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### Resurrecting “She Asked for It”: The Rough Sex Defence in Canadian Courts

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## Resurrecting “She Asked for It”: The Rough Sex Defence in Canadian Courts

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### I. Introduction

According to rape crisis centres and women’s shelters in Canada, the US and the UK, women are reporting extreme levels of violence by men who rape them, including strangulation—a particularly dangerous form of violence that is highly predictive of femicide.<sup>1</sup> At the same time,

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<sup>1</sup> See Jason Viau, “‘I Was Scared’: Strangulation a Factor in Roughly Half of Domestic Violence Cases in Windsor, Experts Say”, *CBC News* (31 January 2020), online: <[cbc.ca/news/canada/windsor/strangulation-windsor-1.5443699](http://cbc.ca/news/canada/windsor/strangulation-windsor-1.5443699)> (reporting that “[s]trangulation is something experienced by about half of all people who come through Windsor Regional Hospital’s sexual assault and domestic violence centre”); Anna Moore & Coco Khan, “The Fatal, Hateful Rise of Choking During Sex”, *The Guardian* (25 July 2019), online <[theguardian.com/society/2019/jul/25/fatal-hateful-rise-of-choking-during-sex](http://theguardian.com/society/2019/jul/25/fatal-hateful-rise-of-choking-during-sex)>; Olga Khazan, “The Startling Rise of Choking During Sex”, *The Atlantic* (24 June 2019), online: <[theatlantic.com/health/archive/2019/06/how-porn-affecting-choking-during-sex/592375/](http://theatlantic.com/health/archive/2019/06/how-porn-affecting-choking-during-sex/592375/)>.

accused men are deploying the “rough sex” defence when the victim—nearly always a woman—has suffered bodily harm or even death as a result of the accused’s actions. This defence is used to suggest that the woman enjoyed strangulation, bondage or other violence as part of “sex play”, inviting judges and jurors to find that she either consented to the acts causing bodily harm or that the man honestly believed she consented.

If successful, the rough sex defence can result in acquittal or the downgrading of charges. For example, the UK organization, *We Can’t Consent to This* tracked 60 homicides in the UK, whereby 57 men killed women, nearly half of them by strangulation,<sup>2</sup> claiming that the deceased consented to “a sex game gone wrong,”<sup>3</sup> and arguing that they lacked the intent to kill or cause grievous bodily harm.<sup>4</sup> This defence resulted in either manslaughter verdicts, dropped charges or acquittals in almost half (26) of the cases.<sup>5</sup>

Canada has also had several highly publicized cases where men have asserted that women who reported assault or sexual assault, or who succumbed to their injuries, consented to “rough sex.” Joshua Boyle,<sup>6</sup> Jian Ghomeshi<sup>7</sup> and Bradley Barton<sup>8</sup> each claimed “consent to rough sex” when

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<sup>2</sup> See Elizabeth Yardley, “The Killing of Women in ‘Sex Games Gone Wrong’: An Analysis of Femicides in Great Britain 2000–2018” (2021) 27:11 *Violence Against Women* 1840 at 1853.

<sup>3</sup> *Ibid* at 1840–41. For example, John Broadhurst left his partner to bleed to death at the bottom of the stairs in their home. His guilty plea to negligent manslaughter was not based on the 40 horrific injuries that he inflicted on Natalie Connelly during sex that caused her death, but rather on his failure to seek medical treatment as she lay dying.

<sup>4</sup> For a discussion of the *mens rea* required for murder in the UK, see Hannah Bows & Jonathan Herring, “Getting Away With Murder? A Review of the ‘Rough Sex Defence’” (2020) 84:6 *The Journal of Criminal Law* 525 at 529. See also *Homicide Act 1957* (UK), 5 & 6 Eliz II, 11, s 1.

<sup>5</sup> See Yardley, *supra* note 2 at 1854.

<sup>6</sup> See Andrew Duffy, “Joshua Boyle Defence Allowed to Question Caitlin Coleman About Her Sexual History, Judge Rules”, *Ottawa Citizen* (12 June 2019), online: <[ottawacitizen.com/news/local-news/joshua-boyle-defence-allowed-to-question-caitlan-coleman-about-her-sexual-history-judge-rules/](http://ottawacitizen.com/news/local-news/joshua-boyle-defence-allowed-to-question-caitlan-coleman-about-her-sexual-history-judge-rules/)>.

<sup>7</sup> See Alyshah Hasham & Kevin Donovan, “Jian Ghomeshi Acquitted on the Basis of ‘Inconsistencies’ and ‘Deception’”, *Toronto Star* (24 March 2016), online: <[thestar.com/news/jian-ghomeshi/2016/03/24/jian-ghomeshi-verdict.html](http://thestar.com/news/jian-ghomeshi/2016/03/24/jian-ghomeshi-verdict.html)>.

<sup>8</sup> See Jess Martin, “Across Canada, Protestors Demand Justice for Cindy Gladue”, *Feminist Current* (3 April 2015) <[feministcurrent.com/2015/04/03/across-canada-protesters-demand-justice-for-cindy-gladue/](http://feministcurrent.com/2015/04/03/across-canada-protesters-demand-justice-for-cindy-gladue/)>.

charged with assault, sexual assault, and in the case of Barton, initially murder. Ghomeshi and Boyle were both alleged to have engaged in strangulation, whereas Barton caused an 11 centimeter wound to the vaginal wall of a Cree and Métis woman, Cindy Gladue, resulting in her death through blood loss. Ghomeshi's consent to "rough sex" claim was made through his social media account; "rough sex gone wrong" was urged by Boyle and Barton at their respective trials. These three men were all acquitted, either on the basis of consent or the complainants' eroded credibility,<sup>9</sup> although Barton was ultimately convicted of manslaughter at a second trial.<sup>10</sup>

Recent empirical studies demonstrate both the growing prevalence and the deeply gendered nature of rough sex practices. In a recent national probability survey of Americans aged 18 to 60 years old, 21.4% of women reported choking/strangulation, 32.3% reported having their face ejaculated on and 34% reported aggressive fellatio at some point during their lifetimes.<sup>11</sup> The BBC found even more alarming rates in a 2019 survey: among UK women aged 18 to 39, 59% had experienced slapping, 38% choking, 34% gagging, 20% spitting and 59% biting.<sup>12</sup> More than half reported that these acts were "unwanted".<sup>13</sup> A parallel 2020 survey of UK men showed even higher

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<sup>9</sup> See Molly Redden, "Jian Ghomeshi Trial: Why the Prosecution's Case Fell Apart", *The Guardian* (24 March 2016), online: <[theguardian.com/world/2016/mar/24/jian-ghomeshi-trial-why-prosecution-fell-apart](https://www.theguardian.com/world/2016/mar/24/jian-ghomeshi-trial-why-prosecution-fell-apart)>.

<sup>10</sup> See Jacob Cardinal, "Bradley Barton Convicted of Manslaughter in the 2011 Death of Cindy Gladue", *Toronto Star* (23 February 2021), online: <[thestar.com/news/canada/2021/02/23/bradley-barton-convicted-of-manslaughter-in-the-2011-death-of-cindy-gladue.html](https://www.thestar.com/news/canada/2021/02/23/bradley-barton-convicted-of-manslaughter-in-the-2011-death-of-cindy-gladue.html)>.

<sup>11</sup> See Debby Herbenick et al, "Diverse Sexual Behaviors and Pornography Use: Findings from a Nationally Representative Probability Survey of Americans Aged 18 to 60 Years" (2020) 17:4 J Sex Med 623 at 627.

<sup>12</sup> See Savanta ComRes, "BBC 5 Live, Women's Poll – 21st November 2019" (2019) at 7, online (pdf): <[2sjjwunnql41ia7ki31qqub1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/Final-BBC-5-Live-Tables\\_211119cdh.pdf](https://www.sjjwunnql41ia7ki31qqub1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/Final-BBC-5-Live-Tables_211119cdh.pdf)>.

<sup>13</sup> *Ibid* at 14.

rates of sexual violence: 62% have slapped, 40% have choked, 36% have gagged, 25% have spit on a partner, 53% have hair-pulled and 44% have bitten.<sup>14</sup>

In this paper, we explore cases in Canada where the “rough sex” defence has been raised in sexual assault, homicide and assault prosecutions. We interrogate how these claims are made, how judges responded, and the themes that appear in these cases. First, we summarize the literature on consent to bodily harm emanating from the UK, the US and Canada. We review the arguments for and against criminalization of allegedly consensual infliction of bodily harm, often framed as the practices of “bondage, domination and sadomasochism” (“BDSM”) or “erotic asphyxiation”, as a result of a Supreme Court of Canada decision bringing this issue to the fore.<sup>15</sup>

Second, we turn to the case law to explore how the courts have approached defences by men who assert that the complainant consented to the sexual activities that caused them bodily harm. We trace the development of this defence and show that courts have legitimized it by holding, at least in Ontario and Alberta, that the complainant’s consent can only be vitiated where the accused intentionally caused that harm, effectively creating a new, higher standard of *mens rea* for proving sexual assault causing bodily harm.

Third, we lay out what we found in our review of the reported cases in the period from 1988 to 2021 where a consent defence has been advanced by an accused (and sometimes by a recanting complainant) charged with assault, sexual assault causing bodily harm, or homicide. Here, we describe our research method and provide an overview of the nature of the cases in which this

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<sup>14</sup> See Savanta ComeRes, “BBC Scotland/Radio 5 Live, Rough Sex Survey with Men – 14th February 2020” (2020) at 9–10, 12, 14, 16, 18, online (pdf): <2sjjwunnq141ia7ki31qqub1-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/Final-5Live-Mens-Poll-Tables-140220-2c0d4h9.pdf>.

<sup>15</sup> See *R v JA*, 2011 SCC 28 [JA].

defence was argued—what charges were laid, the relationship between the parties, and the defence’s success.

Fourth, we elaborate on the themes that emerge from our case law review. Specifically, we look at the role of pornography in these cases, the trivialization of the harm to the complainant and particularly of psychological harm, the mischaracterization of strangulation, and whether a complainant’s consent to any sexual activity undermines her credibility and perpetuates victim-blaming.

Finally, focusing on the sexual assault cases, we conclude by arguing that consent should never be a defence to bodily harm resulting from sexual activity unless that bodily harm was unforeseeable at the time it was inflicted. Those who assert the right to engage in violent sex should be responsible for bearing the risk of causing serious injury or death to their sexual partners.<sup>16</sup>

## II. Literature Review

Concerns about the emergence of the “rough sex” defence began to surface three decades ago. As George E. Buzash argued presciently, this defence “display[s] the potential to become both the updated 1990s’ version of the ‘she asked for it’ defense and a formidable obstacle to prosecutors trying to secure a murder conviction in a homicide involving a male offender and a female victim”.<sup>17</sup>

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<sup>16</sup> This approach is being taken in the UK: “‘Rough Sex’ Defence Will Be Banned, Says Justice Minister”, *BBC News* (17 June 2020), online: <[bbc.com/news/uk-politics-53064086](http://bbc.com/news/uk-politics-53064086)>.

<sup>17</sup> George E Buzash, “The ‘Rough Sex’ Defense” (1989) 80:2 *J Crim L & Criminology* 557 at 557.

In the US and UK, the debate about whether the criminal law should accept a consent defence when bodily harm is caused has focused almost exclusively on BDSM.<sup>18</sup> In Canada, the focus has been on how the law should treat strangulation (euphemized as “erotic asphyxiation”) and sexual contact with an unconscious complainant.<sup>19</sup> The Canadian focus can be attributed to the Supreme Court of Canada’s decision in *R v JA* in 2011,<sup>20</sup> which ruled that the criminal law does not recognize “advance consent”, such that a man who strangles a woman into unconsciousness cannot claim that his sexual use of her inert body was consensual. *JA* has been represented as a case

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<sup>18</sup> For the debate in the UK, see e.g. Marianne Giles, “*R v Brown*: Consensual Harm and the Public Interest” (1994) 57:1 *The Modern Law Review* 101; Sharon Cowan, “Criminalizing SM: Disavowing the Erotic, Instantiating Violence” in Antony Duff et al, eds, *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011) 59; Susan Edwards, “No Defence for a Sado-Masochistic Libido” (1993) 143 *NLJ* 406; Susan Edwards, “The Strangulation of Female Partners” (2015) 12 *Crim L Rev* 949 [Edwards, “Strangulation”]; Susan SM Edwards, “Assault, Strangulation and Murder – Challenging the Sexual Libido Consent Defence Narrative” in Alan Reed et al, eds, *Consent: Domestic and Comparative Perspectives* (London: Routledge, 2016) 88; Susan SM Edwards, “Consent and the ‘Rough Sex’ Defence in Rape, Murder, Manslaughter and Gross Negligence” (2020) 84:4 *J Crim Law* 293 [Edwards, “Consent and the Rough Sex Defence”]; William Wilson, “Consenting to Personal Injury” in Alan Reed et al, eds, *Consent: Domestic and Comparative Perspectives* (London: Routledge, 2016) 68; Annette Houlihan, “When No Means Yes and Yes Means Harm: HIV Risk, Consent and Sadomasochism Case Law” (2011) 20 *Law & Sexuality* 31; Bows & Herring, *supra* note 4; Yardley, *supra* note 2.

For the debate in the US, see e.g. Cheryl Hanna, “Sex is Not a Sport: Consent and Violence in Criminal Law” (2001) 42:2 *BC L Rev* 239; Monica Pa, “Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex” (2001) 11:1 *Tex J Women & L* 51; Lynn Chancer, “From Pornography to Sadomasochism: Reconciling Feminist Differences” (2000) 571:1 *The Annals of the American Academy of Political and Social Science* 77; Robin Ruth Linden et al, eds, *Against Sadomasochism: A Radical Feminist Analysis* (California: Frog in the Wall, 1982).

<sup>19</sup> See e.g. Karen Busby, “*Every Breath You Take*: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions” (2012) 24:2 *CJWL* 328; Elaine Craig, “Capacity to Consent to Sexual Risk” (2014) 17:1 *New Crim L Rev Journal* 103 [Craig, “Capacity to Consent”]; Ingrid Olson, “Asking for it: Erotic Asphyxiation and the Limitations of Sexual Consent” (2012) 4:1 *Jindal Global Law Review* 171; Lise Gotell, “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R v JA*” (2012) 24:2 *CJWL* 359. On consent to sadomasochistic practices, see David Tanovich, “Criminalizing Sex at the Margins” (2010) 74 *CR-ART* 86; Maneesha Deckha, “Pain, Pleasure, and Consenting Women: Exploring the Feminist Response to S/M and its Legal Regulation in Canada Through Jelinek’s *The Piano Teacher*” (2007) 30 *Harv JL & Gender* 425; Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014) at 225–303; Ummni Khan, “Take My Breath Away: Competing Contexts Between Domestic Violence, Kink and the Criminal Justice System in *R v JA*” (2016) 6:6 *Onati Socio-Legal Series* 1405 [Khan, “Take My Breath”].

<sup>20</sup> *Supra* note 15.

involving a complainant who “consented” to what was done to her—a “kinky sex case” rather than one of domestic violence, which the facts supported.<sup>21</sup>

Some commentators argue that “privacy” should shield BDSM that results in bodily harm from state interference.<sup>22</sup> Others suggest that the long history of discriminatory law enforcement against lesbians and gays should caution against criminal law intervention.<sup>23</sup> For example, critics of the House of Lords’ decisions in *R v Brown*<sup>24</sup> and in *Laskey v UK*<sup>25</sup>—which denied the consent defence to gay men who inflicted bodily harm upon each other as part of an allegedly consensual BDSM practice—note that these cases have not been applied where men have inflicted bodily harm on women in the context of marriage, thus protecting “traditional gender relations.”<sup>26</sup>

Some authors argue that criminalizing “rough sex” undermines sexual exploration as a form of empowerment for women and sexual minorities,<sup>27</sup> and thus denies women’s autonomy and agency. Brenda Cossman criticizes the *JA* decision because it restricts “consensual choices of sexual minorities” and thwarts the development of “sexual democracy”.<sup>28</sup> Ummni Khan emphasizes the allegedly transgressive nature of BDSM, positioning it as a form of resistance to dominant

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<sup>21</sup> See generally *R v A(J)*, 2008 ONCJ 624 (where the sentencing judge discussed the accused’s long history of domestic violence against the complainant). See e.g. “Top Court Peeks Into Bedrooms of the Nation with Sexual-Consent Case”, *iPolitics* (6 November 2010), online: <ipolitics.ca/2010/11/06/top-court-peeks-into-bedrooms-of-the-nation-with-sexual-consent-case/> (for an example of the Canadian media’s depiction of the case).

<sup>22</sup> See Matthew Weait, “Harm, Consent and the Limits of Privacy” (2005) 13 *Fem Legal Stud* 97 at 117–18.

<sup>23</sup> See generally Tanovich, *supra* note 19.

<sup>24</sup> [1993] UKHL 19 [*Brown*].

<sup>25</sup> [1997] 24 EHRR 39 (E Ct HR).

<sup>26</sup> Weait, *supra* note 22 at 117. The cases that failed to apply *Brown*, *supra* note 24, are *R v Wilson*, [1996] Cr App R 241 (CA); *R v Donovan*, [1934] 2 KB 498; and *R v Slingsby*, [1995] Crim LR 570. See also Busby, *supra* note 19 at 347; Bows & Herring, *supra* note 4 at 535. See generally Houlihan, *supra* note 18; Leslie J Moran, “Violence and the Law: The Case of Sado-Masochism” in Leslie J Moran, ed, *Sexuality & Identity* (New York: Routledge, 2018) 199; Giles, *supra* note 18.

<sup>27</sup> See e.g. Deckha, *supra* note 19 at 434; Khan, “Take My Breath”, *supra* note 19 at 1420.

<sup>28</sup> Brenda Cossman, “Sex and the Unconscious (No, We Aren’t Speaking of Freud)”, online (blog): *Sextext: The SDS Blog* <uc.utoronto.ca/content/view/1114/2666/>.

institutions governing sexual norms.<sup>29</sup> Khan characterizes the risky practice of strangulation during sexual activity as “[w]anting something dangerous despite or because of the lack of a guaranteed safety clause”.<sup>30</sup> These authors call it paternalistic to interfere with individual women’s freely expressed consent to violent sexual practices as they investigate their own sexuality.

Maneesha Deckha has also written critically about the *JA* decision, but warns that the risk to women’s autonomy must be weighed against the danger of failing to protect women from sexual violence.<sup>31</sup> Deckha’s caution is a corrective to many of the critiques of *JA* that rest upon a “myth of autonomy” that ignores “the material and discursive conditions that frame, constrain, and construct women’s sexual choices”.<sup>32</sup>

On the other side of this debate are authors who attend to the conditions of women’s inequality. Cheryl Hanna contends that decriminalizing the infliction of bodily harm because it occurs in a sexual context creates the potential for mistakes about the scope of consent and for deliberate abuse.<sup>33</sup> The rough sex defence appears more available where the victim is a current or former intimate or dating partner, because the accused is able to draw upon his knowledge to construct a plausible “sex game gone wrong” narrative.<sup>34</sup> The rough sex defence, when set in the backdrop of an intimate relationship, becomes “imbued with notions of mutuality, respect, and consent”,<sup>35</sup>

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<sup>29</sup> See Khan, “Take My Breath”, *supra* note 19 at 1414.

<sup>30</sup> *Ibid* at 1413, citing Lisa Downing, “Beyond Safety: Erotic Asphyxiation and the Limits of S/M Discourse”, in Darren Langdrige & Meg Barker, eds, *Safe, Sane and Consensual: Contemporary Perspectives on Sadoomasochism* (London: Palgrave, 2007) 119 at 123.

<sup>31</sup> See Deckha, *supra* note 19 at 457, 459.

<sup>32</sup> Gotell, *supra* note 19 at 370.

<sup>33</sup> See Hanna, *supra* note 18 at 277–79.

<sup>34</sup> See Yardley, *supra* note 2 at 1845, 1857–58; Busby, *supra* note 19 at 355.

<sup>35</sup> Yardley, *supra* note 2 at 1857–58.

reinforcing the myth of women's autonomy, obscuring abuse and coercive control within intimate relationships, and undermining prosecutions for sexual and domestic violence.<sup>36</sup>

Elaine Craig emphasizes how systemic sexual violence is a central mechanism of women's subordination and that criminal laws must be applied in ways "that recognize the impact of systemic inequities on individual sexual actors."<sup>37</sup> Both Hanna and Craig argue that if we must choose between the law being overinclusive and risking the autonomy of sexual minorities, or underinclusive and failing to protect women from sexual violence, the latter is a greater danger.<sup>38</sup>

UK scholars Susan Edwards and Elizabeth Yardley emphasize how the cultural ubiquity and mainstreaming of BDSM provides a ready-made script for accused to assert a "rough sex" defence, even where the victim has died as a result of her injuries.<sup>39</sup> Canadian scholar Karen Busby demonstrates that in nearly all of the reported cases where a consent to rough sex defence has been advanced, the complainant either asserted that she did not consent to anything, or that the boundaries of her consent were exceeded.<sup>40</sup> Busby identifies a pervasive judicial ignorance around the "safe, sane, and consensual" credo used by BDSM practitioners, which places "erotic asphyxiation" outside the range of accepted practice because of the risk of accidental death. Combined with a reluctance to call evidence from experts, judicial ignorance often results in a heavy emphasis on perpetrators' versions of events, and in reduced culpability for injuries caused.<sup>41</sup>

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<sup>36</sup> See Edwards, "Consent and the Rough Sex Defence", *supra* note 18 at 296.

<sup>37</sup> Craig, "Capacity to Consent", *supra* note 19 at 128.

<sup>38</sup> See *ibid* at 127; Hanna, *supra* note 18 at 248.

<sup>39</sup> See Yardley, *supra* note 2 at 1858; Edwards, "Consent and the Rough Sex Defence", *supra* note 18 at 296.

<sup>40</sup> See Busby, *supra* note 19 (noting that "the issue in all of the Canadian sexual assault cases is not the legal question: *can* they consent to BDSM? It is the factual question: *did* they consent to BDSM?" at 347 [emphasis in original]).

<sup>41</sup> See *ibid* at 352.

Further, while evidence of violence and bodily harm were previously viewed as corroborative of rape accusations, increasing numbers of accused in the UK are reconstructing harm as the outcome of “rough sex.”<sup>42</sup> As Edwards writes, “[r]ough sex’ excuses, once consigned to the annals of sexual psychopathy, are now becoming the defence norm in trials for murder and non-fatal assault in this context.”<sup>43</sup> The courtroom has thereby been transformed into a “theatre of pornography”, where women’s pain is reconstructed as pleasure.<sup>44</sup>

Linked with the reconstruction of serious injury as “play” is the manner in which defence counsel depict victims as responsible for the harm they have suffered. Hannah Bows and Jonathan Herring contend that acts of violence during sex are given a “vener of complicity”.<sup>45</sup> She asked for it, she wanted it, or she should have done more to avoid it. As Yardley has argued, “[t]his victim blaming draws upon neoliberal tropes of the sovereign individual, responsibilized to protect themselves from harm.”<sup>46</sup> Many perpetrators have a history of violent sexual activity, but the links between patterns of entrenched misogyny and coercive control and the acts in question are concealed when injuries are represented as the accidental outcomes of consensual practices.<sup>47</sup>

### III. Defences to Sexual Assault

There are two main vehicles for raising a rough sex defence for an accused charged with assault or sexual assault: the *actus reus* defence of consent and the *mens rea* defence of honest but

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<sup>42</sup> See Edwards, “Consent and the Rough Sex Defence”, *supra* note 18 at 296–97; Yardley, *supra* note 2 at 1840, 1844.

<sup>43</sup> Edwards, “Consent and the Rough Sex Defence”, *supra* note 18 at 297.

<sup>44</sup> *Ibid* at 296, relying on Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 38–39.

<sup>45</sup> See Bows & Herring, *supra* note 4 at 531, 534, citing comments by Laura Farris MP, House of Commons, “Notice of Amendments Given up to and Including Wednesday 29th April 2020” (session 2019–21), online: <publications.parliament.uk/pa/bills/cbill/58-01/0096/amend/domestic\_rm\_pbc\_0429.1-7.html>.

<sup>46</sup> Yardley, *supra* note 2 at 1843.

<sup>47</sup> See *ibid* at 1857.

mistaken belief in consent, the former employed more often than the latter. Both defences often rely on the woman's prior sexual history to lay the groundwork for "consent" or the accused's "mistake."

Suzanne Zaccour argues that asserting the "rough sex" defence seems to facilitate admission of the woman's alleged prior "rough sex" history.<sup>48</sup> This evidence should be regarded as *prima facie* inadmissible since it relies on the prohibited "twin myths" reasoning that because a woman has allegedly previously consented to "rough sex" it makes it more plausible that she did so on this occasion. Some judges nevertheless see prior "rough sex" evidence as highly relevant and admissible. For example, the judge in *R v B(B)* admitted the evidence:

[...] I am concerned that the jury could not properly understand the defence of consent to aspects of the sexual activity involving bondage, as testified to by Mr. B, without knowing if the complainant previously consented to this type of sexual activity in the context of their relationship in the months leading up to the alleged assault.

[. . .]

There is no issue of discriminatory belief or bias.<sup>49</sup>

Similar arguments were accepted in cases involving anal intercourse, dominant/submissive scenarios, including rape fantasies, striking and strangulation, and sadomasochism.<sup>50</sup> Once this kind of evidence is admitted, the complainant may face an even more pitched credibility battle on the issues of consent and mistaken belief. Even in cases where the woman has died from her

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<sup>48</sup> See Suzanne Zaccour, "'I'm Telling You, She Likes It Rough': Sexual History Evidence, Consent and the BDSM Defence in Canadian Sexual Assault Trials" (2021) 4 Child and Family Law Quarterly 347 at 348. See also Busby, *supra* note 19.

<sup>49</sup> *R v B(B)*, 2009 CarswellOnt 1082 at paras 21, 24, 64 CR (6th) 58 (Sup Ct J).

<sup>50</sup> See e.g. *R v B*, 2014 ONSC 6709 at para 14; *R v G(EN)*, 2015 MBQB 95 at paras 22–24.

injuries and cannot contest the claim, judges have permitted men accused of homicide to introduce evidence alleging that the deceased had consented to rough sex with other men.<sup>51</sup>

*(a) Consent Defence*

The general principle in Canadian criminal law, that people can consent neither to their own deaths nor to non-trivial injuries that are reasonably foreseeable,<sup>52</sup> ought to bar a “rough sex” defence when a woman suffers bodily harm, maiming or death. In 1991 in *R v Jobidon*,<sup>53</sup> the Court set out public policy reasons for limiting consent as a defence when fist fights cause non-trivial bodily harm or death, focusing on the social uselessness of fist fights and their potential to lead to serious breaches of the peace. The Court acknowledged that other limits on consent might be necessary in future cases to be developed on a case-by-case basis.

Four years later, the Court of Appeal for Ontario applied *Jobidon* in *R v Welch*,<sup>54</sup> an appeal from a sexual assault causing bodily harm conviction where the accused claimed consensual sadomasochism. The complainant testified that she did not consent to any sexual contact and described a violent rape where the accused beat her with a belt and inserted an object into her rectum, causing prolonged bleeding. The appeal turned not on whether the complainant had consented, but rather on whether the complainant *could* consent to such activity for her own sexual pleasure. The court held that consent could not be given to dehumanizing and degrading activity when the resulting bodily harm was reasonably foreseeable:

Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another

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<sup>51</sup> See *R v Garnier*, 2017 NSSC 341.

<sup>52</sup> See *Criminal Code*, RSC 1985, c C-46, s 14 [*Criminal Code*].

<sup>53</sup> [1991] 2 SCR 714, 7 CR (4th) 233. See also *R v Bruce*, [1995] BCJ No 212 at para 16, 26 WCB (2d) 227 (where the Court of Appeal for British Columbia expressed the view that the public policy concerns in *Jobidon* justifying the vitiation of consent should be given a stricter interpretation in the context of domestic violence).

<sup>54</sup> 1995 CarswellOnt 987, 25 OR (3d) 665 (Ont CA) [*Welch* cited to Carswell].

that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.

[ . . . ]

Specifically, the majority in *Jobidon* recognized that consent may be a defence to certain activities such as rough sporting activities, medical treatment, social interventions, and “daredevil activities” performed by stuntmen, “in the creation of a socially liable cultural product”. Acts of sexual violence, however, were conspicuously not included among these exceptions.<sup>55</sup>

As Janine Benedet has noted, the ruling in *Welch* spares complainants from being cross-examined on whether they enjoyed themselves in circumstances resulting in serious injuries.<sup>56</sup>

However, in a series of decisions in Ontario, starting with *R v Amos*<sup>57</sup> and ending with *R v DK*,<sup>58</sup> the Court of Appeal for Ontario has rendered these clear principles fraught and fragile. It has gradually twisted the statement from *Welch*, “deliberately inflicting pain upon another that gives rise to bodily harm”, into a requirement that not only must the infliction of pain be intentional, but so must the bodily harm. This interpretation flies in the face of the fact that assault and sexual assault causing bodily harm have no such *mens rea* requirement, as long as the underlying touching was intentional and bodily harm was reasonably foreseeable.<sup>59</sup>

The court explicitly overruled *Welch* in *R v Zhao*,<sup>60</sup> a case in which again the complainant described a violent sexual assault. She agreed to participate in some consensual petting with the

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<sup>55</sup> *Ibid* at paras 88, 87. The court added at para 89 that “[q]uite simply, it is suggested that hurting people is wrong and this is so whether the victim consents or not, or whether the purpose is to fulfil a sexual need or to satisfy some other desire.”

<sup>56</sup> *R v Zhao*, 2013 CarswellOnt 5207 (Annotation by Janine Benedet) [Benedet, “*R v Zhao*”], 2013 ONCA 293 [*Zhao*].

<sup>57</sup> 39 WCB (2d) 285, [1998] OJ No 3047 (Ont CA) [*Amos*]. *Amos* was followed by *R v Robinson*, 2001 CarswellOnt 888, 153 CCC (3d) 398 (Ont CA) [*Robinson*]; *R v Quashie*, 2005 CarswellOnt 2645, 198 CCC (3d) 337 (Ont CA) [*Quashie* cited to CarswellOnt]; and *Zhao*, *supra* note **Error! Bookmark not defined.**

<sup>58</sup> 2020 ONCA 79 [*DK*].

<sup>59</sup> See *R v DeSousa*, [1992] 2 SCR 944 at 966, 95 DLR (4th) 595; *R v Godin*, [1994] 2 SCR 484 at 485, 31 CR (4th) 33; *R v Williams*, 2003 SCC 41 at para 22.

<sup>60</sup> *Supra* note **Error! Bookmark not defined.**

accused, but when he came towards her holding a condom she immediately withdrew that consent. She described herself as crouching in a corner with her hands in front of her face. She tried to escape and the accused grabbed her by her underwear. She testified that

he then pinned her down on her back on the floor with one of his hands on her throat and one on her face, with his legs around her. She thought he was going to kill her, and she panicked. She wanted to get away. She again tried to move towards the door. He continued to grab at her underwear and she repeatedly said to him “stop”, “please, please, please stop.” She then began to scream for help, “as loud as [she] possibly could.” [She] testified, “[a]s soon as I started screaming, that’s when he started to strangle me.”<sup>61</sup>

The trial judge charged the jury on sexual assault causing bodily harm but did not instruct the jury that it must find the accused intentionally inflicted the bodily harm. The appeal court overturned

*Welch*:

[...] consent is not vitiated in all circumstances of sexual assault causing bodily harm, but instead only in those circumstances where bodily harm was intended *and* in fact caused. Where the accused did not intend to cause bodily harm, consent is available as a defence, if bodily harm is inadvertently caused.<sup>62</sup>

The Court set out a confusing instruction for the jury, stating that first it should determine whether the accused intended to inflict bodily harm beyond a reasonable doubt. If proven, consent is irrelevant. If unproven, the jury should go on to consider whether the complainant did not consent to the sexual activity beyond a reasonable doubt. We believe it is deeply problematic to consider whether the accused intended bodily harm before making the consent determination.<sup>63</sup> How can vitiation of consent be determined before determining whether there was any consent to begin with? This approach distorts the non-consent inquiry by asking whether we should reject the complainant’s purported consent before her consent is established.

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<sup>61</sup> *Ibid* at para 17.

<sup>62</sup> *Ibid* at para 108 [emphasis in original].

<sup>63</sup> See also Benedet, “*R v Zhao*”, *supra* note **Error! Bookmark not defined.**

In another Ontario case, *R v DK*,<sup>64</sup> the complainant described a violent rape that caused her to lose 40% of her blood volume, to which she acquiesced because she was afraid for her safety. The complainant testified that the accused told her to say her injuries were from rough sex and he told paramedics this story. The trial judge convicted the accused of sexual assault, yet acquitted him of sexual assault causing bodily harm because he had a reasonable doubt about whether the accused intended to cause bodily harm.<sup>65</sup>

The appellate court quashed the conviction on other grounds, but made clear the trial judge's mistake:

The trial judge blurred the distinction between (1) cases where bodily harm is caused during non-consensual sexual activity, and (2) cases where consent is vitiated through the intentional infliction of bodily harm. In the first category of cases, all the Crown is required to prove is objective foreseeability of bodily harm; in the second category, in order to vitiate consent, the Crown must prove the bodily harm was both caused and intentional.<sup>66</sup>

The court did not comment on the order of analysis from *Zhao*, where vitiation is apparently determined before non-consent has been determined.<sup>67</sup> Both *Zhao* and *DK* indicate that where the Crown fails to prove non-consent to sexual contact, it must prove that the accused intended bodily harm in order for consent to be vitiated, a higher level of *mens rea* than is normally required for sexual assault causing bodily harm. What this does is leave a class of victims with less protection from the criminal law. Those who consent to some sex in the circumstances—often intimate partners or women in the sex trade—run a particular risk that the violence against them will not be recognized.

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<sup>64</sup> *Supra* note 58.

<sup>65</sup> See *ibid* at para 20.

<sup>66</sup> *Ibid* at para 23.

<sup>67</sup> In fact, *Zhao*, *supra* note **Error! Bookmark not defined.** is not cited once in the decision.

The Court of Appeal of Alberta explicitly declined to follow the Ontario approach and the requirement for the intentional infliction of bodily harm in the homicide context in *R v Barton*,<sup>68</sup> the facts of which are described above.<sup>69</sup> This issue arose because one path to establishing culpable homicide was to argue that any consent to sex was vitiated because of the fatal bodily harm caused to the victim. Both the Court of Appeal and the Supreme Court of Canada<sup>70</sup> declined to decide the issue. The Court of Appeal acknowledged that *Jobidon* left open the possibility of looking at the policy issues in a particular context and noted that where the victim has been killed, the policy scale may point towards vitiation of consent:

Policy considerations may include how, on the wide continuum of bodily harm, death is the end point – the most serious form of bodily harm possible where personal and public interests are highest. When a person is not alive to testify as to what actually happened, the relative ease with which an accused can then raise defences of consent or mistaken belief may also go on the policy scale in determining whether apparent consent ought to be vitiated in these circumstances.<sup>71</sup>

Barton was found guilty of manslaughter at his second trial,<sup>72</sup> where the judge apparently instructed the jury that any consent the deceased may have given was vitiated if the accused was “reckless as to the risk of serious bodily harm.”<sup>73</sup> However, the Court of Appeal has recently followed the Ontario approach in *Zhao* in the sexual assault context in *R v AE*,<sup>74</sup> a case we discuss

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<sup>68</sup> 2017 ABCA 216 [*Barton ABCA*]. See Introduction, *above*, for the details of the case.

<sup>69</sup> See Part I. Introduction, *above*, for the details of the case.

<sup>70</sup> See *R v Barton*, 2019 SCC 33.

<sup>71</sup> *Barton ABCA*, *supra* note 68 at para 306 [footnote omitted].

<sup>72</sup> See *R v Barton*, 2021 ABQB 603 [*Barton ABQB*] (sentencing decision for manslaughter conviction).

<sup>73</sup> See the defence’s appeal notice, reported in “Ontario Trucker in Prison for Killing Cindy Gladue in Edmonton Hotel Appeals Conviction, Sentence”, *Global News* (25 August 2021), online: <globalnews.ca/news/8140798/barton-cindy-gladue-yellowhead-inn-edmonton-manslaughter\_appeal/?fbclid=IwAR11D11TS1vtJ8ENCteKUEVID6b1qP\_F2ncSSI M5tI>.

<sup>74</sup> 2021 ABCA 172 [*AE*].

in detail below, in finding that consent was vitiated because the accused intended to cause bodily harm.

*(b) Mistaken Belief in Consent*

The accused can also make a mistaken belief in consent claim, that even if the complainant did not consent, he mistakenly believed that she did.<sup>75</sup> Here, sexual history evidence is often offered to support prohibited inferences that are simply re-wrapped as the accused's belief that, because she consented before, she was consenting this time.<sup>76</sup>

For example, in *R v Ross*, the judge admitted evidence that the couple engaged in dominant/submissive sexual activity even though on the occasion at issue he acknowledged that he did not seek her consent. The judge said that “the overall sexual activity of this couple” was relevant to the accused's alleged mistaken belief.<sup>77</sup> We note that the Supreme Court's decision in *R v Goldfinch*<sup>78</sup> should bar such generic uses of sexual history evidence to provide “context” for alleged “rough sex” defences in the future.

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<sup>75</sup> See e.g. *R v Gairdner*, 2017 BCCA 425 at para 4 [*Gairdner*] (where the accused raised a mistaken belief in consent defence on the basis that he was engaged in a BDSM role-play with the complainant where “no” meant “yes”); *R v SB*, 2013 QCCQ 6676 at para 12 [*SB*] (where the accused argued that he had an honest but mistaken belief in the complainant's consent because they had previously engaged in consensual sadomasochistic role-playing during sex without advance agreement).

<sup>76</sup> See *Zaccour*, *supra* note 48 at 352. Mistakes about the existence of implied consent or a belief that no means yes are properly characterized as mistakes of law, not grounding a defence. See Lucinda Vandervort, “Mistake of Law and Sexual Assault: Consent and Mens Rea” (1987) 2:2 CJWL 233; *R v Ewanchuk*, [1999] 1 SCR 330 at 349–350, 169 DLR (4th) 193.

<sup>77</sup> *R v Ross*, 2014 SKQB 50 at para 39. See also *R v Sweet*, 2018 BCSC 1696 at paras 4, 167 [*Sweet*].

<sup>78</sup> 2019 SCC 38.

#### IV. Our Case Sample

We set out to look for reported cases in English and French dealing with some version of the rough sex defence. Our case sample covers the period of 1988 to 2021, inclusive.<sup>79</sup> We relied exclusively on the databases for Westlaw, Lexis Advance and CanLII.<sup>80</sup> We looked for cases where the Crown case alleged that injuries were suffered by the complainant (whether or not the accused was charged with causing bodily harm) and where the complainant asserted either that she did not consent, that she consented to some sexual activity but the accused went too far in his violence, or where the complainant initially indicated that she did not consent and later recanted her evidence. We also looked for cases where the accused argued consent to “rough sex”, consent to the infliction of bodily harm, or consent to sexual contact that in some way caused bodily harm, including death.

We recognize that our findings from these searches paint an incomplete picture of what is happening in Canadian courts because many trial level decisions remain unreported. We suspect that only a small percentage of the total cases charged make it to a final verdict, let alone to written reasons. Jury verdicts and guilty pleas will have been missed unless there are published reasons for sentence or an appeal. Our searches may have identified the more serious cases since those are more likely to go to trial and probably more likely to result in convictions. While our findings cannot provide a precise picture of how the rough sex defence is being used in Canada, they do

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<sup>79</sup> The earliest case we found was from 1988.

<sup>80</sup> We found cases citing ss 271 (sexual assault), 272 (sexual assault causing bodily harm or with a weapon), 273 (aggravated sexual assault), and 222 (homicide) of the *Criminal Code*, *supra* note 52 and searched within those results using: “rough sex” OR “BDSM” OR “sodomasochism” OR “sodomasochism” OR “erotic asphyxiation” OR “bondage” OR “kinky” OR “sex game”. We also ran broader searches of all cases in those three databases using: “rough sex” OR “sex game”; “consen” /s “rough sex”; and (“sexual assault” or “sexual offence”) AND (consent /s “bodily harm” OR “rough sex”). We narrowed all the results by our time period of 1 January 1988 to 31 December 2021.

give us a snapshot of how judges are approaching this issue. We put our numbers forward not to make definitive statements about trends, but rather to provide a large sample of the cases from which to assess judicial approaches to the rough sex defence.

We found a total of 93 completed cases.<sup>81</sup> Within these cases, there were 97 complainants<sup>82</sup> and 98 accused.<sup>83</sup> Of the 93 cases, 75 cases involved sexual assault charges, broken down as follows:

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<sup>81</sup> We considered a matter to be “complete” if it resulted in a reported appeal, conviction (via trial or guilty plea), acquittal, sentencing, or combination of these results. We also found a number of rough sex cases that had reported judgments involving s 276 applications, which we excluded.

<sup>82</sup> All of the completed cases involved one complainant, except for *R v Davidson*, 2010 BCPC 228 [*Davidson*] (3 complainants); *R v Sanmugarajah*, 2018 ONCJ 661 [*Sanmugarajah*] (2 complainants); and *R v Strong*, 2021 ONSC 1906 [*Strong*] (2 homicide victims).

<sup>83</sup> All of the completed cases involved one accused, except for *AE*, *supra* note 74 (3 accused); *R v Bohorquez*, 2019 ONSC 1643 [*Bohorquez*] (2 accused); *R v Hancock*, 2000 BCSC 1581 [*Hancock*] (2 accused); and *R v MacMillan*, 2020 ONSC 3299 [*MacMillan*] (2 accused).

**Table 1: Sexual Assault Cases**

Highest Sexual Assault Charge Laid	N (%)
Level 2 or 3 sexual assault causing bodily harm, aggravated sexual assault, sexual assault with a weapon, or sexual assault with another person <sup>84</sup>	42 <sup>85</sup> (56%)
Level 1 sexual assault <sup>86</sup>	33 <sup>87</sup> (44%)
<b>Total</b>	75 (100%)

As we will discuss in more detail below, this case sample included very serious sexual assaults with a much higher number of level 2 and level 3 charges than is generally the case.<sup>88</sup>

<sup>84</sup> Sexual assault charges under ss 272 and 273 of the *Criminal Code*, *supra* note 52.

<sup>85</sup> The cases are: *R v A(C)*, 2011 ONSC 291 [A(C)]; *AE*, *supra* note 74; *R c Afriat*, 1988 CarswellQue 1314, [1988] RJQ 2906 (CQ crim & pén) [Afriat]; *Amos*, *supra* note 57; *R v Atagootak*, 2003 NUCA 3 [Atagootak]; *R v Barker*, 1997 NSCA 90 [Barker]; *R v Beaudry RP (Corporal)*, 2016 CM 4010 [Beaudry]; *Bohorquez*, *supra* note 83; *R v Boyle*, Ottawa 18-RD19579 (Ont Ct J) [Boyle]; *DK*, *supra* note 58; *Gairdner*, *supra* note 75; *R v Glassford*, [1988] OJ No 359, 42 CCC (3d) 259 (Ont CA) [Glassford cited to OJ]; *R v Gonzalez-Hernandez*, 2011 BCSC 392 [Gonzalez-Hernandez]; *R v Graham*, 2019 ONCA 347 [Graham]; *R v Headley*, 2014 ONCJ 501 [Headley]; *R v KG*, 2018 ONCJ 537 [KG]; *R v Kilbourne*, 2013 MBPC 21 [Kilbourne]; *R v Laporte*, 2012 MBQB 230 [Laporte]; *R v Lavergne-Bowkett*, 2013 BCSC 1737 [Lavergne-Bowkett]; *R v Lozano Lopez*, 2015 BCCA 311 [Lozano-Lopez]; *MacMillan*, *supra* note 83; *R v Nelson*, 2014 ONCA 853 [Nelson]; *R c Oakes*, 2003 CarswellQue 1769, [2003] JQ No 9538 (QC CA) [Oakes]; *R v Olotu*, 2016 SKCA 84 [Olotu]; *R v P(JA)*, 1998 CarswellOnt 5292, 41 WCB (2d) 233 (Ont Ct J) [P(JA)]; *R v Percy*, 2020 NSSC 138 [Percy]; *R v PO*, 2021 ABQB 318 [PO]; *Quashie*, *supra* note 57; *R v RDW*, 2006 BCPC 300 [RDW]; *Robinson*, *supra* note 57; *R c Roy*, 2010 QCCQ 7927 [Roy]; *R v S(JR)*, 2013 BCSC 1363 [S(JR)]; *Sanmugarajah*, *supra* note 82; *R v Spencer*, 1991 CarswellMan 6, 10 CR (4th 26 (Man Prov Ct (Crim Div)) [Spencer]; *Sweet*, *supra* note **Error! Bookmark not defined.**; *R v Tedjuk*, 2004 SKQB 418 [Tedjuk]; *R v Threefingers*, 2016 ABCA 225 [Threefingers]; *R c Touchette*, 2016 QCCA 460 [Touchette]; *R v Vandermeulen*, 2013 MBQB 118 [Vandermeulen]; *Welch*, *supra* note 54; *R v White-Halliwell*, 2019 ONSC 597 [White-Halliwell]; *Zhao*, *supra* note **Error! Bookmark not defined.**

<sup>86</sup> Sexual assault charges under s 271 of the *Criminal Code*, *supra* note 52.

<sup>87</sup> The cases are: *R v B(AJ)*, 2006 CarswellMan 498 [B(AJ)]; *R v Bear-Knight*, 2021 SKQB 308 [Bear-Knight]; *R v C(ER)(Catellier)*, 2016 MBCA 74 [Catellier]; *R v CC*, 2018 ONSC 1262 [CC]; *R v CI*, 2021 ONCJ 43 [CI]; *R v Cross*, 2015 ONSC 4251 [Cross]; *Davidson*, *supra* note 82; *R v DC*, 2017 ONSC 5775 [DC]; *R v E(JA)*, 2006 CarswellOnt 5577 (Ont Ct J) [E(JA)]; *R v Gendreau*, 2011 ABCA 256 [Gendreau]; *R v GOG*, 2000 BCPC 10 [GOG]; *R v Gulliver*, 2017 ABCA 223 [Gulliver]; *R v Hillier*, 2021 NLSC 108 [Hillier]; *R v Hoskins*, 2021 SKCA 23 [Hoskins]; *R v Hunter*, 2019 NSSC 369 [Hunter]; *JA*, *supra* note 15; *R v JP*, 2020 ONCA 162 [JP]; *R v JWS*, 2012 NSPC 102 [JWS]; *R v Kotio*, 2021 NSCA 76 [Kotio]; *R v Lawrence*, 2015 BCCA 358 [Lawrence]; *R v Meyers*, 2016 SKQB 413 [Meyers]; *R v P(A)*, 2013 ONCA 344 [P(A)]; *R v RW*, 2020 ONCJ 148 [RW]; *R v S(M)*, 1999 CarswellOnt 2881, 43 WCB (3d) 406 (Ont Ct J) [S(M)]; *R v SAM*, [1993] OJ No 4240 (Ont Ct J (Gen Div)) [SAM]; *SB*, *supra* note 75; *R v Seaton*, 2012 ONSC 6070 [Seaton]; *R v Shepperd*, 2018 ONCJ 692 [Shepperd]; *R v Skoyen*, 2020 BCSC 362 [Skoyen]; *R v Stewart*, 2001 YKCA 10 [Stewart]; *R v Stratton*, 2010 ONCJ 600 [Stratton]; *R v Ussa*, 2014 MBCA 71 [Ussa]; *R v Went*, 2004 BCSC 1205 [Went].

<sup>88</sup> See Part V. (b) The Minimization of “Bodily Harm”, *below*, for further discussion on this point.

In addition to the 75 sexual assault cases, we found 10 cases involving the culpable homicides of 11 victims by 11 accused.<sup>89</sup> There were six cases involving first-degree murder charges,<sup>90</sup> one involving second-degree<sup>91</sup> and three manslaughter charges.<sup>92</sup> Among these 10 homicide cases, all the men claimed that the victim died as a result of “a sex game gone wrong,” with the exception of one man who denied he killed his wife.<sup>93</sup> Perhaps most notably, four of the 11 homicide victims were women in the sex trade who are particularly vulnerable to being on the wrong end of a rough sex defence because of stereotypes about their perpetual state of consent to sexual activity, however violent.<sup>94</sup> Three of the eleven victims were current or former intimate partners of the accused.<sup>95</sup>

Finally, we also found eight assault offences involving evidence of the rough sex defence.<sup>96</sup> These cases took three different forms. In four cases, the complainant alleged a violent non-sexual assault but the accused maintained that the injuries were caused during consensual rough sex.<sup>97</sup> In two cases, the complainant testified that her injuries were sustained during violent sex but only

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<sup>89</sup> *R c Baril*, 2012 ABQB 428 [*Baril*]; *R c Deschatelets*, 2013 QCCQ 1948 [*Deschatelets*]; *Barton ABCA*, *supra* note 68; *R v Garnier*, 2018 NSSC 196 [*Garnier*]; *R v Guenther*, 2017 ABCA 205 [*Guenther*]; *Hancock*, *supra* note 83; *R v Liu*, 2004 CanLII 34061, [2004] OJ No 4221 (Ont CA) [*Liu*]; *Mcilwaine*, 1996 CanLII 5884, [1996] RJQ 2529 (QC CA) [*Mcilwaine*]; *Toupin-Houle c R*, 2017 QCCS 2280 [*Toupin-Houle*]; *Strong*, *supra* note 82. All the cases involved one victim, except for *Strong*, *supra* note 82, and all the cases involved one accused, except for *Hancock*, *supra* note 83.

<sup>90</sup> See *Barton ABCA*, *supra* note 68; *Guenther*, *supra* note 89; *Liu*, *supra* note 89; *Mcilwaine*, *supra* note 89; *Toupin-Houle*, *supra* note 89; *Strong*, *supra* note 82.

<sup>91</sup> See *Garnier*, *supra* note 89.

<sup>92</sup> See *Baril*, *supra* note 89; *Deschatelets*, *supra* note 89; *Hancock*, *supra* note 83.

<sup>93</sup> See *Liu*, *supra* note 89.

<sup>94</sup> See *Barton ABCA*, *supra* note 68; *Hancock*, *supra* note 83; *Mcilwaine*, *supra* note 89; *Strong*, *supra* note 82.

<sup>95</sup> See *Deschatelets*, *supra* note 89 (current intimate partners); *Guenther*, *supra* note 89 (ex-intimate partners); *Liu*, *supra* note 89 (married).

<sup>96</sup> *R v Bolger*, 2019 CarswellNfld 365, 158 WCB (2d) 116 (Nfld Prov Ct) [*Bolger* cited to CarswellNfld]; *R v Ceelen*, 2011 ONSC 4764 [*Ceelen*]; *R v Finnister*, 2010 ONCJ 14 [*Finnister*]; *R v Giroux*, 2015 ABPC 208 [*Giroux*]; *R v Gosse*, 2015 ONCJ 177 [*Gosse*]; *R v Pacheco*, 2015 ONCJ 485 [*Pacheco*]; *R v Reid*, 2019 ONSC 2165 [*Reid*]; *R v Tompkins*, 2017 ONSC 5524 [*Tompkins*].

<sup>97</sup> See *Finnister*, *supra* note 96; *Pacheco*, *supra* note 96; *Reid*, *supra* note 96; *Tompkins*, *supra* note 96.

assault charges were laid.<sup>98</sup> Finally, in two cases, the complainant alleged a violent assault but then recanted and testified that the injuries resulted from consensual rough sex.<sup>99</sup>

Many of the accused charged with either sexual assault or assault faced other charges, most commonly overcoming resistance by choking, suffocation or strangulation,<sup>100</sup> unlawful confinement<sup>101</sup> and uttering threats.<sup>102</sup>

(a) *The Gendered Nature of “Rough Sex”*

The most striking finding from our case sample was the degree to which consent as a defence to violent sex in these cases is deeply gendered. Every one of the 98 accused in these cases was male. The victims were overwhelmingly female. Of the 97 complainants, there were only 3 male victims, 2 in homicide cases and 1 in a sexual assault.<sup>103</sup> In the 10 homicide cases, all the perpetrators were male and 9 of the 11 victims were female.<sup>104</sup> In the eight assault cases, all the perpetrators were male and all the complainants were female. Thus, the reported cases suggest that it is **only** men committing these crimes and overwhelmingly women who are on the losing end of rough sex. Our case sample would suggest that the “rough sex” defence is a problem of male violence against women.

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<sup>98</sup> See *Bolger*, *supra* note 96 (complainant and accused had consensual sex; issue was whether complainant consented to striking and hitting during sex); *Ceelen*, *supra* note 96 (complainant consented to rough sex, but the accused caused bodily harm that was neither trivial nor transitory; therefore, consent was vitiated).

<sup>99</sup> See *Giroux*, *supra* note 96; *Gosse*, *supra* note 96.

<sup>100</sup> See e.g. *Beaudry*, *supra* note 85; *Gairdner*, *supra* note 75; *Gosse*, *supra* note 96; *Lawrence*, *supra* note 87; *Vandermeulen*, *supra* note 85.

<sup>101</sup> See e.g. *SB*, *supra* note 75; *Barker*, *supra* note 85; *Boyle*, *supra* note 85; *Finnister*, *supra* note 96; *Gendreau*, *supra* note 87.

<sup>102</sup> See e.g. *B(AJ)*, *supra* note 87; *Gulliver*, *supra* note 87; *JP*, *supra* note 87; *Kilbourne*, *supra* note 85; *Meyers*, *supra* note 87.

<sup>103</sup> The complainant was male in *Hancock*, *supra* note 83 (homicide); *Mcilwaine*, *supra* note 89 (homicide); *RW*, *supra* note 87 (sexual assault).

<sup>104</sup> The complainants were women in all but *Hancock*, *supra* note 83 and *Mcilwaine*, *supra* note 89.

## (b) “Rough Sex” and Intimacy

A majority of the perpetrators were known to their victim.

**Table 2: Victim-Accused Relationship in All Cases**

Relationship	N (%)
Current intimate partners <sup>105</sup> (legally married, common-law, dating, or other intimate relationship)	41 (44.1%)
Former intimate partners	5 (5.4%)
Exchanging sex for money	7 (7.5%)
Friends or casual acquaintances <sup>106</sup>	20 (21.5%)
Strangers <sup>107</sup>	16 (17.2%)
Unknown relationship	4 (4.3%)
<b>Total</b>	<b>93 (100%)</b>

Approximately half of the cases in our database (49.5%) involved allegations against men who were current or former intimate partners of the complainant. Overall, women were much more likely to be harmed by men with some degree of access to them than by strangers.<sup>108</sup> There was a

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<sup>105</sup> We defined “intimate partner” as “current and former legally married spouses, common-law partners, dating partners, and other intimate partner relationships”: Statistics Canada, *Intimate Partner Violence in Canada, 2018: An Overview*, by Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 April 2021) at 3, online (pdf): <[www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00003-eng.pdf?st=-XRZ9AmA](http://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00003-eng.pdf?st=-XRZ9AmA)>. We interpreted “other intimate partner relationships” to mean pre-existing relationships of a sexual nature with no other elements of dating, such as a so-called “friends-with-benefits” relationship.

<sup>106</sup> We defined “casual acquaintance” as “a social relationship which is neither long-term nor close”: Statistics Canada, *Measuring Violence Against Women: Statistics Trends*, by Maire Sinha, Catalogue No 85-002-X (Ottawa: Statistics Canada, 25 February 2013) at 36, online (pdf): <[www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11766-eng.pdf?st=VMF-oo5h](http://www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11766-eng.pdf?st=VMF-oo5h)>.

<sup>107</sup> While there is no standard definition of “stranger” accepted by Statistics Canada, we defined this relationship as one where the parties only met in person for the first time on the night of the incident.

<sup>108</sup> See further Sofia Persson and Katie Dhingra, “Attributions of Blame in Stranger and Acquaintance Rape: A Multilevel Meta-Analysis and Systematic Review” (2020) *Trauma, Violence, & Abuse* 1 at 1; Yardley, *supra* note 2 at 1842–43.

documented history of domestic violence in 20 of the cases.<sup>109</sup> It is also important to recognize that coercively controlling relationships often involve men making violent sexual demands to further their use of humiliation, pain and fear to control and isolate their female partners.<sup>110</sup>

*(c) The Distortion of Women's Allegations*

Our case law sample suggests that it is wrong to construct the rough sex issue as being primarily about women's sexual agency to engage in BDSM. Where women survived, they claimed that they did not consent to rough sex<sup>111</sup> or, and more often, to any sexual contact at all.<sup>112</sup> Instead, the argument that the complainant consented to rough sex was used to distort what would otherwise be seen as a violent rape<sup>113</sup> and, often, domestic violence.<sup>114</sup>

There were 83 cases where the complainant survived the sexual or other violence. In only two cases did the complainant testify that she agreed to the violence, including one case where the complainant was a 16-year-old girl who allegedly agreed to serious and disfiguring cuts on her body with a razor blade.<sup>115</sup> It was somewhat more likely (16 cases) for a complainant to testify that she agreed to sexual activity, sometimes involving some violence, but that the accused exceeded

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<sup>109</sup> See *SB*, *supra* note 75; *B(AJ)*, *supra* note 87; *Bolger*, *supra* note 96; *Boyle*, *supra* note 85; *Catellier*, *supra* note 87; *CC*, *supra* note 87; *CI*, *supra* note 87; *DK*, *supra* note 58; *E(JA)*, *supra* note 87; *Giroux*, *supra* note 96; *JA*, *supra* note 15; *KG*, *supra* note 85; *Liu*, *supra* note 89; *Pacheco*, *supra* note 96; *S(JR)*, *supra* note 85; *SAM*, *supra* note 87; *Stewart*, *supra* note 87; *Stratton*, *supra* note 87; *Tompkins*, *supra* note 96; *P(A)*, *supra* note 87.

<sup>110</sup> See Yardley, *supra* note 2 at 1843; Evan Stark, "Foreword" in Louise McOrmond-Plummer, Jennifer Y Levy-Peck & Patricia Easteal, eds, *Perpetrators of Intimate Partner Sexual Violence: A Multidisciplinary Approach to Prevention, Recognition, and Intervention* (New York: Routledge, 2017) xxi.

<sup>111</sup> In 19% of the cases in our sample where the complainant survived, the complainants testified that they only consented to sex without violence.

<sup>112</sup> In 64% of the cases in our sample where the complainant survived, the complainants did not have capacity to consent or testified that they did not consent to any sex at all.

<sup>113</sup> See e.g. *DC*, *supra* note 87; *Hillier*, *supra* note 87; *Robinson*, *supra* note 57.

<sup>114</sup> See e.g. *SB*, *supra* note 75; *Boyle*, *supra* note 85; *CI*, *supra* note 87.

<sup>115</sup> The accused "cut the word 'Rothe', meaning slave in a fictional language. . .into [the complainant's] back. He also cut a star like an inverted pentagram on the back part of her shoulder": *RDW*, *supra* note 85 at para 8. These acts caused serious and permanent scarring requiring surgery. The second case was *Ceelen*, *supra* note 96 (complainant consented to rough anal sex, which was vitiated by an anal tear).

the scope of that agreement despite attempts by the complainant to communicate her objection.<sup>116</sup>

In 53 of the 83 cases—(64%)—the complainant testified that she did not consent to any sex or lacked the capacity to consent.<sup>117</sup>

Looking specifically at the 42 cases involving charges of level 2 or 3 sexual assault, all accused—with the exception of one who pleaded guilty—argued either that the complainant consented or that he mistakenly believed she consented to the sexual activity involving some form of “rough sex”, with the injuries occurring accidentally.<sup>118</sup> In 27 cases (64%), the complainant testified that she did not consent to *any* sexual activity,<sup>119</sup> and in another four cases, the women lacked capacity to consent.<sup>120</sup> In five cases, complainants said they consented to sexual activity but not to violence.<sup>121</sup> In three cases, they consented to some form of “rough sex”, but the accused

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<sup>116</sup> See *Afriat*, *supra* note 85; *A(C)*, *supra* note 85; *AE*, *supra* note 74; *Amos*, *supra* note 57; *Catellier*, *supra* note 87; *Cross*, *supra* note 87; *Davidson*, *supra* note 82; *Gairdner*, *supra* note 75; *Hunter*, *supra* note 87; *Kotio*, *supra* note 87; *Lozano-Lopez*, *supra* note 85; *RW*, *supra* note 87; *Sanmugarajah*, *supra* note 82; *Skoyen*, *supra* note 87; *Stratton*, *supra* note 87; *White-Halliwell*, *supra* note 85.

<sup>117</sup> See *Oakes*, *supra* note 85; *Roy*, *supra* note 85; *SB*, *supra* note 75; *Touchette*, *supra* note 85; *B(AJ)*, *supra* note 87; *Barker*, *supra* note 85; *Bear-Knight*, *supra* note 87; *Beaudry*, *supra* note 85; *Bohorquez*, *supra* note 83; *Boyle*, *supra* note 85; *CC*, *supra* note 87; *CI*, *supra* note 87; *DC*, *supra* note 87; *DK*, *supra* note 58; *E(JA)*, *supra* note 87; *Gendreau*, *supra* note 87; *Glassford*, *supra* note 85; *GOG*, *supra* note 87; *Gonzalez-Hernandez*, *supra* note 85; *Graham*, *supra* note 85; *Gulliver*, *supra* note 87; *Headley*, *supra* note 85; *Hillier*, *supra* note 87; *Hoskins*, *supra* note 87; *JP*, *supra* note 87; *KG*, *supra* note 85; *Kilbourne*, *supra* note 85; *Laporte*, *supra* note 85; *Lavergne-Bowkett*, *supra* note 85; *Lawrence*, *supra* note 87; *MacMillan*, *supra* note 83; *Nelson*, *supra* note 85; *Olotu*, *supra* note 85; *P(JA)*, *supra* note 85; *Percy*, *supra* note 85; *Quashie*, *supra* note 57; *Robinson*, *supra* note 57; *S(JR)*, *supra* note 85; *S(M)*, *supra* note 87; *SAM*, *supra* note 87; *Seaton*, *supra* note 87; *Shepperd*, *supra* note 87; *Spencer*, *supra* note 85; *Stewart*, *supra* note 87; *Sweet*, *supra* note **Error! Bookmark not defined.**; *Tedjuk*, *supra* note 85; *Threefingers*, *supra* note 85; *Ussa*, *supra* note 87; *Vandermeulen*, *supra* note 85; *Welch*, *supra* note 54; *Went*, *supra* note 87; *Zhao*, *supra* note **Error! Bookmark not defined.**; *P(A)*, *supra* note 87.

<sup>118</sup> The accused pleaded guilty in *RDW*, *supra* note 85.

<sup>119</sup> See *Barker*, *supra* note 85; *Beaudry*, *supra* note 85; *Bohorquez*, *supra* note 83; *Boyle*, *supra* note 85; *DK*, *supra* note 58; *Glassford*, *supra* note 85; *Gonzalez-Hernandez*, *supra* note 85; *Graham*, *supra* note 85; *Headley*, *supra* note 85; *KG*, *supra* note 85; *Kilbourne*, *supra* note 85; *Laporte*, *supra* note 85; *Lavergne-Bowkett*, *supra* note 85; *MacMillan*, *supra* note 83; *Nelson*, *supra* note 85; *Olotu*, *supra* note 85; *Percy*, *supra* note 85; *Quashie*, *supra* note 57; *Robinson*, *supra* note 57; *S(JR)*, *supra* note 85; *Spencer*, *supra* note 85; *Sweet*, *supra* note **Error! Bookmark not defined.**; *Tedjuk*, *supra* note 85; *Threefingers*, *supra* note 85; *Vandermeulen*, *supra* note 85; *Welch*, *supra* note 54; *Zhao*, *supra* note **Error! Bookmark not defined.**

<sup>120</sup> See *Oakes*, *supra* note 85; *Roy*, *supra* note 85; *Touchette*, *supra* note 85; *P(JA)*, *supra* note 85.

<sup>121</sup> See *A(C)*, *supra* note 85; *AE*, *supra* note 74; *Amos*, *supra* note 57; *Sanmugarajah*, *supra* note 82; *White-Halliwell*, *supra* note 85.

either acted beyond her consent or refused to stop when asked.<sup>122</sup> In only one case in our study did the complainant allegedly agree to the full degree of bodily harm caused by the accused.<sup>123</sup>

These cases have all the indicia of very serious male violence against women, with the rough sex defence being used to effectively suggest that “she asked for it.” As one trial judge commented after admitting sexual history evidence where an accused alleged consent to “rough sex”:

When I allowed Mr. Sweet’s s. 276 application, I thought this might be a case about possible grey areas in the law concerning the autonomy of adults to set ground rules for themselves to engage in consensual and pleasurable sexual activities, albeit with some level of pain.

After hearing all of the evidence, however, it simply turns out to be a case involving a controlling, possessive, jealous man who perpetrated sexual violence on an intimate partner he professed to love. Sadly, this type of sexual violence against women continues to be far too common.<sup>124</sup>

*(d) Conviction Rate*

The conviction rate in these cases was relatively high, which we suspect is a reflection of the devastating injuries many of these victims faced. We break down conviction rate by offence charged:

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<sup>122</sup> See *Afriat*, *supra* note 85; *Gairdner*, *supra* note 75; *Lozano-Lopez*, *supra* note 85.

<sup>123</sup> See *RDW*, *supra* note 85 (although the complainant did not testify). In another case, *Atagootak*, *supra* note 85, it could not be discerned what the complainant’s position on consent was. And in the remaining level 2 or 3 sexual assault case, *PO*, *supra* note 85, the complainant initially said she did not consent to any sex but later recanted. The trial judge in this case found that the video evidence of the sexual assault disclosed a total absence of consent.

<sup>124</sup> *Sweet*, *supra* note **Error! Bookmark not defined.** at paras 157–58.

**Table 3: Conviction and Acquittal Rates of Sexual Assault Cases**

Outcome of Case	N (%)
Accused ultimately convicted of at least one sexual assault charge	50 (66.7%) <ul style="list-style-type: none"> <li>• Level 1 cases: 22<sup>125</sup></li> <li>• Level 2 or 3 cases: 28<sup>126</sup></li> </ul>
Accused ultimately acquitted of all sexual assault charges	13 (17.3%) <ul style="list-style-type: none"> <li>• Level 1 cases: 7<sup>127</sup></li> <li>• Level 2 or 3 cases: 6<sup>128</sup></li> </ul>
Accused pleaded guilty to simple assault	1 <sup>129</sup> (1.3%)
New trial ordered on appeal (and outcome of new trial unknown)	9 <sup>130</sup> (12%)
Unknown or unclear	2 <sup>131</sup> (2.7%)
<b>Total</b>	75 (100%)

<sup>125</sup> See *SB*, *supra* note 75; *B(AJ)*, *supra* note 87; *Catellier*, *supra* note 87; *CC*, *supra* note 87; *CI*, *supra* note 87; *Cross*, *supra* note 87; *Davidson*, *supra* note 82; *E(JA)*, *supra* note 87; *Gendreau*, *supra* note 87; *GOG*, *supra* note 87; *Gulliver*, *supra* note 87; *Hoskins*, *supra* note 87; *JA*, *supra* note 15; *JP*, *supra* note 87; *JWS*, *supra* note 87; *Lawrence*, *supra* note 87; *Meyers*, *supra* note 87; *S(M)*, *supra* note 87; *SAM*, *supra* note 87; *Skoyen*, *supra* note 87; *Stewart*, *supra* note 87; *Stratton*, *supra* note 87.

<sup>126</sup> See *AE*, *supra* note 74; *Roy*, *supra* note 85; *Touchette*, *supra* note 85; *Barker*, *supra* note 85; *Beaudry*, *supra* note 85; *Bohorquez*, *supra* note 83; *Gairdner*, *supra* note 75; *Glassford*, *supra* note 85; *Gonzalez-Hernandez*, *supra* note 85; *Graham*, *supra* note 85; *Kilbourne*, *supra* note 85; *Laporte*, *supra* note 85; *Lavergne-Bowkett*, *supra* note 85; *Lozano-Lopez*, *supra* note 85; *MacMillan*, *supra* note 83; *Nelson*, *supra* note 85; *Olotu*, *supra* note 85; *P(JA)*, *supra* note 85; *Percy*, *supra* note 85; *PO*, *supra* note 85; *Quashie*, *supra* note 57; *S(JR)*, *supra* note 85; *Sanmugarajah*, *supra* note 82; *Spencer*, *supra* note 85; *Sweet*, *supra* note **Error! Bookmark not defined.**; *Tedjuk*, *supra* note 85; *Vandermeulen*, *supra* note 85; *Welch*, *supra* note 54.

<sup>127</sup> See *Bear-Knight*, *supra* note 87; *Hillier*, *supra* note 87; *Hunter*, *supra* note 87; *RW*, *supra* note 87; *Seaton*, *supra* note 87; *Shepperd*, *supra* note 87; *Went*, *supra* note 87.

<sup>128</sup> See *Afriat*, *supra* note 85; *A(C)*, *supra* note 85; *Amos*, *supra* note 57; *Boyle*, *supra* note 85; *KG*, *supra* note 85; *White-Halliwel*, *supra* note 85.

<sup>129</sup> See *RDW*, *supra* note 85.

<sup>130</sup> See *Oakes*, *supra* note 85; *Atagootak*, *supra* note 85; *DC*, *supra* note 87; *DK*, *supra* note 58; *Kotio*, *supra* note 87; *Robinson*, *supra* note 57; *Threefingers*, *supra* note 85; *Zhao*, *supra* note **Error! Bookmark not defined.**; *P(A)*, *supra* note 87.

<sup>131</sup> See *Headley*, *supra* note 85; *Ussa*, *supra* note 87.

As shown above, the accused were ultimately convicted in 51 cases. Only one of those cases involved a guilty plea. Of the remaining cases that were resolved through the trial process, 44 convictions were based on the trier of fact accepting that the complainant did not consent,<sup>132</sup> and two convictions were based on the complainant's consent being vitiated on public policy grounds.<sup>133</sup>

Eight of the 11 men charged with homicide were ultimately convicted after appeals and retrials,<sup>134</sup> and another two ultimately pleaded guilty: one to second degree murder<sup>135</sup> and one to manslaughter.<sup>136</sup> Finally, one man was convicted of first degree murder but granted a new trial on

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<sup>132</sup> See *AE*, *supra* note 74 (but it was noted that if consent were proven it would have been vitiated because of the surreptitious recording of the encounter); *Roy*, *supra* note 85 (but it was noted that if consent were proven it would have been vitiated); *SB*, *supra* note 75; *Touchette*, *supra* note 85 (but it was noted that if consent were proven it would have been vitiated); *B(AJ)*, *supra* note 87; *Barker*, *supra* note 85; *Beaudry*, *supra* note 85; *Bohorquez*, *supra* note 83; *Catellier*, *supra* note 87; *CC*, *supra* note 87; *CI*, *supra* note 87; *Cross*, *supra* note 87; *Davidson*, *supra* note 82; *E(JA)*, *supra* note 87; *Gairdner*, *supra* note 75; *Glassford*, *supra* note 85; *GOG*, *supra* note 87; *Gonzalez-Hernandez*, *supra* note 85 (but noted that if consent were proven it would have been vitiated); *Gulliver*, *supra* note 87; *Hoskins*, *supra* note 87; *JA*, *supra* note 15; *JP*, *supra* note 87; *JWS*, *supra* note 87; *Kilbourne*, *supra* note 85; *Laporte*, *supra* note 85; *Lavergne-Bowkett*, *supra* note 85; *Lawrence*, *supra* note 87; *MacMillan*, *supra* note 83; *Meyers*, *supra* note 87; *Nelson*, *supra* note 85; *Olotu*, *supra* note 85; *P(JA)*, *supra* note 85; *Percy*, *supra* note 85; *PO*, *supra* note 85; *S(JR)*, *supra* note 85; *S(M)*, *supra* note 87; *SAM*, *supra* note 87; *Sanmugarajah*, *supra* note 82; *Skoyen*, *supra* note 87; *Spencer*, *supra* note 85; *Stewart*, *supra* note 87; *Sweet*, *supra* note **Error! Bookmark not defined.**; *Tedjuk*, *supra* note 85; *Vandermeulen*, *supra* note 85.

<sup>133</sup> See *Lozano-Lopez*, *supra* note 85; *Welch*, *supra* note 54. In the remaining three cases—*Graham*, *supra* note 85, *Quashie*, *supra* note 57, and *Gendreau*, *supra* note 87—it was impossible to determine whether the jury convicted on the basis of non-consent or vitiation.

There were 50 total cases where the complainant disputed consent to any sexual activity, and 34 of those cases (68%) resulted in convictions after all appeals. See *Barker*, *supra* note 85; *Beaudry*, *supra* note 85; *Bohorquez*, *supra* note 83; *Glassford*, *supra* note 85; *Gonzalez-Hernandez*, *supra* note 85; *Graham*, *supra* note 85; *Kilbourne*, *supra* note 85; *Laporte*, *supra* note 85; *Lavergne-Bowkett*, *supra* note 85; *Nelson*, *supra* note 85; *Olotu*, *supra* note 85; *Percy*, *supra* note 85; *Quashie*, *supra* note 57; *S(JR)*, *supra* note 85; *Spencer*, *supra* note 85; *Sweet*, *supra* note **Error! Bookmark not defined.**; *Tedjuk*, *supra* note 85; *Vandermeulen*, *supra* note 85; *Welch*, *supra* note 54; *SB*, *supra* note 75; *B(AJ)*, *supra* note 87; *CC*, *supra* note 87; *CI*, *supra* note 87; *E(JA)*, *supra* note 87; *Gendreau*, *supra* note 87; *GOG*, *supra* note 87; *Gulliver*, *supra* note 87; *Hoskins*, *supra* note 87; *JP*, *supra* note 87; *JWS*, *supra* note 87; *Lawrence*, *supra* note 87; *S(M)*, *supra* note 87; *SAM*, *supra* note 87; *Stewart*, *supra* note 87. By contrast, only 8 out of 16 cases (50%) resulted in convictions where the complainant testified to consenting to sex without violence or with a limited degree of violence. See *Gairdner*, *supra* note 75; *Lozano-Lopez*, *supra* note 85; *Catellier*, *supra* note 87; *Cross*, *supra* note 87; *Davidson*, *supra* note 82; *Skoyen*, *supra* note 87; *Stratton*, *supra* note 87; *Sanmugarajah*, *supra* note 82.

<sup>134</sup> See *Barton ABCA*, *supra* note 68; *Deschatelets*, *supra* note 89; *Guenther*, *supra* note 89; *Hancock*, *supra* note 83 (two accused); *Liu*, *supra* note 89; *Strong*, *supra* note 82; *Garnier*, *supra* note 89.

<sup>135</sup> See *Toupin-Houle*, *supra* note 89.

<sup>136</sup> See *Baril*, *supra* note 89.

appeal.<sup>137</sup> While in several homicide cases arguments were made that the victim agreed to all of the violence,<sup>138</sup> by the very nature of the crime, victims cannot dispute the accuseds' story in these cases.

Among the eight cases where only assault charges were laid, two cases involved complainants who recanted allegations of sexual assault. In both cases the women later claimed that they consented to "rough sex".<sup>139</sup> Both men were found guilty at trial of assault, although one was granted a new trial on appeal.<sup>140</sup> Of the remaining six accused: two were acquitted,<sup>141</sup> three were convicted,<sup>142</sup> and one was convicted but granted a new trial on appeal.<sup>143</sup>

This brief summary of our findings is suggestive of the deeply gendered nature of rough sex claims and the role of intimacy in allowing access to the claim. These cases also overwhelmingly involve women who describe saying no, often repeatedly, even where initial consent may have been given to some sexual activity. Rather than upholding a woman's sexual autonomy to engage in BDSM, the rough sex defence shifts the focus from whether she actually consented to the abstract question of whether law should allow consent to such violence.

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<sup>137</sup> See *Mcilwaine*, *supra* note 89.

<sup>138</sup> See e.g. *ibid*; *Hancock*, *supra* note 83; *Barton ABCA*, *supra* note 68. For example, in *Hancock*, the five accused argued that the victim had agreed to all of the injuries inflicted. The victim was found with third-degree burns over his head and torso, deep and extended tears to his rectum, fractured ribs indicative of stomping and serious head injuries which left a boot imprint. He died from respiratory distress and shock.

<sup>139</sup> See *Giroux*, *supra* note 96; *Gosse*, *supra* note 96.

<sup>140</sup> See *Giroux*, *supra* note 96.

<sup>141</sup> See *Bolger*, *supra* note 96; *Pacheco*, *supra* note 96.

<sup>142</sup> See *Ceelen*, *supra* note 96 (pleaded guilty); *Finnister*, *supra* note 96 (found guilty at trial); *Tompkins*, *supra* note 96 (found guilty at trial).

<sup>143</sup> See *Reid*, *supra* note 96.

## V. Themes Emerging from the Case Law

There are many potential themes emerging from these cases, but we focus on four: the prevalence of pornography, the minimizing of bodily harm, the mischaracterization of strangulation, and the impact on complainant credibility of agreeing to some sex with the accused. We focus primarily on the sexual assault cases rather than homicide because women's stories are heard only in the former context.

### *(a) The Prevalence of Pornography*

The forms of objectifying and violent sexual activities at issue in these cases often read like the scenes typically depicted in mainstream pornography. Indeed, the facts in these cases correspond with what researchers have labelled the “pornographic sexual scripts” prevalent in pornography, including hair pulling, slapping, spanking, facial ejaculation, aggressive penetration, gang rape, double penetration, penile gagging, and various forms of strangulation.<sup>144</sup> Pornography's influence on sexually aggressive and violent behaviours<sup>145</sup> is unlikely to be discussed in reported decisions unless it is explicitly part of the facts of the case, or unless it is noted in sentencing decisions as a factor in psychiatric or psychological examinations of perpetrators. Nevertheless, we found several decisions in which pornography is implicated, and/or in which accused engaged in image-based

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<sup>144</sup> See Fiona Vera-Gray et al, “Sexual Violence as a Sexual Script in Mainstream Online Pornography” (2021) 61:5 *Brit J Crim* 1243 at 1245. See also Gail Dines, *Pornland: How Porn Has Hijacked Our Sexuality* (Boston: Beacon Press, 2010) at 9.

<sup>145</sup> While pornography's influence has been a matter of controversy, recent empirical studies demonstrate how sexually explicit material plays a role in scripting sexual behaviours and in normalizing rough sex. See Vera-Gray et al, *supra* note 144 at 1244–46; Herbenick et al, *supra* note 11 at 628–29 (after adjusting for age, age at first porn exposure, and current relationship status, the authors found statistically significant associations between men's pornography use and aggressive behaviours).

sexual abuse by recording the sexual violence, sometimes without the knowledge or consent of the complainant.

The clearest connection between pornography and acts of extreme sexual brutality can be found in *R v Barton*. The week before Cindy Gladue's death, Barton had engaged in numerous visits to pornography websites searching for images of vaginas being ripped or torn by large objects.<sup>146</sup> Ms. Gladue died from a catastrophic injury to her vaginal wall.<sup>147</sup> As Sherene Razack argues, such acts of extreme sexual violence inflicted on the bodies of Indigenous women function as a visual symbol of systemic gendered colonial violence.<sup>148</sup> Indeed, pornography and rough sex were deeply intertwined in this trial. At the initial trial, Ms. Gladue's severed vagina was brought into the courtroom in an effort by the Crown to show the jury that her injuries confirmed the prosecution theory that she had been wounded by a knife. This display of her flesh was a profound act of dehumanization that mimics the objectifying gaze of pornography.<sup>149</sup>

A forensic analysis of Barton's laptop was excluded at the initial trial.<sup>150</sup> The jury found Barton not guilty, accepting his defence that Ms. Gladue's death had occurred "accidentally" during consensual rough sex. On a retrial for manslaughter only, the trial judge allowed the computer evidence of rough sex pornography and Barton was convicted of manslaughter. In sentencing, Justice Hillier emphasized the significance of this pornography as a factor accentuating Barton's

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<sup>146</sup> See *Barton* ABQB, *supra* note 72 at para 17.

<sup>147</sup> See *ibid* at para 18.

<sup>148</sup> See generally Sherene H Razack, "Gendering Disposability" (2016) 28:2 CJWL 285.

<sup>149</sup> See *ibid* at 287. According to Barbara L Fredrickson & Tomi-Ann Roberts, "Objectification Theory: Toward Understanding Women's Lived Experiences and Mental Health Risks" (1997) 21:2 Psychology of Women Q 173 at 175, sexual objectification occurs when "a woman's body, body parts, or sexual functions are separated out from her person, reduced to the status of mere instruments, or regarded as if they were capable of representing her".

<sup>150</sup> See Ryan Cormier, "Jury Not Told of 'Disturbing' Pornography Evidence in Edmonton Hotel Room Murder Trial", *National Post* (26 March 2015), online: <[news.nationalpost.com/news/canada/jury-not-told-of-disturbing-pornography-evidence-in-edmonton-hotel-room-murder-trial](http://news.nationalpost.com/news/canada/jury-not-told-of-disturbing-pornography-evidence-in-edmonton-hotel-room-murder-trial)>.

moral blameworthiness.<sup>151</sup> A handful of other decisions make similar connections between pornography use and rough sex.

In *R v Bohorquez*,<sup>152</sup> two men were convicted in the brutal gang rape of a young university student. As the judge noted in the sentencing decision, one of the co-accused, “enjoys engaging in rough sex and dominating his partner”, and “[a]t the time of the offence. . .was interested in pornography depicting rough sex”, “watch[ing] it daily.”<sup>153</sup> The perpetrator’s obsession with rough sex pornography was also referenced in the sentencing decision *R v Skoyen*.<sup>154</sup> The accused was convicted of sexual assault after roughly forcing the complainant to perform fellatio, forced intercourse, slapping, and strangulation, over a period of several hours.<sup>155</sup> The accused described himself to a psychologist as a “sex addict” who found it difficult to reach orgasm without “rough sex”, and admitted to “watching an excessive amount of ‘rough sex pornography’”.<sup>156</sup> In *R v Stratton*,<sup>157</sup> the accused pleaded guilty to numerous sexual offences against young women and children and to the possession and production of child pornography, and was designated a long term offender. The psychiatric assessment noted that the offender engaged in “significant viewing of pornography over the Internet”, though he “denie[d] any pornography that was directed at violence or sexual sadism.”<sup>158</sup>

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<sup>151</sup> See *Barton ABQB*, *supra* note 72 at para 81.

<sup>152</sup> *Supra* note 83.

<sup>153</sup> *Ibid* at para 61.

<sup>154</sup> *Supra* note 87.

<sup>155</sup> See *ibid* at para 21.

<sup>156</sup> *Ibid*.

<sup>157</sup> *Supra* note 87.

<sup>158</sup> *Ibid* at 20.

Our cases also revealed compelled pornography viewing. In *R v Cross*, the accused—who was convicted of sexual assault and choking to assist—viewed rough-sex pornography with the complainant during the course of an evening during which he “became heavily intoxicated and then much more aggressive in playing out his rough sex fantasies.”<sup>159</sup> The accused engaged in what the judge euphemistically described as “throat grabbing,” slapping, non-consensual digital penetration and aggressive intercourse.<sup>160</sup> The complainant testified that she had been afraid that if she did not submit there could be a “bad situation” that might have involved her young daughter sleeping in another room.<sup>161</sup>

Perhaps most disturbing are cases in which the links between rough sex and pornography take the form of pornography-creation, memorializing the sexual violence suffered by the survivor. These cases have contradictory implications. On the one hand, making pornography in which women are subjected to sexual violence constitutes image-based sexual abuse, a form of involuntary pornography.<sup>162</sup> Some survivors were unaware that the sexual activity was being filmed and most will never know how widely the images have been circulated. On the other, these videos and images are frequently relied upon by the prosecution as a record of the sexual violence. In *R v Gairdner*, for example, the videos created by the appellant showed the complainant, who was trading sex for money, “imploring him to stop,” though he asserted that this was “all part of BDSM. . . role-play where ‘no means yes, yes means no.’”<sup>163</sup> In *R v PO*, the video evidence of the accused forcing the complainant to perform fellatio and anilingus on him while he hit her with a

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<sup>159</sup> *Cross*, *supra* note 87 at para 27.

<sup>160</sup> See *ibid* at para 13–19.

<sup>161</sup> *Ibid* at paras 13–14, 27.

<sup>162</sup> See generally Clare McGlynn & Erika Rackley, “Image-Based Sexual Abuse” (2017) 37:3 Oxford J Legal Stud 534.

<sup>163</sup> *Gairdner*, *supra* note 75 at para 2.

gun and verbally abused her provided clear evidence that the accused was both terrifying and humiliating the complainant, even though she had recanted her evidence.<sup>164</sup>

In *Stratton*,<sup>165</sup> the accused pleaded guilty to sexually assaulting nine separate victims, but disputed the extent of the sexual assaults against one victim, a vulnerable young woman working in the sex trade who had agreed to be videoed in exchange for money for drugs.<sup>166</sup> The videos show the complainant's consent being exceeded on several occasions when Stratton had intercourse with her when she was "cracked out" and lifeless, as well as over her clear objections, particularly when he penetrated her with a beer bottle. On another occasion, he threatened her with a knife, while repeatedly slapping her face with his penis.<sup>167</sup>

All too frequently, the videos created by the accused and entered into evidence depict scenes that characterize so-called gonzo pornography—a genre of pornography that puts the camera into the action, often with one or more of the participants filming and performing sexual acts, and which is most often marked by "hard core, body-punishing sex in which women are demeaned and debased."<sup>168</sup> This genre appears in the cases where the accused created videos that film rough sex, often in contexts of gang rape. In these cases, rough sex becomes a spectacle of misogyny, with women being violated and sexually humiliated.<sup>169</sup> In *Bohorquez*, for example, the two young men were "trolling" for women to have sex<sup>170</sup> and invited the young complainant, a university student,

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<sup>164</sup> See *PO*, *supra* note 85 at para 319.

<sup>165</sup> 2009 ONCJ 459.

<sup>166</sup> See *ibid* at 14.

<sup>167</sup> See *ibid* at 32.

<sup>168</sup> Dines, *supra* note 144 at xi.

<sup>169</sup> See Nicola Gavey, *Just Sex?: The Cultural Scaffolding of Rape* (London, UK: Routledge, 2018) at 234.

<sup>170</sup> *Bohorquez*, *supra* note 83 at para 4.

to the basement of one of the co-accused.<sup>171</sup> She submitted out of fear and because she was trapped.<sup>172</sup> The two men videoed the hours-long violent assault of the complainant without her knowledge,<sup>173</sup> subjecting her to violent acts that mimic gonzo porn, including double penetration, penile gagging, and slapping.<sup>174</sup>

In *R v AE*,<sup>175</sup> cellphone videos taken without the complainant's consent were central to a successful Crown appeal of the acquittal of two participants in a brutal gang rape. The videos showed the three young men punching and slapping the complainant, laughing and directing each other in making gonzo pornography, yelling "Punch that pussy!" and "F\*cking fist that bitch bro!"<sup>176</sup> The complainant can be heard crying out in pain, and shouting at them to stop. The video culminates with one of the accused penetrating her with an electric toothbrush and yelling, "I'm gonna wreck her, bro" while AE was penetrating her orally.<sup>177</sup> The trial judge described the video as depicting "the most appalling acts of human depravity I have had the displeasure to witness".<sup>178</sup>

A majority of the Court of Appeal of Alberta in *AE* found that the trial judge had wrongly relied on a concept of broad advance consent in acquitting the accused of most charges:

Merely agreeing to participate in rough sex, without more, cannot usually be taken as consent to engage in whatever acts of violence the other party wishes, especially in circumstances such as these, where the parties were sexual strangers.<sup>179</sup>

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<sup>171</sup> See *ibid* at para 8.

<sup>172</sup> See *ibid* at para 38.

<sup>173</sup> See *ibid* at para 29.

<sup>174</sup> See *ibid* at para 37.

<sup>175</sup> *Supra* note 74.

<sup>176</sup> *Ibid* at para 6.

<sup>177</sup> *Ibid* at para 37.

<sup>178</sup> *Ibid* at para 111.

<sup>179</sup> *Ibid* at paras 34. The SCC subsequently agreed with this conclusion. See *R v AE*, 2022 SCC 4 at para 1.

Justice O’Ferrall, concurring, found that the “subjective intent of the respondents to cause bodily harm to the complainant was clear from the video”, and therefore consent was vitiated.<sup>180</sup>

As these cases show, rough sex pornography is deeply embedded in rough sex trials, scripting the violence enacted by perpetrators, who also frequently film their assaults in a manner that mimics gonzo pornography.

*(b) The Minimization of “Bodily Harm”*

Our search terms produced a majority of cases involving very serious sexual assaults charged as aggravated sexual assault producing maiming, disfigurement or endangerment of life or sexual assault causing bodily harm. Yet, nearly all sexual assault cases in our study could have been charged at a higher level because they involved either injury to the complainant or a form of strangulation.

The level of charge has several implications. First, the accused’s violence and the degree of harm inflicted on the complainant may not be fairly reflected by the seriousness of the charge. Second, level one and two charges offer higher sentencing ceilings. Third, any purported “consent” may be vitiated by proven bodily harm under some circumstances, as earlier discussed. Fourth, appropriate charges may encourage plea bargaining for lesser, included offences, relieving the complainant of the ordeal of testifying.<sup>181</sup>

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<sup>180</sup> *Ibid* at paras 115–116, 129.

<sup>181</sup> See e.g. *RDW*, *supra* note 85 (where the accused was charged with sexual assault causing bodily harm and sexual assault with a weapon, but ultimately pleaded guilty to a single count of assault).

While 98% of police-reported sexual assault cases are proceeded with as level one sexual assault,<sup>182</sup> compared with 44% of the sexual assault cases in our study, our data does mirror a wider pattern of under-classifying sexual assault in Canada. Janice DuMont's research shows that only 40% of charges for sexual assault accurately reflected the degree of seriousness of the accused's acts and the injury he inflicted.<sup>183</sup> While our search terms produced a greater proportion charged at the higher levels, in approximately one third of our cases the charge did not reflect the more serious nature of the harm.

“Bodily harm”, “maiming” and “endangerment of life” are legal terms. If the Crown can prove that the accused caused any of these beyond a reasonable doubt, then the sexual assault is aggravated. “Bodily harm” is defined as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”.<sup>184</sup> “Bodily harm” need not have necessitated medical treatment, and bruising, scraping and discomfort that lasts more than a few days can amount to “bodily harm”, as can psychological harm.<sup>185</sup>

Cases in our study revealed some very serious injuries where the accused nonetheless alleged “consent”, including anal and vaginal tearing, bite marks, extensive and deep bruising, burst blood vessels in women's eyes, burns, scarring from wounding and one case where the accused bit off a

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<sup>182</sup> See Statistics Canada, *Police Reported Crime Statistics in Canada, 2019*, by Greg Moreau. Brianna Jaffray & Amelia Armstrong, Catalogue No 85-002-X (Ottawa: Statistics Canada, 29 October 2020) at 5, online (pdf): <[www150.statcan.gc.ca/n1/en/pub/85-002-x/2020001/article/00010-eng.pdf?st=YqDnaehd](http://www150.statcan.gc.ca/n1/en/pub/85-002-x/2020001/article/00010-eng.pdf?st=YqDnaehd)>.

<sup>183</sup> See Janice DuMont, “Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination” (2003) 15:2 CJWL 305 at 305.

<sup>184</sup> *Criminal Code*, *supra* note 52, s 2.

<sup>185</sup> See *Percy*, *supra* note 85 at paras 158–160. But see *Sanmugarajah*, *supra* note 82, where the trial judge found no bodily harm regarding one complainant whose pain was treatable with Tylenol and whose bruising on her breast was “trifling”.

woman's nose. Yet if the Crown failed to charge the accused with bodily harm or endangering life, the degree of the accused's violence is not "seen" by the criminal law. For example, in one case where only simple assault was charged, the accused was witnessed strangling the complainant during sexual activity and a police officer stated that the complainant was covered "head to toe" in bruising.<sup>186</sup> In another, the complainant suffered bruising to her shoulders, neck and thighs as well as cuts to her vaginal wall and urethra, yet the accused was charged with level one sexual assault.<sup>187</sup> Similarly, photos of the complainant's injuries showed bruising to her neck and chunks of her hair torn out in a case where the accused was charged with assault.<sup>188</sup>

Only a handful of cases in our study<sup>189</sup> specifically acknowledged psychological injury, even though the cases we examined involved violence that would be extremely traumatizing. In 1991, the Supreme Court in *R v McCraw*<sup>190</sup> ruled that a man's threat to rape a woman amounted to a threat to cause "serious" bodily harm, that psychological harm is bodily harm and that: "[t] here can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm."<sup>191</sup> In *AE*, discussed earlier, Justice Martin held in *obiter* that the multiple accused's non-consensual videoing of the sexual violence vitiated any consent that the complainant may have given early on in the assault because of the serious psychological harm it caused, producing "paralyzing fears" of its dissemination and leading the complainant to consider suicide.<sup>192</sup>

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<sup>186</sup> *Bolger*, *supra* note 96 at para 2.

<sup>187</sup> See *S(M)*, *supra* note 87 at para 35.

<sup>188</sup> See *Tompkins*, *supra* note 96 at para 152.

<sup>189</sup> See *AE*, *supra* note 74; *Bohorquez*, *supra* note 83; *Ceelen*, *supra* note 96; *MacMillan*, *supra* note 83; *Meyers*, *supra* note 87; *Nelson*, *supra* note 85; *Quashie*, *supra* note 57; *Sweet*, *supra* note **Error! Bookmark not defined.**; *Zhao*, *supra* note **Error! Bookmark not defined.**

<sup>190</sup> [1991] 3 SCR 72, 66 CCC (3d) 517 [cited to SCR].

<sup>191</sup> *Ibid* at 81.

<sup>192</sup> *AE*, *supra* note 74 at paras 74–75.

Given the extreme violence that women in our study endured, it is surprising that psychological injury to the complainants was so rarely mentioned. In some cases, judges stated that a complainant did not experience psychological harm because the Crown had not introduced such evidence. In *R v Glassford*, the complainant was followed out of a bar by a man whose advances she refused. He attacked her outdoors, punching her repeatedly in the face until she lost consciousness, attempted to rape her, then left her on the street. Although he was convicted of sexual assault causing bodily harm due to her physical injuries, the judge at sentencing described the attack as “very traumatic but of short duration”, stating: “[t]here is no evidence before me that she suffered any lasting emotional or psychological injury.”<sup>193</sup>

In other cases, the trial judge alluded to the complainant’s psychological harm, but did not discuss it. For example, in *R v B(AJ)*, the complainant, who was 7.5 months pregnant, was strangled, threatened with death and raped while her children were in the next room. The accused was not charged with an offence involving “bodily harm”, nor did the judge elaborate on her trauma.<sup>194</sup> Sometimes the psychological harm was mentioned as part of sentencing although it did not ground the bodily harm component of the charge.<sup>195</sup>

There were only a few cases in which psychological harm *may* have been one of the bases for the bodily harm charge. For example, in *R v Sweet*, among the complainant’s many injuries were “[p]sychological effects such as flashbacks, fear of being in public, fear of being hurt, isolating

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<sup>193</sup> *Glassford*, *supra* note 85 at para 14.

<sup>194</sup> See *R v B(AJ)*, *supra* note 87 at para 25.

<sup>195</sup> See e.g. *Ceelen*, *supra* note 96 at para 7; *MacMillan*, *supra* note 83 at para 39; *Bohorquez*, *supra* note 83 at para 52.

herself and anxiety attacks.”<sup>196</sup> In none of the cases was psychological harm the sole “bodily harm” alleged by the Crown for the offence of sexual assault causing bodily harm.

The courts have never pronounced whether psychological harm itself can amount to “bodily harm” to which a complainant cannot consent. The issue was raised on appeal, in *R v Nelson*.<sup>197</sup> At sentencing, the trial judge described the impact of the accused’s attack on the complainant:

She has been traumatized, cannot sleep, cannot trust anyone, especially men. She has moved home, and is afraid to be alone. She has dropped out of school, and appears to be immobilized as a result of the traumatic events. She filed a victim impact statement at the sentencing hearing confirming and elaborating upon her evidence at trial. I conclude that the psychological effect of these events upon Ms. S. has been profound.<sup>198</sup>

The accused appealed his jury conviction for sexual assault causing bodily harm, which included physical and psychological injury to the complainant, in part on the basis that psychological harm can never vitiate consent, or alternatively that it can only if the accused specifically intended that psychological harm.<sup>199</sup> The appeal court decided the appeal on other grounds.

In sum, our case review suggests that Crown charging patterns in the reported cases where a “rough sex” defence is launched understate both the physical and psychological injury that these women have experienced, failing to hold accused men accountable for the harms they have inflicted. We found a similar pattern in the cases involving strangulation, as will be discussed below.

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<sup>196</sup> *Sweet*, *supra* note **Error! Bookmark not defined.** at para 59.

<sup>197</sup> *Supra* note 85.

<sup>198</sup> *R v Nelson*, 2012 ONSC 4248 at para 12.

<sup>199</sup> See *Nelson*, *supra* note 85 at paras 35–36.

(c) *Mis-Characterizing Strangulation*

Strangulation emerged as a theme in our case law review because the accused allegedly strangled, suffocated or gagged the complainant in approximately half of our sexual assault cases. This finding is consistent with official statistics and social science evidence showing that men use strangulation in perpetrating domestic and sexual assault.<sup>200</sup>

Although practices like “erotic asphyxiation” are framed as gender neutral, “sex positive” activities, and “choking” as something either partner in a domestic fight might engage in,<sup>201</sup> women are overwhelmingly on the losing side of strangulation, more than 13 times more likely than men to be strangled during their lifespans.<sup>202</sup> None of our cases involved women strangling

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<sup>200</sup> See e.g. Colleen Mcquown et al, “Prevalence of Strangulation In Survivors of Sexual Assault and Domestic Violence” (2016) 34:7 *Am J Emergency Medicine* 1281 at 1281; Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2005*, Kathy AuCoin, ed, Catalogue No 85-002-X (Ottawa: Statistics Canada, July 2005) at 28, online (pdf): <[www150.statcan.gc.ca/n1/en/pub/85-224-x/85-224-x2005000-eng.pdf?st=tBsxQVaG](http://www150.statcan.gc.ca/n1/en/pub/85-224-x/85-224-x2005000-eng.pdf?st=tBsxQVaG)>; Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2000*, Valerie Pottie Bunge & Daisy Locke, eds, Catalogue No 85-224-XIE (Ottawa: Statistics Canada, July 2000) at 12, online (pdf): <[www150.statcan.gc.ca/n1/en/pub/85-224-x/85-224-x2000000-eng.pdf?st=hycj8Kw->](http://www150.statcan.gc.ca/n1/en/pub/85-224-x/85-224-x2000000-eng.pdf?st=hycj8Kw->)>. Some studies have found that Indigenous women and women with disabilities are much more likely to experience strangulation in the context of intimate partner violence. See Douglas A Brownridge, “Understanding the Elevated Risk of Partner Violence Against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada” (2008) 23 *J Fam Viol* 353 at 359. See Douglas A Brownridge, “Partner Violence Against Women with Disabilities: Prevalence, Risk, and Explanations” (2006) 12:9 *Violence Against Women* 805 at 810 (this study relied on the 1999 General Social Survey, which used the WHO/UN definition of disability: “a long-term physical or mental condition or health problem [that] reduce[s] the amount or the kind of activities [one] [can] do at home, school, work, or in other activities”). Pregnancy also heightens the risk that men will strangle their female partners. See Douglas A Brownridge et al, “Pregnancy and Intimate Partner Violence: Risk Factors, Severity, and Health Effects” (2011) 17:7 *Violence Against Women* 858 at 869.

<sup>201</sup> See e.g. *R v Gardiner*, 2018 ABCA 298 at para 5 [*Gardiner*].

<sup>202</sup> See Matthew J Breiding et al, “Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011” (2014) 63:8 *Morbidity and Mortality Weekly Report* at Table 6, online: *Centers for Disease Control and Prevention* <[cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm](http://cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm)>; Helen Bichard et al, “The Neuropsychological Outcomes of Non-Fatal Strangulation in Domestic and Sexual Violence: A Systemic Review” (2021) *Neurological Rehabilitation* (ahead of print) at 2.

men, and the available evidence supports our observation that strangulation is “very clearly a male act.”<sup>203</sup>

Despite what we know about strangulation, it is represented in legal decisions as an equal opportunity activity. Consider *R v Gardiner*, where the trial judge convicted the accused after having found the complainant did not want to be “choked” and had not agreed to it.<sup>204</sup> The Court of Appeal of Alberta normalized men “choking” women in the context of domestic violence. It acquitted the accused, ruling that “choking was something that both parties accepted might reasonably occur during the fight. . . . If choking was a reasonable part of the risk that was consented to, it would be immaterial which party choked which.”<sup>205</sup> Only the dissenting judge pointed out that it is wrong to equate equally matched sporting opponents with domestic partners.<sup>206</sup>

Strangulation must also be seen as a coercive strategy—a “reliable means of achieving... control”<sup>207</sup>—and as “setting the stage”<sup>208</sup> for femicide by communicating the capacity to kill. If a woman has been strangled by her partner, the risk of attempted murder increases sixfold, and the risk of femicide sevenfold.<sup>209</sup>

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<sup>203</sup> John Archer, “Sex Differences in Physically Aggressive Acts Between Heterosexual Partners: A Meta-Analytic Review” (2002) 7:4 *Aggression and Violent Behavior* 313 at 327. See also Gael B Strack, George E McClane & Dean Hawley, “A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues” (2001) 21:3 *J Emergency Med* 303 at 307 (99% of the perpetrators in this case sample were men).

<sup>204</sup> See *Gardiner*, *supra* note 201 at para 4.

<sup>205</sup> *Ibid* at para 5.

<sup>206</sup> See *ibid* at para 29.

<sup>207</sup> Yardley, *supra* note 2 at 1846.

<sup>208</sup> Kristie A Thomas, Manisha Joshi & Susan B Sorenson, “Do You Know What It Feels Like to Drown? Strangulation as Coercive Control in Intimate Relationships” (2014) 38:1 *Psychology of Women Q* 124 at 133; Gael B Strack & Casey Gwinn, “On the Edge of Homicide: Strangulation as a Prelude” (2011) 26:3 *Criminal Justice* 32.

<sup>209</sup> See Nancy Glass et al, “Non-Fatal Strangulation is an Important Risk Factor for Homicide of Women” (2008) 35:3 *J Emergency Med* 329 at 329, 332 (the risk of attempted murder increased sevenfold if demographic predictors in the study were controlled). See also Ontario, Ministry of the Solicitor General, *2013–14 Annual Report* (Domestic Violence Death Review Committee, October 2015) at 19, 31, online (pdf): <cdhpi.ca/sites/cdhpi.ca/files/2013-

Even when strangulation is not immediately lethal, victims may die even weeks later because of irreversible damage to their brains.<sup>210</sup> Further, if a victim experiences any loss of consciousness, the accused has inflicted at least mild traumatic brain injury upon her.<sup>211</sup> It only takes seconds of pressure on the neck to cause a lasting, serious injury.<sup>212</sup> Strangulation may result in no external evidence of injury, and is thus minimized or missed by victims, medical professionals and police.<sup>213</sup> Strangulation is also known to cause other long-term health problems like paralysis<sup>214</sup> and psychological impacts such as acute and chronic fear, post-traumatic stress disorder, suicidality and cognitive deficits like memory loss.<sup>215</sup>

Despite the wealth of evidence demonstrating the potential for profound injury and lethality, the vast majority of Crown attorneys failed to lay charges at the more serious levels. Only two of the many cases where men strangled women<sup>216</sup> involved a charge of level 3, aggravated sexual

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2014\_DVDRC\_Annual\_Report\_Final-English\_2.pdf>; Anne Kingston, “We Are the Dead” *Maclean’s* (17 September 2019), online: <macleans.ca/news/42Canada/we-are-the-dead/>.

<sup>210</sup> George E McClane, Gael B Strack & Dean A Hawley, “A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim” (2001) 21:3 *J Emergency Med* 311 at 313 [McClane, Strack & Hawley, “Clinical Evaluation”].

<sup>211</sup> See Bichard et al, *supra* note 202 at 2.

<sup>212</sup> See McClane, Strack & Hawley, “Clinical Evaluation”, *supra* note 210 at 313.

<sup>213</sup> See Strack & Gwinn, *supra* note 208 at 32.

<sup>214</sup> See Heather Douglas & Robin Fitzgerald, “Strangulation, Domestic Violence and the Legal Response” (2014) 36 *Sydney LR* 231 at 232–33.

<sup>215</sup> See *ibid*; Bichard et al, *supra* note 202 at 19. See generally Eve M Valera et al, “Strangulation as an Acquired Brain Injury in Intimate–Partner Violence and Its Relationship to Cognitive and Psychological Functioning: A Preliminary Study” (2022) 37:1 *J Head Trauma Rehabilitation* 15.

<sup>216</sup> The following cases involved strangulation: *Baril*, *supra* note 89; *Deschatelets*, *supra* note 89; *SB*, *supra* note 75; *B(AJ)*, *supra* note 87; *Bear-Knight*, *supra* note 87; *Beaudry*, *supra* note 85; *Bohorquez*, *supra* note 83; *Bolger*, *supra* note 96; *Boyle*, *supra* note 85; *CC*, *supra* note 87; *Cross*, *supra* note 87; *Davidson*, *supra* note 82; *DC*, *supra* note 87; *Gairdner*, *supra* note 75; *Giroux*, *supra* note 96; *Gosse*, *supra* note 96; *Guenther*, *supra* note 89; *Gulliver*, *supra* note 87; *Hoskins*, *supra* note 87; *Hunter*, *supra* note 87; *JA*, *supra* note 15; *JP*, *supra* note 87; *KG*, *supra* note 85; *Kilbourne*, *supra* note 85; *Lavergne-Bowkett*, *supra* note 85; *Lawrence*, *supra* note 87; *Liu*, *supra* note 89; *Mcilwaine*, *supra* note 89; *Meyers*, *supra* note 87; *Nelson*, *supra* note 85; *Pacheco*, *supra* note 96; *PO*, *supra* note 85; *Reid*, *supra* note 96; *SAM*, *supra* note 87; *Seaton*, *supra* note 87; *Shepperd*, *supra* note 87; *Skoyen*, *supra* note 87; *Spencer*, *supra* note 85; *Tedjuk*, *supra* note 85; *Threefingers*, *supra* note 85; *Tompkins*, *supra* note 96; *Vandermeulen*, *supra* note 85; *White-Halliwell*, *supra* note 85; *Zhao*, *supra* note **Error! Bookmark not defined.**; *Garnier*, *supra* note 89; *P(A)*, *supra* note 87.

assault (endangering life),<sup>217</sup> despite the fact that strangulation clearly endangers life.<sup>218</sup> Although there were charges of level 2, sexual assault causing bodily harm where the accused deployed strangulation and the woman's injuries included bruising and swelling of the neck or burst blood vessels in the eyes, in none was proof of bodily harm dependent on strangulation injuries.<sup>219</sup> We did find one charge of the new, level two offence, sexual assault involving strangulation (section 272(1)(c.1)).<sup>220</sup> This new offence, introduced into the *Code* in 2019 among reforms aimed at domestic violence, obviates the need for the Crown to prove bodily harm in order to elevate assault or sexual assault involving strangulation to a level 2 offence by equating strangulation with bodily harm with no need for proof of the connection between the two.<sup>221</sup>

Part of the difficulty may be that Crowns do not have the resources to acquire expert evidence about the hidden injuries of strangulation to prove bodily harm or endangerment of life. For example, the Crown in *JA* attempted this argument without expert evidence. Although the trial judge found that strangulation to the point of unconsciousness amounts to “bodily harm”, she accepted the complainant's claim that she consented. The judge found that the complainant's consent could not be vitiated because her loss of consciousness was “transitory” and, without expert evidence, the judge could not find that the harms were so serious as to vitiate consent.<sup>222</sup>

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<sup>217</sup> See *Giroux*, *supra* note 96; *JA*, *supra* note 15.

<sup>218</sup> See Uniform Law Conference of Canada, *Report of the Working Group on Strangulation* (May 2006) at 2, online (pdf): <ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2006/Working-Group-on-Strangulation.pdf>.

<sup>219</sup> See e.g. *Beaudry*, *supra* note 85; *Lavergne-Bowkett*, *supra* note 85; *Gairdner*, *supra* note 75; *Vandermeulen*, *supra* note 85.

<sup>220</sup> See *Bear-Knight*, *supra* note 87.

<sup>221</sup> Consent remains a defence. See generally Department of Justice Canada, *Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament)* (last modified 6 September 2019), online: <justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>.

<sup>222</sup> See *R v JA*, 2010 ONCA 226 at para 44 [*JA ONCA*].

The Court of Appeal for Ontario stated that the judge erred in not also considering whether the accused caused “bodily harm” because unconsciousness is more than a “trifling” interference with a complainant’s health,<sup>223</sup> but indicating that it would be “preferable” if the Crown introduced expert evidence.<sup>224</sup>

Some Crowns captured the strangulation dimension by adding charges under section 246(a) of choking or strangulation with the intent to overcome resistance to the commission of an indictable offence, as they did in one-third of our strangulation cases. Although half of these charges resulted in convictions,<sup>225</sup> the other half failed, most based on Crown inability to prove the particular intent required.<sup>226</sup> In one case, the judge acquitted, saying:

I accept that the accused attempted to choke K.Q. However, he appeared to do so because he was angry, and to demonstrate his physical dominance over K.Q. I have a reasonable doubt that he was trying to overcome her resistance to facilitate the sexual assault, which may not have been in his mind at the time.<sup>227</sup>

In another case, the judge acquitted on the basis that the strangulation was part of the sexual assault,<sup>228</sup> which reinforces the need for prosecutors to incorporate strangulation by charging under the new section 272 (1)(c.1).

Not only is strangulation overlooked in charging, but it is mischaracterized in the case law. First, terms like *strangulation*, *choking* and *suffocation* are used in *Code* section 246(a)—choking or strangulation to overcome resistance—and even in the new offence of section 272(1)(c.1)—

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<sup>223</sup> *Ibid* at para 95.

<sup>224</sup> *Ibid* at para 108.

<sup>225</sup> See *B(AJ)*, *supra* note 87; *CC*, *supra* note 87; *Cross*, *supra* note 87; *Gairdner*, *supra* note 75; *Gosse*, *supra* note 96; *Gulliver*, *supra* note 87; *JP*, *supra* note 87; *Lawrence*, *supra* note 87.

<sup>226</sup> See *JA*, *supra* note 15; *Lavergne-Bowkett*, *supra* note 85; *Meyers*, *supra* note 87; *Nelson*, *supra* note 85; *Vandermeulen*, *supra* note 85

<sup>227</sup> *Meyers*, *supra* note 87 at para 69.

<sup>228</sup> See *SAM*, *supra* note 87 at para 67.

sexual assault involving strangulation or choking—although these terms mean different things.<sup>229</sup> Choking describes a blockage in the throat—often food—that usually involves no other human agent<sup>230</sup> and can result in deprivation of oxygen to the brain. Asphyxiation and suffocation, through covering the mouth and nose, also impede oxygen to the brain.<sup>231</sup> But strangulation involves an external force—usually human—that impedes not only the flow of oxygen but also blood to the brain, which always risks permanent injury or even death.<sup>232</sup>

These misdescriptions matter in practical terms, as illustrated by one of the cases where the accused was charged with choking or strangulation to overcome resistance and the judge appeared oblivious to the difference between “choking” and “strangulation” and the more serious risk strangulation poses of cutting off blood flow to the brain. Despite the serious bruising caused by the accused seizing the complainant by her throat, the judge acquitted based on the dictionary definition of “choking” because no evidence was introduced to show that she was deprived of oxygen.<sup>233</sup>

Second, inaccurate descriptors of strangulation mask both the agency and the force the accused has deployed. Susan Edwards’ analysis reveals defence counsel reframing this dangerous act as “erotic asphyxiation”, “squeezing”, applying “pressure” or “pushing down”, concealing its strong association with intimate partner violence.<sup>234</sup> Accused men and defence lawyers in our study routinely re-characterize strangulation in euphemisms, and judges often follow suit. For example,

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<sup>229</sup> See Busby, *supra* note 19 at 338.

<sup>230</sup> But see also penile gagging in Percy, *supra* note 85 at para 140.

<sup>231</sup> See Busby, *supra* note 19 at 338.

<sup>232</sup> See *ibid* at 338–39.

<sup>233</sup> See Beaudry, *supra* note 85 at para 42.

<sup>234</sup> Edwards, “Strangulation”, *supra* note 18 at 954.

in *R v JA*, the Supreme Court decision was premised on framing the accused's act as "erotic asphyxiation",<sup>235</sup> with the minority casting the issue as women's freedom to pursue "sexual adventures".<sup>236</sup>

We also found cases where complainants were cross-examined about whether, "from time to time, out of playfulness ... you sometimes have him put his hands around your neck",<sup>237</sup> and whether the accused "had in the past 'playfully' choked her during sex with her consent".<sup>238</sup> The suggestion that strangulation is playful occurred in cases where complainants suffered subconjunctival hemorrhaging and bruising. Other euphemisms, many adopted by judges, included "pressing on her throat",<sup>239</sup> "grabb[ing] her by the throat",<sup>240</sup> "plac[ing] his hand around her throat",<sup>241</sup> or engaging in "breath play", in a case where the accused allegedly strangled his domestic partner into unconsciousness and left her on the ground.<sup>242</sup>

In some cases, judges held a reasonable doubt based on the lack of bruising or marks on the complainant's neck,<sup>243</sup> despite the fact that strangulation injuries are frequently internal. In *R v Hunter*, the trial judge acquitted the accused and minimized the strangulation, despite the complainant's testimony that it rendered her unable to speak or to resist. The trial judge found: "I am satisfied that the placement of the hand did cause some discomfort to the complainant, but not sufficiently to leave a mark or to cut off her ability to breathe or talk."<sup>244</sup>

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<sup>235</sup> *JA*, *supra* note 15 at para 5.

<sup>236</sup> *Ibid* at para 73, per Fish J.

<sup>237</sup> *R v AJB*, 2007 MBCA 95 at para 9 (appeal of *B(AJ)*, *supra* note 87).

<sup>238</sup> *CC*, *supra* note 87 at para 16.

<sup>239</sup> *Cross*, *supra* note 87 at paras 13, 19.

<sup>240</sup> *DC*, *supra* note 87 at para 9.

<sup>241</sup> *Tompkins*, *supra* note 96 at para 64.

<sup>242</sup> *Reid*, *supra* note 96 at paras 10, 18, 32.

<sup>243</sup> See e.g. *Bear-Knight*, *supra* note 87 at para 117; *Pacheco*, *supra* note 96 at para 88.

<sup>244</sup> *Hunter*, *supra* note 87 at para 178.

Overall, our cases show that strangulation is dramatically under-charged and the serious risk to women’s lives and health is doubted and minimized in the context of “rough sex”. Judges seem to accept that consent to strangulation is legitimate and that, if couples agree on a “safe word”, men can strangle women safely.<sup>245</sup> Not only do such claims blame women for failing to set and police the ground rules for “rough sex”, but they mask the reality that strangulation cannot possibly be made “safe” as a form of alleged “rough sex.”<sup>246</sup>

*(d) Credibility Assessments*

As noted above, in a relatively small number of cases women consented to some sex with the accused, even to some rough sex, but clearly indicated that they did not consent to what was ultimately done to them. If the complainant consented or participated in some form of sex, judges seemed more skeptical of their assertions that they did not consent to the harm inflicted. These findings played out in different ways—the assault never happened, she must have consented to all of it, she colluded with another complainant, and so on. This discount was evident in a number of contexts—perhaps most pronouncedly with (former) intimate partners, women in the sex trade<sup>247</sup> and one time hookups, particularly where more than one other person was involved.<sup>248</sup> Judges sometimes found reasons to explain why women would make up these allegations, invoking stereotypes about the vengeful spouse<sup>249</sup> and the spouse seeking advantage in family law

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<sup>245</sup> See *ibid* at para 185; *JA ONCA*, *supra* note 222 at paras 17, 37.

<sup>246</sup> Bichard et al, *supra* note 202 state at 21: “The potential onset of dyspraxia, amnesia, and unconsciousness itself (in as little as four seconds) are disabling: the very organ that is needed to withdraw consent is compromised by the activity to which it applies. The term ‘consenting kink’ is therefore a potentially fatal misnomer.”

<sup>247</sup> See e.g. *Stratton*, *supra* note 87; *Davidson*, *supra* note 82.

<sup>248</sup> See e.g. *Hunter*, *supra* note 87; *AE*, *supra* note 74; *Hillier*, *supra* note 87.

<sup>249</sup> See e.g. *A(C)*, *supra* note 85.

proceedings<sup>250</sup> and criminal injuries compensation.<sup>251</sup> The role of sexual history evidence is particularly pervasive in these cases where agreeing to engage in rough sex in the past is used improperly to influence credibility and findings around consent to rough sex during the incident in question. In other cases, it was difficult to fathom why judges thought women would put themselves through the trauma of a sexual assault trial where they would face questioning about whether they enjoyed being injured in order to falsely accuse men of violent sexual assault.<sup>252</sup>

The distinction drawn between cases where the complainant consents to some sex and cases where there was no consent is a direct manifestation of this discounting of women's experiences once they consent to something. In *R v DK*, described above, the Court of Appeal held that an intention to cause bodily harm is necessary to vitiate consent only in cases where the complainant agreed to the underlying sexual activity,<sup>253</sup> creating a different legal standard for sexual assault causing bodily harm where the complainant agreed to some sex but not to what was done to her.

Cases involving intimate partners are particularly challenging for the Crown where the complainant admits to any level of rough sex in the past. For example in *R v A(C)*,<sup>254</sup> the complainant was in an intimate relationship with the accused in which he sometimes tied her up and engaged in dominant submissive sexual activity. On the night in question, the complainant's hands were bound. While they were engaging in mutual oral sex, he began to rub her vagina very hard and she testified that she asked him to stop and told him he was hurting her. Instead of stopping he intensified the pressure. She suffered a vaginal hematoma that required surgery.<sup>255</sup>

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<sup>250</sup> See e.g. *DC*, *supra* note 87.

<sup>251</sup> See e.g. *DK*, *supra* note 58.

<sup>252</sup> See e.g. *Hunter*, *supra* note 87 at para 183.

<sup>253</sup> See *DK*, *supra* note 58 at para 23.

<sup>254</sup> *Supra* note 85.

<sup>255</sup> See *ibid* at para 2.

The judge's dismissal of the complainant was so riddled with stereotypes that the outcome was inevitable. He began by explicitly undermining her credibility because she did not leave the accused immediately and in fact stayed with him for two years and continued to have a sexual relationship with him. The narrative of "why didn't she leave" ran through the judgment, despite her explanation that she had nowhere to go and would be homeless. In fact, when she did leave she moved to a cheap motel. The judge implied that she falsely "represent[ed] herself" as an abuse victim so that she could get access to free storage that a woman's shelter was offering.<sup>256</sup> The trial judge was not satisfied that the accused intended to cause her bodily harm nor that it was even foreseeable. But he went further and completely rejected the complainant's testimony that she asked him to stop, instead, portraying her as a scorned woman who only made the allegations once the relationship ended.

In *R v Seaton*,<sup>257</sup> the complainant and the accused had been in a relationship and he was staying overnight at her home with his parents. The complainant acknowledged consensual sex on that night but alleged a sexual assault in the morning, after his parents had gone, where the accused spat on her, called her derogatory names and slapped her in the face. She acknowledged that she was used to having "aggressive sex" with the accused, but said that they had never engaged in sexual activity like this. The accused admitted that the sex took place but described it as consensual and as consistent with their usual sexual practices. He admitted spitting on her, "covering her mouth and nose", "holding her neck" and calling her derogatory names.<sup>258</sup> Thus, the only live issue in the case should have been consent.

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<sup>256</sup> *Ibid* at para 9.

<sup>257</sup> *Supra* note 87.

<sup>258</sup> *Ibid* at para 47.

Nonetheless the trial judge went into a great deal of detail about inconsistencies in her evidence with respect to the date on which the events took place and the fact that the complainant did not report the sexual assault until after the accused had begun harassing her with text messages. The judge mentioned the abrogation of the doctrine of recent complaint and the stereotypes about a single complainant's testimony being "inherently suspect and trustworthy",<sup>259</sup> but then was clearly influenced by both. The trial judge made no explicit finding about consent—he simply rejected all of her evidence as "unreliable and incredible"<sup>260</sup> despite the admissions of the accused that rough sex did take place.<sup>261</sup>

We also saw the devaluing of credibility in the context of women in the sex trade. In *R v Davidson*,<sup>262</sup> for example, the accused was charged with sexually assaulting three women in similar circumstances. The trial judge inaccurately described what he did to the first complainant, DB, as choking,

much like a wrestler using a wrestle chokehold. This went on for some time, and D.B. was fearful that she was going to lose consciousness. She went limp, faking that she had blacked out. She testified that she was unable to say anything because the chokehold was so severe.<sup>263</sup>

The second complainant, NT, described a similar incident where the accused asked her if he could choke her until she passed out. He had "the crook of his elbow around her windpipe and was squeezing her tighter and tighter. She recalled at one point he even stuck some fingers down her

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<sup>259</sup> *Ibid* at para 81.

<sup>260</sup> *Ibid* at para 82.

<sup>261</sup> In acquitting the accused of criminal harassment, the judge blamed the complainant for not answering the accused's harassing text messages, noting at para 87 that "if she did not want to talk to him anymore, and had another boyfriend, all she had to do was say so, and that would have been the end of it."

<sup>262</sup> *Supra* note 82.

<sup>263</sup> *Ibid* at para 12.

throat.”<sup>264</sup> NT also faked unconsciousness and at one point the accused tried to revive her with CPR. The third woman, JG, described being slapped several times during sex.

All three women described the accused as deeply apologetic after these events took place. DB admitted that she was a drug addict although she was in a methadone program at the time of trial. NT was clearly still struggling with drugs at trial and ultimately passed out in the witness stand. The judge had a reasonable doubt that NT and JG had colluded with each other and thus rejected the Crown’s similar fact application and rejected their identification of the accused.<sup>265</sup> He accepted only the evidence of DB, finding that the accused had an obligation to ensure that she was informed about what he was going to do.<sup>266</sup>

In *Stratton*, the complainant was addicted to drugs and agreed to let the accused beat her in exchange for money for drugs so long as he did not cause her bodily harm. There were many hours of video footage of the abuse the accused perpetrated against the complainant, but the only incidents the trial judge found to constitute sexual assault were those when she was clearly unconscious from drug intoxication. The trial judge had a reasonable doubt that she may have consented to other abuse despite her clear protests.<sup>267</sup>

There are also cases involving younger, vulnerable complainants hooking up with men for sex, whose credibility is suspect for doing so.<sup>268</sup> Elaine Craig has analyzed the abuse in *R v Hunter*,<sup>269</sup>

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<sup>264</sup> *Ibid* at para 33.

<sup>265</sup> See *ibid* at para 153.

<sup>266</sup> See *ibid* at para 167.

<sup>267</sup> *Stratton*, *supra* note 87 at 10.

<sup>268</sup> See e.g. *AE*, *supra* note 74, where the trial judge acquitted three men who used extreme violence against a young woman who had initially agreed to some form of rough sex. On appeal, the judge’s reasoning was called “dangerously close to engaging in the myth- and stereotype-based thinking that continues to linger in the legal landscape like a fungus,” essentially implying that she got what she asked for: *ibid* at para 153.

<sup>269</sup> *Supra* note 87.

which involved a young woman with limited hearing who met the accused online and agreed to a “dominant-submissive” sexual encounter with him and his female friend. The complainant testified to being “deep throated” by the accused, who thrust his penis down her throat to the point where she was gagging, choking and couldn’t breathe. She tried to push him away and communicate her lack of consent, but she was unable to speak and had the much larger accused’s stomach covering her face. The accused described her as a willing participant throughout. Craig points out “the absurdity of testifying that the complainant was gagging and coughing, had lost her breath, her nose was running, her eyes were glassy, and her face was turning red and then asserting that he did not see or hear any indication that ‘she was in a state of discomfort.’”<sup>270</sup> The trial judge had a reasonable doubt both that the complainant consented and that the accused had an honest and reasonable belief in consent, even though he took no steps to ascertain consent.<sup>271</sup>

## **VI. Conclusion**

Our study leads us to conclude that consent should not be a defence to causing bodily harm in a sexual context unless bodily harm was not reasonably foreseeable. We acknowledge that denial of a consent defence where bodily harm has resulted may be experienced by some women as repudiation of their sexual freedom or autonomy,<sup>272</sup> and some may choose not to report such violence to police. While the case for individual liberty may be compelling at an abstract level, our case law review shows that the cases reaching the criminal courts do not involve “rough sex games gone wrong”. Rather, they are overwhelmingly cases where complainants assert that they did not

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270 Elaine Craig, “The Legal Regulation of Sadomasochism and the So-Called ‘Rough Sex Defence’” (2022) Windsor YB Access Just (forthcoming).

<sup>271</sup> See *Hunter*, *supra* note 87 at para 179, 183.

<sup>272</sup> See generally Olson, *supra* note 19.

consent to any sexual contact at all. Even had we found large numbers of cases where women agreed to bodily harm, the clear risks to women's safety and a context in which systemic sexual violence is a mechanism of women's subordination weighs heavily against allowing a consent defence.<sup>273</sup>

As Susan Edwards and Julie Bradwell argue, legitimizing sadomasochism through a consent defence when bodily harm is caused will effectively legalize men's violence against women.<sup>274</sup> Consent must also be barred for strangulation in light of Bichard et al's review of strangulation studies that found its physical and psychological effects to be more profound than waterboarding, which has been banned as a form of torture.<sup>275</sup> Gotell makes a compelling case that a legal doctrine allowing "consent" to bodily harm would reify some neo-liberal notion of the autonomous woman, able to freely agree to violent acts despite her containment by the structures of poverty, racism, disability, and misogyny.<sup>276</sup> Even those feminists who take seriously the notion that women have a "right" to agree to sexual practices that may cause bodily harm recognize that the criminal law is a blunt instrument largely incapable of differentiating a genuinely consensual interaction from one that is coerced or imposed upon a woman.<sup>277</sup>

Prosecution of sexual and domestic violence is already seriously hampered by discriminatory beliefs about women's sexuality and their credibility.<sup>278</sup> Allowing a consent defence when bodily

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<sup>273</sup> See Craig, "Capacity to Consent", *supra* note 19 at 130.

<sup>274</sup> See e.g. Edwards, "Strangulation", *supra* note 18; Julie Bradwell, "Consent to Assault and the Dangers to Women" (1996) 146 *New LJ* 1682.

<sup>275</sup> See Bichard et al, *supra* note 202 at 21; see also Busby, *supra* note 19 at 340–41.

<sup>276</sup> See e.g. Gotell, *supra* note 19.

<sup>277</sup> See e.g. Deckha, *supra* note 19 at 457, 459; Jennifer Koshan, *R v JA* (2018) 30:2 *CJWL* 323 at 324; Craig, "Capacity to Consent", *supra* note 19 at 127.

<sup>278</sup> See Jennifer Koshan, "The Judicial Treatment of Marital Rape in Canada: A Post-Criminalisation Case Study" in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *Marital Rape and Law Reform: A Comparative Analysis of the Right to Say No* (Oxford: Hart Publishing, 2017) 257 at 265–66; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance and Victim Blaming" (2010) 22:2 *CJWL* 397 at 404–405.

harm is caused fuels pernicious pornographic scripts that cast women as stimulated by male violence, adding to the beleaguered burden of proof in such cases. The “straw woman” behind the argument is the betraying woman who “likes” to be violently abused and injured, but who then wrongfully accuses her partner of assault. The heart of this argument relies on age-old beliefs: that women lie, that they will use allegations of assault as revenge, or “cry rape” as cover for their promiscuity or their shameful depravity.

These discriminatory stereotypes are now deployed in gruelling cross-examinations that are damaging to complainants, whatever the outcomes of the trial. In one case, for example, the complainant was forced to endure a “particularly humiliating” hours-long questioning while a videotape was repeatedly freeze-framed and she was asked if she was orgasming during a violent gang rape.<sup>279</sup> To degrade a complainant in this manner in a courtroom full of people, to ask her if she was enjoying being sexually brutalized, is a demonstration of how the “rough sex” defence breathes new life into the “she asked for it” myth. When the victim has died, their surviving family members are haunted by the spectacle of hearing their loved one’s life and worth debased by the rough sex defence.<sup>280</sup>

The discriminatory impact of any legitimized “rough sex” defence will be exacerbated by the harmful stereotypes about certain groups of women. It may be more plausible to suggest that women stereotypically viewed as violent, strong, wild, independent or unpredictable—Indigenous and Black women for example—enjoy or invite “rough sex.” And women who are drug-addicted,

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<sup>279</sup> *Bohorquez*, *supra* note 83 at para 41.

<sup>280</sup> See Aly Thomson, “‘There will be no forgiveness’: Mother of murder victim tells hearing” *The National Post* (13 August 2018), online: <<https://nationalpost.com/pmnn/news-pmnn/canada-news-pmnn/parole-eligibility-hearing-set-for-halifax-man-who-strangled-off-duty-cop>>.

criminalized or entrapped in the sex trade will be similarly discredited as complainants even when they suffer bodily harm or death, because these women are typically constructed as consenting to anything.<sup>281</sup>

Finally, the notion expressed by some that any prohibition on a consent defence to bodily harm should only come into play only if the injury caused is grievous, irreversible, or results in death must be problematized.<sup>282</sup> Such line-drawing exercises cannot provide strong social messaging or deterrence because they are focused on avoiding consequences rather than risk-taking acts. Given that our criminal law already defines ‘bodily harm’ as any sort of interference with the life or health of another than is more than trivial or transitory, this form of prohibition would require prosecutors, experts and judges to engage in determining when the injuries inflicted cross the line into “grievous” or “irreparable.” It presents a significant risk of normalizing very violent behaviour, inching acceptable male violence up further to the limit of maiming or killing women. While we acknowledge that cases are more likely to come to the attention of police and prosecutors where more serious injuries have been caused, requiring prosecutors to prove this harm normalizes an “acceptable” level of violence against women.

It is time for our highest court to affirm *Welch* and *Jobidon* and recognize that there is no social utility in causing foreseeable bodily harm to women. Alternatively, Parliament should amend the *Criminal Code* barring consent as a defence where bodily harm, including serious psychological harm, is proven unless that harm was unforeseeable. Consent defences should also be precluded where strangulation is involved. Explicit amendments must be made to the sexual history

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<sup>281</sup> As was argued at Barton’s trial. See Introduction, *above*.

<sup>282</sup> See e.g. Tanovich, *supra* note 19 at 94; Pa, *supra* note 18 at 81–82.

provisions to clarify that a past history of consensual violent sex is not admissible to prove consent on a subsequent occasion. This is a matter of great urgency because of clear threats to women's safety and equality rights.