

# Oppression, Fraud and Consent in Sexual Offences



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*This article explores the circumstances in which intimidation and fraud will vitiate consent in the context of sexual offences. It is argued that, in the wake of recent reforms to the law of sexual offences, different principles should apply in the two situations. In the case of intimidation (or oppression), the question of consent should be left to the jury, as a question of fact. In contrast, there must be legal limitations to the circumstances in which fraud will vitiate consent. This paper examines those limitations and their ramifications, and makes proposals for reform.*

THE effect of recent legislation in Western Australia has been to update and simplify the law relating to sexual offences and to ensure that a wide spectrum of acts of sexual violence are treated with appropriate gravity.<sup>1</sup> However, as Mr George Syrota argued in the previous issue of this *Review*, the legislation has not adequately resolved the conundrum of when consent is vitiated by fraud. In particular, it is debatable whether the courts would employ the common law approach that fraud will only vitiate consent if the victim is mistaken as to the nature of the act or as to the identity of the actor.<sup>2</sup> Mr Syrota's article defended the application of the common law rules in the recent English case of *Linekar*,<sup>3</sup> a case of rape. He took the view that the Criminal Code would and should be interpreted in the same way.

This paper agrees that the decision in *Linekar* was correct but expresses concern at the effect of the common law rules in cases where the victim has been deceived into believing that an act of sexual penetration is required for

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1. The Criminal Code was amended in 1985 when the offence of sexual assault was introduced in place of the offence of rape. The Code was fine tuned and consolidated in 1992.
2. G Syrota 'Rape: When Does Fraud Vitate Consent?' (1995) 25 UWAL Rev 334.
3. [1995] 3 All ER 69.

medical reasons. The common law appears unduly restrictive in such cases, but it would be over-simplistic and impractical to adopt the view that consent is vitiated *whenever* it can be proved that the complainant is deceived into agreeing to sexual contact. This paper seeks to distinguish between cases of oppressive and intimidatory behaviour on the one hand and cases of fraud on the other. It argues that although a wide range of oppressive and intimidatory behaviour should be capable of vitiating consent, the courts must draw limits in the area of fraud to ensure that the law of sexual assault does not become unworkable. The paper concludes that in the absence of more detailed statutory provisions, the concept of fraud as to the nature of the act is the best mechanism for explaining when fraud vitiates consent and that if properly applied, this would lead to a conviction in bogus medical examination cases. It is acknowledged that under this analysis some controversial cases will still fall outside the scope of the sexual assault laws, particularly those cases where the defendant has put a partner at risk of contracting a serious disease through sexual contact. However, it is argued that liability in such cases is and should be determined by offences which specifically target the conduct in question. Suggestions are also made as to possible reforms in this area. The paper concentrates on fraud as to the nature of the act because it is this, rather than fraud as to identity, which generates particular legal problems.

### THREE COMMON LAW CASES: PAPADIMITROPOULOS, LINEKAR AND MOBILIO

Three common law cases encapsulate the key legal and policy issues in this area. After examining the basis of these cases, we can analyse how the provisions of the Criminal Code would apply to similar facts and, later in the paper, how these principles apply to the spreading of sexually transmitted disease.

The first case is *Papadimitropoulos*.<sup>4</sup> In this case the defendant and a young woman lodged a notice of intended marriage at a Registry Office. The defendant thereupon told the woman, who had only recently arrived in Australia and spoke little English, that they were married. He knew this was untrue and there was evidence that she only agreed to sexual intercourse on the understanding that they were married. The High Court held that this was not rape; she had consented to the act of sexual intercourse, knowing what was about to take place and knowing the true identity of the man. Her consent was therefore 'comprehending and actual' and it was not destroyed by the fact that it had been induced by a mistake as to their marital status.

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4. (1957) 98 CLR 249.

The court reasoned that:

Rape is carnal knowledge of a woman without her consent; carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.<sup>5</sup>

Mr Syrota clearly explains the basis of *Papadimitropoulos* as follows:

This view seems to distinguish between, on the one hand, the 'physical act of penetration' and, on the other, the 'inducing causes' (ie, the factors which motivate the woman to submit to intercourse with the man). According to the High Court, consent relates *only* to the first of these — the physical fact of penetration. From this it follows that if the woman correctly understands the nature of the act and knows the identity of the man, then intercourse with him is ipso facto consensual. It is really irrelevant that the man deceives the woman as to some collateral matter (eg, he claims that it is his intention to marry her or to pay for her services) because, as the High Court asserts, mere 'inducing causes' can never destroy the reality of the woman's consent.<sup>6</sup>

The same reasoning was used in *Linekar*.<sup>7</sup> A young man and a prostitute agreed a fee for sexual intercourse but after they had intercourse, he ran off without paying. It was also established that he had never intended to pay. At his trial, he was convicted of rape when the trial judge directed the jury that his deception as to his intent to pay had destroyed her apparent consent. However, the English Court of Appeal quashed the conviction, reasoning that the complainant had not been mistaken as to the nature of the act or the identity of the other party; put simply, she had consented to sexual intercourse with the appellant.

It is important to emphasise that even if a rape/sexual assault offence is not established, the facts of some cases may give rise to a lesser offence. For convenience, these lesser offences will be termed 'fraud based offences' in order to distinguish them from sexual assault. The English Court considered that Mr Linekar would have been guilty of the offence of obtaining sexual intercourse by false pretences even though he was not guilty of rape. Mr Syrota has pointed out that the equivalent offence in Western Australia is found in section 192(2) of the Criminal Code but that this would not cover the facts of *Linekar* because it does not protect 'common prostitutes'.<sup>8</sup> However, as he shows, the facts would generate a fraud offence under the

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5. Id, 261.

6. Syrota *supra* n 2, 342.

7. *Supra* n 3.

8. Syrota *supra* n 2, 343-344. It is extraordinary that this limitation has survived so long and, particularly, that s 192 was not amended together with the other sexual offences in 1985 and 1992.

terms of section 409 of the Criminal Code; Mr Linekar clearly obtained a benefit by his deceit and had the intent to defraud.<sup>9</sup>

The present writer believes that the decision in *Linekar* was right in principle and that a fraud based offence properly and adequately represents the nature and degree of criminality which was involved.<sup>10</sup> However, because his focus was the case of *Linekar*, Mr Syrota did not consider the problems raised by the controversial Victorian case of *Mobilio*.<sup>11</sup> There, a radiographer performed 'transvaginal' (ie, internal) ultrasound examinations on a number of female patients who had been referred to a clinic specifically for *external* examinations. Mr Mobilio represented to the complainants that he needed to carry out internal examinations for medical reasons in order to 'get a proper picture.' However, the internal examinations had no medical purpose and the defendant admitted that he had conducted them for his own sexual gratification. The Victorian Court of Criminal Appeal applied *Papadimitropoulos* and held that this conduct did not amount to rape; each patient had known who the defendant was and had understood the nature of the act which had occurred, namely the insertion of the transvaginal ultrasound probe.

The Victorian Court of Appeal indicated that the appropriate charge in that jurisdiction would have been one of procuring sexual penetration by deception. However, if such facts arose in Western Australia, it is far from clear whether any 'fraud based offence' would have been committed. First, the offence of obtaining 'carnal connection' by false pretences under section 192(2) would not apply because carnal connection involves vaginal or anal intercourse and does not seem to be satisfied by other forms of penetration.<sup>12</sup> Secondly, as far as the general fraud offence under section 409 is concerned, the defendant had clearly deceived the victims who were induced by that deceit 'to do any act that ... [they were] lawfully entitled to abstain from doing';<sup>13</sup> but it is far from clear that he had the 'intent to defraud'.<sup>14</sup>

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9. S 409(1)(c) covers the situation where a person obtains a benefit, pecuniary or otherwise, by fraud. There are some doubts as to the precise meaning of the mental element in an 'intent to defraud' but it clearly covers cases where, as in *Linekar*, the defendant intended to cause economic detriment; see also *infra* n 14.

10. See *infra* p 233.

11. [1991] 1 VR 339.

12. The use of the term 'carnal connection' in this context is rather odd. The offence of rape required 'carnal knowledge' but this was abandoned in 1985 in favour of the broad definition of sexual penetration now found in s 319 of the Criminal Code. S 6 of the Criminal Code was amended in 1989 but does not extend the meaning of penetration.

13. S 409(1)(e).

14. There is an ongoing debate as to the precise meaning of this phrase. Some authorities suggest that it means an intention to cause or to threaten economic loss or detriment, but others seem to take the view that it is satisfied by proof that the defendant simply intended to cause the other party to act or to refrain from acting, even though there was no intent to threaten that person's economic interests. See *Balcombe v De Simoni* (1972) 46

The following analysis demonstrates that it is also debatable whether the facts of *Mobilio* would give rise to a conviction for sexual assault in Western Australia. In Victoria the law relating to rape has been amended, in direct response to *Mobilio*, to provide that there is no consent if the complainant 'mistakenly believes that the act is for medical or hygienic purposes.'<sup>15</sup> However, such piecemeal amendments do nothing to alter the general common law rules to the effect that consent will only be vitiated by fraud where there is a mistake as to the nature of the act or the identity of the actor; indeed, the enactment of a specific statutory exception to the general rules serves to entrench those rules. Since there has been no equivalent statutory amendment in Western Australia, the question arises as to how far, if at all, the common law rules would be followed by Western Australian courts.

## FRAUD AND CONSENT: THE CRIMINAL CODE PROVISIONS

### 1. The statutory definition

Section 319(2)(a) of the Criminal Code defines consent for the purposes of all sexual offences in which lack of consent is an element. The key offences in this category are indecent assaults and offences of sexual penetration without consent (generally called sexual assault). The following discussion uses examples which involve sexual penetration but the same general principles apply to cases of sexual touching which would give rise to an indecent assault offence. The section was derived directly from the proposals of the Murray Report of 1983:

'Consent' means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means.<sup>16</sup>

For present purposes, two key points emerge from this definition. The first is that consent must be 'freely and voluntarily' given; in other words, the issue should not be whether the complainant has merely 'acquiesced' to sexual penetration, but whether she or he has genuinely consented.<sup>17</sup> Secondly, the section states that without in any way affecting

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ALJR 141; *Tan* [1979] WAR 149; *Re A-G's Reference No 1 of 1981* [1982] WAR 96; *Clark and Bodlovich* (1991) 52 A Crim R 180. Cf G Syrota 'Criminal Fraud in WA: A Vague, Sweeping and Arbitrary Offence' (1995) 24 UWAL Rev 261; N Morgan 'Case Commentary on *Clark and Bodlovich*' (1991) 15 Crim L Journ 373.

15. Crimes Act 1958 (Vic) s 36, introduced by the Crimes (Rape) Act 1991 (Vic).

16. M Murray QC *The Criminal Code: A General Review* (Perth, 1983) 528.

17. Some cases which had arisen prior to the 1985 amendments suggested that this distinction had not always been fully understood: see eg *Holman* [1970] WAR 2.

the meaning of a 'free and voluntary consent', consent is not free and voluntary if it is obtained by fraud. Although the Murray Report anticipated a broad reading of this section and specifically criticised the result in *Papadimitropoulos*,<sup>18</sup> writers disagree on whether the language of section 319(2) actually leads to a different approach. On the one hand, Syrota<sup>19</sup> and Edwards, Harding and Campbell<sup>20</sup> adopt what may be termed the 'narrow view' that the common law approach still applies. On the other hand, Fisse and Bronitt, have taken the 'wide view' of section 319(2)(a) that 'any fraudulent behaviour which induces a person to have intercourse will vitiate consent'.<sup>21</sup> The legal and policy issues surrounding these two approaches require careful assessment.

## 2. Problems with 'wide' and 'narrow' interpretations

It is offensive to a modern sense of justice to regard the facts in *Mobilio* as being anything less than sexual assault and, on the facts of that case, the wide view would apparently lead to the 'right result'. However, the ramifications of the wide view are truly dramatic. Over one hundred years ago, Stephen J recognised the essential dilemmas in *Clarence*:

It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true.... [I]f fraud vitiates consent, every case in which a man ... commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes.<sup>22</sup>

The first concern expressed in this passage is one of legal analysis, namely that a broad interpretation of fraud in this context would collapse the distinction between bigamy and sexual assault. It would also leave only limited scope for section 192 of the Criminal Code.<sup>23</sup>

In this writer's view, the policy argument is even more fundamental. Stephen J expressed this in the terms that the law of rape should not reach into the area of 'seductions'. In more modern terms, the law of sexual assault

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18. Supra n 16, 221.

19. Supra n 2. His arguments are more fully canvassed below: see infra pp 229-231.

20. EJ Edwards, RW Harding & IG Campbell *The Criminal Codes: Commentary and Materials* 4th edn (Sydney: Law Book Co, 1992) 542.

21. S Bronitt 'Rape and Lack of Consent' (1992) 16 Crim L Journ 289, 301. Cf B Fisse *Howard's Criminal Law* 5th edn (Sydney: Law Book Co, 1992) 180-183.

22. (1888) 22 QBD 23, 43.

23. Under this section it is an offence for any person, by false pretences, to procure a female to have unlawful carnal connection with another person either within Western Australia or elsewhere. The wide approach leaves little scope for this section though it might still be used in cases in which a woman is deceived into becoming a prostitute outside Western Australia: see Syrota supra n 2, 339.

should not reach too far into the area of human relationships. However much we might wish that it was otherwise, human beings can be less than 100 per cent open and truthful when it comes to personal and sexual relationships and the dynamics of some personal relationships are extraordinarily complicated. Since the sexual offences are now defined in gender neutral terms, an unrestricted wide approach has the potential to lead to both men and women facing grave charges in the context of their personal relationships. Take the example of a man who falsely professes his undying love for a woman; is it sexual assault if she says that she only agreed to sexual intercourse because she believed his protestations? What about the woman who tells a man that she is unmarried when she is in fact married? Or the woman who agrees to sexual intercourse on the basis of the man's false promise that he intends to marry her? It surely cannot have been intended that the law of sexual assault should reach so far or that attempted sexual assault charges might lie in the case of failed 'seductions'.<sup>24</sup>

It must also be added that the scope of the law is particularly wide and uncertain in that the Code states that consent is vitiated by deceit *or fraudulent means*. The phrase 'fraudulent means' is not defined any further but is used in the context of the general fraud offences. It appears from the Murray Report that it is designed to embrace situations where the defendant has been generally 'sneaky' or 'devious' even though there has not been any 'deceit' operating on any other person's mind.<sup>25</sup>

Given these problems, a mechanism is clearly required to restrict the criminal law to areas involving genuine criminality and then to delineate those offences in which the criminality is such that a conviction for sexual assault should arise and those in which a conviction for a lesser, fraud-based offence would adequately reflect the gravamen of the offending behaviour.

### **3. Section 319(2)(a): the defendant's fraud or the complainant's mistake?**

As a number of writers have noted, the common law effectively draws the jury's attention away from the fraud practised by the defendant and to the nature of the victim's mistake.<sup>26</sup> In *Padimitropoulos*, the High Court went as far as to say that a discussion of fraud would distract attention from the 'essential inquiry, namely whether the consent is no consent.'<sup>27</sup> As we

24. Some further practical ramifications are considered at *infra* p 234.

25. The Murray Report *supra* n 16, 267 explained the phrase in the context of the general fraud offences by way of the example of a person sneaking into a cinema without purchasing a ticket.

26. Bronniti *supra* n 21, 294-296. The point can also be illustrated by *Linekar* *supra* n 3, 75 in which the English Court of Appeal said that it 'is the absence of consent and not the existence of fraud which makes it rape.'

27. *Supra* n 4, 260.

have seen, this approach is based on the view that the question is whether the complainant has agreed to the physical act of penetration.<sup>28</sup>

It is striking not only that the victim's mistake becomes the focus of inquiry, but also that it is only where the jury is satisfied that the victim made a rather curious, almost 'bizarre' mistake, that fraud will vitiate consent. As a result, at common law, the sexual offences do not cover cases involving understandable and potentially common mistakes but only cases where the victim's mistake may generate a degree of incredulity. The 'classic cases' where a mistake as to the nature of the act has been held to vitiate consent date from an earlier age and, to a modern observer, reflect a degree of naïveté on sexual matters. For example, in *Flattery*<sup>29</sup> the defendant induced a nineteen year old woman to agree to sexual intercourse by pretending that he was performing a surgical operation. It appears that she was ignorant of the facts of life. In the words of Kelly CB, she therefore 'submitted to a surgical operation and nothing else'.<sup>30</sup> Today, there are likely to be very few cases where a victim who is above the age of consent<sup>31</sup> is ignorant of what sexual intercourse means but it is easy to envisage cases of sexual penetration or indecent touching in the course of bogus medical examinations where the defendant has deliberately abused a position of trust and exploited the vulnerability of a victim.

A basic question is whether the courts should focus on the victim's mistake or the defendant's fraud. This requires a close analysis of the wording of section 319(2)(a), which reads:

**'Consent'** means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means.

Prima facie, the statement that consent is not freely and voluntarily given if it is obtained by force, threats, intimidation or fraud suggests that the focus should be the defendant's conduct and not, as it is at common law, the victim's mistake. However, advocates of the common law approach would dispute this interpretation. They would point to the fact that before referring to force, threats, intimidation and deceit, the section specifically states that these factors do not 'in any way affect ... the meaning attributable' to the requirement that consent must be freely and voluntarily given. Mr Syrota's arguments apparently follow this line of reasoning; he considers that sexual assault under the Code is analogous to the definition of rape at common law in the sense that it requires proof of the physical act of sexual

28. Supra p 225.

29. (1877) 2 QBD 410.

30. Id, 413.

31. Consent is not, of course, at issue if the complainant is under the age of consent.



penetration. Consequently, he argues, it is still consent to that physical act which is at issue; fraud as to a collateral matter cannot vitiate consent and the specific reference to fraud as a vitiating factor does not alter the law.<sup>32</sup>

Under this analysis, the phrase 'without in any way affecting' would therefore act as a qualification which potentially *restricts* the extent to which the specified vitiating factors will operate. However, the more natural reading would seem to be that the phrase is intended to *extend* rather than to restrict the possible operation of the law. In other words, it is used because there may be cases where the complainant has not freely and voluntarily consented even though there is no proof that the defendant used what the criminal law would regard as force, threats, intimidation or fraud. This expansive interpretation, which is more fully explored below,<sup>33</sup> would also appear to be more in line with the Murray Report.

It is therefore submitted that section 319(2)(a) requires the courts to focus on the defendant's fraud rather than the victim's mistake. This ensures a clearer focus on the defendant's culpability and also accords with the policy behind modern sexual assault laws which, as discussed in the next section, should seek to protect victims from violence and various forms of exploitation and not from their own mistakes.

## **FREE AND VOLUNTARY CONSENT: DISTINGUISHING INTIMIDATION/OPPRESSIVE BEHAVIOUR FROM FRAUD**

### **1. The rationale of sexual assault laws**

By the time of the 1985 amendments to the Criminal Code, it was increasingly accepted that sexual assaults should not be regarded as essentially 'sexual' acts but as acts of violence; in other words, as acts in which the defendant asserts power and control over the victim by dominating and humiliating her. This 'violence/power rationale' is the key to the 1985 reforms. It explains why rape, which focused on the act of sexual intercourse between a man and a woman, was abandoned in favour of sexual assault which embraces numerous forms of penetration. It was because of our increasing understanding of the role of power and control within intimate relationships that we abolished the anachronistic rule that husbands could not be found guilty of raping their wives. It also naturally followed from the violence/power rationale that sexual assault offences can be perpetrated upon victims who are of the same sex as the offender and can be committed by young men who were previously assumed to be physically incapable of

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32. Syrota *supra* n 2, 342.

33. See *infra* pp 235-237.

sexual intercourse.

It is important to bear this rationale in mind when evaluating the scope of section 319(2)(a). As we have seen, the section states that consent is not freely and voluntarily given if it is obtained by force, threat, intimidation or fraud. Within this definition there is no indication that the various 'vitiating factors' are to be treated any differently. However, pursuant to the violence/power rationale of the 1985 reforms, it is submitted that cases involving fraud raise somewhat different considerations from cases involving force, threats and intimidatory behaviour.

## 2. Intimidation and oppressive behaviour

Section 319(2) states that consent must be freely and voluntarily given and 'without in any way affecting the meaning attributable to those words' it is not free and voluntary if it was obtained by force, threats, intimidation or fraud. It is important to ask whether the requirement of 'free and voluntary' consent adds anything to the specific vitiating factors which are listed or whether force, threats, intimidation, deceit and fraudulent means really 'cover the field'.

Although the specific vitiating factors are broad enough to cover most situations, it is submitted that following the violence/power rationale, the requirement of free and voluntary consent does add something of importance. There are cases where the jury should consider the question of consent even though the defendant has not used 'force' or 'threats' in the traditional sense of those words, and where it might be debatable whether his conduct could be described as amounting to 'intimidation'. Take, for example, the situation of a woman who has been subjected to economic pressures from her partner or to other forms of emotional abuse to persuade her to have intercourse. In such cases the question should not be whether, as a matter of *law*, we can designate the defendant's conduct as 'threats' or 'intimidation'; rather, the jury should consider, as a question of *fact*, whether the complainant voluntarily consented.

This point may be illustrated by the case of *R v Ibbs*.<sup>34</sup> The complainant had moved in to live with Mr and Mrs Ibbs when her de facto relationship broke down and her ex-partner required her to leave the house which they had previously shared. In the words of the sentencing judge, Mr Ibbs immediately took 'every possible advantage of her weakened position for [his] own totally reprehensible self-gratification.' He made it clear that he was attracted to the complainant and asked her for sex, both directly and by using his wife as a 'go-between'. Eventually the complainant said, 'Well, let's get it over with' but she became increasingly distressed during intercourse. She tried to push Ibbs away but he continued, probably for

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34. (1987) 163 CLR 447.

around 30 seconds more. The jury returned a verdict of guilty of sexual assault on the basis that Ibbs had continued with the act of penetration after an initial consent had been withdrawn. However, the trial Judge appears also to have directed the jury to consider whether there had been consent at the outset. This is significant because it supports a broad interpretation of the requirement of free and voluntary consent; whilst Ibbs' behaviour clearly involved an oppressive use of his position of power, there was no evidence that he had used what the law would consider to be force or threats<sup>35</sup> and it would be open to debate whether his behaviour constituted 'intimidation' or whether it amounted, rather, to harassment or oppressive conduct.

In cases other than fraud, judges should therefore leave the jury to decide whether as a matter of *fact*, there was free and voluntary consent as opposed to mere acquiescence. Furthermore, in order to give effect to the purpose of the legislation, and to avoid possible assumptions and misconceptions on the part of jurors, judges should clearly explain that oppressive behaviour as well as force, threats and intimidation, may be evidence that the victim did not freely and voluntarily consent.

### 3. Fraud: the problem of overreach

An initial reaction to the injustice of the case of *Mobilio* might be to call for the same approach to fraud; in other words, to call for the abandonment of *legal* limitations to the principle that fraud vitiates consent in favour of the view that the matter should simply be left to the jury. However, as stated earlier, the common law rules do serve an important role in that they prevent the law extending too far. It is time to explore these arguments more fully.

#### (i) Sexual assaults and commercial transactions

Since sexual assault laws target cases of violence and the abuse of power, it follows that they should not be used, in cases such as *Linekar*, to regulate what may be regarded as essentially commercial transactions. Prostitutes, both female and male, must be protected from violence and abuse and there should be no room for the type of argument which surfaced in the Victorian case of *Hakopian*,<sup>36</sup> to the effect that prostitutes are less

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35. There is no definition of these terms in the specific context of sexual offences and it is not clear whether the courts would interpret the terms by reference to the definitions which are used elsewhere in the Criminal Code. The word 'force' is used in the definition of assaults (s 222) and there is a definition of threats in the context of threat based offences (s 338).
  36. (Unreported) Ct Crim App 10-11 Dec 1991, discussed by D Cass (1992) 16 Crim L Journ 200.

likely to be affected by sexual violence than 'chaste' or 'happily married women'.<sup>37</sup> However, the fact remains that the victim of Mr Linekar's deception did agree to have sexual intercourse with him and she was under no misapprehension as to the nature or moral quality of this act or the reasons for it.

It could be argued that the victim in *Linekar* was working as a prostitute under 'economic duress' in the sense that she faced some hardship in attempting to live on state benefits. However, it follows from our earlier analysis that section 319(2)(a) requires consideration of the defendant's conduct; to the extent that economic pressures existed, they were not attributable to Mr Linekar but to the level of state benefits. The essence of his offending behaviour was quite simply that he obtained services by deceit, an offence which could, and should be treated in the same way as other fraudulent 'commercial transactions'. His conduct was not unlike that of a prostitute who receives payment for her or his services in advance but then makes off without providing those services. This too would generate a fraud offence. In this sense, a conviction for a lesser offence of fraud rather than sexual assault adequately and appropriately reflects the degree of criminality.

## (ii) Sexual assaults and personal relationships

It has already been observed that the criminal law would reach into areas where it does not belong if any type of deception was capable of vitiating consent. This general comment is backed up by several serious practical concerns. First, it is not the business of the police and the courts to regulate private relationships because of lies told by one or more of the parties. Secondly, far from enhancing the law of sexual assault, the wide approach would ultimately serve to detract from the gravity of the offence and bring the law into disrepute. Thirdly, there is the prospect that hurt and/or vindictive ex-partners, both male and female, may seek to make a point through the courts. It should be remembered in this context that the usual practice is to reveal the name of the defendant alone and to suppress the name of the complainant. It is also possible that ex-partners may attempt to obtain compensation under the Criminal Injuries Compensation Act 1985. Finally, there will be difficult problems of proof. In the context of fraud offences the courts in Western Australia have insisted on strict proof of a causal link between the fraud and the complainant's conduct.<sup>38</sup> In cases involving sexual contact it will be particularly difficult to prove the causal link between the deception and the act of penetration because many different

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37. In *Pinder* (1992) 8 WAR 19, 40 Murray J effectively rejected the *Hakopian* type of argument.

38. See especially *Clemesha* [1978] WAR 193.

considerations are likely to be taken into account before a person agrees to sexual contact.

## STRIKING A BALANCE

### 1. A test of unconscionability?

It is not easy to suggest alternative tests for when fraud would vitiate consent other than those which have been formulated at common law or the 'wide approach' that any kind of fraud will vitiate consent. One alternative, suggested by Waye, is that the jury should approach the task by considering whether, as a matter of ordinary human experience, the 'situation or behaviour is *unconscionable*' and that in determining this, the '*unfairness* might arise out of fraud, emotional abuse or economic blackmail'.<sup>39</sup>

I have already argued that cases of emotional abuse or economic blackmail should, in Western Australia, be put to the jury as matters which may vitiate consent. However, Waye's principle goes much further. To phrase the problem in terms of unconscionability, or under the potentially broader rubric of 'unfairness' does not address the problem of over-reach which we have discussed and would seem to generate further uncertainty. For example, Waye phrases her test in terms of a 'situation' being unconscionable. As Bronniti points out, this might mean that a person could be guilty of sexual assault not because of his/her oppressive behaviour, but because of the 'situation';<sup>40</sup> the ramifications of this are not entirely clear but, to return to the *Linekar* example, it could presumably be argued that the situation was unequal/unfair and therefore unconscionable because the complainant needed to work as a prostitute in order to supplement her state pension. For reasons I have already canvassed, this is not an appropriate basis for liability.

The fundamental problem with 'unconscionability' is that it is a creature of equity and is still in a state of flux. Quite apart from being too broad, it lacks sufficient certainty to be used as the basis for criminal liability and would lead to inconsistent jury verdicts. It is therefore important to revisit the question of fraud as to the nature of the act.

### 2. Reworking the 'nature of the act' rule

#### (i) Bogus medical examinations

The most glaring problem with the traditional common law approach

39. V Waye 'Rape and the Unconscionable Bargain' (1992) 16 Crim L Journ 94, 102 (emphasis added).

40. Bronniti supra n 21, 298-300.

is probably that of bogus medical examinations. As we have seen, the common law takes the view that there is no offence of rape/sexual assault if the complainant knew the physical nature of what was going to be done to her; in such a situation, it is said that she is not mistaken as to the nature of the act. Under this approach, the *reasons* for the act of penetration are not relevant.

It can be argued that even under the common law, this is an unduly restrictive interpretation of the notion of the nature of the act. In *Mobilio* the victims agreed to permit the insertion of the ultrasound probe because they mistakenly believed that this was part of a medical examination. As a matter of the use of the English language, it could be held that they were therefore mistaken as to the nature of the act. In other words, a true knowledge of the nature of an act of penetration extends beyond the physical act of penetration and connotes an understanding of the fundamental purpose behind this physical act. The case of *Williams*<sup>41</sup> may lend some support to this approach. The appellant was a singing teacher who had sexual intercourse with one of his pupils under the pretence that he was performing an operation to improve her breathing and hence her singing voice. He was found guilty of rape. The facts bear a superficial similarity to *Flattery*<sup>42</sup> but there is an important difference. In *Williams* there was no evidence that the complainant was ignorant of the facts of life and the English Court of Criminal Appeal approved the trial judge's summing up, which was in the following terms:

Where a girl ... is persuaded that what is being done to her is not the ordinary act of sexual intercourse but is some medical or surgical operation in order to give her relief from some disability from which she is suffering, then that is rape although the actual thing is done with her consent, because she never consented to the act of sexual intercourse. She was persuaded to consent to what he did because she thought it was not sexual intercourse and because she thought it was a surgical operation.<sup>43</sup>

It is not easy to reconcile the reasoning in *Williams* with the decision in *Mobilio*. Applying the language of *Williams*, is it not the case that the victims in *Mobilio* were persuaded to consent because they thought the act was not an 'ordinary' act of sexual penetration but a medical or surgical operation?<sup>44</sup>

It is submitted that the reasoning in *Williams* is also closer to the approach under the Criminal Code. It follows from the fact that the Code

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41. [1923] 1 KB 340.

42. *Supra* n 29.

43. *Supra* n 26, 347.

44. For a discussion of *Williams* and *Papadimitropoulos*, and the view that *Williams* was wrongly decided: see G Williams *Textbook of Criminal Law* 2nd edn (London: Stevens, 1983) 561-562; G Roberts in 'Dr Bolduc's Speculum and the Victorian Rape Provisions' (1984) 8 Crim L Journ 296, favours the approach suggested in this article.

focuses on the defendant's fraud rather than the victim's mistake, that attention is inevitably drawn to the surrounding circumstances, and particularly to the fundamental reasons for penetration. The point can be illustrated by considering the question which should be put to the jury if the common law terminology is retained but the question is posed clearly in terms of deceit rather than mistake; the question would be whether the defendant deceived the complainant as to the nature/character of the act and whether the complainant permitted penetration to take place because of this deceit. If the question is so posed, the *reasons* for penetration clearly become relevant and the result of the case would also seem clear; the defendant in *Mobilio* deceived the victims as to the nature of the act by falsely representing that it was a legitimate medical examination; a medical examination is different in nature from an act carried out for personal sexual gratification. Finally, there was no causal problem in this case; it was only because of the deceit that the victims permitted the insertion of the ultrasound probe.

## (ii) Papadimitropoulos and related cases

It seems clear that there is no need for an unrestricted 'wide' view in order to accommodate a conviction for sexual assault on the facts of *Mobilio*. Such a result can be achieved simply through an analysis based squarely on fraud as to the nature of the act rather than a narrow interpretation of mistake as to the nature of the act. However, we must ask whether this approach would 'open the floodgates' of sexual assault laws in the area of personal relationships. This question is best considered by revisiting the facts of *Papadimitropoulos* and considering whether it is possible to construct an argument on those facts that the defendant had deceived the complainant as to the nature of the act. Any such argument would seem to boil down to the proposition that an act of sexual intercourse within marriage is different in nature from an act of non-marital intercourse. In turn, the core of this proposition would be that the *moral quality* of an act of marital intercourse is different from that of non-marital intercourse.<sup>45</sup>

However, despite one's sympathies for the complainant in *Papadimitropoulos*, this line of argument is open to serious objections. There are obvious dangers in opening up the law of sexual assault to judgments about the moral quality of an act and especially to placing courts in the role as arbiters of morality in this context. To return to the earlier examples, it would be wrong for the courts to be called upon to pass judgment as to the moral quality of an act of intercourse between two unmarried parties where a woman agrees to extra-marital intercourse because she believes the defendant's profession of undying love or of an intention to marry; or where

45. J Scutt 'Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and its Moral Implications' (1975) 18 Crim LQ 312.

a man agrees to intercourse when a married woman falsely tells him that she is unmarried. Judgments of morality of this sort do not belong with the courts and especially do not belong with juries. Although the law clearly has a moral backdrop, it is not for courts to make conduct criminal on the basis of moral judgments.

If the law relating to sexual assault is to reflect morality judgments of this sort, it is for Parliament to enact legislation which sets down the specific situations in which the moral quality of the act which is done is so different from that which was represented that an offence of sexual assault should arise. For example, if the facts of *Papadimitropoulos* are to give rise to liability for sexual assault, Parliament, as the elected guardian of society's morality, should enact a specific provision to the effect that consent may be vitiated by a knowingly false statement as to marital status.<sup>46</sup>

## SPREADING DISEASE THROUGH SEXUAL CONTACT

A final category of cases relates to the spreading of sexually transmitted diseases. Take, for example, a defendant who knows that she has HIV/AIDS. Is she guilty of sexual assault if she assures her partner prior to intercourse that she does not have any sexually transmissible disease? It should be emphasised that if this scenario falls within the scope of sexual assault laws, it does not matter whether the complainant actually contracted the disease or not; the question is whether the complainant agreed to sexual contact in reliance upon the defendant's false representations.

At common law this is not rape because there is no mistake as to the nature of the act.<sup>47</sup> Following our earlier analysis of the Criminal Code, this would not constitute sexual assault because the defendant does not deceive the complainant as to the nature of the act. However, under the wide view of fraud it would clearly be open to argue that the defendant is guilty of sexual assault in such circumstances.<sup>48</sup>

Recent legislative changes in Western Australia indicate that the wide view should not be followed in this specific context and hence lend further

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46. In the lengthy preamble to the Law Reform (Decriminalisation of Sodomy) Act 1989 (WA), the State Parliament affirmed its moral disapproval for 'same sex' relationships but did emphasise that moral disapproval should not translate directly to criminal liability: see N Morgan 'Law Reform (Decriminalisation of Sodomy) Act 1989 (WA)' (1990) 14 *Crim L Journ* 180.

47. *Clarence* supra n 22.

48. Even if the defendant made no explicit claims to be free of HIV/AIDS, it could be argued that she may have used 'fraudulent means' if she failed to disclose her HIV status. This argument could be made by analogy with the example of 'fraudulent means' used in the Murray Report supra n 16, namely sneaking into a cinema without buying a ticket.



support to our thesis that fraud will not always vitiate consent. In 1992, in direct response to concerns about HIV/AIDS, Parliament inserted specific provisions into the Criminal Code with respect to the spreading of diseases. It seems clear that Parliament intended that cases involving the 'spreading of disease' by sexual contact would be dealt with by these specific provisions and not by means of an extended application of the sexual assault laws.

This writer does not share the view which has been expressed by some groups that the transmission of HIV/AIDS and other serious diseases should be treated as a 'public health' matter and not as a criminal matter.<sup>49</sup> Indeed, it is submitted that there should be further amendments to the Western Australian Code in order adequately to address the problem. The 1992 reforms merely redefined bodily harm and grievous bodily harm to include certain types of disease.<sup>50</sup> This approach has two major limitations. First, if the defendant has not actually transmitted the disease, the case will, at most, be one of attempted bodily harm or attempted grievous bodily harm. However, attempt charges will be extremely hard to prove because it will be necessary to prove that the defendant *intended* to spread the disease;<sup>51</sup> more commonly, the defendant will be acting recklessly or negligently rather than with any direct intent. Secondly, if the disease in question falls only under the definition of bodily harm rather than grievous bodily harm, the question will arise as to whether the defendant 'assaulted' the victim. An assault will only be established if it can be proved that the complainant did not consent to the application of force (ie the act of sexual intercourse) by which the bodily harm was caused.<sup>52</sup> The question of consent brings us back full circle to the problems discussed above.

In this writer's view, a significantly better model is to be found in a recent discussion paper on the Model Criminal Code:<sup>53</sup>

A person who places another person in danger of contracting a serious disease:

(a) intending that the other person contract the disease; or

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49. See the discussion of submissions in the Model Criminal Code Officers Committee Discussion Paper *The Model Criminal Code: Non Fatal Offences Against the Person* (Canberra, 1996) 57-63.

50. 'Bodily harm' now embraces a 'disease which interferes with health or comfort' and 'grievous bodily harm' includes a 'serious disease': Criminal Code s 1(4). A 'serious disease' is one which endangers life or is likely to endanger life or which causes or is likely to cause permanent injury to health': s 1(1).

51. Criminal Code s 4.

52. Criminal Code ss 222-223. However, offences of grievous bodily harm are not defined by reference to an assault or lack of consent. Consequently, if the disease falls within the definition of grievous bodily harm, the complainant's consent would not be in issue: Criminal Code ss 297, 294; *Raabe* [1985] 1 Qd R 115; *Lergesner v Carroll* (1989) 49 A Crim R 51.

53. *Ibid.*

- (b) being reckless as to whether or not the other person contracts the disease  
is guilty of an offence.

The terms of this proposed offence address the essential nature of the criminality far more directly, clearly and effectively than either sexual assault laws or the non-fatal, non-sexual offences against the person. Although there appear to be serious gaps in the current law, the courts should resist the temptation to stretch the sexual assault laws to cover situations for which Parliament could and should have made express provision.

## CONCLUSIONS

I have argued that in order to give effect to the purpose of reforms to the law of sexual assault, the courts must ensure that juries consider, as a question of fact, whether intimidatory and oppressive behaviour has vitiated an apparent consent. However, the courts must reject the wide view that any type of fraud can vitiate consent; such a view is unworkable and would generate many practical difficulties. Similar problems confront the notions of unconscionability and fraud as to the moral quality of an act. It has therefore been argued that the courts in Western Australia should adopt legal rules which delimit the situations in which fraud vitiates consent and should not regard this merely as a question of fact for the jury. It is suggested that the best approach is for the courts to rework the common law rules. Once it is recognised that the proper focus is the defendant's fraud rather than the victim's mistake, the law can readily accommodate a conviction on facts such as *Mobilio*.

However, there are limits to what the courts can and should do and this area is ripe for legislative review. Rather than leaving the Criminal Code so open-ended, Parliament should consider enacting legislation which addresses specific areas of concern. These may well include bogus medical examinations and the spreading of disease. Although most of the preceding analysis has been concerned with the offences of sexual and indecent assault, any review of legislation should also work out the role of what we termed the 'fraud based offences' because, put simply, the law of fraud is not the appropriate mechanism to police honesty in human relationships any more than the law of sexual assault.

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