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**NO MEANS NO -
BUT WHEN DOES YES MEAN YES? :
THE LEGAL VALIDITY OF A VOLUNTARILY
INTOXICATED CONSENT TO SEX**

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o te Ūpoko o te Ika a Māui*



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I INTRODUCTION

In modern "dating and mating" situations, in which alcohol is frequently consumed, sex which occurs when one or both of the parties are drunk raises some important legal issues. What is the ability of the woman to give consent in this situation? How much the man does the man have to know about his partner's ability to give consent before he no can no longer say that he reasonably believed she consented?

Because the majority of rape complaints are brought by a woman against a man, in most situations it is the woman's consent that is in question at trial. While male on male rape and female on male rape is not an issue to be neglected, this paper adopts the assumption that the woman is giving consent while the man is seeking consent, in accordance with the majority of rape cases that come to trial.

This paper is concerned with scenarios in which a woman, "A", has voluntarily ingested alcohol and is physically functioning at the time of sexual intercourse. She has reached a state of drunkenness of her own volition, as she was neither drugged by her partner nor was she plied with drink. She is, however, very drunk, to the point of slurring her words and being unsteady on her feet, and she may express a range of other intoxicated behaviour including vomiting and lack of coordination. So, while she is experiencing more than just the mildly disinhibitory and relaxant effects of alcohol, she never enters a state of unconsciousness or complete physical incapacitation. She is at a problematic intermediate stage that Dixon, in his discussion of alcohol and rape, terms "impaired sex".¹

This paper focuses on two important features of the above scenario: the woman's ability to consent to sex; and the relevance of the fact that she is voluntarily intoxicated. In the New Zealand Court of Appeal case of *R v Sturm (Sturm)*, the Court commented on both these issues.² In relation to intoxicated consent, the Court observed that, although A was functional and gave a token of consent, the jury should

¹ Nicholas Dixon "Alcohol and Rape" (2001) 15 Public Affairs Quarterly 341, 343.

² *R v Sturm* [2005] 3 NZLR 252 (CA).

still examine whether her consent satisfied the legal requirements for consent.³ This paper is in agreement with the Court on that observation.

However, the Court went on to confuse the consent issue with the voluntariness issue. It noted that if A is voluntarily intoxicated and she gives a token of consent, the voluntariness of her intoxication renders her consent valid.⁴ This paper is not in agreement with the Court's position on this point. It is incorrect to consider the voluntariness of A's intoxication as going to whether she did or did not consent. This is only relevant to whether her sexual partner, "B", was not liable for rape on the basis that he reasonably believed that A consented.

This essay has three parts. The first deals with A's consent; the second, with the confusion between consent and voluntariness of intoxication that occurred in *Sturm*; and the third, with B's reasonable belief in consent.

Part one focuses purely on the position of A, her state of mind, and the quality of her consent. If A unambiguously agrees to have sex with a man only because she is extremely intoxicated, she is not operating in accordance with her sober preferences. She may not even be aware of what her sober preferences are. Part one examines how we should regard her "token" of consent in that situation. The position that was taken in *Sturm* on the consent issue is supported. It is argued that her intoxicated agreement does not render it legally permissible for her partner to have sex with her. If the issue comes to trial, the jury is to examine whether her drunken "yes" satisfied the legal requirements for consent.

Part two examines the judicial comments in *Sturm* as they relate to the voluntariness of A's intoxication. Unlike the consent issue, the Court's treatment of the voluntariness issue is not supported. For several reasons, it is incorrect to gauge A's capacity to consent by reference to whether she was voluntarily drunk or not.

This is not to say that the voluntariness of A's intoxication is completely irrelevant. Part three considers the issue of A's voluntary intoxication where it *should* be considered, which is how it impacted upon her partner's belief that she was consenting. Thus part three focuses on A's sexual partner, B, and his state of mind

³ Ibid, para 49 (CA) Judgment of the Court.

⁴ Ibid, para 48 (CA) Judgment of the Court.

with regard to his belief in A's consent. This is the "reasonable belief" inquiry. If A is voluntarily drunk and she gives an apparent but invalid consent cue, currently, if B has a reasonable belief that A consents, he is not guilty of rape. This paper supports retaining a lack of reasonable belief as part of the mens rea of the crime of rape. However, if a man's sexual partner is very drunk, yet he believes that she consents, it is necessary for him to reinforce the reasonableness of his belief by taking steps to ensure the quality of her consent.

These issues are due for consideration because of the existence of section 128A(4) of the Crimes Act 1961, which is the New Zealand legislature's acknowledgment that intoxication can affect a person's ability to legally consent to sex. The provision gives little to no guidance on how judges and juries should deal with the consent and the voluntariness issues in a rape trial. There has also been little judicial interpretation of the provision, since it was only enacted in 2005. It is necessary to consider how Courts and jurors in the future are likely to approach these two key issues. Jurors in particular need more legislative guidance than is currently provided by section 128A(4) alone.

The paper argues for legislative reform. Provided that the law is duly promulgated, it is reasonable to use it to send a message to society about standards of acceptable sexual behaviour and to expect people to conform to these standards. The expectation that citizens adjust their behaviour to conform with the law is one of the central tenets of a legal system.⁵ Therefore, if the burden on men to establish consent is to be increased, it must be accompanied by educational measures which target both men and women to increase their understanding of the interaction between sex, intoxication, and rape, and to reduce the frequency of men and women embarking on intoxicated sexual encounters which result in harm to one, the other, or both of them.

II THE LEGISLATIVE REQUIREMENTS OF RAPE

Under New Zealand law, rape is a statutory offence contained within section 128(2) of the Crimes Act 1961:

"128(2): Person A rapes person B if person A has sexual connection with person B,

⁵ Lois Pineau "A Response to my Critics" in Leslie Francis (ed) *Date Rape*, cited in Nicholas Dixon, above n 1, 348.

effected by the penetration of person B's genitalia by person A's penis,—

(a) without person B's consent to the connection; and

(b) without believing on reasonable grounds that person B consents to the connection.”

(In the above provision, person A is the man for the purposes of this paper and person B is the woman.)

Thus If A claims that she was raped while she was intoxicated, she must establish that she and B had sex; that she did not consent; and that B did not reasonably believe she consented. All three elements must be proved beyond reasonable doubt to obtain a rape conviction. This paper does not consider cases in which it is disputed whether the sexual connection took place. It is accepted that sex occurred, but the parties dispute whether, due to A's intoxication, it was consensual, and whether B reasonably believed that A consented.

A Factual versus Legal Consent

The word “consent” can be used in a range of different senses. It is important to preface Part One with a discussion of the difference between a factual and a legal consent. A “factual” consent occurs in “every instance in which a person can be found or deemed to acquiesce to something.”⁶ It is an assent that is unfettered by normative or legal requirements or implications. A “legal” consent, in contrast, satisfies the legal requirements for consent as set down by the legislature and through the courts. All legal consents are factual consents, but not every factual consent will satisfy the requirements of a legal consent. In the scenario with which this paper is concerned, there is always a factual consent in the form of an agreement to have intercourse induced by intoxication. But, as will be demonstrated, this does not always satisfy the legal requirements for consent.

III A'S CONSENT

A Section 128A(4)

⁶ Peter Westen *The Logic of Consent* (Ashgate, Aldershot, 2004) 4.

Despite the centrality of the consent issue, the Crimes Act does not define consent. It does however state within section 128A(4) that:

“Section 128A(4): A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.”

Therefore at trial, to establish non-consent due to intoxication, A must establish that she could not consent or refuse to consent because she was so affected by alcohol according to section 128A(4). The onus is on the Crown to establish that A did not consent, rather than on the defence to prove that she did.

Whether A consented or not is a question for the jury. Where intoxicated consent is in issue, it will be necessary for the judge to direct the jury on the meaning of consent, but there are no statutory model directions for doing so. The trial judge determines how he or she will direct the jury according to the complexity of the facts at hand.⁷

Section 128A(4) has only been in existence since its insertion into the Crimes Act by the Crimes Amendment Act (No 2) 2005. The New Zealand Law Society has observed that it gives little guidance as to the factual circumstances in which an intoxicated consent is invalidated at law- it is unclear the level, or more accurately, the nature of intoxication that constitutes being “so affected” as to be unable to consent.⁸ In particular, it is unclear whether it includes cases in which A remains functional but, because of intoxication, is incapable of giving a “true” consent, or whether it is limited to cases in which A gave no consent because she was in a physically incapacitated state.

It is not yet known for certain whether the Courts will interpret section 128A(4) so as to restrict its application to cases of physical incapacity, because there has been little direct judicial consideration of the provision as of yet. However, the Court of Appeal in *Sturm* did discuss the issue of intoxicated consent one month after the

⁷ *R v Olugboja* [1981] 3 All ER 443, 448 (CA) Dunn LJ for the Court.

⁸ Women’s Consultative Group of the New Zealand Law Society “Submissions to the Law and Order Committee on Crimes Amendment Bill (No 2) 2004” [www.lawyers.org.nz/general/submissions/Crimes%20Amendment%20\(No2\)2003%20WGC.htm](http://www.lawyers.org.nz/general/submissions/Crimes%20Amendment%20(No2)2003%20WGC.htm) (accessed 1 July 2008).

enactment of the provision, and the approach the Court took could (and should) influence the interpretation of section 128A(4) in the future.

B R v Sturm

The Court in *Sturm* observes that the fact that A experiences a drug-induced receptiveness to sex as a result of heavy intoxication does not entail that she consented. This is the *Sturm* approach to intoxicated consent. (The Court later qualified this statement with a consideration of the voluntariness of the intoxication, but at this stage of the paper, only the comments on intoxicated consent are being considered).

Section 128A(4) was actually not under consideration in the appellate *Sturm* decision, because the provision was not in existence at the time of the original trial judgment. Instead the Court referenced their comments on intoxicated consent to the common law definition of consent, which holds that a true consent must be full, free, voluntary and informed.⁹ But, since section 128A(4) was intended to codify the existing common law position on intoxicated consent,¹⁰ the comments made in *Sturm* about how the common law treats intoxicated consent are relevant to the interpretation of the provision.

At paragraph 46, the Court cites an article written by Emily Finch and Vanessa Munro in 2003, entitled "Intoxicated Consent and the Boundaries of Drug-assisted Rape."¹¹ In it the authors suggest that heavy intoxication can lead to three distinct outcomes for A. Firstly, it can induce unconsciousness. Secondly, it can induce a state of physical incapacity similar to a stupor in which A is physically incapable of demonstrating a consent cue or of resisting B's sexual advances (termed a state of inert unresponsiveness.) Thirdly, it can engender an uncharacteristic drug-induced receptiveness to sexual activity which A would reject if she were sober (termed a state of drug-induced receptiveness to sex).

Thus, the second and third outcomes raised by Finch and Munro directly relate to the issue raised by section 128A(4), which is whether A must be physically

⁹ *R v Cox* (7 November 1996) CA 213/96.

¹⁰ Crimes Amendment Bill (No 2) 2005, no 104-1 (Explanatory Note) iv.

¹¹ E Finch and VE Munro "Intoxicated Consent and the Boundaries of Drug-assisted Rape" (2003) Crim LR 773.

incapacitated to fall within it (in a state of inert unresponsiveness) or, whether she falls within it if she is still functioning, and experiencing a state of drug-induced receptiveness to sex. If A experiences a state of alcohol-induced unconsciousness then her non-consent is provided for by section 128A(3), which holds that:

“Section 128A(3): A person does not consent to sexual activity where he or she is asleep or unconscious at the time the sexual activity occurs.”

At paragraph 48 the Court observes, in regard to the third outcome, that “in such cases [of a drug-induced receptiveness to sex] an apparent consent may not be a true consent in that once the drug has taken effect on the mind of the person, the ability to form an informed and voluntary consent will have been impaired to a greater or lesser degree.”¹²

So, evidence that A experienced a drug-induced receptiveness to sex and gave an apparent consent does not entail that A legally consented. The *Sturm* approach is to look past the intoxicated consent cue and examine whether A’s consent was full, voluntary, free and informed. It may not be voluntary and informed if it was induced by intoxication. The Court then goes on to say that whether or not there is consent is ultimately a question for the jury.

Carrying the *Sturm* approach through to section 128A(4), the formulation of “so affected that she cannot consent” would include cases where A gives an apparent but not a true consent because she is under the effect of alcohol and experiencing a drug-induced receptiveness to sex. The jury would be directed that evidence that A is still physically functioning will not necessarily mean that she was capable of giving a legal consent, and that they must still inquire into whether her consent satisfied the common law requirements of being full, voluntary, free and informed.

C The Effects of Alcohol

Adopting a *Sturm* approach to section 128A(4), and extending it to cases where A experiences the third outcome, of a drug-induced receptiveness to sex, and gives an apparent but not genuine consent cue, is recommended.

¹² *R v Sturm*, above n 2, para 48 Judgment of the Court.

Research into the effects of alcohol has concluded that, "with moderate to heavy consumption, alcohol and marijuana have properties similar to that of both GHB and Rohypnol."¹³ GHB and Rohypnol lower anxiety and alertness whilst inducing passivity and a sense of relaxation and well-being. They distinctively alter the victim's thought processes and behaviour, making her highly suggestible to the suggestions of others and causing her to engage in uncharacteristic, uninhibited behaviour.¹⁴

Thus, if A is heavily inebriated she is likely to find a suggestion of sex more acceptable than she would if she were sober. She is functioning at a reduced physical capacity so is more likely to accept coercion or coaxing by her partner's sexual advances. She may comply, willingly, with suggestions of sexual intercourse because her judgment is impaired and her will to object is reduced. But this does not and should not entail that she legally consents, for the reasons discussed below.

1 *The value of consent*

Commentators on the subject of consent identify that consent is valuable because it protects two dimensions of A's autonomy.¹⁵ The requirement that A consent before sex is permissible protects her right to refuse unwanted sexual contact, thereby protecting her negative sexual autonomy, but the fact that A *can* consent protects her positive sexual autonomy, or her right "to seek emotional intimacy and sexual fulfilment with willing partners"¹⁶ when she so desires.

But consent is also valuable because it recognises that A is an autonomous agent who decides when and whether to give her consent according to the moral values and principles that she has made for herself.¹⁷ The law protects her from unwanted sexual intercourse, but she decides when intercourse is wanted and unwanted, according to her sober preferences. Therefore consent is, or it should be, a

¹³L Slaughter "Involvement of Drugs in Sexual Assault" (2000) 45 *Journal of Reproductive Medicine* 425, 429, cited in E Finch and VE Munro, above n 11, 778.

¹⁴E Finch and VE Munro, above n 11, 778.

¹⁵Stephen Schulhofer "Rape-Law Reform circa June 2002: Has the Pendulum Swung Too Far?" (2003) 989 *Annals of the New York Academy of Sciences* 276; Alan Wertheimer *Consent to Sexual Relations* (Cambridge University Press, Cambridge, 2003) 125.

¹⁶Stephen Schulhofer *Unwanted Sex* (Cambridge, MA, Harvard University Press, 1998) xi, cited in Alan Wertheimer, above n 15, 125.

¹⁷Alan Wertheimer, above n 15, 125.

reflection of A's long term higher order preferences. When A is drunk, these preferences are obscured. To enforce A's consent where it does not accord with her sober preferences is to compel A to live in accordance with her non-moral or non-reflective desires, which is not to live an autonomous life.¹⁸

Some may argue that, if we make it legally impermissible for women to have intercourse when it does not accord with their sober preferences, we are restricting the autonomy of all those women whose sober preferences are to drink heavily as a precursor to sexual intercourse. The difference, however, is that these women are sober when they make the decision to override their own consent capacity with alcohol. To have sex when they are in an advanced state of intoxication accords with their sober preferences. This can be contrasted with women who override their sober preferences about sex only *because* they are intoxicated. Their alcohol-induced consent is inconsistent with their sober preferences and should therefore be considered invalid.

2 Consent as a subjective state

The alternative to the *Sturm* approach to section 128A(4) would be to restrict its application to cases in which the complainant could establish that she was physically incapacitated. This amounts to using a predefined physical state to illustrate non-consent. If A is in a stupor, then her consent is questionable, but if she remains physically functional and apparently cooperative, then she gives good consent.

The above approach is in conflict with the established common law position, which treats consent as a subjective state rather than an expression.¹⁹ The expression of A's consent is not what makes it legally permissible for A's sexual partner to proceed to have sex with her; it is the fact that her consent cue is accompanied by a genuinely consensual state of mind. To restrict section 128A(4) to cases of physical incapacity incorrectly misdirects the consent inquiry away from the victim's state of mind, towards evidence of her physical inability.

Furthermore, it would be a mistake to assume that the woman who experiences physical incapacity must be more intoxicated than her physically functional

¹⁸ Ibid, 126.

¹⁹ *R v Isherwood* (14 March 2005) CA 258/04, para 36 Judgment of the Court.

counterpart. If A becomes very drunk, very quickly, she may experience an alcohol-induced blackout. In this state she is capable of engaging in detailed behaviours such as holding a conversation, and even driving a vehicle, because her short-term memory remains functional. But she is just as, if not more so, intoxicated than a woman who lapses into a state of unconsciousness or physical incapacitation.²⁰ It may be much more common for social drinkers to experience such blackouts than was previously thought,²¹ so physical incapacity may in fact be less likely to result from heavy intoxication than continued functionality.

3 *The range of intoxication outcomes*

As a matter of practical reality, intoxication is unlikely to affect A by resulting in two discretely experienced pharmacological states of *either* inability to resist *or* increased receptiveness to sex. It is probable that drinkers will experience behaviours characteristic of both pharmacological outcomes, since alcohol's effects on cognitive and physical capacities are wide-ranging and variable, and include slurring, unsteadiness, sleepiness and loss of hand-eye-brain coordination, and at higher blood-alcohol concentrations vomiting, blackouts, memory loss and unresponsiveness.²² It is not unreasonable or incredible to suggest that A may be unresponsive, feel sedated, not in control of her body or able to resist, while also cooperating or complying with sexual intercourse.

This situation arose in the California Supreme Court decision of *People v Giardino*,²³ in which A felt woozy, light headed and not "altogether there" after drinking alcohol. She was uncoordinated and required physical support from others at various stages of the night. Some minutes after having lain prone on the floor unable to dress herself, she had sex with two males upon their encouragement. In this case A was in a state in which she was both physically unresponsive and sedated, but also compliant and apparently cooperative with a suggestion to have intercourse. The fact of her cooperation does not mean that she consented.²⁴ (Although at trial, the jury

²⁰ Aaron M White "What Happened? Alcohol, Memory Blackouts, and the Brain" (2003) 27 Alcohol Research and Health 186, 188.

²¹ *Ibid*, 189.

²² *Ibid*, 186.

²³ *People v Giardino* (2000) 82 Cal App 454 (4th Cir).

²⁴ Professor Gerald Orchard "Sexual Violation: The Rape Law Reform Legislation" (1986) 12 New Zealand Universities Law Review 97, 99.

found that she did not consent, on appeal the conviction was reversed on the ground that the trial judge had failed to give adequate instructions concerning the level of intoxication sufficient to void consent.)

4 *False distinction between willingness and consent*

Adams on Criminal Law cites Finch and Munro's third outcome and states that section 128A(4) does not extend to cases of drug-induced receptiveness to sex, because, "in cases of drug induced 'willingness' it is inaccurate to say that the complainant "cannot" consent as a result of the ingestion of the drug. Rather the complainant's "willingness" to participate in the activity may not be genuine because it is the result of the drug."²⁵

The issue here is with words and with an artificial distinction between drug-induced willingness and drug-induced consent. If A is induced by alcohol to be more willing to have sex, the alcohol is consenting to the intercourse, not the woman who has ingested it. Whether A is physically incapable of resisting or whether she is experiencing a false receptiveness to sex, in both cases intoxication deprives her of her ability to demonstrate her stable sober preferences.

D *The Role of the Jury*

A discussion of the interpretation of section 128A(4) must also consider the approach that the jury will take towards the provision, given that the jury decides whether or not there was consent in any given case. With the current wording of section 128A(4), it is unlikely that jurors will appreciate that a drug-induced consent cue does not indicate a consent. This is a ground on which to reword section 128A(4).

In a small-scale mock juror trial which dealt with intoxicated consent in a rape case, Finch and Munro found that the mock jurors in the study made a number of legal errors around A's capacity to give consent when she is intoxicated.²⁶ For example, some participants were willing to rule out consent only if A was in an intoxicant-

²⁵ Hon Bruce Robertson (ed) Adams on Criminal Law (loose leaf, Brookers, Wellington, Crimes Act, 1992) para CA 128.05 www.brookersonline.co.nz (18 August 2008).

²⁶ E Finch and VE Munro "Juror Stereotypes of Blame Attribution in Rape Cases Involving Intoxicants: Findings of a Pilot Study" (2005) 45 *British Journal of Criminology* 25.

induced unconscious state.²⁷ This is not reflective of the current legal position, which holds that A's consent capacity can evaporate at a stage well before the onset of unconsciousness. The jurors also demonstrated prejudicial attitudes towards intoxicated women as rape victims which affected their ultimate decision as to the existence of consent.²⁸

Although this study was based on British law and British participants, it is likely that jurors in New Zealand trials also make errors in the way they approach intoxicated consent. A study done by Yvette Tinsley into juror decision-making in New Zealand criminal trials found that there were only 13 of the 48 trials in which jurors had not developed a fairly fundamental misunderstanding of the law.²⁹ Some jurors, for example, were confused about the concept of intent.³⁰ Although these were not rape trials, in a rape trial, where an equally complex concept such as consent is in issue, there is a risk that jurors will misunderstand the legal position.

To minimise the risk of intoxicated consent rape cases being decided according to juror error and prejudice, a clear statement about A's capacity to legally consent when intoxicated is required on the face of the statute.

E Recommendations

1 Legislative reforms

While the Court's comments in *Sturm* on the consent issue are not determinative of how section 128A(4) will be interpreted by future Courts considering intoxicated consent, the *Sturm* approach is preferred.

Furthermore, legislative reform is required. In the past, the legislature has been content to allow the principles of good consent to develop incrementally through the Court. For example, Parliament declined to include a definition of consent within the sexual offence provisions of the Crimes Act on the grounds that the common law definition was sufficient.³¹ However, case law is ill-suited to deal with changing

²⁷ Ibid, 33.

²⁸ Ibid, 35.

²⁹ Yvette Tinsley "Juror Decision-Making: A Look Inside the Jury Room" in Roger Tarling (ed) *The British Criminology Conference: Selected Proceedings* (Leicester, July 2000) vol 4.

³⁰ Ibid.

³¹ Crimes Amendment Bill (No 2) 2005, no 104-2 (Select Committee report) ix.

behaviour in modern sexual relations. With the increasingly widespread use of disinhibiting intoxicants, the onus is on the legislature to state clearly on the face of the statute that it is possible to lack the full measure of control over one's physical and cognitive capacities, so that one is not acting voluntarily, while at the same time accepting a passive or cooperative role in sexual intercourse, and that this does not necessarily equate to consent.

This could be achieved by rewording section 128A(4) as follows:

"Section 128A(4): A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she either:

(a) cannot physically communicate his or her consent or refusal to consent to the activity, or;

(b) is only induced to comply with sexual acts because of the effect of the alcohol or other drug."

Section 128A(4)(b) indicates to jurors and the public that women who are physically functional but very intoxicated may not be capable of giving an informed and voluntary consent. Jurors should be instructed at trial not to take an intoxicated consent cue at face value. It is necessary to examine the quality of A's apparent consent cue to determine whether it was, according to the common law requirements for good consent, full, voluntary, free and informed.

2 *Educational measures*

Beyond sending a message through legislation about the impact of intoxication on consent, additional educational measures are also desirable. Studies of college students in the United States indicate that young people in particular believe alcohol plays an important role in facilitating sexual and social relationships.³² Thus for some women there is a clear linkage between drinking alcohol and having sex. There is always a risk that some of these women will experience significant psychological,

³² Meichun Mohler-Kuo and others "Correlates of Rape While Intoxicated in a National Sample of College Women" (2004) 65 *Journal of Studies on Alcohol* 37, 37.

physical and emotional harm from being in a state of advanced intoxication in which they were compliant to sexual advances that they would normally reject. Increasing women's awareness that alcohol can induce uncharacteristically uninhibited sexual behaviour over which they may lack volition and control aims to reduce this risk, and thereby to reduce the harms of non-consensual intoxicated sex.

IV CONFUSION OF CONSENT AND VOLUNTARY INTOXICATION

While in *Sturm* the Court's comments on intoxicated consent are the favoured approach to section 128A(4), their next comments, relating to voluntariness of intoxication, are less so. Having observed that a drug-induced receptiveness to sex does not entail that there was a legal consent, the Court went on to note that this is only the case where the person experiencing the state of drug-induced receptiveness is *involuntarily* intoxicated. The full quote within paragraph 48 of the case follows:³³

In such cases [of drug-induced receptiveness to sex] an apparent consent may not be a true consent in that once the drug has taken effect on the mind of the person, the ability to form an informed and voluntary consent will have been impaired to a greater or lesser degree. *On the other hand*, drugs may have been voluntarily taken with awareness of, and acceptance of, the likelihood of disinhibited and otherwise uncharacteristic behaviour. [Emphasis added].

Thus, the Court's approach is to hold that, if A experiences a drug-induced receptiveness to sex while involuntarily intoxicated, she may not have been capable of giving a genuine consent, and her consent capacity should be examined by the jury. On the other hand, if she drinks alcohol voluntarily, accepting the likelihood of uninhibited behaviour, and then experiences a drug-induced receptiveness to sex, her apparent consent should be taken as true consent. Her capacity to consent is determined by whether she drank voluntarily or involuntarily.

The *Sturm* approach to voluntary intoxication is a drastic change to the settled approach, established by the 1975 English Court of Appeal case of *R v Lang*, that A's consent is not determined by "how she came to take a drink" but whether at the time of intercourse she understood her situation and was capable of making up her mind.³⁴

³³ *R v Sturm*, above n 2, para 48 Judgment of the Court.

³⁴ *R v Lang* (1975) 62 Cr.App.R 50, 52.

As a matter of alcohol pharmacology, the effect of alcohol on A's consent capacity is exactly the same whether she is intoxicated by choice or not. However, the Court in *Sturm* says that the *Lang* approach of disregarding the circumstances of A's intoxication is no longer appropriate, given that disinhibiting drugs, including alcohol, are now taken by many on a voluntary basis.³⁵ The voluntariness of A's intoxication must have some relevance to B's liability for rape.

As far as the *Sturm* approach recognises that A's voluntary intoxication is relevant to B's liability for rape, it is not problematic. This is due to the existence within section 128 of the Crimes Act of the requirement that, in order to be guilty of rape, B must either knows A does not consent, be reckless as to whether she consents, or negligently believe that she does consent: that is, base his belief in her consent on unreasonable grounds. Therefore if B reasonably believes A consented, he is not guilty of rape.³⁶

So, if A is surreptitiously administered alcohol by B so that she will be more likely to have sex with him, he could not rely on a reasonable belief in her consent as a defence to rape. As Dixon notes, "the very fact he used such a strategy implies that he doubts that she would agree to have sex with him if she were sober."³⁷ Conversely, if A is voluntarily drunk, B did not administer intoxicants as a strategy to facilitate intercourse and may believe that she is voluntarily consenting. Thus the voluntariness or otherwise of A's intoxication goes to B's reasonable belief in consent.

The *Sturm* approach to voluntary intoxication is misleading, because it considers voluntariness of intoxication as relevant to whether A consented, rather than whether B had a reasonable belief in consent. As far as the Court in *R v Sturm* confuses the consent issue with the voluntariness issue, it should not be adopted in the section 128A(4) inquiry. A better approach is to accept that, whether voluntarily or involuntarily intoxicated, if A cannot legally consent then she does not consent. But if her intoxication is voluntary, then B may have grounds on which to base a reasonable belief in consent.

A Recognition of Harm

³⁵ *R v Sturm*, above n 2, para 48 Judgement of the Court.

³⁶ Crimes Act 1961, s 128.

³⁷ Nicholas Dixon, above n 1, 344.

By stating that, if A drank voluntarily, she is deemed to have consented to any intercourse which follows, the law fails to give adequate weight to the fact that A actually did not consent and that an act of non-consensual, potentially harmful sexual intercourse took place. In fact, complainants who drink voluntarily are required to absorb the responsibility for the harm caused by later non-consensual sex, because they drank alcohol with "awareness of, and acceptance of, the likelihood of disinhibited and otherwise uncharacteristic behaviour."³⁸

It is probable that most women who drink alcohol are aware of its disinhibiting properties. But it is not fair to go further, and to assume that the average female drinker is aware that heavy intoxication can specifically induce an increased receptiveness to sex, and that every time she drinks she is deemed by the law to have given, in advance, a valid consent to sex should she later experience such a state. Furthermore, the harm that she may feel at having been subjected to sex in a state in which she could not consent is glossed over if the Court holds that she was capable of, and did, consent.

B The Ideal Intoxicated Rape Victim

The *Sturm* rule also creates a perception that voluntarily intoxicated women are less deserving of the protection of section 128A(4), because they do not fit the image of the "ideal" intoxicated rape victim. The "ideal" intoxicated rape follows the prototypical construction of a drug rape, in which the rapist surreptitiously administers an illicit drug rape drug, such as Rohypnol, to his female victim, inducing unconsciousness as a precursor to intercourse.³⁹ As a matter of fact many, if not most, drug-assisted rapes deviate significantly from this template.⁴⁰ But *Sturm* perpetuates the myth that the "real" intoxicated rape involves an involuntarily intoxicated victim. Women who get heavily drunk by choice violate societal norms of "appropriate" female behaviour and therefore are not ideal victims.⁴¹

³⁸ *R v Sturm* above n 2, para 98 Judgment of the Court.

³⁹ E Finch and VE Munro, above n 11.

⁴⁰ *Ibid.*

⁴¹ Abbey, Antonia and others "Alcohol, Misperception and Sexual Assault: How and Why Are They Linked?" in David M Buss and Neil M Malamuth (eds) *Sex, Power, Conflict: Evolutionary and Female Perspectives* (Oxford University Press, Oxford, 1996).

If the *Sturm* approach is adopted, the implicit condemnations of voluntarily intoxicated victims by the Courts will likely filter down into police and prosecutors' attitudes towards rape complainants. This may make a rape victim who was drinking at the time of the offence less likely to report it, even if her non-consent was absolute and legally unproblematic. In a study cited by Abbey and others, women victims of rape who were drinking prior to the rape considered themselves significantly more responsible than those who were not drinking.⁴² *Sturm* exacerbates this misplaced assumption of responsibility on to the voluntarily intoxicated woman.

C The Fear of False Rape Claims

A feared increase in false rape claims is also behind the obfuscation of the consent issue by the voluntariness of A's intoxication. Finch and Munro believe that to legitimise A's non-consent in cases of drug-induced receptiveness when she is voluntarily intoxicated would be to allow women to retrospectively revoke what was at the time a genuine, albeit intoxicated, consent. Women may "seek refuge" in their voluntary intoxication because, based upon a sober re-evaluation of events, they regret having had sex or wish to avoid social censure for having sexual intercourse while drunk.⁴³ Indeed, the fear of such "mischievous accusations" was the very reason the British Parliament rejected voluntary intoxication as a basis of non-consent when they reformed their sexual offence provisions in 2003. Former Home Secretary David Blunkett, discussing the reforms in Parliament in 2002, stated that "it is worth making it clear that I have rejected the suggestion that someone inebriated could claim that they were unable to give consent – as opposed to someone who was unconscious for whatever reason, including because of alcohol, and was therefore unable to do so – on the ground that we do not want mischievous accusations".⁴⁴

This argument, while not explicitly stated by the Court, may have been in the minds of the judges in *Sturm* when they formed their stance on voluntary intoxication. They cite the Finch and Munro article which raises the spectre of retrospective revocation of consent,⁴⁵ and historically, judicial dicta illustrate a profound scepticism

⁴² Ibid.

⁴³ E Finch and VE Munro, above n 11, 783.

⁴⁴ (19 November 2002) HC col 512.

⁴⁵ *R v Sturm*, above n 2, para 46.

towards women rape complainants.⁴⁶ As recently as 1975, judges expressed the view that “it is well known that women in particular, and small boys, are liable to be untruthful and invent stories”.⁴⁷ It was believed that it was easy for women to bring a false rape complaint to achieve a given aim.⁴⁸

There are few crimes in which false charges are more easily or confidently made than in rape. Experience has shown that unfounded charges of rape are brought for a variety of motives. The adage, ‘Hell hath no fury like a woman scorned’, is frequently encountered in rape prosecutions.

If such thinking influenced the judges in *R v Sturm*, and it is not beyond the realms of possibility, the fear of a rise in false rape claims is an insufficient ground upon which to deprive voluntarily intoxicated women of the protection of section 128A(4).

The false rape claim debate is dominated by two things: assumptions, fuelled by media representations, that women use rape complaints to “cry wolf” for a multitude of reasons;⁴⁹ and, a dearth of empirically backed investigation into actual rates of false complaints.⁵⁰ A study undertaken by Jan Jordan in 2004 illustrated that accurate rates of false rape claims are difficult to obtain because of varying practice amongst New Zealand police in what are termed false complaints and how they are recorded.⁵¹ It would be a breach of justice to exclude voluntarily intoxicated women from the reach of section 128A(4) based on a misconceived belief in the prevalence of false rape claims, which is itself largely a construction of false premises and assumptions.

In response to the fear of false rape claims, Rumney and Fenton note that, as a practical matter, it depends on the complainant to make the false allegation.⁵² Given that a large number of rapes go unreported, not all reported rapes are investigated, and even fewer reach the prosecution stage, the probability that one of these will be based upon a retrospective revocation of intoxicated consent, and that the jury will deliver a verdict of non-consent, seems slim, or at least not a justifiable ground for narrowing

⁴⁶ Jan Jordan “Beyond Belief? Police, rape and women’s credibility” (2004) 4 Criminal Justice 29, 30

⁴⁷ Judge Sutcliffe, 1976, cited in Jan Jordan, *ibid*, 31.

⁴⁸ Judge Ploscowe *Sex and the Law* (1951) 187 cited in Jan Jordan, *ibid*, 31.

⁴⁹ Gavey, Nicola and Gow, Virginia “‘Cry Wolf’ Cried the Wolf: Constructing the Issue of False Rape Allegations in New Zealand Media Texts” (2001) 11 *Feminism and Psychology* 341.

⁵⁰ Philip NS Rumney “False Allegations of Rape” (2006) 65 *CLJ* 128, 129

⁵¹ Jan Jordan, *above n* 46, 34.

⁵² Rumney, Philip NS and Fenton, Rachel Anne “Intoxicated Consent in Rape: *Bree* and Juror Decision-Making” (2008) 71 *MLR* 279, 290.

the application of section 128A(4) to involuntarily intoxicated women experiencing a state of drug-induced receptiveness. The effect that the *Sturm* rule for voluntary intoxication will have on already low reporting rates should be of more concern.

V *B'S REASONABLE BELIEF*

We can reject the *Sturm* approach, which confuses voluntary intoxication with A's consent capacity, but still hold the voluntariness of A's intoxication relevant to the existence of B's reasonable belief in consent. If A is voluntarily intoxicated as opposed to being drugged, B is more likely to believe she consented to sex. If B's belief in A's consent is reasonable, then he is not guilty of rape.

A *The Current Legal Position*

1 *An objective standard*

Prior to 1985, New Zealand Courts followed the decision of the House of Lords in *DPP v Morgan*, which held that the crime of rape requires knowledge of the absence of consent, or recklessness.⁵³ Therefore, it was only necessary that B have an honest belief in consent in order to avoid liability for rape. It did not matter whether that belief was reasonable or unreasonable. Now, the test is objectively assessed, so that B must honestly believe in consent and it must be reasonable in the circumstances for him to form this belief.⁵⁴ However, it is established as a matter of law that if B is drunk and his drunkenness induces him to believe that A consents, he will not be held to have a reasonable belief in consent.⁵⁵

2 *Determining reasonable belief*

Whether B's belief in consent is reasonable is a matter for the jury, because it is a factual question going to what B actually believed, and whether this was reasonable given the circumstances. Although B's belief in consent must be reasonable, there is no legal obligation for him to check that his partner consents as part of establishing

⁵³ *DPP v Morgan* [1976] AC 182 (HL).

⁵⁴ Crimes Act 1961, s 128.

⁵⁵ *R v Clarke* [1992] 1 NZLR 147, 149 (CA).

the reasonableness of his belief. At trial, the onus is on the Crown to show that B's belief was not reasonable, rather than on B to show that his belief was reasonable.⁵⁶

B B's State of Mind

In a case in which A is voluntarily intoxicated, B has not drugged A, nor has he plied her with drink. He either meets A when she is already drunk, or he drinks with her with no designs on getting her drunk. In that case he may have one of two states of mind. He may opportunistically take advantage of A's intoxicated state to have sex with her, knowing that she would not consent if she were sober. Alternatively, he may realise that A is very intoxicated but honestly believe that she is capable of giving a genuine consent.

In the first scenario, Dixon would support holding that B lacks a reasonable belief in consent, because he knows that A would not have sex with him if she were sober, therefore he has no belief in her genuine consent.⁵⁷ Although he may be less culpable because he did not administer the alcohol that made B intoxicated, he has no more of a belief in the voluntariness of A's consent than does the man who drugs A or plies her with alcohol to facilitate sexual intercourse.

In the second scenario, B genuinely believes that A consents. She may be staggering, slurring and even vomiting, but she does not descend into complete physical incapacity. She is also compliant and cooperative with B's sexual advances. Assuming that it was established earlier in this paper that the law provides that a drunken consent cue is legally questionable, this will alter what it is reasonable, at law, for B to believe in this situation about his partner's capacity to consent.

C A New Approach to Reasonableness

As long as legal consent is held to be something that is subjectively felt rather than objectively expressed, it is important to retain the reasonable belief element of the crime of rape. However, even if A is voluntarily intoxicated, and if B believes that she is capable of consenting, it is necessary for him to take steps to establish that his belief is reasonable.

⁵⁶ *R v Daniels* [1986] 2 NZLR 106, 114 (CA).

⁵⁷ Nicholas Dixon, above n 1, 346.

B would not be required to present in Court a “consent contract” or something similar which establishes beyond doubt that his partner consented- although, if he chooses to do so, it will no doubt support a reasonable belief in consent. It is a fact of the rape trial that B would have to present the evidence of the steps he took, and it would be the jury’s task to determine the credibility of that evidence.

1 *B’s responsibility*

Putting the onus on men to establish that their sexual partner truly consents, and requiring them to hold up evidence of the reasonableness of their belief in consent in Court, represents a fundamental shift to the burden of proof, which traditionally rests with the prosecution, not the defence. It may be argued that B has to bear a greater burden for A’s intoxication than does A. Perhaps. But while A is responsible for getting herself into a state in which she cannot legally consent, once in that state, she is not responsible for unwanted sexual acts committed by B when she cannot consent; this is B’s responsibility. Wertheimer notes that men’s legal and moral burden may indeed be greater. But women would continue to bear the physical and emotional burdens from unwanted intoxicated sexual relations.⁵⁸

Provided that the proposed changes to section 128A(4) with regard to intoxicated consent are duly promulgated, B should be aware that A is potentially unable to consent when she is very intoxicated. He is then responsible for ensuring that A’s consent is sufficiently legally transformative to render his actions permissible.

2 *A’s responsibility*

It is reasonable to hold A responsible for voluntarily becoming intoxicated. But it does not follow that she must absorb responsibility for all the consequences that flow from that, including the erosion of her consent capacity and unwanted sexual intercourse. As Wertheimer notes, we may desire autonomous agents to be held morally responsible for their choices, but does this also mean that we should require women to internalize *all* the consequences of that behaviour?⁵⁹ This is arguably a reflection of dominant social norms which tend to hold intoxicated men less

⁵⁸ Alan Wertheimer “Intoxicated Consent to Sexual Relations” (2001) 20 Law and Philosophy 373, 401.

⁵⁹ Alan Wertheimer, above n 15, 244.

responsible for their behaviour but hold intoxicated women *more* responsible.⁶⁰ Wertheimer puts it in retributive terms: the “punishment” of treating A’s consent as valid may not fit the “crime” of becoming intoxicated.⁶¹ Moreover, the fact that we may desire to assign some responsibility to A for inducing her own intoxicated state, does not mean that we should let B “off the moral hook”⁶² for having sex with someone who could not consent.

3 *Consistency of Responsibility*

Susan Estrich argues that, if men are capable of forming the mens rea required to do a criminal act even when they are extremely drunk, then the law should treat women as capable of giving a valid consent, even though they are extremely drunk. There should be consistency of responsibility between these two situations. To hold otherwise would be to condescend to women and to treat them as being insufficiently autonomous to be held responsible for their own behaviour.⁶³

This consistency “claim”, notes Wertheimer, exerts “strong intuitive moral pull”⁶⁴ for assigning the burden of intoxicated consent to A, not B. It seems unfair that, if both a man and a woman are intoxicated when they have sex, the woman can point to her intoxication as evidence of non-consent, but the man cannot point to his intoxication as the reason why he reasonably believed that his partner consented.

But this desire to even things up between intoxicated men and women fails to recognise that the mental state required for criminal wrongdoing is inherently different from the mental state that is required to give a valid consent.⁶⁵ Forming the mens rea required to commit a crime means determining what action one will take or omit to take. In contrast, forming the mens rea of a consensual state of mind says what it is permissible for others to do to *you*. Consent in these circumstances is transformative, because it renders it legally permissible for B to have sex with A. Such transformations, arguably, “require a deeper expression of the agent’s will than the

⁶⁰ Abbey, Antonia and others, above n 41.

⁶¹ Alan Wertheimer, above n 15, 245.

⁶² Ibid.

⁶³ Susan Estrich “Palm Beach Stories” 11 *Law and Philosophy* 5 (1992) 10, cited in Alan Wertheimer, above n 15, 243.

⁶⁴ Alan Wertheimer, above n 15, 253.

⁶⁵ Ibid, 244.

intentions required for culpability for wrongdoing.”⁶⁶ Furthermore, what is being consented to is a fundamentally intimate crossing of A’s sexual and personal boundaries. These boundaries are arguably “the most important attributes of our humanity.”⁶⁷ The capacity required to give a valid consent, then, is more robust than that which is required to assign responsibility for criminal wrongdoing. The consistency claim may exert strong moral pull but this alone does not support equating the mens rea of committing a crime with the mens rea of giving a legally transformative consent.

VI CONCLUSION

Given that alcohol is consumed on a regular basis by men and women in social and dating situations, it is necessary to consider the effects that intoxication can have on their ability to give, and to get, a consent to sex that satisfies the requirements of the law. Perhaps because alcohol features so regularly in social interactions, people may not give sufficient weight to the “sledgehammer”⁶⁸ effect that it can have on physical and cognitive capacities, including the capacity to consent to sex. This can lead to harmful sexual interactions, in which A is not capable of giving consent but B reasonably believes she is. If the issue goes to trial, the result is that A suffers the harms of non-consensual sex, while B suffers the harm of being put on trial for a violent sexual crime.

The reforms recommended in this paper aim to clarify understanding of the interface between intoxication and consent and to reduce the likelihood of such harms arising on a frequent basis. It is probably unavoidable that men and women will continue to drink alcohol and engage in intoxicated sexual relations. Both these behaviours are legal and, moreover, common. The challenge for the law is to strike the correct balance between allowing positive intoxicated sexual encounters and minimising harmful ones. At the moment, the Courts are taking the lead, but it is now necessary for clear legislative direction in regard to intoxicated consent and reasonable belief.

⁶⁶ Ibid.

⁶⁷ Nagel “Concealment and Exposure” 4 cited in Alan Wertheimer, above n 15, 106.

⁶⁸ Aaron M White, above n 20, 186.

The Ministry of Justice has just released a discussion document which seeks public opinion on a number of reforms that could potentially improve the criminal justice system's response to sexual offending. With the possibility of a complete reform of rape laws and the rape trial on the horizon,⁶⁹ Parliament has the opportunity to make a statement about the importance of giving and getting full and genuine consent in intoxicated sexual relations. It is hoped that the issues raised in this paper will feature highly in any future reforms.

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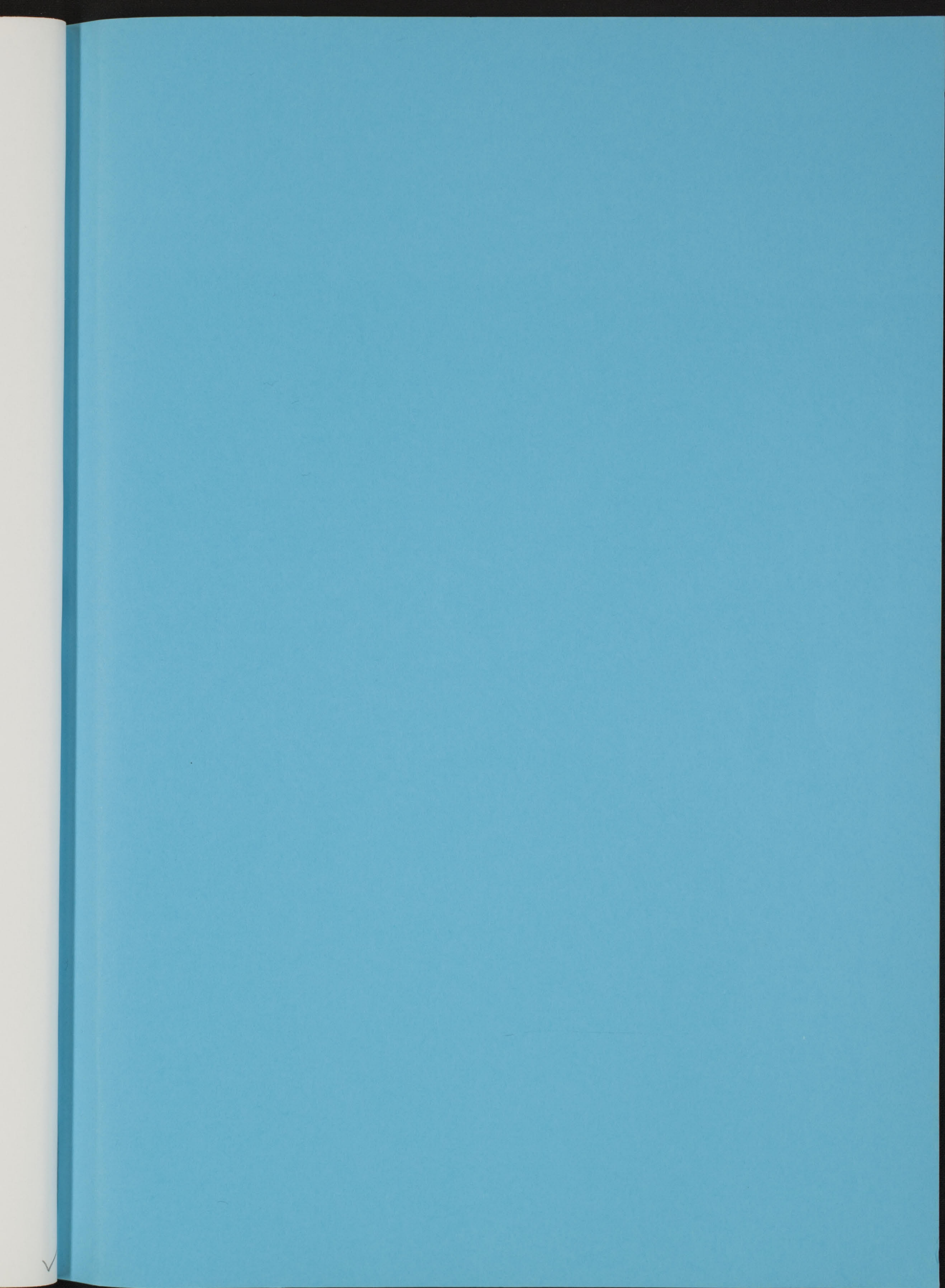
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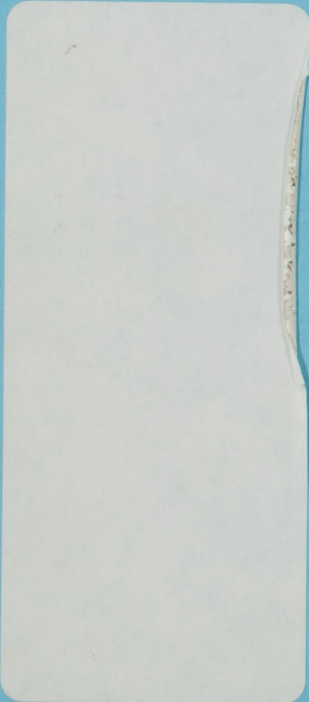
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