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## **The Concept of Consent under the Sexual Offences Act 2003**

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*Abstract This article examines the provisions relating to consent under the Sexual Offences Act 2003. It considers whether the law in this area now possesses a satisfactory level of clarity following a number of recent Court of Appeal decisions, and concludes that there may be a need for further legislative reform in this respect.*

*Keywords Sexual Offences Act 2003; Consent; Reasonable belief; Rape; Sexual assault*

This article examines the concept of consent under the Sexual Offences Act 2003. Scholars have consistently raised concerns regarding this concept.<sup>1</sup> Most of these concerns were raised before the existence of leading cases on the correct interpretation of the relevant sections of the 2003 Act. Focusing on the definition of consent under s. 74 of the Act, as well as the rebuttable and conclusive presumptions regarding consent and reasonable belief in it under ss 75 and 76, this article examines recent case law with a view to determining whether the courts have succeeded in clarifying the definition of consent and the appropriate application of the evidential presumptions. It concludes that further legislative reform may be necessary in order to clarify the law because the Judicial Studies Board and the Court of Appeal seem to be reluctant to offer comprehensive guidance in this area, and that it is accordingly regrettable that the Government has withdrawn its plan to reform the substantive law in this respect.

### **An overview of the 2003 reforms regarding consent**

Before examining the recent case law, it is important to consider the background to the 2003 reforms regarding consent so that the case law can be understood in its context. The issue of consent is central to the offence of rape and the three other principal offences in England specifically involving non-consensual sexual activity, namely: (1) assault by penetration; (2) sexual assault; and (3) causing a person to engage in sexual activity without consent.<sup>2</sup> The Sexual Offences Act 2003 introduced the latter three offences, placed the definition of consent on a statutory footing, introduced certain evidential presumptions, altered the fault element of the offence of rape, and made numerous other reforms. The origins of the Act lie in the recommendations of a Home Office review completed in July 2000. Recognising that the law needed reviewing because, amongst other things, it was 'a patchwork quilt of provisions ancient and modern that ... [lacked] coherence and structure',<sup>3</sup> the Home Office created a body in order to conduct a review of sex offences. The paper produced by the body set out recommendations to Ministers.<sup>4</sup> The Home Office had sought recommendations that would: (a) 'provide coherent and clear sex offences which protect individuals from abuse and exploitation'<sup>5</sup>; (b) 'enable abusers to be appropriately punished'<sup>6</sup>; and (c) 'be fair and non-discriminatory in accordance with the European Convention on Human Rights and the Human Rights Act [1998]'.<sup>7</sup> The Home Office was concerned to modernise comprehensively the law on sexual offences in

order to create 'a framework that protects the weaker members of society--particularly children and vulnerable people--and those who have been subject to sexual abuse or exploitation'.<sup>8</sup> As the sexual offences review body put it in relation to the law at the time of the review, 'much of the law dates from a hundred years ago and more, when society and the roles of men and women were perceived very differently ... The result is a loose framework of offences, designed to meet specific problems that caused concern in their day, but with little coherence or structure'.<sup>9</sup> The advent of a new century and the incorporation of the European Convention on Human Rights into English law, 'with its emphasis both on the responsibilities of the state and the rights of the citizen ... [provided] a timely context in which to examine this area of the law'.<sup>10</sup> In conducting its analysis, one of the review body's fundamental guiding principles was that the law on sex offences embodies society's view 'of what is right and wrong in sexual relations',<sup>11</sup> and that 'this judgment on what is right and wrong should be based on assessment of the harm done to the individual (and through the individual to society as a whole)'.<sup>12</sup> As a corollary of its adoption of this liberal harm principle, the review body also took the position that the criminal law should not intrude unnecessarily into the private lives of adults.<sup>13</sup> The review body furthermore adopted another liberal premise, that the law should adopt a position of formal equality. In terms of sexual offences, this means that '[i]n order to deliver effective protection to all, the law needs to be framed on the basis that offenders and victims can be of either sex'<sup>14</sup>; that is, in gender neutral terms, unless there is a good reason for it to be otherwise.

The sexual offences review body recommended a large number of reforms, among which were important proposed modifications of the existing offences of rape and indecent assault. As Jennifer Temkin and Andrew Ashworth state, 'the Government accepted most of those recommendations in its White Paper of 2002',<sup>15</sup> but several parts of the Sexual Offences Bill changed considerably in response to criticism as it passed through Parliament. The Sexual Offences Act 2003 made many important changes to the law. Consent is now defined in s. 74 of the Act, which states that 'a person consents if he [or she] agrees by choice, and has the freedom and capacity to make that choice'. English common law previously gave 'consent' its 'ordinary meaning'. The dividing line was between 'real consent' on the one hand and 'mere submission' on the other; as the Court of Appeal put it before the 2003 reforms, '[w]here it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case'.<sup>16</sup> Although it was conceptually clear that consent obtained by physical force or the threat of physical force is vitiated,<sup>17</sup> the position was less clear where such coercion was non-physical, such as with blackmail or economic threats.<sup>18</sup> A feminist criticism of the pre-2003 law of rape was that by overlooking more subtle forms by which consent may be contrived, such as through psychological bullying, 'rape law conceals and hence legitimates socio-economic conditions that compromise women's capacity to say and to be understood as saying "no"'.<sup>19</sup> The sexual offences review body proposed to overcome perceived difficulties that had arisen in relation to the interpretation of consent by defining consent as 'free agreement' and by setting-out a non-exhaustive list of examples, illustrating circumstances in which consent is not present such as where a person 'submits or is unable to resist because of force or fear of force ... or was asleep, unconscious, or too affected by alcohol or drugs to give free agreement'.<sup>20</sup> The point of these proposed reforms was to clarify the concept of consent rather than to change its meaning.<sup>21</sup> In this respect, the Sexual Offences Act 2003 introduced certain rebuttable and irrebuttable presumptions regarding consent and belief in consent in ss 75 and 76 respectively. However, the list of irrebuttable presumptions in s. 76 is much shorter than the list proposed by the review body, and, as Temkin and Ashworth point out, 'where the facts of the case do not fall squarely within any of the irrebuttable or rebuttable presumptions, the arguments will focus on the application of ... [the general definition of consent provided in s. 74]'.<sup>22</sup> The definitions of rape, assault by penetration, sexual assault and causing sexual activity all follow the same structure. In relation to rape and these other offences, the prosecution can establish an absence of consent in three possible ways. As Temkin and Ashworth summarise the situation:

The first route, and that generally most favourable to the prosecution, would be to bring the circumstances within one of the conclusive (irrebuttable) presumptions in s.76. The second route would be to bring the circumstances within one (or more) of the rebuttable presumptions in s.75. The third route is to rely on the general definition of consent in s.74.<sup>23</sup>

The issue that this article will consider is whether the law regarding consent is in a satisfactory state following recent case law on the interpretation of ss 74, 75, and 76.

## The interpretation of s. 74

In conducting its assessment of the sexual offences laws, the Home Office review body was keen to make it clear that consent is not something that should be perceived as being sought by the stronger and given by the weaker.<sup>24</sup> In the leading pre-2003 authority, *R v Olugboja*, Dunn LJ stated that there is a difference between 'consent' and 'mere submission', and claimed that 'every consent involves a submission, but it by no means follows that a mere submission involves consent'.<sup>25</sup> This contentiously implied that submission is a part of 'normal' sexual relations. Section 74 uses different terminology; unlike *Olugboja*, it does not refer to a distinction between mere submission and consent. However, like *Olugboja* with its reference to 'ordinary meaning', it does seem to be premised on the assumption that consent requires little definition. *Olugboja* stated that the issue of consent 'should not be left to a jury without some further direction',<sup>26</sup> but it ultimately provided the jury with a great deal of discretion by stating that they should be told that that consent is to be given its 'ordinary meaning', and that where the line between consent and non-consent 'is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case'.<sup>27</sup> The problem with this approach is that '[t]he concept of consent has, in reality, no single clear "ordinary meaning"',<sup>28</sup> and that it accordingly requires definition. As a 2004 editorial in the *Criminal Law Review* points out, s. 74 'is presumably intended, *inter alia*, to replace the distinction at common law between [mere] submission and consent explicated by the Court of Appeal in *Olugboja* ... but broad notions of "choice" and "freedom" leave a good many questions unanswered about the kinds of non-violent threats or other pressures that might invalidate an apparent consent'.<sup>29</sup> Section 74 provides no definition of capacity, and this has given rise to difficulties in certain cases, as discussed below. Home Office guidance on the subject does not provide an answer, since it merely states that 'a person may not have the freedom to consent because, for instance, he has a mental disorder'.<sup>30</sup> Similarly, as Peter Rook and Robert Ward state, 'the concept of "free agreement" is capable of wide interpretation ... Is a penniless employee, who is threatened with the sack by her employer unless she grants him sexual favours, giving her free agreement if she grants those favours?'.<sup>31</sup>

It is currently impossible to predict how police, prosecutors, and courts would apply s. 74 to certain situations. For example, the Crown Prosecution Service has issued only a vague policy statement on the issue: 'the question of whether the victim consented is a matter for the jury to decide, although we consider this issue very carefully when first reviewing the file. The prosecutor will take into account evidence of all the circumstances surrounding the offence'.<sup>32</sup> Temkin and Ashworth stated in 2004 that, given the lack of a statutory definition of concepts such as 'freedom' and 'choice', 'it will be for the Judicial Studies Board [a body that provides training and instruction for all judges] (and then the Court of Appeal) to develop a standard direction on consent which can be suitably tailored to the circumstances of each case'.<sup>33</sup> Unfortunately, the Judicial Studies Board has not developed a meaningful standard direction relating to s. 74: rather, its direction merely replicates the wording of the section in stating that '[a] person consents only if he/she agrees by choice and has the freedom and capacity to make that choice'.<sup>34</sup> Furthermore, the Court of Appeal had not adequately addressed this lack of guidance.

The leading case on capacity is *R v Bree*,<sup>35</sup> but this case arguably raised more questions than it answered. The complainant had consumed a large amount of alcohol before having sexual intercourse with the appellant. The Court of Appeal held that the judge had failed to direct the jury properly on the significance of intoxication as it relates to consent. The judge had given the jury no guidance about how properly to address the issue of consent, and, as Sir Igor Judge P put it, 'the jury should have been given some assistance with the meaning of "capacity" in circumstances where the complainant was affected by her own voluntarily induced intoxication, and also whether, and to what extent, they could take that into account in deciding whether she had consented'.<sup>36</sup> *Bree* is significant because it suggests that the phrase 'a drunken consent is still consent' accurately encapsulates the legal position.<sup>37</sup> Giving the judgment of the court, Sir Igor Judge P stated that 'the phrase lacks delicacy, but, properly understood, it provides a useful shorthand accurately encapsulating the legal position'.<sup>38</sup> Sir Igor Judge P drew a distinction between a complainant who is so drunk that he or she lacks the capacity to consent and a complainant who retains the capacity to consent and actually does so. As he put it:

If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting ... However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape.<sup>39</sup>

One interpretation of *Bree* is that the phrase 'a drunken consent is still consent' applies to both voluntary and involuntary intoxication. This is the literal interpretation of Sir Igor Judge P's words, as taken by Damian Warburton, who states that '[t]he lesson that should be taken from this case ... is that ... the law cannot ... condone a conclusion whereby because the complainant would not have acted while sober as she did while drunk, she therefore could not have consented and must have been raped'.<sup>40</sup> As the present author has stated elsewhere,<sup>41</sup> the problem with this interpretation of *Bree* is that it is arguable that the law should draw a distinction between voluntary and involuntary intoxication in this context. Sir Igor Judge P's view that 'drunken consent is still consent' seems uncontroversial where the complainant was voluntarily intoxicated, but is arguable that different considerations should apply, and do so under the current law, in cases of involuntary intoxication. It is not clear that the phrase 'drunken consent is still consent' should apply in the latter context; for example, where the defendant surreptitiously administered a so-called 'date rape' drug to the complainant in order to disinhibit him or her. As Jonathan Herring puts it, 'if a legal system is to rely on consent as a justification for what would otherwise be a grave wrong, it must demand consent in a rich sense'.<sup>42</sup> The law does not allow individuals to intoxicate others without their consent in order to procure their engagement in sexual activity. Section 61 of the Sexual Offences Act 2003 stipulates that it is an offence for a person to administer a substance to another person, B, knowing that B does not consent, and with the intention of stupefying or overpowering B, to enable any person to engage in sexual activity that involves B. The existence of the s. 61 offence suggests that any apparent consent to sexual activity is invalid where this apparent consent is caused by the administration of a 'stupefying' or 'overpowering' substance against the complainant's consent. The s. 61 offence addresses 'a very real concern about the use of drugs and alcohol to enable rape to take place'.<sup>43</sup> It is arguable that any sexual activity that takes place because of the behaviour prohibited by s. 61 is the result of exploitation and therefore non-consensual for the purposes of the Sexual Offences Act 2003. As Andrew Simister and Robert Sullivan put it, 'where D has administered or caused V to take a substance without her consent, it may be said her consent was not valid where she does things she would not have done but for the disinhibiting effects of the substance'.<sup>44</sup>

A second major problem with *Bree* is that it does not make it clear exactly when a person lacks the capacity to consent because of intoxication. On this issue, Sir Igor Judge P stated that 'capacity to consent may evaporate well before a complainant becomes unconscious',<sup>45</sup> but added that whether this is so or not is a matter of fact for the jury to decide with the help of guidance from the judge. *Bree* does not define the term 'capacity'. As Philip Rumney and Rachel Fenton put it, '[t]he upshot of *Bree* is that capacity to consent when voluntarily intoxicated is an issue for the jury to decide, with the aid of some (as yet unknown) judicial direction'.<sup>46</sup> *Bree* states that the judge should have provided the jury with assistance regarding the definition of capacity as it applied to the circumstances of the case. However, *Bree* does not itself provide the judge with detailed guidance about how properly to address this task, and in this sense it delegates the task of defining the law to the trial judge. The court could have taken the opportunity to state that a complainant does not have the capacity to consent when his or her knowledge and understanding are so limited that he or she is not in a position to decide whether to agree.<sup>47</sup> As stated by the present author elsewhere,<sup>48</sup> this definition would have the benefit of making it clear that knowledge and understanding are integral to the concept of 'consent'. Rumney and Fenton rightly observe: '[g]iven the complexities of the area the court could not have been expected to produce a definitive statement. However, some indication of the factors to be considered by judges when directing rape juries ... would have been useful'.<sup>49</sup>

*Bree* does little, if anything, to increase consistency in this area of the law, since it does not deal with the 'core concern with the current statutory framework, that is, lack of guidance'.<sup>50</sup> *R v H*, a more recent Court of Appeal decision, adds little to the guidance provided in *Bree* on the issue of consent and shows that trial judges cannot necessarily be relied upon to deal with this issue adequately.<sup>51</sup> After celebrating the New Year with friends, the complainant in *R v H* became separated from those friends and ended up having sex with a stranger. The Crown claimed that the defendant, H, was the stranger in question, and that the complainant had not consented. The Crown's argument was that even if the complainant had said "yes" to

intercourse ... there remained an issue as to whether or not she had the capacity to consent',<sup>52</sup> since she had consumed a significant alcohol on the night in question. The judge accepted H's submission that there was no case to answer. Taking into account the decision in *Bree*, '[h]e found that although there was evidence of drunkenness, it was insufficient to allow a jury safely to conclude that the complainant had lacked the capacity to consent'.<sup>53</sup> The Court of Appeal overturned this finding, and remitted the case to the Crown Court for the trial to continue. The Court of Appeal held that the judge had trespassed 'too far into the jury's territory by withdrawing the case from them'.<sup>54</sup> As the court put it:

It would be a rare case indeed where it would be appropriate for a judge to stop a case in which, on one view, a 16 year old girl, alone at night and vulnerable through drink, is picked up by a stranger who has sex with her within minutes of meeting her and she says repeatedly she would not have consented to sex in these circumstances.<sup>55</sup>

The court stated that '[i]t was for the jury, not the judge, to decide, on the basis of the evidence called, whether, on these facts, in this case, the complainant had the capacity to consent and/or in fact consented to intercourse or not'.<sup>56</sup> *R v H* is a reminder that the judge should normally leave the issue of consent to the jury in a case involving an allegation of non-consensual sexual activity. It also shows that trial judges may need detailed guidance about how properly to address their task in such cases. It appears that the trial resumed with the same judge after the ruling by the Court of Appeal. The Court of Appeal was apparently satisfied for the trial to resume in this way, since it noted that 'the judge has sensibly made arrangements for the jury to be contacted ... [and] [t]hey can therefore resume this trial blissfully ignorant of the judge's ruling and this appeal'.<sup>57</sup> However, taking into account the fact that the trial judge had already made a fundamental mistake regarding the issue of consent, it is not obvious why the Court of Appeal apparently trusted him to provide the jury with adequate guidance regarding this issue. The final point to note about *R v H* is that it does nothing to address the view that complainants are culpable for being raped when drunk. Hallett LJ characterised *R v H* as 'yet another sad example of what can happen when young people roam the streets of our cities vulnerable through drink and/or drugs'.<sup>58</sup> This characterisation is worrying because it brings to mind the empirical research that suggests that some jurors think that women are totally responsible when they are raped while intoxicated.<sup>59</sup> The point here is not that Hallett LJ was inappropriately criticising the complainant for her 'carelessness'; it is that Hallett LJ delivered a judgment that does nothing to correct the view that women are responsible when they are raped while voluntarily intoxicated.

One of the dilemmas in this area of the law is where to draw the line between capacity and incapacity in cases of intoxication. Another dilemma is where to draw the line in cases where the complainant gave apparent consent to sexual activity on the basis of a mistake. At one extreme, Jonathan Herring proposes that any such mistake can undermine consent. Herring argues that there is no valid consent '[i]f at the time of the sexual activity a person: (i) is mistaken as to a fact; and (ii) had s/he known the truth about that fact would not have consented to it'.<sup>60</sup> He claims that this is the correct approach for the law to take because the right to sexual autonomy demands that we should require consent in a rich sense and give 'due respect to the parties' understandings of what the act means'.<sup>61</sup> At the other extreme, there is the view, associated with Hyman Gross, that the law should place strict limits on the kinds of mistake that undermine consent, and that the criminal law is not needed to protect people 'against the disappointments and humiliations of their bad judgment, their gullibility, or their too trusting nature'.<sup>62</sup> The law currently seems to favour the latter approach but it is unsettled and it is still not fully clear which mistakes will vitiate consent under the Sexual Offences Act 2003.<sup>63</sup> This issue will be discussed in more detail below, since it tends to arise in relation to the correct interpretation of s. 76. For now, it is important to note that *R v B*<sup>64</sup> establishes that the fact that a defendant who has a sexually transmissible disease did not disclose this information about his status to the complainant is irrelevant to the issue of consent under s. 74 of the 2003 Act, but that *R v Jheeta*<sup>65</sup> establishes that certain other deceptions can vitiate consent under s. 74. The defendant in *R v B* was charged with rape. The Crown argued that the fact that he had not disclosed his HIV-positive status to the complainant was relevant to the issue of whether the complainant had consented, but the Court of Appeal conclusively rejected this argument, holding that, 'as a matter of law, the fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74'.<sup>66</sup> The court reasoned that consent is not vitiated by the lack of disclosure in this respect, since 't]he act remains a consensual act'.<sup>67</sup> Nonetheless, it concluded:

[T]he party suffering from the sexually transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease.<sup>68</sup>

The Court of Appeal seemed to think that the Crown was seeking a development in the law when it argued that the fact that the defendant had not disclosed his HIV-positive status to the complainant was relevant to the issue of whether the complainant had consented, and the court concluded that any such development 'is a matter properly for public debate' rather than for judges.<sup>69</sup> However, this conclusion is hard to understand: the Crown had asked the court to interpret the 2003 Act in a certain way. It had not asked the court to introduce a new criminal offence or to redefine the scope of the Act. It is even harder to understand the court's conclusion in *R v B* regarding an article by Temkin and Ashworth about the Act. In this article, Temkin and Ashworth specifically discuss a hypothetical situation involving a defendant who deceives the complainant about his HIV status, and assert that 'it is arguable that, if C gives her agreement in ignorance of a key fact, and if D knows of that ignorance and takes advantage of it, it may be concluded that C did not agree by choice'.<sup>70</sup> It might seem obvious that Temkin and Ashworth's assertion implies that the defendant's HIV status can be relevant to the issue of consent, but the Court of Appeal concluded that 'there is no suggestion' in their article that '[a deception about the defendant's HIV status] should vitiate consent'.<sup>71</sup> *R v B* does at least establish a clear rule regarding the defendant's status in relation to sexually transmissible diseases, but it is a contentious decision and it does not provide comprehensive guidance about which mistakes vitiate consent.

The reasoning of the Court of Appeal in *Jheeta* is less contentious but equally unsatisfactory in terms of the lack of guidance that it provides. The complainant and the defendant began a sexual relationship. A few months after the beginning of this sexual relationship, the complainant started to receive threatening text messages. Initially believing that these messages were from Muslim students at her college, she confided in the defendant about them. He was responsible for all the messages, but pretended to be concerned about them and eventually purported to lodge a complaint with the police on her behalf. She received numerous text messages from the complainant over the next few years in the guise of various 'police officers'. Concerned about her relationship with the defendant despite the fact that she did not suspect that he was responsible for the text messages, she tried to break up with him, only to receive further text messages from the 'police officers' informing her that the defendant had tried to kill himself, that she should take care of him, and that she would be liable for a fine if she did not sleep with him. She received 50 such threats of a fine, and complied with all of them. The Court of Appeal concluded that, given these circumstances, 'on some occasions at least the complainant was not consenting to intercourse for the purposes of s. 74',<sup>72</sup> and that the defendant was well aware of this lack of consent. The court reasoned:

[H]e persuaded the complainant to have intercourse with him more frequently than otherwise, and the persuasion took the form of the pressures imposed on her by the complicated and unpleasant scheme which he had fabricated. This was not a free choice, or consent for the purposes of the Act.<sup>73</sup>

This conclusion may seem acceptable, given the reprehensible nature of the defendant's conduct and the fact that it is easy to believe that the complainant felt that she had no practical choice but to accede to the threats and have sex with the defendant.<sup>74</sup> However, as Ben Fitzpatrick points out, it is not clear from *Jheeta* 'what type of pressures, and of what magnitude, must be exerted on a complainant before their freedom to choose is compromised to the extent that consent is vitiated'.<sup>75</sup> The decision clearly treats the pressures present in *Jheeta* as being capable of vitiating consent, but it says nothing at all about other types and degrees of pressure. The court could not have produced a definitive statement about this issue, but it could have usefully listed factors that could be relevant in this context and discussed hypothetical examples to illustrate the potential application of the law. It is impossible to say where *Jheeta* leaves the law in relation to a variety of pressures. As Fitzpatrick puts it, '[c]onsider the example of the prostitute who is engaged in his work out of economic necessity: the inducement to provide services on a given occasion arises in the broader context of his feeling compelled to work in the sex industry'.<sup>76</sup> How does the 2003 Act deal with the issue of consent in this context? Can general economic circumstances vitiate consent, or must the pressures derive from a specific party or parties? The statute is silent about this issue, and the case law has so far done little to clarify matters relating to s. 74.<sup>77</sup>

## The interpretation of s. 75

Sections 75 and 76 are not designed to clarify the definition of consent. Leveson LJ stated in *R v Devonald*<sup>78</sup> that 'to understand the meaning of "consent" it is necessary to go to sections 75 and 76 of the Act', but these sections are actually concerned with evidential presumptions about consent and reasonable belief in consent rather than with the definition of consent. Section 75(1) provides that it will be presumed both that consent and reasonable belief in consent were lacking if the prosecution can prove that the defendant did the relevant act in any of the circumstances specified by s. 75(2) and that he knew of these circumstances. If the prosecution can prove this, '[t]he defence will then bear the evidential burden of adducing sufficient evidence to raise the issue of consent or reasonable belief in consent'.<sup>79</sup> The defendant should be found guilty if he cannot discharge this evidential burden. However, as Temkin and Ashworth point out, if it is discharged, 'the prosecution will have to establish the absence of consent or reasonable belief in consent beyond reasonable doubt'.<sup>80</sup> What does this mean in practice?

The presumptions clearly relate to essential elements of the relevant offence. Thus, they may raise a question of compatibility with Article 6 of the ECHR, which provides the right to a fair trial.<sup>81</sup> The prevailing view seems to be that 'they are only evidential and do not impose a reverse onus of proof'.<sup>82</sup> The contention here is that the presumptions are likely to be displaced 'where there is some evidence which would convey a sense of reality in [the defendant's] submission'.<sup>83</sup> However, it is unclear exactly what evidence from the defendant is likely to shift the presumptions. Let us suppose that the defendant's case is that the complainant did consent although the act took place in one of the circumstances specified by s. 75(2). Will this mere assertion amount to sufficient evidence to raise an issue as to whether the complainant consented? Temkin and Ashworth claim that it will not: 'some supporting explanation of why the presumption ought not to apply in this case must be presented'.<sup>84</sup> This is in line with the Government's view about the 2003 Act, as presented by Baroness Scotland. She has stated that 'in order for these presumptions not to apply, the defendant will need to satisfy the judge from the evidence that there is a real issue about consent [or belief in consent] that is worth putting to the jury'.<sup>85</sup> However, as Temkin and Ashworth note, the matter effectively comes down to how judges choose to interpret s. 75(1). It may be that 'little more than the defendant's say-so ... [will be] held sufficient'.<sup>86</sup> The Judicial Studies Board has not provided judges with clear guidance on this issue. On this point, it has merely implied that the defendant must adduce sufficient evidence 'to raise an issue as to whether the complainant consented and/or whether D reasonably believed that the complainant consented'.<sup>87</sup> In *R v Zhang*,<sup>88</sup> the Court of Appeal was similarly vague. In this case, the court said that 'provided the defendant himself gives or otherwise adduces evidence capable of rebutting the presumption it becomes a matter for the jury whether the Crown has discharged the burden upon it of disproving the defence to the criminal standard'.

The circumstances specified by s. 75(2) are that:

- (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
- (d) the complainant was asleep or otherwise unconscious at the time of the relevant act;



(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

Although s. 75 may be contentious as a matter of justice,<sup>89</sup> s. 75(2) seems to be reasonably well drafted in terms of clarity. However, it not entirely clear what counts as 'immediate' or 'violence' for the purposes of this part of the Act. If a man wrestles a woman to the ground, is he using 'violence', or does 'violence' require an action such as punching or kicking? Battery is sometimes described as the 'infliction of violence', but 'violence' is used in a very extended sense [in the context of the offence of battery], reflecting the values of autonomy and privacy as well as protection from physical harm'.<sup>90</sup> It is therefore possible that 'violence' will be used in an extended sense under s. 75. Similarly, it is unclear what counts as 'immediate' for the purposes of this section; 'immediate' may be given an extended definition, as it sometimes is in the context of assault, but it is not promising as far as certainty for this area of the law is concerned that the courts have not clarified the 'immediacy requirement' as it relates to assault.<sup>91</sup>

The s. 75(2)(f) presumptions regarding a substance that is capable of stupefying or overpowering the complainant also require examination. Emily Finch and Vanessa Munro have discussed these presumptions at length,<sup>92</sup> and it is difficult to add anything new to this topic. However, it is worth pointing out here that Sir Igor Judge P seems to have misinterpreted this part of the Act in his *obiter dictum* concerning it in *Bree*. He stated that it 'is plainly adequate to deal with the situation when a drink is "spiked", but unless productive of a state of near unconsciousness, or incapacity, this paragraph does not address seductive blandishments to have "just one more" drink'.<sup>93</sup> The present author has argued elsewhere that this statement seems to be wrong in two respects.<sup>94</sup> First, it is unlikely that encouragement to have 'just one more drink' renders the consumption of the drink involuntary; the consumption of the drink would still seem to be consensual, albeit in response to encouragement. Secondly, as Finch and Munro state, the reference to substances that are 'capable of causing or enabling' within s. 75(2)(f) implies that the Crown can raise the evidential presumption without proving that the substance did in fact overpower or stupefy the complainant.<sup>95</sup>

## The interpretation of s. 76

Section 76 sets out two situations where it is to be conclusively presumed not only that the complainant did not consent to the relevant act of the defendant, but also that the defendant did not believe that the complainant consented. The conclusive presumptions apply: (a) where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; and (b) where the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.<sup>96</sup> The first of these conclusive presumptions seems to have caused the most difficulty in practice, if the reported cases are a reliable indication in this respect, but the second presumption is also not straightforward. The law on sexual offences has long had to deal with the issue of mistakes.<sup>97</sup> As John Spencer puts it, the common law rule regarding sexual acts 'was that mistake as to the identity of the other person vitiated consent; but mistake about other matters only did so if the complainant failed to appreciate ... that the other party's purpose was to gratify his sexual desires'.<sup>98</sup> The Sexual Offences Act 2003 now provides statutory guidance regarding mistakes, but this guidance is opaque. In 2007, Spencer wrote that s. 76 'was widely assumed to codify the position as it was at common law; and that is how the Court of Appeal has now interpreted it [in *R v B and Jheeta*].'<sup>99</sup> This was an accurate summary of the Court of Appeal's approach in *R v B and Jheeta*, but *Devonald*, a 2008 Court of Appeal case, renders the situation more complex.<sup>100</sup>

As mentioned above, *R v B* concerned a mistake about the defendant's HIV status. In this case, the Court of Appeal held that that '[w]here one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated',<sup>101</sup> and concluded that s. 76 did not apply to deceptions about the defendant's HIV status. This is a controversial conclusion: it is arguable that the defendant deceived the complainant about the extent of the risk involved, and that he therefore deceived her about the nature of the act. Herring argues that '[i]n order for a decision to carry the weight we expect of autonomy we need to ensure that the decision-maker is aware of the key facts involved in making the decision'.<sup>102</sup> The Court of Appeal could have accepted this argument, and it could have reached a different conclusion about the application of s. 76.

The Court of Appeal took a similarly narrow interpretation of the scope of s. 76 in *Jheeta*. In this case, the court held that s. 76 requires 'the most stringent scrutiny' because it raises conclusive presumptions.<sup>103</sup> Stating that s. 76(2)(a) is relevant 'only to ... comparatively rare cases',<sup>104</sup> it emphasised that '[n]o conclusive presumptions arise merely because the complainant was deceived in some way or other by disingenuous blandishments of or common or garden lies by the defendant'.<sup>105</sup> According to the Court in *Jheeta*,<sup>106</sup> s. 76 does not apply to a case like *R v Linekar*.<sup>107</sup> In *Linekar*, the Court of Appeal decided that a person who obtained sexual intercourse by promising to pay £25 which he never intended to pay had not committed rape because the reality of the complainant's consent had not been destroyed by the defendant's deception. On the facts of the case at hand in *Jheeta*, the Court of Appeal similarly concluded that the conclusive presumption in s. 76(2)(a) was irrelevant because the complainant 'was not deceived as to the nature or purpose of intercourse, but deceived as to the situation in which she found herself'.<sup>108</sup> Spencer agrees with this conclusion about the correct interpretation of the Sexual Offences Act 2003; he thinks that the Act 'fails to deal with this type of misbehaviour',<sup>109</sup> and that *Jheeta* reveals a 'glaring and obvious' gap in the law.<sup>110</sup> However, the Court of Appeal could have concluded that the defendant had deceived the complainant about the nature of the relevant act on the occasions when she thought that sexual intercourse was necessary to fulfil 'her duty and take care of ...[the defendant]'.<sup>111</sup> The point here is not that the court should have taken this approach, but that it could have done so. As Herring says, s. 76 provides the courts with an opportunity to develop a new approach to consent whereby 'the wider understanding of the act must be looked at',<sup>112</sup> and the jury should ask: 'what did the parties understand this act of sexual intercourse to be about?'<sup>113</sup>

The correct interpretation of s. 76 was a matter of dispute again in *Devonald*. In this case, the complainant believed that he was indulging in sexual acts for the gratification of 'Cassey', a 20-year-old woman, when he was actually doing so for the defendant, 'the father of his ex-girlfriend who was anxious to teach him a lesson by later embarrassing him or exposing what he had done'.<sup>114</sup> The defendant had assumed the identity of a 20-year-old woman, 'Cassey', struck up a relationship with the complainant through the internet, and induced the complainant to masturbate in front of a 'web cam'. The prosecution charged the defendant with causing a person to engage in sexual activity without consent contrary to s. 4 of the Sexual Offences Act 2003, and the issue for the Court of Appeal to consider was whether the complainant had consented to the activity in question. Relying on *Jheeta*, the defendant argued that s. 76(2)(a) 'deals with a deception as to the act rather than a deception as to the surrounding circumstances',<sup>115</sup> and that the case at hand concerned the latter type of deception. However, the court held that it had been open for the jury to conclude that the defendant deceived the complainant as to the purpose of the act, and stated that 'it is difficult to see how the jury could have concluded otherwise that the complainant was deceived into believing that he was indulging in sexual acts with, and for the sexual gratification of, a 20-year-old girl with whom he was having an on line relationship'.<sup>116</sup> The Court of Appeal seemed to conclude that the conclusive presumption under s. 76(2)(a) was relevant to the facts of the case because the purpose of the act was to provide sexual gratification for 'Cassey', rather than simply to provide sexual gratification for whoever happened to be watching via the 'web cam'. Unlike *Jheeta*, *Devonald* seems to take a broad, rather than restrictive, approach to the scope of s. 76. These conflicting approaches leave the law in a state of confusion.

A second issue raised in *Devonald* was whether the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant. The prosecution argued that this intentional deceit had occurred, and that s. 76(2)(b) applied on the facts of the case at hand. However, the court expressed no view about this argument, and instead focused on the issue of the correct interpretation of s. 76(2)(a). Fitzpatrick has pointed out that it is unclear 'whether someone who does not

exist can be known personally to ... [the complainant for the purposes of s. 76(2)(b)].<sup>117</sup> This statutory provision is concerned with situations where the agreement was to engage in sexual activity with a particular person, and it is therefore arguable that it should apply to a case like *Devonald*, where the complainant was engaging in sexual activity to please 'Cassey', a 20-year-old woman interested in sexual activity via the internet, rather than whoever happened to be watching him. Nonetheless, it is difficult to see how a complainant can 'personally know' someone who does not exist, and Rook and Ward even go as far as to say that 'it would seem that, as a bare minimum, the person impersonated should be someone the complainant has met'.<sup>118</sup>

## Conclusion

In *Bree*, Sir Igor Judge P specifically rejected the need for reform to clarify the law on consent in sexual offences cases. He stated that the Sexual Offences Act 2003 'provides a clear definition of "consent" for the purposes of the law of rape, and by defining it with reference to "capacity to make that choice", sufficiently addresses the issue of consent in the context of voluntary consumption of alcohol by the complainant'.<sup>119</sup> However, this is not a convincing conclusion: the Act does not provide a clear general definition of consent, and it is not clear how the evidential presumptions are supposed to apply to certain situations. As Rumney and Fenton point out, '[s]ince the introduction of the 2003 Act, there has emerged a scholarly consensus that has raised serious concerns regarding the current definition of consent and the lack of guidance given to rape jurors'.<sup>120</sup> These concerns do not relate to mere 'philosophical difficulties', to use Sir Igor Judge P's terminology in *Bree*:<sup>121</sup> rather, they regard the central issue of consent. Catherine Elliott and Claire de Than stated in 2007 that, '[g]iven the pivotal role it can play in determining the defendant's guilt, there is currently remarkably little case law on the meaning of consent in sex offences'.<sup>122</sup> There are now several cases dealing with this issue, but the problem with them is that they do not provide sufficient guidance to judges and juries and thereby mean that 'the new legislative provisions continue to leave the concept open to jury discretion, and in the worst scenario, prejudice'.<sup>123</sup> The recent cases have not adequately addressed the issues identified by the scholarly consensus about the Sexual Offences Act 2003, and it seems that Parliament needs to remedy the situation by amending the Act so that it is more specific about which circumstances vitiate consent. One way in which it could do this is by inserting a new section into the Act which makes it clear that certain mistakes do not vitiate consent for its purposes. Parliament could also potentially usefully amend the Act to include a more extensive and specific non-exhaustive list of situations where consent is definitely not present. As Rumney and Fenton point out, 'legislation cannot fully address many of the problems evident in the treatment of rape cases by the criminal justice system',<sup>124</sup> but further substantive law reform in this area could be beneficial, and it is therefore regrettable that the Government has rejected proposals to clarify the definition of consent.

<sup>1</sup> See, e.g., S. Cowan, 'Freedom and Capacity to Make a Choice: A Feminist Analysis Of Consent in the Criminal Law of Rape' in V. Munro and C. F. Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish: London, 2007) 51; C. Elliott and C. de Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70 MLR 225 at 238; and V. Tadros, 'Rape Without Consent' (2006) 26 OJLS 515 at 517.

<sup>2</sup> Together with rape, these offences have been described as 'the ... main offences in the Sexual Offences Act 2003' (J. Temkin and A. Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] Crim LR 328).

<sup>3</sup> Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000) para. 0.2.

<sup>4</sup> *Ibid.* at i.

<sup>5</sup> *Ibid.* at para. 0.3.

- 6 Ibid.
- 7 Ibid.
- 8 Ibid. at para. 1.1.3.
- 9 Ibid. at para. 1.1.2.
- 10 Ibid. at para. 1.1.3.
- 11 Ibid. at para. 0.6.
- 12 Ibid.
- 13 Above n. 3 at para. 0.7.
- 14 Ibid. at para. 0.6.
- 15 Temkin and Ashworth, above n. 2 at 328, referring to Home Office, *Protecting the Public: Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences*, Cm 5668 (2002).
- 16 *R v Olugboja* [1982] 2 QB 320 at 332.
- 17 Ibid. at 320.
- 18 Law Commission, *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) para. 6.10.
- 19 D. Nicolson, 'Criminal Law and Feminism' in D. Nicolson and L. Bibbings (eds), *Feminist Perspectives on Criminal Law* (Cavendish: London, 2000) 18.
- 20 Home Office, above n. 3 at para. 2.10.9.
- 21 Above n. 20 at para. 2.10.3.
- 22 Temkin and Ashworth, above n. 2 at 336.
- 23 Ibid. at 334.
- 24 Home Office, above n. 3 at para. 2.10.3.
- 25 [1982] 2 QB 320 at 332.
- 26 Ibid.
- 27 Above n. 25
- 28 Elliott and de Than, above n. 1 at 237.

- 29 I. Dennis, 'The Sexual Offences Act' [2004] Crim LR 79.
- 30 Home Office, 'Guidance on Part 1 of the Sexual Offences Act 2003', Home Office Circular 021/2004, para. 330.
- 31 P. Rook and R. Ward, *Rook and Ward on Sexual Offences: Law and Practice*, 3rd edn (Sweet and Maxwell: London, 2004) paras 1.84-1.85.
- 32 CPS, *Policy for Prosecuting Cases of Rape*, 5, available at [http://www.cps.gov.uk/publications/docs/prosecuting\\_rape.pdf](http://www.cps.gov.uk/publications/docs/prosecuting_rape.pdf), accessed 22 September 2008.
- 33 Temkin and Ashworth, above n. 2 at 336.
- 34 Crown Court Bench Book Specimen Directions (2007), available at [http://www.jsboard.co.uk/criminal\\_law/index.htm](http://www.jsboard.co.uk/criminal_law/index.htm), accessed 22 September 2008.
- 35 [2007] EWCA Crim 256, [2008] QB 131.
- 36 Above n. 35 at [39].
- 37 Ibid. at [32].
- 38 Ibid.
- 39 Ibid. at [34].
- 40 D. Warburton, 'Court of Appeal: Rape: Consent and Capacity' (2007) 71 JCL 394 at 396.
- 41 J. Elvin, 'Intoxication, Capacity to Consent, and the Sexual Offences Act 2003' (2008) 19 *King's Law Journal* 151 at 152-3.
- 42 J. Herring, 'Human Rights and Rape: A Reply to Hyman Gross' [2007] Crim LR 228 at 229.
- 43 Home Office, above n. 3 at para. 2.19.2.
- 44 A. Simister and R. Sullivan, *Criminal Law: Theory and Doctrine*, 3rd edn (Hart Publishing: Oxford, 2006) 432.
- 45 [2007] EWCA Crim 256, [2008] QB 131 at [34].
- 46 P. Rumney and R. Fenton, 'Intoxicated Consent in Rape: *Bree* and Juror Decision-Making' (2008) 71 MLR 279 at 288.
- 47 On this suggested definition of 'capacity', see the Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims--Justice for Victims of Rape: A Consultation Paper* (2006) 14, drawing on an observation made by Rook and Ward, above n. 31 at paras 1.81-1.94.
- 48 Elvin, above n. 41 at 155.
- 49 Rumney and Fenton, above n. 46 at 289-90.
- 50 Ibid. at 287.

- 51 [2007] EWCA Crim 2056.
- 52 *Ibid.* at [19].
- 53 *Ibid.* at [22].
- 54 *Ibid.* at [32].
- 55 *Ibid.* at [34].
- 56 *Ibid.* at [32].
- 57 Above n. 51 at [36].
- 58 *Ibid.* at [1].
- 59 See Rumney and Fenton, above n. 46 at 284-6 for an overview of this research.
- 60 J. Herring, 'Mistaken Sex' [2005] Crim LR 511 at 517.
- 61 *Ibid.*
- 62 H. Gross, 'Rape, Moralism, and Human Rights' [2007] Crim LR 220 at 224-5. See too M. Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71 JCL 412, criticising Herring's proposal 'as an example of exaggerated political correctness'.
- 63 See S. Cooper and A. Reed, 'Informed Consent and the Transmission of Sexual Disease: *Dadson* Revivified' (2007) 71 JCL 461 at 474, stating that 'it remains for later days to explore fully the nature of deceptions which vitiate consent'.
- 64 [2006] EWCA Crim 2945, [2007] 1 WLR 1567 (this case is also known as *R v EB*).
- 65 [2007] EWCA Crim 1699, [2007] 2 Cr App R 34.
- 66 [2006] EWCA Crim 2945, [2007] 1 WLR 1567 at [21].
- 67 *Ibid.* at [17].
- 68 *Ibid.*, following *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257, and *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 198 on the interpretation of the Offences Against the Person Act 1861 in this context.
- 69 [2006] EWCA Crim 2945, [2007] 1 WLR 1567 at [20].
- 70 Temkin and Ashworth, above n. 2 at 345.
- 71 [2006] EWCA Crim 2945, [2007] 1 WLR 1567 at [19].
- 72 [2007] EWCA Crim 1699, [2007] 2 Cr App R 34 at [29].

73 Ibid.

74 See, e.g., R. Williams, 'Deception, Mistake, and Vitiating of the Victim's Consent' (2008) 124 LQR 132 at 135, commenting that the reasons for the court's conclusion 'in terms of the general moral culpability of the defendant are obvious'.

75 *R v Jheeta (Harvinder Singh)* (2007) 72 JCL 11 at 12, commentary by B. Fitzpatrick.

76 Above n. 75 at 13.

77 See A. Reed, 'Rape and Drunken Consent' (2007) 176 *Criminal Lawyer* 3, 4, stating in his analysis of *Bree* that 'the true meaning behind ... section [74] remains as opaque as ever with confusion over the true meaning attached to "freedom", "choice" and "capacity"'. .

78 [2008] EWCA Crim 527.

79 Temkin and Ashworth, above n. 2 at 335.

80 Ibid.

81 Dennis, above n. 29 at 80.

82 Ibid.

83 Rook and Ward, above n. 31 at para. 1.20.

84 Temkin and Ashworth, above n. 2 at 343.

85 Quoted by the House of Commons Home Affairs Committee, *Sexual Offences Bill: Fifth Report of Session 2002-03*, HC 639 (2003) para. 29.

86 Temkin and Ashworth, above n. 2 at 344.

87 Crown Court Bench Book Specimen Directions, above n. 34.

88 [2007] EWCA Crim 2018.

89 See Temkin and Ashworth, above n. 2 at 336, stating that 'there are grounds for doubting whether these presumptions include or exclude all the matters they should'.

90 Simister and Sullivan, above n. 44 at 396.

91 Ibid. at 394, stating that there is 'considerable doubt about the current scope of the offence [of assault] as the result of the decision in *R v Ireland* [1998] AC 147.

92 E. Finch and V. Munro, 'The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited' [2004] Crim LR 789.

93 [2007] EWCA Crim 256, [2008] QB 131 at [24].

- 94 Elvin above n. 41 at 156.
- 95 Finch and Munro, above n. 92 at 798, admitting that, '[o]n the face of it, this is surprising'.
- 96 Section 76(2)(a) and (b) respectively.
- 97 See, e.g., *R v Flattery* (1877) 2 QBD 410; *R v Williams* [1923] 1 KB 340.
- 98 J. R. Spencer, 'Three New Cases on Consent' (2007) CLJ 490 at 491, referring to *R v Tabassum* [2000] 2 Cr App R 328 and *R v Linekar* [1995] 2 Cr App R 49.
- 99 Spencer, above n. 98 at 491.
- 100 [2008] EWCA Crim 527.
- 101 [2006] EWCA Crim 2945, [2007] 1 WLR 1567 at [17].
- 102 Herring above n. 60 at 516.
- 103 [2007] EWCA Crim 1699, [2007] 2 Cr App R 34 at [23].
- 104 *Ibid.* at [24].
- 105 *Ibid.*
- 106 [2007] EWCA Crim 1699, [2007] 2 Cr App R 34 at [27].
- 107 [1995] 2 Cr App R 49.
- 108 [2007] EWCA Crim 1699, [2007] 2 Cr App R 34 at [28].
- 109 Spencer, above n. 98 at 493.
- 110 *Ibid.* at 492. As he points out, s. 3 of the Sexual Offences Act 1956 provided a specific offence of procuring a woman to have sexual intercourse by false pretences.
- 111 [2007] EWCA Crim 1699, [2007] 2 Cr App R 34 at [8].
- 112 Herring, above n. 60 at 519.
- 113 [2008] EWCA Crim 527.
- 114 *Ibid.* at [9].
- 115 Quoted *ibid.* at [6].
- 116 Above n. 113 at [9].



117 *R v Jheeta (Harvinder Singh)* (2007) 72 JCL 11 at 12, commentary by B. Fitzpatrick.

118 Rook and Ward, above n. 31 at para. 1.51.

119 [2007] EWCA Crim 256, [2008] QB 131 at [36].

120 Rumney and Fenton, above n. 46 at 287.

121 [2007] EWCA Crim 804; [2008] QB 131.

122 Elliott and de Than, above n. 1 at 236.

123 *Ibid.* at 239.

124 Rumney and Fenton, above n. 46 at 286.