Note — *Lazarus* in Tasmania: Comparing the Responsibility to Communicate and Ascertain Consent under New South Wales and Tasmanian Law

TAYLOR BACHAND*

I INTRODUCTION

The *Lazarus* case has attained an infamous status around Australia.[1] The sexual assault case spanned two trials and two appeals over five years, and ultimately came to an unsatisfying end: Luke Lazarus's acquittal was allowed to stand, despite an error of law in the second trial. The outcome sparked considerable debate about NSW consent legislation, even prompting a review of the current law.[2]

This case note will analyse how the court approached the disputed elements of sexual assault under s 61I of the *Crimes Act 1900* (NSW), namely, the complainant's absence of consent and the accused's knowledge of that absence. This analysis will demonstrate how NSW law allocates responsibility between parties to sexual activity to communicate and ascertain consent. This paper will further analyse how the *Lazarus* case might have been argued and decided under Tasmanian legislation, and whether the balance of responsibility may have differed under what is considered some of the most progressive consent legislation in the world.[3]

II THE CASE

The complainant (SM) was visiting Kings Cross to celebrate a friend's birthday. She met Lazarus on the dancefloor at Soho Nightclub around 4am. She had consumed somewhere between ten to sixteen standard drinks. The two spoke briefly on the dancefloor, where Lazarus indicated that the nightclub was his/his family's. He led the complainant to the DJ booth, where the complainant says they held hands, and Lazarus said the pair were passionately kissing and dancing closely. Lazarus claims he

* BA University of Victoria (Canada), LLB (Hons) University of Tasmania, Co-editor of the *University of Tasmania Law Review* for 2019. I am grateful for the guidance of Dr Helen Cockburn. All errors remain my own.

1 *Lazarus v R* [2016] NSWCCA 52; *R v Lazarus* [2017] NSWCCA 279.

2 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) 1.

3 Helen Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (University of Tasmania, June 2012) iii.

asked her if she wanted to go somewhere private; the complainant gave evidence that he said he would take her to a VIP area. Lazarus eventually led her outside into a laneway.[4]

The complainant's evidence was as follows. The pair kissed for 'a little bit' until SM wanted to leave. She stopped and said 'I need to go back to my friend'. Lazarus tried to convince her to stay, and when she turned around to go, he put his hands up her skirt and pulled her stockings down a few inches. She pulled them back up and reiterated that she needed to go, but he told her to put her 'fucking hands on the wall' in what she describes as a 'frustrated and impatient' tone. He then pulled her stockings and underwear to her ankles and told her to 'get on [her] hands and knees and arch [her] back' in an 'authoritarian' tone. He proceeded to anally penetrate her. She said she told him to stop and that she kept saying 'I need to get back to my friend'.[5]

The defence case was that SM was in fact consenting and that she had only changed her story after Lazarus asked her to add her name to a list in his phone that appeared to be a list of sexual conquests. The defence further argued that SM's conduct, which included 'almost skipping' down the laneway, kissing and touching him, and pushing back against his penis as he tried to penetrate her, provided reasonable grounds for him to believe that she was consenting, and provided no reason for Lazarus to enquire as to whether she was indeed consenting.[6]

III Absence of Consent

It is a central feature of the crime of rape that the prosecution must prove beyond a reasonable doubt that the complainant did not consent to the sexual intercourse. In NSW, consent is defined as 'free and voluntary agreement'.[7] Commentators argue that this definition reflects a 'communicative' model of consent.[8] Under a communicative model, consent is not mere submission. Instead, consent is something to be communicated and sought, rather than presumed based on lack of resistance.[9] This model recognises that parties to a sexual encounter have a responsibility to ascertain whether the other party is consenting.[10]

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4 *Lazarus v R* [2016] NSWCCA 52, [26]–[38] ('*First Appeal*').
5 Ibid [49]–[50].
6 Ibid [82]–[86].
7 *Crimes Act 1900* (NSW) s 61HE(2). At the time of the case, the relevant provision was s 61HA, however, the relevant sections remain identical in substance.
8 James Monaghan and Gail Mason, 'Communicative Consent in New South Wales: Considering *Lazarus v R*' (2018) 43 *Alternative Law Journal* 96, 97–8.
9 James Monaghan and Gail Mason, 'Autonomy and responsibility in sexual assault law in NSW: The Lazarus cases' (2019) 31(1) *Current Issues in Criminal Justice* 24, 26–7.
10 Ibid.

Importantly, consent to *one* sexual act is not regarded as consent to *any* sexual act.[11]

This reading is supported by the use of the word 'agree' in the definition of consent, which suggests a positive state of mind, rather than a mere lack of resistance. Indeed, s 61HE(9) states that 'a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting'. In Tasmania, consent is similarly defined as 'free agreement'.[12] On its face, Tasmania's legislation appears to more strongly endorse an affirmative consent standard, where consent must be communicated: s 2A(2)(a) states that 'a person does not freely agree to an act if the person does not say or do anything to communicate consent'. However, this distinction may be insignificant in a case such as *Lazarus* where there is equivocal conduct on the part of the complainant which the defence can point to as evidence of consent, or as founding a belief in consent.

A *First Trial and Appeal: Credibility*

The reasoning of the jury in the first trial is unknown to us. However, the questions asked during cross-examination of the complainant show what the jury was invited to consider. There is no evidence in the cross-examination questions of the principles of communicative consent. Instead, counsel for the defence relied heavily on rape myths, as well as assumptions about consent that ought to have been 'ousted' by legislation.

Claims put to SM in cross-examination	*Underlying Myth/Assumption*
SM did in fact consent, and only changed her story when she felt jilted by Lazarus.[13]	Women readily make false allegations.[14]
SM had willingly kissed Lazarus, rubbed against his body, and let him touch her buttocks.[15]	Consent to previous conduct is considered consent to further conduct.

11 Ibid.
12 *Criminal Code* (Tas) s 2A(1).
13 *First Appeal* (n 4) [76].
14 Liz Wall and Cindy Tarczon, Australian Centre for The Study Of Sexual Assault, *True or false? The contested terrain of false allegations* (November 2013) 9–10.
15 *First Appeal* (n 4) [71]–[73].

SM willingly went with Lazarus down the laneway, that she didn't resist or say 'no' at any time.[16]	Consent can be assumed by lack of resistance/real victims fight back.[17]
Lazarus issued no threats and used no force.[18]	'Real rape' involves the use of force.[19]

Despite these lines of questioning, the jury found that SM was not consenting. The defendant appealed this verdict as unreasonable, based on 'unexplained and material inconsistences' in SM's evidence.[20] In her leading judgement, Fullerton J considered 'the interpretive possibilities regarding each piece of evidence or each attack on the complainant's credit' and found that 'it was open to the jury to accept her position'.[21] SM's credibility and status as a 'good victim' was therefore a key factor in the first trial and appeal. In cases where it is the word of one party against another, being a good witness, and therefore a believable victim, is a key aspect of a successful complaint.[22] This primacy of credibility means that cross-examination aimed at 'playing to a jury's misconceptions and the tendency to attribute "contributory negligence" to the victim' would be equally present in a Tasmanian court.[23]

B *Second trial and appeal: Manifesting Non-Consent*

There is ongoing theoretical debate as to whether consent should be considered an attitude/mental state, or whether consent also involves an action, and must be communicated in order to be valid.[24] This question is important: the definition of consent affects what counts as reasonable grounds for a mistaken belief in consent. Tupman J found that SM 'in her own mind was not consenting to sexual intercourse'.[25] However, she did not manifest that non-consent. Instead, the court found that Lazarus had reasonable grounds for a mistaken belief that she was in fact consenting.

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16 Ibid.
17 Simon Bronitt and Patricia Easteal, *Rape Law in Context: Contesting the Scales of Injustice* (Federation Press, 2018) 98–9.
18 *First Appeal* (n 4) [71].
19 Susan Estrich, *Real rape: How the legal system victimizes women who say no* (Harvard University Press, 1987).
20 *First Appeal* (n 4) [101].
21 Monaghan and Mason (n 8) 99.
22 Wendy Larcombe, 'The "Ideal" Victim v Successful Rape Complaints: Not What You Might Expect' (2002) 10 *Feminist Legal Studies* 131, 138.
23 Bronitt and Easteal (n 17) 84.
24 Bronitt and Easteal (n 17) 104.
25 *R v Lazarus* [2017] NSWCCA 279, [134] ('*Second Appeal*').

Key aspects of Tupman J's reasoning includes the fact that she went willingly with Lazarus into the laneway, that she stayed there with him, that she complied when asked to put her hands on the fence or to get down on all fours, and that she did not say 'stop' or 'no' or physically resist.[26] As noted above, under NSW law, 'a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse'.[27] However, SM's relatively passive acts of compliance or acquiescence are nonetheless considered to be part of the 'series of circumstances' that amounted to reasonable grounds for the accused to form a genuine belief that she was consenting.

'Mental' non-consent that is not clearly manifested can therefore look enough like consent to ground a defence of mistake. This line of reasoning could be potentially deployed in Tasmania as well. On its face, s 2A(2)(a) suggests that consent must be communicated in order to be valid. However, Cockburn's research suggests that this provision has been 'misunderstood and misinterpreted' and therefore not given its full force in 'marginal' cases where the complainant appears to have acquiesced to sexual intercourse out of fear without manifesting lack of consent.[28] This means that complainants continue to bear responsibility to clearly manifest lack of consent, lest their apparent acquiescence be considered reasonable grounds for a mistaken belief in consent.

IV KNOWLEDGE AND MISTAKE

Under NSW law, proving the crime of rape requires proof that the accused had knowledge that the complainant was not consenting.[29] The prosecution can prove this element in three ways: by showing that a) the accused had actual knowledge of the absence of consent, b) the accused was reckless as to whether the complainant was consenting, or c) there were no reasonable grounds for believing that the complainant was consenting. This third ground is not merely a subjective test, but involves an objective element.[30] When deciding whether one of these circumstances was present, the trier of fact must have regard to all the circumstances of the case, including steps taken by the accused to ascertain whether the complainant was consenting.[31]

Under the Tasmanian *Criminal Code*, the crime of rape has no 'mental element'.[32] Rather, the defence of honest and reasonable mistake of fact is

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26 Ibid.
27 *Crimes Act 1900* (NSW) s 61HE(9).
28 Cockburn (n 3) 207–08.
29 *Crimes Act 1900* (NSW) ss 61I and 61HE(3).
30 *First Appeal* (n 4) [156].
31 *Crimes Act 1900* (NSW) s 61HE(4).
32 Aside from basic voluntariness in s 13(1).

available under s 14. The availability of the defence is qualified by s 14A, which states that an accused cannot rely on the defence of a mistaken belief in consent if they 'did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act'. Both pieces of legislation therefore place some level of responsibility on the defendant to take steps to ascertain consent. However, the degree of responsibility appears to differ between the legislation.

A *First Trial and Appeal: At Least Reckless*

A key aspect of the defence case was that SM's behaviour 'gave him no reason to enquire as to whether she was consenting'.[33] However, the court in the first appeal held that the evidence from the first trial could reasonably support a finding that Lazarus was at least reckless as to whether SM was consenting.[34] A key point made by the court was the undisputed fact that Lazarus 'made no enquiry of the complainant before or during intercourse as to whether she was willing to have anal intercourse (or intercourse at all), or whether she was willing for him to proceed to try to achieve penetration when, even on his evidence, she expressed pain and declared that she was a virgin'.[35] In Tasmania, the fact that Lazarus made no enquiries would, on its face, disallow reliance on the defence of mistake of fact on the basis that he failed to take reasonable steps to ascertain whether SM was consenting. However, the subsequent interpretation of the meaning of 'steps' in the second appeal must also be considered, as it has the potential to affect this conclusion.

B *Second Trial and Appeal: Reasonable Grounds, Reasonable Steps*

In the second trial, Tupman J found that there were reasonable grounds for the accused to have formed the belief that SM was consenting.[36] Tupman J's findings of fact accord largely with the defence case. For instance, she emphasises that SM 'willingly' went into the laneway and that she did not say 'stop' or 'no' or offer any physical resistance.[37] She accepted that SM 'participated' in the intercourse by 'pushing back towards him and then back and forwards as the anal intercourse took place'.[38] She also noted that when Lazarus pulled SM's stockings and underwear down, he was 'clearly indicating what his intentions were', suggesting that SM's decision to stay with him should be considered in light of that indication.[39]

This understanding of what amounts to 'reasonable grounds' places almost no responsibility on Lazarus to confirm consent when faced with

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33 Ibid [82].
34 *First Appeal* (n 4) [5], [129].
35 Ibid [130].
36 *Second appeal* (n 25) [134].
37 Ibid.
38 Ibid.
39 Ibid.

potentially ambiguous behaviour. The Crown appealed on the basis that the trial judge failed to expose her reasoning as to how the (seeming lack of) steps taken by the accused to ascertain consent influenced her consideration of the knowledge element. This ground of appeal was made out. However, it was held that the meaning of 'steps' 'extends to include a person's consideration of, or reasoning in response to, things or or events which he or she hears, observes or perceives'.[40] Therefore, it would be open for an accused in Lazarus's position to argue that he did indeed take steps to ascertain whether SM was consenting.

There is a possibility that the above definition of 'steps' could be applicable to s 14A in Tasmania's Code, as there is a lack of Tasmanian appellate authority on the scope of the term.[41] However, an important aspect of s 14A is the requirement that the steps be 'reasonable in the circumstances known to the accused'. This requirement may effectively place responsibility onto the accused to obtain clear consent in the face of ambiguous conduct. While this is also yet to be tested in a Tasmanian court, Canadian jurisprudence may be persuasive, as s 14A 'was clearly inspired by the Canadian mistake provision'.[42]

As in s 14A, s 273.2 of the Canadian Criminal Code states that an accused cannot raise a defence of mistaken belief in consent if they 'did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting'.[43] Cockburn notes the case of *Cornejo*, where 'the accused argued mistake on the basis that the complainant had lifted her hips to assist in removing her trousers'.[44] The court found that it 'was not reasonable for him to rely only on his interpretation of the complainant's equivocal conduct'[45] in the circumstances. Those circumstances are that:

The accused let himself into the apartment of a co-worker in the early hours of the morning and found her in an intoxicated slumber on the couch. There was no pre-existing sexual relationship between them and, on previous occasions, the complainant had made it clear that she was not sexually interested in him.

The nature of lifting one's hips to assist the removal of trousers is comparable to the evidence that SM either 'pushed back against Lazarus' or was 'moving back and forth' during sex. The circumstances may also be compared: Lazarus and SM had only known one another for a matter of

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40 Ibid [147].

41 While s 14A was discussed in the case of *SG v Tasmania* [2017] TASCCA 12, the case does not offer much guidance. The appellant had already pleaded guilty to rape, meaning that he had already admitted that any mistake he had was not honest or reasonable. The issue on appeal was whether a non-exculpatory mistake could be relevant to sentencing.

42 Cockburn (n 3) 109.

43 Ibid; *Criminal Code*, RSC 1985, c C-46, s 273.2.

44 Cockburn (n 3) 111, citing *R v Cornejo* (2003) 68 OR (3d) 117 (CA).

45 Cockburn (n 3) 111.

minutes and she had expressed some degree of reluctance as to staying in the laneway. While such a comparison is persuasive, whether s 14A would be interpreted in such a way, to find that Lazarus did not take reasonable steps in the circumstances known to him, remains a matter of speculation.

V CONCLUSION

Many aspects of the decision in the *Lazarus* case could potentially stand in a Tasmanian court. However, it appears that s 14A of the Tasmanian Code may be the predominant differentiating factor between the two legislative regimes which could have altered the outcome of the case. This is a significant conclusion. As NSW undertakes a review of their own legislation as a result of public dissatisfaction with the outcome of the *Lazarus* trial, the potential avenues for review are hotly contested.[46] I suggest that a provision like s 14A holds the most potential for fairly and effectively distributing responsibility to communicate and ascertain consent when engaging in sexual intercourse.

[46] New South Wales Law Reform Commission (n 2).