Indeed, even if she did not identify as male, but as a masculine woman, presenting as such and preferring to use a name traditionally associated with the male gender, as long as this was not done in order to deceive, then it does not follow that a deception has occurred as a matter of law. To conclude otherwise, would be to implicate law in unnecessary and unwarranted state intrusion and regulation of gender and sexuality. Such an approach would give the imprimatur of law to the idea that gender non-conforming people are, by definition, duplicitous and/or that other people have a right to know intimate details about their personal and private lives.

40. In my view, uncertainty as to whether active deception has been established according to law renders the appellant’s conviction unsafe. However, I also express concern regarding the conclusion that the appellant lacked a reasonable belief in consent. Of course, we cannot know what was in her mind at the relevant time. Nevertheless, I harbour concern regarding the difficulties both the appellant and other gender non-conforming people are likely to face in meeting a legal standard of ‘reasonableness.’ I suspect that a claim made by, for example, a young transgender man, that he believed his sexual partner’s desire for him would have been unaffected by knowledge of his gender history, is one unlikely to resonate in normative terms and therefore with a jury. In this respect, I express concern that the truthful transgender or gender non-conforming defendant is likely to be equated with some kind of self-loathing individual who can never legitimately or convincingly claim to be the object of another’s desire. While I do not base my decision on a failure to prove lack of reasonable belief in consent, I do think these sorts of concerns point to very real dangers in regulating sexuality through the fraud mechanism, and certainly in the present context.

41. Ultimately, law, and especially criminal law, ought to respect the self-determination that is implicit in gender identity claims unless it can be clearly established that they are fabricated. For my part, I do not consider gender identity to be fabricated because it differs from birth-designated gender or because it is not static, or because it creates alarm in others.

Conclusions

42. Accordingly, and for the reasons given, I consider the convictions in this case to be unsafe. For this reason, I would order a re-trial where a jury can consider the Crown's case as well as other possible interpretations of the evidence.
