

Gayle Newland, 25, has been convicted of three counts of sexual assault against a woman who had believed she was in a sexual relationship with a man. Newland's case has thrown up some very thorny questions about gender and sexual consent – and about what, exactly, we are required by law to reveal to our sexual partners.

Newland had established contact with the victim, also a 25-year-old woman, through a Facebook profile set up in the name of a fictitious young man, "Kye Fortune". She later also used this profile to introduce herself to the victim, and they went on to become close. The two-year relationship that developed between the victim and "Kye" always required the victim wear a blindfold. "Kye's" justification for this unusual situation was that "he" was self-conscious about his body after suffering an accident.

At trial, Newland maintained that both she and the victim had suffered some confusion about their sexual orientation, and that the sexual activity, which had taken place with Newland using a prosthetic penis, was role-play – something the victim vigorously disputed.

Although these circumstances might sound highly unusual, there have actually been convictions in similar cases before.

In 2012, Gemma Barker, 19, was convicted of sexual assault after disguising herself as male in order to sexually touch a number of her friends. And in 2013, Justine McNally, 18, also presented herself as male to engage in sexual activity.

Calling herself "Scott" McNally, she built up an online relationship with another young woman over a number of years. When the parties met McNally continued the ruse and penetrated the complainant orally and digitally. She was convicted of six counts of assault by penetration.

These cases raise an interesting question: how, if the victims are "consenting" to sexual activity, can this be a sexual offence?

Baring all

Section 74 of the Sexual Offences Act 2003 provides that a person consents to sex if he or she agrees by choice, and has the freedom and capacity to make that choice. The central issue in these gender deception cases, then, is then whether a free choice has actually been made.

As the Court of Appeal found in McNally's appeal, "deception as to gender can vitiate consent", as the sexual nature of the acts is different where the complainant is deliberately deceived by a defendant into believing the latter is a male. In that case, the court found that the complainant had chosen to have sexual encounters with a man, and therefore that her freedom to choose whether or not to have a sexual encounter with a woman was removed.

The defining issue seems to be whether the deception has been an "active" one – not a mistake about gender that goes uncorrected, but a purposeful intention to deceive. The evidence given in the Gayle Newland trial did strongly support, and the majority of the jury accepted, that Newland had intended to mislead the victim about her gender in order to engage her in a sexual relationship.

At first blush, this seems perfectly reasonable. We should all have the right to consent to sexual activity with a person who is the gender of our choosing, and the law should uphold this right.

But it gets tricky when we consider the lies that are so often told to attract a partner. People often lie about their marital status, income and age, for instance. These lies don't make any sexual activity that ensues unlawful.

So the case law singles out gender as a crucial feature on which consent is based – and that could mean trouble for people transitioning into a new gender.

Enforced honesty

Getting legal recognition for a new gender identity takes time: the UK's Gender Recognition Act 2004 requires an applicant for a gender recognition certificate to have been living in the acquired gender for two years. Nonetheless, once someone who wants to transition is recognised, they are, legally speaking, to be identified by their acquired gender alone.

While those living in an acquired gender role might legally be recognised by it, they might worry that they could be committing a sexual offence if they fail to declare their gender history to new sexual partners.

The case law certainly suggests they could – but there are provisions that mean prosecutions against transgender people in these circumstances would be given careful consideration.

The Crown Prosecution Service policy advises that where there is such a deception that, in addition to the general Public Interest Test, other considerations should be taken into account including the nature of the sexual activity, whether the offending occurred as a result of gender uncertainty and the duration of the relationship between the suspect and complainant.

While this certainly moderates the harshness of the criminal law, it provides cold comfort to those who may be transitioning or experimenting with their gender identity.

Justine McNally had experienced confusion about her gender identity and sexuality, and whether or not Gayle Newland had similar issues, her case proves that as far as the case law goes, gender identity remains a legal and ethical minefield when it comes to sex.