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# *Rape and the Civil Law: An Alternative Route to Justice*

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## **STATUTE LIST**

Civil Evidence Act 1968

Criminal Injuries Compensation Act 1995

Criminal Justice Act 1998

Criminal Justice and Public Order Act 1994

Law Reform (Husband and Wife) Act 1962

Limitation Act 1980

Matrimonial Causes Act 1973

Norwegian Damage Compensation Act 1969

Offences Against the Person Act 1861

Protection from Harassment Act 1997

Sexual Offences Act 1956

Sexual Offences (Amendment) Act 1976

Sexual Offences Act 1992

Sexual Offences Act 2003

Supreme Court Act 1981

Youth Justice and Criminal Evidence Act 1999

## CASE LIST

*A v Hoare (and other appeals)* [2008] UKHL 6  
*A v Hoare* [2008] EWHC 1573  
*Appleton v Garrett* (1997) 34 BMLR 23  
*Ashley v Chief Constable of South Sussex Police* [2008] 1 AC 962  
*AT, NT, ML, AK v Dulghieru* [2009] EWHC 225  
*Bater v Bater* [1950] 2 All ER 458  
*Bazely v Curry* [1999] 2 SCR 534  
*Bird v Jones* (1845) 7 QB 742  
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*Chatterton v Gerson* [1981] QB 250  
*Church v Church* (1983) 13 Fam Law 254  
*Clarence* (1888) 22 QBD 23  
*Cole v Turner* (1704) 90 ER 958  
*Collins v Wilcock* [1984] 1 WLR 1172  
*DPP v K* [1990] 1 WLR 1067  
*DPP v Morgan* [1976] AC 182  
*Elbekkay* [1995] CrimLR 163  
*Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22  
*Flattery* (1877) 2 QBD 410  
*Fowler v Lanning* [1959] 1 QB 426  
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*Gibbon v Pepper* (1965) 1 Ld Raym 38  
*Griffiths v Williams* (1995) The Times, 24<sup>th</sup> November 1995  
*Imperial Chemical Industries v Shatwell* [1965] AC 656  
*J v Oyston* [1999] 1 WLR 694  
*Joel v Morrison* [1834] 6 C&P501  
*Halford v Brookes (No.3)* [1992] PIQR P175  
*Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841  
*Hill v Chief Constable of West Yorkshire* [1989] AC 53  
*Ireland; Burstow* [1998] AC 147  
*Konzani* [2005] 2 Cr App R 14  
*KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441  
*Latter v Braddell* [1880] 50 LJQB 448

*Lawson v Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865  
*Letang v Cooper* [1965] 1 QB 232  
*Linekar* [1995] QB 250  
*Lister v Hesley Hall Ltd* [2001] UKHL 2  
*Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34  
*Malone* [1998] 2 Cr App R 454  
*MC v Bulgaria* [2005] 40 EHRR 20  
*Meah v McCremer* (No. 1) [1985] 1 All ER 367  
*Miles v Cain* (1989) *The Times*, 15<sup>th</sup> December 1989  
*Moore v Green* (1990) *The Guardian*, 13<sup>th</sup> September 1990  
*N v Chief Constable of Merseyside Police* [2006] EWHC 3041 (QB)  
*Non-Marine Underwriters, Lloyd's of London v Scalera* [2000] 1 SCR 551  
*O'Brien v Cunard Steamship Co.* (1891) 154 Mass. 272  
*Orr v Norway* [2008] ECHR 387  
*Parrington v Marriott* (1999) Unreported, Court of Appeal, 19<sup>th</sup> February 1999  
*Prosecutor v Akayesu* [1998] ICTR-96-4-T, Judgment 2<sup>nd</sup> September 1998  
*R v A (No. 2)* [2002] AC 45  
*R v Chief Constable of Devon and Cornwall, ex parte CEGB* [1982] QB 458  
*R v Bree* [2007] EWCA Crim 804  
*R v Dica* [2004] EWCA Crim 1103  
*R v Dougal* (2005) Swansea Crown Court  
*R v Governer of Brockhill Prison, ex parte Evans (No. 2)* [2002] 2 AC 19  
*R v Legal Aid Board and Anor, ex parte Moores* (1992) Unreported, 4<sup>th</sup> March 1992  
*R v Legal Aid Board, ex parte Moores* (1992) Unreported, 16<sup>th</sup> December 1992  
*R v MOD* [2007] EWCA Civ 1472  
*R v R* [1991] 4 All ER 481  
*R v Satnam and Kewal* [1984] 78 Cr App R 149  
*R v Tabassum* [2000] Crim LR 686  
*R v Williams* (1923) 1 KB 340  
*Robinson v Balmain New Ferry Co. Ltd* (1910) AC 295  
*Re B (Children)(Sexual Abuse: Standard of Proof)* [2008] UKHL 35  
*Re D* [2008] 1 WLR 1499  
*Re F* [1989] 2 AC 1  
*Re H and others (Minors)( Sexual Abuse: Standard of Proof)* [1996] 2 WLR 8  
*Re W (Minors)(Sexual Abuse: Standard of Proof)* [1994] 1 FLR 419  
*Rookes v Barnard* [1964] AC 1129

*S v W (Child Abuse: Damages)* [1995] 1 FLR 862  
*Scott v Shepherd* (1773) 95 ER 1124  
*Stephen v Myers* [1830] 172 ER 735  
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*W v Meah; D v Meah* [1986] 1 All ER 935  
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*Weir v Chief Constable of Merseyside Police* [2003] EWCA Civ 111  
*Williams v Holland* (1833) 10 Bing. 112  
*Williams v Humphrey* (1975), *The Times*, 20 February 1975  
*Wilson v Pringle* [1987] QB 237  
*X and Y v Netherlands* [1985] ECHR 4  
*Y v Norway* [2005] 41 EHRR 7

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Rape: The Legal Context

Over the past three decades there has been a considerable amount of attention paid to the problem of rape and how the law and legal system should address it. During this period, feminists highlighted the ways in which expressions of male sexuality and dominance all too frequently deny women respect for their sexual autonomy and integrity, revealing the extent to which rape pervades society (for a recent example of the prevalence of rape, see Povey *et al.* 2008: tables 3.01 and 3.03). As feminists secured rape on the political agenda, changes to rape laws were gradually introduced, from restrictions on the admissibility of sexual history evidence (Sexual Offences (Amendment) Act 1976, sections 2(1), (2); Youth Justice and Criminal Evidence Act 1999, section 41) to the abolition of the marital rape exemption (*R v R* [1991] 4 All ER 481; Criminal Justice and Public Order Act 1994, section 142). Over this time, a progressive increase in the number of reported rapes has been seen; however, the number of convictions remained static, resulting in a considerable 'justice gap' (Kelly *et al.* 2005). In response to growing concerns, the sexual offences underwent significant governmental reviews at the turn of the century and reforms were ratified in the Sexual Offences Act 2003 (Home Office 2000, 2002, 2006a). But, it seems, to little avail; the conviction rate remains at 6 per cent (HMCPSP 2007: 2.10; Home Office 2006b) and the 'justice gap' continues to widen (Kelly *et al.* 2005).

A significant reason for this, it is suggested, is that the problem of rape is connected to perceptions of what constitutes (hetero)sexual normality and appropriate masculine and feminine behaviour which it seems unlikely the changes in substantive laws alone can obviate (Lacey 2001: 14; Centre for Law, Gender and Sexuality 2006). Common (mis)understandings and shared assumptions of what amounts to 'real' rape and what otherwise reflects 'normal' sexual relations - so-called 'rape myths' - influence the implementation of the laws, preventing justice from being done in many cases (Temkin and Krahé 2008). While this has been recognised and procedural changes and other measures have been introduced and explored in attempts to dispel these myths (Home Office 2006a), meanings and understandings of gender and sexuality are so socially ingrained that attitudes towards rape and victims remain problematic (Temkin and Krahé 2008). Consequently, in spite of significant political good will, there has been slight impact on the conviction rates for rape and there seems almost no prospect of immediate improvement (Home Office 2006b: 3).

In light of this, the civil law will be considered as a way out of the impasse. There has, in fact, been an increase in the number of civil suits for rape brought in other jurisdictions – notably the US and Canada – matched with a growing body of academic literature on the subject (LeGrand and Leonard 1978; West 1992; Feldthusen 1993; Bublick 2006) - and there have been similar cases, albeit fewer, in the UK (for example, *Parrington v Marriott* (1999) Unreported, Court of Appeal, 19<sup>th</sup> February 1999; *Griffiths v Williams* (1995) *The Times*, 24<sup>th</sup> November 1995; *Lawson v Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865). As such, tort law, in particular the torts comprising trespass to the person – battery, assault and false imprisonment – will be explored as a means to provide an alternative legal avenue to redress rape; and, possibly, a way in which to disrupt and destabilise rape myths and gendered assumptions.

On the face of it, there are advantages which may make the civil route appealing, for example the lower standard of proof – the claimant has to prove the case on the balance of probabilities, rather than beyond reasonable doubt as in the criminal law. Other differences are in the remedy of compensation afforded to the claimant as opposed to punishing the defendant, and the fact that the trial is more likely to be conducted without a jury. Furthermore, in contrast to the criminal law where the complainant is only a witness to the state's action, which is said to further victimise and traumatise rape victims (Madigan and Gamble 1991), the claimant in the civil law brings the case against the defendant herself which has the potential of providing a sense of therapeutic justice and empowering those who have been subject to rape (Feldthusen 1993; West 1992). However there are considerable disadvantages of the civil system. Taking responsibility for the claim against the defendant, and going through a civil trial where the claimant's experience of rape and behaviour, conduct and sexual history will be on public display may be equally – if not more – traumatic than the criminal trial. In addition, civil cases are notoriously costly and lengthy, and the possibility of receiving compensation is limited by the defendant's ability to pay. These difficulties may act as considerable deterrents to civil claims.

Moreover, responding to rape as a civil - as opposed to a criminal - wrong may have the consequence of it being perceived as being treated less seriously. And, civil claims for rape, brought under the trespass to the person torts, nevertheless face a number of doctrinal boundaries and procedural restrictions which not only limit the success of cases but contribute to constructing and maintaining a problematic conception of rape. However, on the one hand, the way in which tort law frames rape may be different to the criminal law and this could limit the influence of myths and assumptions; yet on the other,

these myths and gendered models could similarly play out in the civil context, only serving to perpetuate rather than subvert them.

But this could be an inevitable consequence of turning to law which, Carol Smart (1989) argues, is an embodiment of male power, operating to reinforce and reproduce the gender inequalities which give effect to rape and provide rape myths with their power. However, Smart's location of the power of law firmly within its ideology divorces theory from practice, precluding any possible interface (Bottomley and Conaghan 1993: 2-3). And theory and practice are not dichotomised to this extent, interacting in such a way as to hold a 'series of ideas, practices and engagements ... together loosely under the rubric "law"' (Bottomley and Conaghan 1993: 2-3). Although this is not to say that law does not generally privilege certain classes, it is to say that if 'the state is male in the feminist sense: the law sees and treats women the way men see and treat women' (MacKinnon 1989: 141), then this must be challenged - law cannot be avoided by feminists simply because it is gendered and has gendering effects (Conaghan 1996a: 431).

As such, considering the difficulties the criminal justice system has in implementing rape laws, but without abandoning law, the trespass to the person torts will be advocated as an alternative way in which to recognise that a wrong has been done and redress the harm that has been caused. To this end, the thesis will take the small body of case law as its backdrop and explore the extent to which tort law can respond to the realities of rape and might disrupt the distorting presence of rape myths, and consider its potential to provide justice for rape victims.

## **1.2 Chapter Outlines**

After having briefly considered the difficulties the criminal law and legal system has had in addressing rape in this first introductory chapter, the first part of this thesis will explore rape and the criminal law in more detail. The second chapter will explore different conceptualisations of the wrong and harm of rape, and debates as to how it should be defined. This will allow for the criminal laws on rape to be positioned in relation to these debates, and then, later in chapter four, to repeat and compare with the torts comprising trespass to the person. Starting with the deliberations as to whether rape is about violence or sex, the chapter will move on to explore tensions between consent and coercion based definitions of rape, both in relation to defining the wrong and conceptualising the harm. In light of these debates, the definition of rape in the Sexual Offences Act 2003 will be evaluated. However, while the substantive rape laws are not

without criticism, a considerable part of the problem is the way in which they are interpreted and applied.

The third chapter will explore rape in the criminal justice system and the extent to which rape myths and assumptions as to what constitutes 'real' rape and 'normal' sex influence the implementation of the law and inhibit victims' route to justice. Beginning with these social (mis)conceptions, it goes on to consider the extent to which these ideas inhabit the minds of those within and outwith the criminal justice system, contributing to maintaining a high level of non-reporting and attrition, and a low conviction rate for rape. However, there have been measures introduced in attempts to limit the influence of rape myths and gendered assumptions, such as limitations on the use of sexual history evidence (Youth Justice and Criminal Evidence Act 1999, section 41), but it seems they have had little impact on altering attitudes to rape. In this regard, the chapter will consider why rape myths are so powerful in inhibiting legal change, and the way in which the criminal law in its purpose(s), substance and structures, can be said to support the meanings of gender which are embodied in rape myths.

The civil law then, in part two of the thesis, will be considered in two (interrelated) respects. One, whether it can provide an alternative mode of redress for rape where the criminal law more commonly – in nearly 19 out of 20 cases – denies it. And two, if altering the definition of rape – bringing it within the torts comprising trespass to the person - and framing rape as a tort - with different meanings, purpose(s) and procedures to the criminal law - can disrupt rape myths and gender stereotypes which dominate current social perceptions.

In the fourth chapter, the purpose(s) of tort law will be considered and the reasons why victims of rape may wish to pursue a civil case. While there are conflicting views as to the aims and functions of tort law, whichever approach is taken it can encompass claims for rape. Moreover, it is clear that the act of rape comes within the boundaries of the torts comprising trespass to the person – battery, assault and false imprisonment. This will be explained before considering the differences between these torts and the crime of rape, for instance in relation to the definition of the acts, the label 'rape' and the conceptualisation of the wrong and harm. Further, the claim that tort law is gendered and gendering will be explored, and the extent to which this may maintain a problematic conception of rape and limit the potential of tort law to redress it. Finally, this chapter will analyse *Lawson v Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865 as an example civil claim for rape, concluding that tort law can be seen to have a gendered dimension and, further, that rape myths, assumptions and particular understandings of rape may influence such cases.

The fifth chapter will explore procedural differences, beginning with the standard of proof. While the civil standard is lower than the criminal standard, the case needing to be proved on the balance of probabilities and not beyond reasonable doubt, it has been applied in a more stringent manner in civil cases which involve 'serious' acts. This is evident in claims for rape and may, to some extent, reduce this advantage of the civil law. Following this, there will be an examination of the way in which rape cases and complainants are treated in the civil justice system, particularly at the trial stage. In this respect, the extent to which the lack of restrictions on the use of sexual history evidence is problematic will be explored. The troubles of such evidence being used to invoke rape myths will be weighed against the claimant taking responsibility in a system of formal equality, which may act as a mode of empowerment (West 1992). Further, the fact that a bench trial is more commonly the norm in civil cases whereas a criminal rape trial is heard by a jury might be beneficial in the context of civil claims for rape as judges may be less likely to be influenced by rape myths than jurors. If this is the case, it may limit the problem of sexual history evidence, however it would be unlikely to reduce the stress of the trial which is increased by the use of such evidence.

The role of finance in civil claims will be explored in the sixth chapter. The extent to which high costs and impecunious tortfeasors may limit (direct) civil claims for rape will be considered, in addition to alternative claims that can be made – such as those which are brought vicariously – as well as another source of compensation, the Criminal Injuries Compensation Authority. The response and remedy these alternatives provide will be compared to direct tortious actions, and reasons as to why such claims in tort law may be brought, other than compensation, will be considered. Nevertheless, as compensation is the typical means by which tort law remedies wrongs, the level of damages awarded in rape cases will be explored, as well as the way in which the tortious categorisation of harm and damages contributes to its construction of a particular conception of rape.

The final chapter will consider whether civil claims for rape are most likely to be brought in addition to or instead of a criminal complaint being made. This will be examined in relation to the reasons for which rape victims may wish to bring a civil or criminal case against the perpetrator; and with regards to the fact that the presence or absence of a case in one system can have an impact on proceedings in the other. This may affect the likelihood that a civil claim for rape will be successful and limit the choices of rape victims as to whether to make a criminal complaint, civil claim or both.

However, it will be borne in mind that by framing rape as a civil – as opposed to a criminal – wrong may undermine the severity of rape, and the necessity of the criminal

law will be considered. Nevertheless, the thesis will conclude, tort law can provide an alternative avenue of redress for victims of rape and it is another way in which to legally recognise that a wrong has been done and harm has been caused. Furthermore, it may provide an alternative perspective from which to interrogate the harm of rape that could improve understandings of rape in the criminal law and provoke a rethink of rape and the legal response.

## PART 1

# **RAPE AND THE CRIMINAL LAW**

## CHAPTER 2

### CONCEPTIONS AND DEFINITIONS OF RAPE

#### 2.1 Introduction

Rape has been at the forefront of feminist concern over the last four decades, placing considerable pressures on policy-makers to effect changes in the law. In particular, there has been an emphasis on altering the definition of rape from one which primarily characterises (unlawful) sexual relations from a male perspective to one which is more reflective of women's experiences. However, the way in which this should be done and how women's sexual integrity and autonomy can best be protected by rape laws has been debated within feminist legal theory. For example, there are conflicting views as to whether rape is an act of violence or one of sex, over the (in)capability of the concept of consent to protect women's autonomy, and how the presence of coercive circumstances can inform understandings of rape. This chapter will explore these debates over the conceptualisation of rape and how it should thus be defined in law. In light of this, the current law as enshrined in the Sexual Offences Act 2003 will be evaluated, and reasons why substantive changes have failed to have much of a positive impact in practice will be considered. Further, these debates will also inform the analysis of the civil law as a possible alternative legal means to address rape in exploring the definitions and conceptualisations of the trespass to the person torts which encompass rape (or acts like rape) (chapter 4).

#### 2.2 Violence or Sex?

Historically, rape was seen as a violation of a man's proprietary rights over a woman. Belonging either to her father or her husband, rape left a woman as 'damaged goods', bringing shame to her and her family. It was defined by William Blackstone as the 'carnal knowledge of a woman forcibly and against her will' (1765: 209). Deriving from the latin *rapere* meaning 'to seize by force', rape was viewed primarily as a form of theft and only secondarily as the assault of a woman (Oxford English Dictionary; Naffine 1994: 18-20).

In the 1970s, Susan Brownmiller's *Against Our Will* (1975) drew feminists' attention to rape, arguing that sexual assaults against women embody and express male dominance in a political drive for power. Viewed in this way, although rape occurs between two individuals it is social by definition as rapist and victim are located in the categories of gender (Brownmiller 1975: 397). Rape, therefore, is not about sex but rather

violence against women. Similarly, Susan Estrich (1987) argued that sex needs to be recognised as inconsistent with violence and rape is a violent act, not a sexual one. Importantly, however, violence does not mean purely physical force or physical injury: first, this does not necessarily distinguish sex from rape as consensual sexual intimacy can contain such elements and, secondly, this does not represent the nature of the violence in rape which can take the form of not only force but deception or coercion, for example (Estrich 1987). Violence, in other words, is an abuse of power.

In contrast, Catharine MacKinnon argues that a line cannot be drawn between sex and violence or sexuality and gender because, like violence, sexuality is about power: all sex contains an element of violence – such as physical force, economic coercion and even love – because sexuality is inherently linked to (male) power (1987: 88). She presents a model of sexuality in which to be male is to dominate and to be female is to submit which, she says, has been eroticised so that ‘rape may be sexual to the degree that, and because, it is violent’ (1983: 646). Put another way, violence against women is inherently sexual and sexual interactions are inherently violent because both are an expression of this construction of sexuality (1989: 174).

Nevertheless, the commonality between these positions is defining rape as a particular form of (sexual) violence against women, or gendered harm.<sup>1</sup> These are harms which are suffered only or more commonly by women as a product of - and (re)produce - gender inequality, which, in part, informs the nature of and shapes the experience of the harm.<sup>2</sup> However, there are different ways in which this can be understood. For example, Brownmiller ties rape’s gendered incarnation to biological differences between the sexes: ‘in terms of human anatomy the possibility of forcible intercourse incontrovertibly exists. ... When men discovered they could rape they proceeded to do it’ (1975: 13-14). Although, she argues, any form in which male dominance is exerted over women is rape, this exertion of power ultimately derives from the exploitation of the biological possibility of rape and women’s subordination. In contrast, rather than defining gender (and consequently rape) in relation to biological sex differences, MacKinnon describes the gendered nature of rape as a reflection of structural inequalities (1987, 1989). Viewed in

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<sup>1</sup> Regina Graycar and Jenny Morgan prefer the term gendered harm as it broadens the focus from acts which are traditionally seen to come within the rubric ‘violence against women’ – such as rape and domestic violence – to other harms women more commonly suffer such as those related to (unwanted) pregnancy or fertility control. In this respect, they argue that the term violence has particular connotations and does not reflect the more and different ways in which women suffer and experience harm (2002: 301-2). To this idea, the term gendered harm will be used throughout this thesis rather than (sexual) violence against women.

<sup>2</sup> Graycar and Morgan; 2002: 300-3; outlining Adrian Howe’s concept of social injury which forms the basic idea of gendered harm.

this way, the occurrence of harm follows patterns of social arrangements, and, further, such arrangements and social meanings affect the way in which the harm is experienced and perceived. For instance, where a rape victim is male this does not necessarily absolve rape of its gendered meaning as it is nonetheless an embodiment of male violence and 'an experience which "feminises" men' (Gillespie 1996: 160).

However, MacKinnon has been criticised for defining 'woman' as the subordinate position in the sexual hierarchy - 'sexuality as defined by male dominance' - which condemns women to be trapped within patriarchy (Anleu 1992). In other words, she depicts women as inevitably powerless, contributing to representing and (re)enforcing sexual difference. Furthermore, relying on this fixed model of gender and sexuality not only (re)produces these meanings, but, feminists have argued, the categories themselves are oppressive. By assuming gender can be defined, those whose experiences do not come within these understandings are marginalised and diversity among women is ignored; moreover, this eschews the ways in which individuals' experiences are shaped and informed by their identification with other social categories such as race or class (for example, Harris 1994; Smart 1989: 66-89). So understood, describing rape and sexual assaults as 'sexual crimes against the bodies of sexed subjects ... effectively reduce[s] them to their 'sex' thereby reaffirming and enforcing the reduction of the category itself' (Butler 1990: 166).

In response, Holly Henderson explores redefining rape as an assault based on Foucault's desexualisation of rape because, she says, if it is seen as only violence, not sex, then perhaps the discursive construction and regulation of sexuality through rape laws can be avoided (2007: 239). She acknowledges, however, that this would be at the expense of obscuring the reality that the body is already (discursively) sexed as it would be 'suspended in the hope that it will begin the process of de-saturating this misplaced meaning' (2007: 248). Against this 'suspension of meaning', Joanna Bourke argues that if rape is experienced in a different way to non-sexual assaults, then it must be seen and treated as such (2007: 408). The challenge for feminists, therefore, is to recognise this whilst at the same time disrupting these meanings to avoid 'essentiali[sing] rape as a static component of our social formation' (Henderson 2007: 244).

In relation to gendered harms more broadly, Adrian Howe defends that referring to understandings of gender does not necessarily enforce fixed gender categories, or ignore the ways in which other features of identity influence subjective understandings and experiences; but as gender is a part of the social reality which is experienced, it must be acknowledged as maintaining, conveying and (re)producing particular meanings (Howe 1994: 176, extracted in Graycar and Morgan 2002: 301). It is in this respect that the

ways in which the criminal law and particularly tort law construct and respond to rape as a gendered harm will be explored.

### 2.3 Sex without Consent

Moving away from historical understandings of rape as depriving a man of a woman as his property, or of sex procured by physical force, it has been reframed as violation of sexual autonomy, and of women's sexual autonomy in particular. In so doing, the focus was shifted from the force or coercion used by the perpetrator, to the question of whether or not the sex was consensual (Estrich 1987; Henderson 1992; Schulhofer 1998).

Consequently, whenever a woman does not consent to sex – and for whatever reason(s) – then it is rape. The point is that individuals have the right to make choices in relation to their sexual engagements: first, in relation to freely choosing to refuse sexual contact by another, and secondly in freely choosing to engage in sexual relations (with another who has made a free choice) (Schulhofer 1998). This choice is represented by the concept of consent or, in John Gardner and Stephen Shute's opinion, the choice is consent (2000).

Viewed in this way, the harm of rape is the violation of sexual autonomy and so the absence of consent became a central element of rape (Sexual Offences Act 1976, section 1; and now the Sexual Offences Act 2003, section 1). This facilitated other legal changes such as the abolition of the exclusion of rape within marriage - a significant step forward in enshrining the protection of women's sexual autonomy (*R v R* [1991] 4 All ER 481; Criminal Justice and Public Order Act 1994, section 142). Nevertheless, ideas that rape is accompanied by (physical) force and that it is not 'real' rape where it occurs between people who are or have been in an intimate relationship pervade the collective imagination (see chapter 3, section 3.2). As such, where a situation looks like 'sex' rather than 'rape', typically it is thought that the victim was consenting – or, at least, the accused honestly or reasonably believed she was consenting (Smart 1989: 33). That is to point out that to amount to rape it is not only necessary that the victim did not consent, but that the accused did not believe she was consenting. In this regard, it was held in *DPP v Morgan* [1976] AC 182 that an honest but not necessarily reasonable belief in the victim's consent would suffice.<sup>3</sup> This decision caused considerable controversy, and the *Morgan* defence became known as the 'rapist's charter' whereby the defendant would simply have to

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<sup>3</sup> The decision was subsequently reaffirmed in the Sexual Offences (Amendment) Act 1976; and it was later clarified that the perpetrator (subjectively) must either have known that the victim was not consenting, or been reckless as to whether or not consent was given in that he did not consider the victim may not be consenting (Criminal Justice and Public Order Act 1994, section 1(2)(b); *R v Satnam and Kewal* [1984] 78 Cr App R 149).

convince the jury that he honestly believed in consent (Temkin 2002: 119). As this mental state is difficult to disprove, in effect men could rape with relatively little threat of punishment (Temkin 2002: 120). However, after continuous feminist criticism, the law was changed (albeit against significant resistance) so that only a reasonable belief in consent will suffice (Home Office 2002; Sexual Offences Act 2003, section 1). Nevertheless, what is typically viewed as 'reasonable' tends to reflect the dominant perspective; in other words, the situations and circumstances in which men view a woman usually consents to sex (MacKinnon 1983: 652). That is, where a woman's behaviour, attitude and dress, while passive in itself, acts to draw men's sexual attention and seduction, reflecting assumptions of what constitutes acceptable masculine and feminine behaviour and 'normal' sexuality. In such conditions, a woman's 'no' is often interpreted as meaning 'yes' (Estrich 1987).

Furthermore, Carol Smart argues, consent cannot protect women's sexual autonomy because the language of consent itself is gendered (1989: 33-4). By framing sexual relations as something which one party does and one party consents to reflects a subject-object model in which men are active and women are passive, men possess and women are possessed (Naffine 1994). Consent, rather than protecting women's sexual autonomy, constructs their sexuality in a mirror of men's (Naffine 1994: 33). Further, Smart argues, the either/or, consent/non-consent binary does not reflect the realities of women's lives (1989: 34). For example, it does not accommodate ambiguities such as when a woman may unwillingly or reluctantly submit to sex - or at least in so far as it does submission falls on the 'consent' side of the dichotomy, reinforcing 'phallogentric values' (Smart 1989: 34).

## **2.4 Freedom of Choice and Gender Inequality**

### **2.4.a *Consent v. Coercive Circumstances***

Consent is predicated on the notion that individuals have the freedom and capacity to make a choice. This, MacKinnon argues, does not account for the ways in which structural inequalities, power differentials and socio-sexual norms limit and shape women's choices to withhold consent or engage in sexual relations (1987, 1989). In this respect, women's choices are obscured because men's dominance over women is socialised and eroticised in and by understandings of (hetero)sexuality and, as such, MacKinnon implies, it becomes difficult to distinguish between rape and sex (1989: 174). So understood, Louise du Toit argues, '[c]onsent is no more than a notion men conveniently employ to characterise women's submission as a product of free choice' (2007: 59 (italics removed)). The rhetoric

of choice, therefore, maintains the status quo of male (sexual) dominance by (re)constructing it as female sexuality in 'presuppos[ing] what it undermines' – that is, women's sexual agency (du Toit 2007: 59 (italics removed)).

In light of this, MacKinnon calls for a shift in focus from consent to the circumstances in which sexual relations take place, so that rape would be redefined as a 'physical invasion of a sexual nature under coercive conditions' (MacKinnon 2006: 956). However, defining rape in relation to coercive circumstances and sexual inequality could deny women the capacity to make choices and exercise their agency by conceptualising women as powerless victims (Abrams 1995: 329-32). Consequently, in retaliation, Camille Paglia (1992), Christine Hoff Summers (1995) and Katie Roiphe (1994) argued that rape should only be restricted to situations where there is clear force and/or threats and should not, as they suggest radical feminists did, confuse rape with 'bad sex'. They accepted that while women may have been coerced in other situations, they made choices which led them into that situation, of which they should know the potential consequences, and therefore should 'take responsibility' and clearly express their sexual boundaries. This frames women as being empowered to make their own choices, relieving them from their victim status.

So, it is argued on the one hand that radical feminists overemphasise the power of male dominance to the extent that it denies women agency, however, on the other that representing women's agency as entirely unrestrained obscures the extent to which social and relational contexts limit and shape the choices that are made. As such, Robin West (1992) and Lynne Henderson (2002) have argued that while there is a continuum from pleasurable sexual intercourse to rape, there is a dividing line between rape and 'bad sex' which can be drawn, and one that does not necessarily lay with the use of force or threats. This rests, Henderson explains, on the extent of the woman's pain and the extent of the man's disregard for her personhood and humanity because although "'bad sex" covers a range of heterosexual interactions ... women do not feel *raped*, if for no other reason than they are exercising some agency' (1992: 165-6; see also Schulhofer 1998: 56).

#### 2.4.b *The Harm of Rape*

These positions also highlight different aspects of the harm of rape. Where rape is defined by (lack of) consent, the harm is mainly located in the violation of sexual autonomy and personal integrity, whereas a definition which is centred on the coercive circumstances in which sexuality is expressed situates the harm primarily in gender inequality. In relation to the latter, in order to convey the harm to individual women *as women*, as harm to

women as a collective, rape is seen as the 'shattering of identity', as a 'fate worse than death' (Bourke 2007: 425). However, if the devaluation of an individual woman's identity is the shattering of her identity as a *woman*, it is argued, this reinforces women's inequality. And, although rape 'does not *actually* degrade or make the person less valuable ... people can treat others as if they were less valuable, as if they were inferior' (McGregor 2005: 229). So viewed, talking about rape as self-shattering contributes to it being experienced in this way (Henderson 2007: 250). In other words, this reifies the harm of rape as treating it as a 'fate worse than death' contributes to both a woman's perception of her experience of rape as such and the way in which that woman is perceived by others (Engle 2005: 813). In this regard, Kelly Askin has questioned that if the stigma and stereotypes associated with rape can be reversed whether this can 'take away much of the power held by the perpetrators of these crimes' (2003: 347).

However, the harm of rape has been similarly emphasised when it is primarily located in the individual under consent-based definitions. Where rape is conceptualised as a violation of sexual autonomy, with the perpetrator having no respect for the victim as a moral agent, as a person, the psychological and emotional harms this causes have been highlighted. These harms ranged from feelings of shame, embarrassment, guilt, humiliation and shock to long-term psychiatric disorders and difficulties in building and maintaining relationships, and, in this way, can be perceived as a 'fate worse than death'. The attention drawn to these harms was largely a challenge to the view that rapes which occurred without violence, particularly those between (ex)partners, were less harmful (for example, see Wiehe and Richards 1995). However, to validate such experiences a particular response to rape which embodies these psychological and emotional harms was canvassed and labelled 'rape trauma syndrome' (RTS). This, arguably, has led to an idea of a typical rape victim response and women who do not react in this way are not believed to have been raped and their experience is delegitimized (Kennedy 2005: 133-4). Further, Susan Stefan put forward, this depicts women as being inevitably psychologically and emotionally traumatised by rape; and, consequently, the recognition of RTS has been individually and collectively damaging for women (1993).

Therefore, each of these conceptualisations which draw attention to different aspects of the harm of rape can be said to create narratives which exaggerate and reify the harm on the levels of both the individual and collective. However, rather than denying the harm rape can and does cause it has been suggested that 'survivor discourse' be produced as a means to emphasise that women can and do overcome the harms of rape and move on with their lives (Sandland 1995: 36; Kelly 1988). Yet it has been pointed out that 'labels of survivor still construct an identity in relation to the before and after the attack and so the

sexually abused must define themselves in relation to the actions of the perpetrator' (Bourke 2007: 430). Nevertheless, the harm of rape and the impact on an individual's life must be acknowledged and it 'needs to be thought of as pervasive, sustained and repetitive, but not ultimately defining, element of women's experience' (Cahill 2001: 4-5).

#### 2.4.c *The Context to Consent and Harm*

While defining rape by the absence of consent has been subject to criticism, the alternative of framing rape in relation to coercive circumstances is equally as problematic. Typically, the former is viewed to ignore the context in which choices are constrained and made, while the latter may deny women sexual agency. To strike a balance, gender inequalities must be accepted as shaping individuals' choices, but a sense of agency must be retained to allow the possibility of challenging and resisting those imbalances (Abrams 1995: 374-6). In this respect, the potential of the concept of consent to be sensitive to social and relational context has been highlighted, and attempts have been made to (re)conceptualise consent to better account for the realities of women's lives (Cowan 2007; Munro 2008).

Starting from the point that communicating the absence or presence of consent does not protect women's sexual autonomy (cf. Schulhofer 1998; Weirtheimer 2003), so-called 'consent plus' models have been advanced. These models advocate consent as a necessary element but one that is not sufficient in and of itself to allow choice and agency to be exercised; and, therefore, to legitimate sexual engagements something more is needed – for instance, mutuality, agreement or 'wantedness' of sexual relations (Chamallas 1988; Anderson 2005; Munro 2008). This may allow for women to act as moral agents whilst enabling a space for critically reflecting on the social conditions within which they act and make choices (Munro 1998; and more generally, Lacey 1995). So viewed, this could escape the narrow conception of consent which operates on the assumption that individuals have the capacity and freedom to act regardless of material circumstances without necessarily restricting women's ability to choose. Furthermore, the harm of rape here is primarily located in the individual, although the unequal environment is recognised as cultivating and reinforcing such harmful relations. In other words, it accounts for rape as a gendered harm, but, arguably, in such a way that does not construct women as being inevitably victimised by rape, suffering an irrecoverable harm to their identity as a woman – a fate worse than death – yet nonetheless allows for recognition of the multiple ways in which rape can be harmful individually and collectively.

What can be taken from this is that harm is not a natural and inevitable given but is a social construct, a concept which is open to interrogation and susceptible to

change (Conaghan 2002). Also, it is important to recognise that, in Sharon Cowan's words, '[c]onsent is a concept which we can fill either with narrow liberal values, based on the idea of the subject as an individual atomistic rational choice maker, or with feminist values encompassing attention to mutuality, embodiment, relational choice and communication' (2007b: 53). So understood, in spite of doubt as to whether 'consent is a meaningful concept' (MacKinnon 1989: 178), perhaps the better question is whether it can be made so – as Martha Minow points out, 'rights rhetoric bears traditional meanings but it is capable of carrying new meanings' (1986, as quoted in Bridgeman and Millns 1998: 34). Similarly, Susan Estrich argues that '[c]hanging the words of the statute is not nearly as important as changing the way we understand them' (1987: 91).

## **2.5 The Legal Definition of Rape: The Sexual Offences Act 2003**

At the turn of the century, the laws on sexual offences underwent a significant review. The previous legislation was condemned as 'archaic, incoherent and discriminatory' and in much need of updating to respond to 'changes in society' (Home Office 2002: 8, 4). After successive governmental initiatives, the result was the Sexual Offences Act 2003 (SOA). Prior to this, rape had taken a prominent place on the feminist agenda since the 1970s, instigated by the decision in *DPP v Morgan* and the Heilbron Committee (1975), but had thus far lead to piecemeal reforms. The first major statutory changes had been in the Sexual Offences Act 1976 which removed the necessity of evidence of force or resistance and centred the crime on lack of consent (section 1). It also placed restrictions on the use of sexual history evidence (section 2) which were further extended in the Youth Justice and Criminal Evidence Act 1999 (section 142). By this time, the marital rape exemption had been abolished, first at common law and then reinforced by statute (*R v R* [1991] 4 All ER 481; Criminal Justice and Public Order Act 1994, section 142). However, rape laws were still considered inadequate and in need of a substantial reform, exemplified by the low conviction rate which continued to fall (Home Office 2000).

The changes were collaborated in the SOA 2003 which, *inter alia*, altered both the *actus reus* and *mens rea* of rape. Currently, rape is defined as a person intentionally penetrating another's vagina, anus or mouth with their penis without their consent and without reasonable belief in their consent (SOA 2003, section 1). Further, a definition of consent is provided, in addition to circumstances which raise presumptions about the absence of consent (sections 74-6). However, the Home Office's review of the SOA 2003 concluded that it had had little impact on improving the conviction rate for rape or encouraging more women to report rape (2006b: 97). Moreover, there has been

scepticism as to what extent 'tinkering' with the substantive law can really effect change, doing little to challenge the framework of gender and sexual inequality embedded in society within which these laws are implemented (Centre for Law, Gender and Sexuality 2006).

### 2.5.a *The Gendered Act of Rape*

By definition, rape is a gendered offence as it is restricted to penile penetration so that only men can rape. However, since the Criminal Justice and Public Order Act 1994, both women and men can be victims of rape as the definition was broadened from penetration of the vagina to include non-consensual anal intercourse (section 142).<sup>4</sup> But the SOA 2003 went further, so that now non-consensual penile penetration of the mouth can also amount to rape (section 1) to recognise the similar level and type of harm this causes (Home Office 2000: 2.3.1). These moves have been towards a gender-neutral offence, but it still remains that only men can be the perpetrators. However, these moves, and the current law, are controversial.

In favour of the expansion of the *actus reus* for rape, it has been argued that including men as the potential victims of rape acknowledges that these instances can be as much of a violation of sexual integrity and equally as harmful as vaginal penetration (Rumney 2001: 894-8; Rumney and Morgan-Taylor 1997: 219-4). However, as women are precluded from perpetrating rape this ignores the extent of harm women can cause by sexually assaulting men, and the similarities of this to the sufferings of female rape victims (Rumney 2001). Furthermore, Smart argues, the focus on penile penetration reflects a male view of sexuality, stemming from and perpetuating a 'phallogocentric culture' which 'disqualifies' women's sexuality (1989: ch. 2). In this way, male sexuality is normalised as heterosexuality whereby men act upon women as the object of their desires (Naffine 1994). In light of these arguments, it has been suggested that rape laws should be completely gender neutral so that women can also commit rape. This has been the approach taken in some Australian jurisdictions and in Canada (for analysis see Naffine 1994; Boyle 1985). However, it has been argued that a gender neutral definition of rape does nothing to challenge the object-subject formation of heterosexuality: just by labelling it as gender equal does not make it so (Naffine 1994: 30). Rather, gender neutral definitions of rape conceal the gender of each role, misrepresenting rape as they compound the nature of it as an expression of male violence and distort the reality that

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<sup>4</sup> Previously the separate offence of buggery; Sexual Offences Act 1956, section 12. This was not repealed until the Sexual Offences Act 2003, Sch. 7 para. 1.

rapes are, most commonly, of women by men (Naffine 1994: 24-5; see chapter 3, section 3.2). By contrast, framing rape as a gender-specific offence brings this sexual inequality to the fore which raises 'unique and important issues of male and female power' (Estrich 1986: 1149). While this is reflected, to an extent, by the current definition without focusing entirely on a single specific (hetero)sexual act (Box 1983: 121, extracted in Lacey, Wells and Quick 2003: 485), it nevertheless presents an overtly masculine picture of sexuality (Lacey, Wells and Quick 2003: 485; Lacey 2001).

### 2.5.b *Consent*

A central concern of the SOA 2003 was to clarify the 'complex' case law on consent and provide a clearer definition, aiming to convey 'unambiguously' that sexual relations should only take place where both parties have agreed and understood that it has been agreed (Home Office 2002: 29-30). In this respect, section 74 of the SOA 2003 states that consent is where a person 'agrees by choice' when they have the 'freedom and capacity to make that choice'. However, little guidance is given as to when an individual has the freedom and capacity to choose, and when and to what extent social conditions and contexts that constrain individuals' choices will be accounted for. With these terms being left open to interpretation, they are likely to be interpreted narrowly (Finch and Munro 2006). So, for example, although it is clear that violence, threats or physical resistance are not necessary to demonstrate a lack of consent they are typically persuasive factors which are taken to indicate lack of consent (Kelly *et al.* 2005).

Nevertheless, to further the attempt at clarifying consent, the SOA 2003 introduced a number of circumstances in which a conclusive or evidential presumption that the complainant was not consenting, and that the defendant had no reasonable belief in consent, will arise (sections 75-6). The conclusive presumptions arise where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act, or intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant (sections 76 2(a) and (b) respectively). There are a number of evidential presumptions which include circumstances such as those in which a person was, at the time of the relevant act or immediately before it, using violence against the complainant or causing the complainant to fear that immediate violence would be used against them or against another; the claimant was asleep or unconscious; or the complainant had a physical disability precluding them from communicating their consent to the defendant (sections 75 (2)(a),(b),(d),(e) respectively). However, it has been suggested that the approach

endorsed by the SOA 2003 could be seen as representing a moral hierarchy with the irrebuttable presumptions proscribing the most serious cases of non-consent and violations of autonomy, followed by the rebuttable presumptions and finally the general definition of consent (Ashworth and Temkin 2004: 336-7). Alternatively, the ordering principles of these categories may be clarity and certainty rather than severity, or it could be a mixture of the two (Ashworth and Temkin 2004: 337). So, while these categories can be seen to endorse a more contextualised view of consent, at the same time a broader interpretation of social and cultural factors which could vitiate consent may be restricted.

### 2.5.c *Belief in Consent*

A significant amendment the SOA 2003 made to the definition of rape was to alter the *mens rea* requirement from honest to reasonable belief in consent. This was a welcome relief for feminists who had long since campaigned for this change and which had initially been rejected (Home Office 2002; Ashworth and Temkin 2004: 332). The position that had previously been supported was the subjective test; being described as a matter of 'inexorable logic', it was accepted that if a man honestly believed the complainant was consenting then he should not be guilty of rape (*DPP v Morgan* [1976] AC 182: 214, *per* Lord Hailsham). However, it has since been accepted that this pays scant regard to the woman who views the encounter as non-consensual and a serious and harmful violation of her physical and mental integrity. As such, the move to a reasonableness standard is symbolically important as it reflects the law's commitment to the 'positive integrity as well as the full humanity of both rape victims and men accused of rape' (Lacey: 1998: 122).

Aside from this, it is questionable as to the extent to which the SOA 2003 formulation will affect the *mens rea* standard in practice. As MacKinnon argues, polarising the subjective and objective approaches is unhelpful as ultimately they are the same perspective: men's (1983: 652). What she means by this is that to determine what it is likely the perpetrator honestly believed, generally socially accepted standards of behaviour and norms – assumptions of when a woman normally consents to sex - will be the yardstick. And this same yardstick is used to determine whether or not a belief in consent was reasonable. This overlap could, perhaps, be reinforced by the requirement that a reasonable belief in consent is to be determined by accounting for all the circumstances, which can include the defendant's own circumstances and characteristics (section 1(2)). Further, this requirement may cause responsibility to be allocated to both the defendant and claimant in the events leading up to the incident in question, which invites jurors to 'scrutinise the claimant's behaviour' as to whether her actions effectively

indicated consent to sex (Temkin and Ashworth 2004: 341-2; Cowan 2007b: 63). As such, this factor introduced in the 2003 Act may have little impact on reducing the reliance on socio-sexual assumptions and norms (Ashworth and Temkin 2004). This was highlighted in Emily Finch and Vanessa Munro's mock jury trials which showed a greater lenience towards the defendant where a subjective element was introduced in the reasonableness test as opposed to it being purely objective (2006: 317). As such, the way in which the reasonableness test is framed in the SOA 2003 appears to reduce the impact of altering the law from a subjective to qualified objective test, both in practical terms of improving convictions and the fairness of the trial, as well as symbolically (Finch and Munro 2006: 309 and 317). On the whole, the 'quasi-objective test' is 'contradictory' and 'unsatisfactory' (Cowan 2007b: 66).

Despite the changes in the SOA 2003, it appears that women's sexual autonomy is since little better protected by rape laws. Although, the SOA has the potential for alternative interpretations of concepts such as consent, ones which better reflect the realities of women's lives, as a result of constructions of masculinity and femininity which underpin understandings of sexuality and rape, rape laws continue to regulate men's sexuality rather than protect women's sexual autonomy (Centre for Law, Gender and Sexuality 2006).

## **2.6 Conclusions**

Rape is a problem which is enmeshed with constructions of (hetero)sexuality and understandings of what constitutes masculinity and femininity. Deriving from a property offence whereby a woman was taken from a man's possession, rape is currently viewed predominantly as the violation of (women's) sexual autonomy. Nevertheless, there are debates among feminists as to how rape should be conceptualised and defined. For example, while it has been argued that rape should be conceived of as a crime of violence as a means to divorce it from sex and emphasise the abuse of power it involves (Brownmiller 1975), it has conversely been argued that both sex and violence contain and express the same gendered power dynamics and thus cannot be separated in this way (MacKinnon 1987, 1989). However, it is suggested that framing rape as a sexual offence not only proscribes unlawful sexual activity but, in so doing, prescribes what constitutes lawful, 'normal' sexual activity, limiting the potential for alternative sexualities to be expressed (Henderson 2007). Similar tensions are felt in debates as to whether consent should draw the line between lawful and unlawful sex, or whether the focus should be on the coercive circumstances within which sexual relations take place (MacKinnon 2006).

While the former may eschew the context which restricts and shapes the women's (sexual) choices and may not account for the (gendered) social harms that rape causes, the latter could pre-dictate actions and deny women sexual agency. The response to these conflicts has been attempts to strike a balance between these positions, taking an approach to consent which incorporates and accounts for the context and conditions which allow for or limit the extent to which meaningful choices can be made (Cowan 2007a). Such reformulations or reinterpretations of the concept of consent have incorporated values like 'mutuality' or 'wantedness' rather than simply permitting sexual intercourse (for example, Chamallas 1988; Anderson 2005; Munro 2008).

In the midst of these debates, over the last four decades feminist campaigns have informed reforms to rape laws; from gradual changes such as limitations on the use of sexual history evidence in rape trials, to the fundamental review of the sexual offences at the turn of the century which resulted in the Sexual Offences Act 2003. Nevertheless, the current laws remain contentious, and questions continue to be raised as to the impact these changes will or can have in practice.

## **CHAPTER 3**

### **RAPE, 'MYTHS' AND THE CRIMINAL JUSTICE SYSTEM**

#### **3.1 Introduction**

In spite of considerable political attention being paid to rape, governmental initiatives and law reforms over the past thirty years, the criminal justice system delivers justice to rape victims in few cases. While the Sexual Offences Act 2003 introduced changes in attempts to improve the conviction rate which had been continually falling thereto, it nevertheless has continued to fall thereafter, hovering currently at around 6% (Home Office 2006b). However, it has been recognised that a considerable part of the problem lies in the way in which rape laws are interpreted, their application shaped by commonly held assumptions regarding what constitutes 'real' rape, and attitudes towards perpetrators and victims (Temkin and Krahé 2008). As such, starting with these social (mis)conceptions, this chapter will consider the ways that these so-called 'rape myths' influence and inhibit the criminal justice system's response to rape - from reporting to prosecution through to conviction. It will also evaluate measures that have been suggested and implemented in efforts to dispel rape myths and improve the treatment of rape cases in the legal system. However, the extent to which rape myths relate to understandings of rape as a particular crime will be considered, as well as the ways in which the criminal law and criminal justice system - in form, substance and procedure - can be said to uphold gendered ideologies which underpin such myths. Following this, it will be questioned how placing rape in a different legal context and framework - the civil law - might disrupt gendered assumptions, provide a different perspective from which to interrogate the harm of rape and an alternative means to address rape through law.

#### **3.2 'Rape Myths'**

Rape laws - and their implementation - distinguish unlawful, non-consensual, sexual relations from situations of acceptable, consensual, sex. In this way, the criminal law operates to set standards of impermissible conduct and behaviour through coercive state action. However in determining what is unlawful - what conduct is 'criminal' - it also determines what conduct is lawful: it has both a negative and positive capacity to proscribe immoral conduct and prescribe social norms (Lacey, Wells and Quick 2003). As such, rape laws prohibit unlawful sex (rape) but, at the same time, impose ideas as to what

constitutes lawful 'normal' sex. Yet, in a self-perpetuating manner, these ideas influence the interpretation of rape laws, and the determination of when sex is unlawful.

Typically, 'real' rape is thought to be committed by a stranger - a sexual deviant - preying on a young innocent victim who is alone, at night, subjecting her to physical violence and a forceful rape, causing considerable physical injuries (Estrich 1987). This stems from doubts as to what extent a woman can really be raped against her will without the use of force, with questions asked such as 'how a man can both hold a struggling woman down whilst being able to undress her'; and retorts like 'a woman can run faster with her skirt up than a man with his trousers down', or that even when a woman says 'no' she really means 'yes', and many women lie about rape - it being an easy allegation to make and a difficult one to refute - to preserve their honour and reputation. These beliefs, it is argued, derive from social constructions of masculinity and femininity embedded within a framework of eroticised (hetero)sexuality and male domination (MacKinnon 1987, 1989). But these perceptions do not reflect the realities of rape - they are myths. The majority of rapes are not perpetrated by strangers but occur between people who know each other - whether they are friends, (ex)partners, family and so on.<sup>1</sup> Further, the closer the relationship between the parties the more serious the sexual assault,<sup>2</sup> with the most serious assaults perpetrated by a partner or ex-partner.<sup>3</sup> And, contrary to the stereotypical rape, the majority do not happen in a dark alley way, as nearly half take place in either the victim or the perpetrator's home (Kelly *et al.* 2005: 21). Also, while there is a pervasive myth that many women lie about rape, there is no evidence that there are more false allegations than for any other crime (Temkin 2002: 5). Moreover, rape is a much more common and mundane occurrence than people believe (Amnesty International UK 2005). There is a significantly high incidence and prevalence rate,<sup>4</sup> and the majority of rapes are perpetrated by men against women.<sup>5</sup>

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<sup>1</sup> Findings from the annual population survey on all crime, the British Crime Survey (BCS) in 2004 showed that 54 per cent of rapes were between people who were or had been in an intimate relationship, 29 per cent between people who knew each other but were not intimate and 17 per cent between strangers (Walby and Allen 2004: 60; and see similar findings in Kelly *et al.* 2005: 10, table 3.4).

<sup>2</sup> A less serious sexual assault includes flashing, sexual threats or touching that caused fear, alarm or distress and a more serious sexual assault is the penetration of the vagina or anus with an object or other body part without consent (including attempts).

<sup>3</sup> For the BCS figures from 2004-2005 see Finney 2006: 7; for 2005-2006 see Coleman *et al.*, 2007: 61; for 2006-2007 see Povey *et al.*, 2008.

<sup>4</sup> Both are calculated from the BCS figures.

<sup>5</sup> See Povey *et al.* 2008: tables 3.01 and 3.03 for comparisons with the findings from previous years. However, as the BCS is about crime in general it tends to under-report sexual violence and so these figures are likely to be 'conservative' and rape more common than these statistics would suggest (Temkin and Krahé 2008: 12; Kelly *et al.* 2005: 14-7).

Nevertheless, ideas of 'normal' typically-sexually-aggressive men and 'bad' slutty women and myths of rape continue to dominate social thought. For example, a research study commissioned by Amnesty International (2005) found that people thought a woman was wholly or partially responsible – that she was 'asking for it' - where she was flirting (34 per cent), if she was drunk (30 per cent), if she was wearing sexy or revealing clothing (26 per cent) and if she was in a dangerous or deserted area (21 per cent). Further, 37 per cent of people thought that a woman was partially or wholly responsible for her own rape if she did not say 'no' clearly enough. This represents patterns of thought that women must take responsibility for conveying to a man that she is not consenting to sex, that otherwise consent is assumed and he cannot be blamed for simply responding to socio-sexual norms and his libido.

As a result of these gendered assumptions and stereotypes, it has been suggested that the label 'rape' be dropped so as to try and limit the extent to which these myths are invoked by its incantation. Some jurisdictions have favoured this radical approach, re-labelling and restructuring the sexual offences. For example, in Canada the newly formed 'equivalent' to rape is called 'sexual assault', whereas jurisdictions in Australia have termed it 'sexual penetration without consent', 'sexual intercourse without consent' or 'unlawful sexual penetration' (Western Australia, Northern Territory, Australian Model Criminal Code Officers Committee respectively; see Temkin 2002: 178). This latter term was adopted in an attempt to avoid the notion of violence which is implicitly conveyed by the word 'assault'. However, some have argued that these labels do not convey the full horror and wrong of rape and that this undermines and devalues the victim's experience. Further, the defendant may lose the full extent of the condemnation that is associated with the label 'rapist' (see Temkin 2002: 177-8). Yet it can be argued that the label 'rape' places a burden of responsibility, stigma and shame upon the victim which aggravates and reinforces the harm that is suffered; and juries are reluctant to convict defendants of rape unless they match the character of the stereotypical rapist, viewing that they otherwise do not deserve this label (Temkin 2002: 178). However, it is argued that removing the label rape obscures the extent to which rape is a problem inherently tied to sexual inequality and by labelling the offence as 'rape' it retains this symbolic value (McGlynn 2008: 78).

In the UK, the term 'rape' has been retained but there is, nevertheless, awareness of the power of this label and meanings it conveys and assumptions it invokes. However, these meanings provide a limited understanding of the contexts in which rape occurs and in which women are subject to unwanted sexual intercourse. As such, the further a case from the rape paradigm the more likely it is that it will result in an acquittal (Kelly *et al.* 2005). Considering that the realities of rape are typically far from assumptions as to what

constitutes 'real' rape, it is perhaps unsurprising that the conviction rate remains low. However, this is not something gone unacknowledged by policy makers. Recently, there has been a turn in focus to the attitudes towards rape of those within and outwith the criminal justice system and the extent to which rape myths influence the implementation of rape laws, restricting the recourse to justice (Kelly *et al.* 2005; Temkin and Krahé 2008).

### 3.3 The Justice Gap

As the prevalence of rape has surfaced over the past two decades, coming into the public eye, there has been an increasing intolerance to rape (Temkin 2002: 12) and the number reported to the police has increased exponentially.<sup>6</sup> But, at the same time, the number of convictions has remained relatively constant. In other words, of the rapes that are reported fewer and fewer are resulting in a conviction. This exemplifies the high attrition rate, with many of the rapes that are reported to the police filtering out the criminal justice system at different stages. Some are not properly investigated by the police, in other cases the Crown Prosecution Service (CPS) decide not prosecute, some from here do not go to trial and of those that do only a relatively low number result in a conviction. This has become notoriously known as the 'justice gap' (Kelly *et al.* 2005). Furthermore, there is another considerable gap between the prevalence of rape and those reported. As such, the criminal justice system provides justice to victims of rape in a lower proportion of cases than even the low conviction rate conveys.<sup>7</sup> So understood, Liz Kelly *et al.* (2005) question, is this a justice 'gap or a chasm'?

#### 3.3.a Reporting and Recording Rape

Although there has been a progressive increase in the number of rapes reported to and recorded by the police over the past 20 years, there remains a relatively high level of non-

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<sup>6</sup> From 1989/1990 to 1999/2000 the number of recorded rapes increased by almost 150 percent (Temkin 2002: 11; see pp. 11-13 for an account of the increase in reporting since 1947). Between 2001/2002 and 2004/2005, the number of rapes recorded by the police rose by 40.9 per cent - from 9,734 to 13,712, dropping only slightly to 12,654 in 2007/2008 (HMCPSI 2007: 2.10 and Kershaw *et al.* 2008: table 2.04). Note the changing/broadening definition of rape - including rape within marriage, penile penetration of the mouth, and attempting, conspiring to commit and aiding and abetting these crimes - which could account for a part of the increased numbers after 2005 (i.e. when the Sexual Offences Act 2003 came into force).

<sup>7</sup> The 2001 BCS Interpersonal Violence Module found that only 15 per cent of rapes were brought to the attention of the police (Home Office 2006b: 8). Considering the factor that the BCS results are likely to be underestimates, this means that there is probably a much higher level of non-reporting than the statistics can say.

reporting. There are a number of reasons why women decide (not) to report rape to the police (these are described in detail by Kelly 2002: 9). One reason is that the victim does not view their experience as rape because it does not reflect social perceptions of rape (see, for example, Warshaw 1988). Sylvia Walby and Jonathan Allen found that of those whose descriptions came within the legal definition of rape, just under half classified it as such ((43 per cent) 2004: viii). Further, in cases of sexual assault in general, where the perpetrator and claimant were or had been intimate, only half of those interviewed considered it as a criminal act, compared to three-quarters when the victim was assaulted by a stranger (Myhill and Allen 2002). More recently, David Povey *et al.* found that, in relation to serious sexual assault (rape or assault by penetration, SOA 2003 definitions), only two-thirds of victims saw the assault as a 'crime', although one-fifth thought the assault was 'wrong but not a crime' (2008: 78, figure 3.14, table 3.). As such, (mis)perceptions of rape influence victims' perspectives of their experience: because rape is seen as a particularly heinous offence and has particular characteristics – such as a stranger as the perpetrator, using force and violence – in the absence of these the act is viewed as less serious, and not as 'bad' as the crime of rape.

Further, where women do consider reporting, they often feel that where their complaint does not fit the rape template then the police will not view it as rape, not believe them and/or blame them (Kelly 2002: 9-10). They may fear family and friends knowing and, again, disbelieving and/or blaming them. Other reasons include a fear of the criminal justice process – the victim may not be able to face the idea of relaying their experience numerous times, answering questions, being subject to intrusive mental and physical examination. Women are often surprised to find that they have no right to independent legal representation (Adler 1987), and are only a witness to the state's action, having no 'standing' themselves (Temkin 2002; cf. the civil justice system, see chapter 5, section 5.3). As such, it is not just perceptions of rape, but perceptions of the nature of rape as a particular *crime* and the criminal justice system's treatment of cases that deter women from reporting.

Similarly, views on the role of the criminal law also act as a motivator for women to report rape. It has been said it felt like an 'automatic response', seeming the right thing to do and a way to seek justice (Kelly 2002: 10). This, perhaps, is in line with the purpose of the criminal law to provide retributive justice, giving people their 'just deserts' (Criminal Justice Act 2003, section 142). Further, women have reported that they wished to prevent attacks on others or themselves (Kelly 2002: 10), reflecting the criminal law's aim to deter future crimes and protect the public (Criminal Justice Act 2003, section 142 (b) and (d), and also the aim to rehabilitate offenders subsection (c)). These concerns may

be more apparent where the rape is by someone unknown to the victim and, so, the purposes of the criminal law in combination with rape myths affect women's decisions (not) to report rape.

In addition, such understandings influence the reception of cases into the criminal justice system, as not all cases that are reported are accepted and recorded by the police. Rapes are frequently classified as 'no-crime' – more so than other reported complaints.<sup>8</sup> It is thought that this is affected by the (mistaken) belief that there are a high number of false allegations of rape (see Rumney 2006: 128-58). There is also a myth that women report rape immediately – or soon after – the incident. However, as women frequently are too traumatised, ashamed, and embarrassed this is far from the case (Temkin 2002: 1-3). Moreover, the longer the delay the more likely the complainant had a close relationship with the perpetrator.<sup>9</sup> As such, the more delayed the report the further the case, generally, deviates from the rape stereotype the more likely the police will not believe the complainant (Temkin and Krahé 2008: 38-41). Furthermore, this hostility continues even when complaints are accepted and women often withdraw their cases as a result (Kelly 2002: 17). It seems, then, that rape myths and attitudes towards rape influence women's decisions (not) to report, and have a significant impact on the reception and the handling of rape cases. This is evident by the fact that over half of reported rapes go no further than this stage; they do not even pass through the first gateway of the criminal justice system (Kelly 2002: 25). But this is not for lack of guidelines or education as to how to handle rape complaints: just that rape myths have too strong a hold on the collective imagination. As such, despite attempts at improvement, little has changed in relation to the police stage of the process (Hamilton 2009).

### 3.3.b *Prosecuting and Convicting Rape*

Rape cases are continually dropped as they undergo intensive scrutiny at all stages of the criminal justice process. If a case does not appear strong – that is, if it does not reflect the stereotypical rape – then it will be thought relatively unlikely to result in a conviction and therefore not worth pursuing (Brown, Hamilton and Neil 2007; Temkin and Krahé 2008: 18). As the majority of rape cases do not embody those particular characteristics, the CPS

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<sup>8</sup> Kelly *et al.* found that a quarter of reported rapes were classified as 'no-crime' (2005: xi). Although these figures dropped in the 1990s, this has been met with a rise in the 'no-further action' category (Kelly 2002: 15, table 1).

<sup>9</sup> From the 2007 study, 75 per cent of stranger rapes were reported within 24 hours of the incident, compared with only 35 per cent of recorded rapes where the parties were (ex)partners (Home Office Online Report 2007: 25, table 3.4).

frequently chooses not to prosecute. Over the past two decades, the proportion of reported cases being prosecuted has fallen, recently calculated to be down to around 20 per cent (Temkin and Krahe 2008: 16).

It could be argued that this is due to evidential difficulties as it is more likely that where the parties know each other or are (ex)partners there is less proof, it simply being a case of one person's word against another's. However, Jennifer Temkin and Barbara Krahe (2008) argue that although evidential problems do play a part in this, this is not as problematic as it is presented. Rather, the fundamental issue is the attitudes of those within the criminal justice system towards the evidence. This is further aggravated by perceptions that rapes occurring between people who know each other are less violent, less intrusive and less harmful, both physically and psychologically, and therefore are less deserving of the CPS's attention, time and resources (Kelly 2002: 29-30). So viewed, such rapes are not seen as so 'wrong' or 'harmful' as many other crimes and therefore there is less concern with punishing the perpetrator – whether this be for retribution, rehabilitation, deterrence or protecting the public. As such, rape cases continue to filter out the criminal justice system and, particularly, those which do not fit the rape template (Kelly 2002: 28; Temkin 2002: 24-5).

Of the few cases that are tried, only a small number result in a conviction for rape - for example, in 2004 this was 28 per cent (Home Office 2006a: 9). As a large number of cases do not even go to trial, this result means that very few rape victims are delivered justice by the criminal justice system. The conviction rate remains low, currently lingering at around 6 per cent, after dropping from 33 per cent in 1977, to 7.5 per cent in 1999 and 5.3 per cent in 2004.<sup>10</sup>

The conviction rate remains low and attrition rate high – at least, for a significant part – because of preconceptions as to what constitutes rape, the context and situations it happens in and the types of people that are rapists or victims of rape. In other words, assumptions based on rape myths. However, the outcome of a single rape case is not just significant for that particular complainant and accused: the judgment contributes to defining rape – or, at least, the way in which it is understood to be defined. As a conviction is more likely where a rape reflects the stereotype, these verdicts strengthen the grip of rape myths and support the idea that rapes which deviate from this paradigm are not really 'rape' (Sinclair and Bourne 1998: 577; Temkin and Krahe 2008: 70). So

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<sup>10</sup> Home Office 2006a: 8-9; and see the graph which shows numbers of rapes of a female recorded by the police, the number of cases proceeded against, and the number of cases resulting in a conviction, for each year between 1997 and 2004; Temkin and Krahe 2008: 20, figure 1.5 based on Home Office data; Williams (2009) reported the current conviction rate to be at 6.5 per cent.

understood, this self-perpetuating cycle reinforces gendered assumptions and stereotypes, failing to protect women from rape and allowing it to continue as a relatively unpunished practice. Consequently, the justice gap – or chasm – remains with too many women experiencing rape and too few experiencing justice.

### **3.4 Measures to Dispel Rape Myths**

A significant part of the problem is not the substantive law but rather the way in which rape laws are interpreted and implemented in practice. As such, there have been proposals regarding ways in which to minimise the influence of rape myths throughout the criminal justice process. This is hoped to decrease the levels of attrition and increase the conviction rate, as well as improving the experience of the legal system for complainants. The criminal justice process – and especially the trial – is often viewed as a ‘second rape’, being traumatic, emotional and psychologically harmful as the complainant repeatedly recalls her experience and is subject to intrusive questioning with attempts to blacken her character and discredit her as a witness (Adler 1987; Temkin 2002).

In particular, there has been an emphasis on enforcing ‘victim rights’ with suggestions such as providing independent legal representation for complainants and using video recorded evidence to try and reduce the stress of criminal justice process (Home Office 2006a: 31-3). Also, there have been measures to educate those within the legal system – from the police to judges – so as to inform them of the realities of rape, as well as introducing expert witnesses into trials, in attempts to dispel the myths (Home Office 2006a: 16-22). This is in addition to more general measures to better educate the public – for example, the consent campaign in 2006.<sup>11</sup> However, it is argued that entrenching victimhood within the legal system is not necessarily going to resolve the problem as it may simply reinforce the gender roles of men as active and dominant and women as passive and submissive (West 1992). Moreover, there is considerable debate as to the effectiveness of these measures in practice (Temkin and Krahé 2008: 161-76 and 188-94). For instance, although judges who hear rape cases must attend seminars on sexual assault monitored by the Judicial Studies Board, there is evidence that rape myths nevertheless influence their interpretation and application of the substantive law. This is highlighted in the context of sexual history evidence.

There are considerable concerns regarding the (mis)use of the complainant’s sexual history evidence in rape trials. Typically, this information is introduced to show

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<sup>11</sup> Available online: <http://www.homeoffice.gov.uk/documents/consent-campaign/> (last accessed 18<sup>th</sup> September 2009).

that the complainant is sexually promiscuous, or has had sex with the defendant before or another in a similar situation and so on. Such evidence is divulged to invoke two rape myths: one, the complainant is an untrustworthy witness, and, two, that her sexual history implies it is likely she consented to sex with the defendant – or, at least, it was reasonable for him to believe she was consenting (Temkin 1984). This evidence is generally – if not always - irrelevant to the event in question; however, it can have a negative impact on the claimant's account and the outcome of the case (Adler 1987). Further, it considerably adds to the trauma of the trial for a victim whose sexual experience, body and behaviour is already on public display (Lees 1996). As such, it deters women from reporting rape or encourages them to withdraw their claims because they do not want to go through invasive questioning about their sexual history and past relationships (Home Office 1998: 9.57-9.58).

So understood, this has been a subject of concern for feminists over the past twenty years (Adler 1987; Lees 1996; Temkin 1984 and 2003). Although there has been legislation limiting the use of sexual history evidence in rape trials since 1976 (sections 2(1) and (2) of the Sexual Offences (Amendment) Act 1976), this was heavily criticised for not being restrictive enough as it led to the provisions being read in such a way that irrelevant sexual history evidence was frequently admitted (Adler 1987; Lees 1996; Temkin 1984). In response to these criticisms, the Youth Justice and Criminal Evidence Act 1999 (YJCEA) was enacted in which section 41 introducing further limitations. However, shortly after it came into force, in *R v A (No. 2)* [2002] AC 45, section 41 was interpreted in a way which returned much of the judicial discretion in relation to the admissibility of sexual history evidence that the act was supposed to remove. A subsequent evaluation of section 41 YJCEA by Jennifer Temkin, Liz Kelly and Sue Griffiths concluded that it had no discernable effect on the attrition rate in rape cases (improvement measured by the proportion of reported rapes resulting in a prosecution) (2006: 70). However, they did find that complainants considered the use of sexual history as 'unjust and an invasion of privacy' and that the existence of the laws factored in to decisions to report rape and maintain a complaint (2006: 62-3, 69). This example highlights the extent to which much of the problem lies in the way the substantive laws are interpreted and applied (Temkin and Krahé 2008: 146). And, in spite of attempts to improve rape trials and the treatment of rape cases in the criminal justice system they seem to have had little positive effect.

### 3.5 Conclusions

#### 3.5.a *Myths and Stories Law Tells*

Rape myths and gendered assumptions relating to sexual relations are largely constituted by social perceptions as to what is appropriate masculine and feminine behaviour. Such assumptions inform ideas of the situations in which women do not usually consent to sex – when it is rape – and when it is otherwise ‘normal’ and consensual (hetero)sexual relations. On the face of it, such myths do not reflect the realities of rape and, so viewed, they are a falsity, a fantasy, an irrational belief with no sound basis. However, Richard Cavendish argues that this perception of ‘myth’ as synonymous with ‘foolish story’ is to imply that it is ‘trivial’ when, actually, ‘[t]he reality is the reverse’: while the narrative is fiction it is nevertheless ‘full of meaning’, of ‘truths of a different or deeper kind’ (1992: 8). As explained by Roland Barthes:

Myth consists of overturning culture into nature or, at least, the social, the cultural, the ideological, the historical into the ‘natural’. What is nothing but a product of class division and its moral, cultural and aesthetic consequences is presented (stated) as being ...

Common Sense, Right Reason, the Norm, General Opinion (1997: 165).

Myth, then, is not synonymous with untruth – in fact it is the element of ‘truth’ which gives myths their power. Myths are not just present in society but society is present in its myths: it is social arrangements, values and ideas of masculinity, femininity and sexuality that are embedded in and create rape myths. These myths - these social ‘truths’ - the essences and ideologies are then naturalised in the ‘depoliticised speech’ of myths and perpetuated in society to maintain the hegemonic culture (Barthes 1993: 124-5).

Part of the problem is, however, that despite efforts to dispel rape myths – illustrating the falsity of the story - the criminal law implicitly embraces the constructions of gender and sexuality which inform them, doing little to disrupt the social ‘truths’ which give rape myths their power. Put another way, the criminal law reflects and (re)produces the gendered ideological foundations of rape myths in its substance and procedure. For example, the laws on sexual offences in defining rape as unlawful sexual intercourse by implication define lawful sexual intercourse, prescribing socio-sexual norms. As the focus is on penile penetration, which men actively perform and to which women submit and consent to, this, arguably, constructs sexuality from a masculine perspective in which women are the willing recipients of men’s desires (Naffine 1994). So viewed, rape laws serve to regulate male sexuality rather than protect women’s sexual autonomy and integrity (Centre for Law, Gender and Sexuality 2006). Such ideas of (hetero)sexuality are

further represented and supported by the criminal justice system. Here, the state acts against the defendant, the complainant only having a passive role as a witness and the complainant is said to be re-victimised as the process is just as traumatic as the rape itself (Adler 1987). Although this has led to more protections being introduced – providing victims’ rights – to some extent this can be seen to reinforce women’s victim status.

Scripting this story of sexuality and inscribing meanings of gender, the criminal law continues to support the gendered assumptions and ideologies which inform rape myths. Further, these myths also influence the way in which substantive laws are applied, which in turn reinforce the assumptions and stereotypes. Helena Kennedy puts it this way:

Myths are tent pegs which secure the status quo. In the law, mythology operates almost as powerfully as legal precedent in inhibiting change, and the law is full of mythology. Women are particularly at its mercy ... mythology is a triumph of belief over reality, depending for its survival not on evidence but on constant reiteration (2005: 32).

In this respect, gendered myths affect attitudes towards rape of those within the criminal justice system and of the general public. They can influence women’s decisions (not) to report rape, the acceptance of cases into the criminal justice system by the police, the decision of the CPS to prosecute or not and the verdict of the jury (Kelly 2002). But the realities of rape more often than not do not reflect the paradigmatic rape, and cases which are not seen as ‘real’ rape are filtered out the criminal justice system at every stage of the process (Kelly *et al.* 2005).

As a result, the attrition rate remains high and the conviction rate low. However, this serves, in a cyclical manner, to perpetuate ideas of sexual normality and rape myths. As only one in 20 reported rapes result in a conviction, the conclusion for the other 19 cases is that there was no rape. This obscures women’s experiences and undermines and trivialises the harms they suffer (MacKinnon 1983: 654). In this respect rape can be said to reflect a ‘split reality’: from the woman’s perspective she was sexually violated; from the man’s perspective they were having consensual sex (MacKinnon 1983: 654). However, more often than not the law views the story from the man’s perspective and this is represented as the ‘truth’ (MacKinnon 1983: 652). This does not only fail to protect women but actually operates to legitimise sexual violence (Lees 1996: 111). It is in this way that the law itself operates similarly to mythology – telling stories which (re)present and (re)create a certain ‘truth’. However, this ‘truth’ is simply the perspective of the person with the power which does not acknowledge the multiple perspectives and meanings in legal texts and stories (Abrams 1991). Kim Scheppelle explains that:

[s]tories may diverge, then, not because one is true and another false, but rather because they are self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events (1989: 2088).

So understood, there has been a growing emphasis by feminists on the telling and hearing of women's stories in law (and, more generally, those of the powerless, disadvantaged or oppressed groups in society) (Abrams 1991; Delgado 1988).

Nevertheless, Regina Graycar points out that there is an assumption here that new stories will make a difference, regardless of the framework within which they are told and heard (1996: 298). She argues that it is not enough to challenge the stories law tells about women, but the structures they are told in must be challenged and rearranged: the legal categories themselves limit understandings and comprehension of these stories which contributes to shaping legal problems and (re)interpreting women's realities. In focusing this discussion on violence against women, she highlights that 'there has been almost no attention paid to violent stories outside the criminal law' (298). Graycar illustrates the extent to which violence against women already does cut across legal categories, with stories being told in different legal contexts – however, not often as the main subject of the legal issue but rather a penumbral problem, which reinforces women's outsider status. A different way of looking at rape, then, may be to see how other areas of law are or can be used to respond to it as the primary legal issue.

### 3.5.b *Alternative Possibilities*

Viewing rape from the perspective of tort law may provide an alternative way in which to interrogate the wrong and harm of rape, and to rethink the legal response. This may be because different areas of law vary in their purpose, substance, procedure, method and symbolically represent and convey different meanings,<sup>12</sup> leading to debates being repeated but reframed as well as possibly formulating new ones. This is illustrated, for example, in the increasing interest in challenging rape and rape laws in the arena of human rights, both nationally and internationally.<sup>13</sup> So, for instance, Catharine MacKinnon has argued that rape be reconceptualised as torture (2006), and rape has also been framed as a violation of the right to privacy under Article 8 of the European Convention on Human Rights (*X and Y v Netherlands* (1985) ECHR 4). However, these (re)conceptualisations have been challenged on the basis that they do not reflect the wrong or harms of rape – which necessitates further thinking and explanation as to why they do not and what the harm is

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<sup>12</sup> For example, see in this chapter, section 3.3a which highlights the reasons for women (not to) report rape often links to their perception of the purpose(s) of the criminal law.

<sup>13</sup> For instance, *Prosecutor v Akayesu* [1998] ICTR-96-4-T, Judgment 2<sup>nd</sup> September 1998; *MC v Bulgaria* [2005] 40 EHRR 20. In terms of repeated debates in different contexts, the consent- versus coercion-based definitions of rape on the domestic and international levels provides a good example (see MacKinnon 2006; Engle 2005).

(McGlynn 2008). In other words, placing rape in different frameworks reshapes and provokes a rethinking of rape and potential legal alternatives to explore.

But what about alternatives to the criminal law in the domestic context? Here, feminist engagements with rape have by and large focused on the criminal law. As such, in spite of the wide acknowledgement that the criminal law all too frequently fails to provide redress for rape victims, there appears to be few other legal options to pursue. Over the last fifteen years this has been recognised and, for instance, Nicola Lacey has advised that 'we must be prepared to reach beyond the boundaries of criminal law' (2001: 14), and Mary Heath and Ngaire Naffine have urged that we 'think of less conventional legal ways of helping women' (1994: 51).

One such less conventional way is to encourage civil claims, in particular tortious claims, to be pursued against rapists. This has, in fact, recently been used as a mode of redress by rape victims in the US and Canada, producing an increasing line of case law as well as academic commentary (Feldthusen 1993; West 1992). Heath and Naffine, as well as Joanne Conaghan, have suggested that this may be a worthwhile strategy to be adopted – for reasons such as the lower burden of proof, the remedy of compensation for the claimant rather than punishment of the perpetrator, and the fact that victims would have legal standing as opposed to only being a witness in the criminal justice system (1994: 51; 2005). Lacey angles towards this by drawing a comparison with Catharine MacKinnon and Andrea Dworkin's anti-pornography ordinance which seeks to rely on the civil law for enforcement, with the aim of empowering victims rather than relying on the state's disciplinary actions (2001: 14, see also MacKinnon 1989: ch. 11).

So viewed, because of the ways in which tort law differs from the criminal law - in purpose, substance and procedure - it could perhaps be a useful way in which to escape the sexual script which is embedded in the criminal law and is played out in its response to rape. This could serve to disrupt and destabilise the constructions of sexuality and gender, addressing individuals' realities of rape and taking power from the myths which dominate current social perceptions. However, tort law could equally operate on the same gendered bases and encounter similar problems as the criminal law, perpetuating rape myths rather than subverting them. Nevertheless, this is something which could be explored for, despite the suggestions, limited efforts have been made to consider this possibility which could open up alternative avenues of redress for rape victims and inspire new thoughts and directions for legal responses to rape.

## PART 2

# **RAPE AND THE CIVIL LAW**

## CHAPTER 4

### TORT LAW AND RAPE

#### 4.1 Introduction

In spite of political good will, legislative reforms and initiatives to improve the way in which rape is dealt with in the criminal justice system, the conviction rate remains low and the attrition rate high. As a result, very few women's experiences of rape are legally recognised as such and consequently their experiences are undermined and trivialised. The civil law could offer a way out of the impasse, and, in this respect, tort law in particular will be explored as an alternative legal means to address rape and achieve justice for victims. Furthermore, due to differences between the criminal and civil law, such as in purpose(s), substance and procedures, tort law may provide an alternative perspective from which to interrogate the wrong and harms of rape. The following chapters will explore this in relation to procedural differences between these two branches of law, in particular the standard of proof, the use of sexual history evidence and the mode of trial (chapters 5), as well as considerations relating to costs and damages (chapter 6). This chapter, however, will focus on how rape 'fits' within tort law and how such torts are defined and conceptualised.

As to the purpose(s) of tort law, scholars have diverging views which will be explored in relation to reasons why rape survivors may want to pursue a civil suit. Despite purposes conflicting to an extent, whichever view is taken as to what tort law is for, claims for rape come within it. Furthermore, it is clear that rape is a civil in addition to a criminal wrong. Although there is no tort of rape as such, rather a claim for rape (or acts like rape) would come within other torts, for example trespass to the person.<sup>1</sup> In light of this, the constituents and defining elements of these torts – battery, assault and false imprisonment – will be considered with particular regard to rape, and similar acts.

Following this, the chapter will explore the extent to which the trespass to the person torts may have a gendered content (Conaghan and Mansell 1999, ch. 7). The gendered nature of legal reasoning and concepts underpinning tort law will be examined,

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<sup>1</sup> A claim could also be brought in negligence where a person's carelessness can be said to have caused the interference with the claimant. E.g. systemic negligence actions – e.g. *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441, and negligence action in *S v W (Child Abuse: Damages)* [1995] 1 FLR 862 or actions against the police for failing to properly protect individuals from crimes, for example, *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (although this case was unsuccessful). However, as the focus here is on reframing rape itself – rather than those who have failed to prevent, or who have facilitated rape – these options will not be explored.

as well as the ways in which this may limit or constrain tort law's ability to redress gendered harms, such as rape. In this respect, tort law may similarly support and invoke gendered assumptions and rape myths which inhibit the criminal justice system's response to rape. However, as a result of substantive differences between the crime of rape and the trespass to the person torts, such as their formal gender neutrality and lack of the label 'rape', this may allow for a more flexible framework within which to challenge harmful gender stereotypes and rape myths. This possibility will be explored through *Lawson v Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865 which concerned a claim for rape brought within the torts comprising trespass to the person.

## 4.2 The Purpose(s) of Tort Law

Although by definition rape is a crime, the act of rape is also a tort. A tort is a form of civil wrong: 'a form' in that not all civil wrongs are torts, for instance breach of contract, and 'civil' as in opposed to a criminal wrong. Like the criminal law, which is made up of a number of different crimes, tort law is comprised of a number of different torts - for example, negligence, defamation, assault, battery and false imprisonment. However, there is no consensus as to how many torts there are and, more significantly, it is unclear whether a common thread - principle, purpose or justification - ties the individual torts together.<sup>2</sup> Regardless of this, it is clear that claims in tort can be brought for rape; although there is no specific tort of rape, a claim is most likely to lie in the trespass to the person torts - assault, battery and/or false imprisonment - which protect against intentional interferences with the person. In this respect, there is little doubt that rape - or acts like rape - are wrongful in both the criminal and civil senses of the word.<sup>3</sup>

However, while rape is both a crime and a tort, there are significant differences in the way in which the wrong is responded to, which leads to questions of why this is the case and what the purpose of tort law is. In contrast to the criminal law which traditionally punishes the perpetrator, paradigmatically by imprisonment, tort law typically compensates the claimant for the harm the tortfeasor caused, aiming to put them back in

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<sup>2</sup> For example, Tony Weir argues that 'tort is what is in the tort books, and the only thing holding it together is the binding' (2006: ix).

<sup>3</sup> The term 'rape' does specifically relate to the criminal act, although it also has a social usage. This is problematic to the extent that the trespass to the person torts do encompass many different acts and are not as restrictive as the crime of rape, and further, 'rape' conveys particular meanings and assumptions which the trespass to the person torts may not (see this chapter, section 4.4). However, as the focus is, predominantly, on bringing civil claims for tortious acts which could constitute the crime of rape, the term will be used here but at the same time it will be emphasised that the claim is in trespass to the person.

the position they would have been in – so far as money will allow – had the tort not been committed. As such, this led to the view that this was the purpose of tort law; it is about determining when a person will be liable to compensate for a loss they have caused another (Wright 1944). So, for instance, John Fleming explains, ‘The law of torts is ... concerned with the allocation of losses incident to man’s activities in society’ (Fleming 1998; *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22: 9, *per* Lord Bingham).

However, this only tells us what harms the tortfeasor has caused and not why the claimant can recover for them – in other words, it doesn’t tell us why it is wrong, why it is a tort. As such, other tort law scholars, such as Peter Birks, have argued that the focus of tort law is not on compensation but rather on determining whether a wrong has been done and then what remedies are available to redress it (1995). Or, as put by Robert Stevens, torts are the ‘infringement of primary rights’ which generates an obligation to compensate for loss (2007: 2). So viewed, tort law is a way in which to recognise that a wrong has been done and redress the harm it causes. In this respect, Ernest Weinrib explains that wrongs are remedied by tort law to give effect to corrective justice and that this is its only purpose (1995). The purpose of tort law is to ensure that when a person has committed a wrong which has caused another a loss that they correct the wrong by making good the loss (Weinrib 1995). So understood, corrective justice is predicated on the notion of individual responsibility and morality: where an individual has caused harm to another, and if they are at fault, then it is right to hold them responsible for any loss caused. In this instance it would be ‘unfair’ for the suffering individual to bear the loss. A successful civil claim for rape - or act(s) similar to rape – would therefore not just recognise that a wrong has been done, but also hold the tortfeasor responsible for the harm caused to the claimant. In this sense, a rape survivor may wish to bring a civil claim, as well as to receive compensation for the harm that has been suffered.

This may also serve similar functions to the criminal law as it can provide a sense of vindication or retribution; it provides a public recognition that the defendant has wronged the claimant and the payment of damages can be seen as a form of punishment. In a similar vein, appeasement is also seen as a purpose of tort law, as well as being a justification for corrective justice: where the defendant has caused the claimant a loss and has not compensated for that loss the claimant may feel aggrieved, and therefore compensation is offered to restore the social order (McBride and Bagshaw 2005: 44). From the perspective of those who have been harmed by another’s tortious conduct this could provide a form of cathartic relief – or, as Bruce Feldthusen puts it, therapeutic justice (Feldthusen 1993). These reasons could provide motivations - other than the

purely financial - for rape and sexual assault victims to pursue civil claims (Feldthusen 1993).

Further, tort law is not necessarily just about interactions between two individuals. Contrasting to Weinrib, for example, who argues tort law's only purpose is to give effect to corrective justice, and any other functional effects – such as retribution or deterrence - are merely incidental, is Peter Cane's view. Cane explains that tort law protects interests through a system of ethical principles of personal responsibility or 'a system of precepts about how people may, ought and ought not to behave in their dealings with others' (Cane 1997: 13). So viewed, as tort law requires people to compensate another when they have wronged them, this may encourage people not to commit torts. Tort law, therefore, has a broader purpose of guiding social behaviour and, similarly to the criminal law, could contribute to prohibiting unlawful sexual conduct.

Unlike the criminal law, however, there are general questions as to whether tort law – or some other body - should respond in situations where individuals have been harmed, but the tortfeasor is not legally at fault, or where they cannot afford to pay, as otherwise these losses simply lie where they fall.<sup>4</sup> This may not, though, fulfil the functions outlined above. Nevertheless, where the loss suffered cannot be shifted from the claimant to the tortfeasor, as often is the practical reality, tort law does, in some cases, shift losses from the claimant to a defendant who is not the tortfeasor and/or distribute them among society. This does not give effect to corrective justice, yet the claimant is still compensated – for example, through vicarious liability and/or liability insurance. So, although in tortious ideology individual responsibility remains the 'primary rhetorical focus', collective *responsibility*, as opposed to justice, often ends up as the practical effect (Conaghan and Mansell 1999: 12). However, regardless of these tensions, civil claims for rape (or acts like rape) can fulfil whichever purpose(s) tort law is said to be for – be it corrective or distributive justice, compensation, deterrence, retribution or public vindication.

### **4.3 Rape and the Trespass to the Person Torts**

In tort law there is no specific civil wrong which is equivalent to the crime of rape. Instead, a civil claim for rape is most likely to be brought within the torts comprising trespass to the person – battery, assault and false imprisonment. Unlike 'rape' these torts are formally

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<sup>4</sup> For example, Joanne Conaghan and Wade Mansell point out that 'while the maxim "no liability without fault" may make a certain sense, its corollary – "no compensation without fault" – is much more questionable' (1999: 7).

gender neutral and cover a range of intentional acts that directly interfere with another person, violating their right to (bodily and mental) integrity and liberty. As this interference is wrongful in itself, the trespass to the person torts are actionable *per se* – that is, without proof of (actual) harm – and, therefore, the defendant need not intend to harm the claimant but rather simply intend the contact with the claimant (*Williams v Humphrey* (1975) *The Times*, 20 February 1975). In this sense, it is clear that contact must be made through an act which is voluntary and actively desired and not an unwilled physical action (*Gibbon v Pepper* (1965) 1 Ld Raym 38). However, what is not so apparent is whether the defendant must have intended the consequences of their action, or whether they can be negligent or reckless as to the possibility of causing a trespass against the claimant's person. In other words, it is unclear if it suffices that the defendant foresaw but did not desire the consequences of their action, or that the consequences were reasonably foreseeable.<sup>5</sup> However, in terms of claims in trespass to the person for rape, this issue does not arise: it is difficult to imagine a situation in which the defendant could, in intending and carrying out certain actions, be negligent or reckless as to bringing about sexual intercourse with the claimant as a result. An issue that can arise, though, is whether or not the claimant consented to the contact which distinguishes lawful from unlawful intentional physical interactions. So understood, conduct which amounts to the crime of rape, as non-consensual penile penetration of the vagina, anus or mouth, can constitute a trespass to the person in tort law. Consequently, all three of these torts – battery, assault and false imprisonment - could be invoked in a civil claim for rape or other forms of sexual assault.

#### 4.3.a Battery

Battery is the most likely trespass to the person tort to encompass the act of – or acts similar to – rape, being defined by Goff LJ in *Collins v Wilcock* [1984] 1 WLR 1172 as the 'actual infliction of unlawful force on another person' ([1177]). 'Force' here simply means physical contact and does not mean force resulting in actual harm as the defendant need only intend to contact the claimant, and these torts are actionable *per se* (*Williams v Humphrey*). So understood, the essence of the wrong in battery is the impermissibility of

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<sup>5</sup> This confusion stems from the historical development of the trespass to the person torts and negligence which were earlier distinguished on the basis of whether the contact between the claimant and defendant was direct or indirect, as opposed to intentional or unintentional which is the current division. It was held in *Fowler v Lanning* [1959] 1 QB 426 that the trespass to the person torts could be committed intentionally or negligently, but this was put into doubt in *Letang v Cooper* [1965] 1 QB 232 by Lord Denning MR who differentiated them from negligence on the grounds that they were intentional acts ([240]; cf. Diplock LJ, [244-5]).

bodily contact. It follows that any unwanted contact is, potentially, an actionable battery – including, for example, a kiss, caress or any other sexual touching or interference (*R v Chief Constable of Devon and Cornwall, ex parte CEBG* [1982] QB 458: 471, *per* Lord Denning, referring to Salmond 1977: 120). But, given how far reaching this definition is, there are limitations on the type of contact in that it must be direct (as opposed to being consequential upon the defendant’s actions) and immediate (*Scott v Shepherd* (1773) 95 ER 1124; *DPP v K* [1990] 1 WLR 1067). However, the contact need not be hostile or motivated by ill-will;<sup>6</sup> so, for instance, the surgeon performing an operation with the intention to improve the claimant’s health can still commit a battery if the operation was unwanted (without the claimant’s consent; see below, section 4.3.d).

Another constituent of the tort of battery is that the contact must be beyond that which is acceptable in everyday life (*Collins v Wilcock*: 1177, *per* Goff LJ). Some physical interaction with others - for example, pushing and shoving on the underground, touching another for attention at a loud party and so on – is an inevitable and acceptable part of the ‘ordinary conduct of everyday life’ and therefore, it is argued, should not constitute an unlawful act (*Collins v Wilcock*: 1177, *per* Goff LJ). Although some contact such as an operation or sexual intercourse could be described as socially acceptable, they are only so deemed by virtue of being consented to and, as such, do not come within this remit (*Re F* [1989] 2 AC 1: 73, *per* Lord Goff). Therefore, it is clear that the act of rape constitutes a battery.

#### 4.3.b Assault

Where a battery occurs, frequently there will be a period immediately beforehand whereby the defendant intentionally caused the claimant to fear unwanted contact. This can constitute an assault which is defined as ‘an act which causes another person to [reasonably (*Stephen v Myers* [1830] 172 ER 735)] apprehend the infliction of immediate, unlawful force on his person’ (*Collins v Wilcock*: 1177, *per* Goff LJ). But as an assault does not necessarily involve physical contact, with the wrong being in placing the claimant in fear of bodily contact or interference, it can be committed in the absence of a battery (for instance, see *Ireland; Burstow* [1998] AC 147). In the context of unwanted sexual relations, an illustration would be where the claimant has escaped the defendant’s advances which

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<sup>6</sup> There has been a debate as to whether hostility is a requirement of battery, however the weight of authority indicates that it is not – see Holt CJ in *Cole v Turner* (1704) 90 ER 958; Croom-Johnston LJ in *Wilson v Pringle* (1987) QB 237: 253; cf. *Williams v Humphrey* and Lord Goff in *Re F* [1989] 2 AC 1: 73.

caused her to reasonably believe he was going to touch her. In other circumstances a battery may be actionable without an assault – for example, if the claimant was unconscious at the time of the (sexual) contact then there could have been no apprehension of it. However, for the majority of cases involving rape (or acts like rape) the claimant will have suffered both a battery and an assault.

#### 4.3.c *False Imprisonment*

In some situations, where an act ‘primarily’ constitutes a battery it can also amount to false imprisonment, for example rape (Rogers 2006: 102). This could be, for instance, if the defendant was holding the claimant down, as false imprisonment is defined as the ‘unlawful imposition of constraint on another’s freedom of movement from a particular place’ (*Collins v Wilcock*: 1177, *per* Goff LJ). The limitations of this tort are in that the restriction of the claimant’s physical movement must be complete so that they are confined to a particular place (*Bird v Jones* (1845) 7 QB 742) and have no reasonable means of escape (*Robinson v Balmain New Ferry Co Ltd* (1910) AC 295). As such, false imprisonment typically occurs where someone is (unlawfully) locked in a room or is tied up, for example. However, as rape does not usually occur with physical force or violence (see chapter 3, section 3.2), it may be the case that the act of rape as a battery will also amount to false imprisonment in only a small proportion of claims.

#### 4.3.d *Consent*

Consent is a defence to all the trespass to the person torts, although it can also be seen as a constitutive element as the act must be an unlawful one (*Ashley v Chief Constable of South Sussex Police* [2008] 1 AC 962; cf. *Freeman v Home Office (No. 2)* [1984] QB 524). Consent is of central importance to these torts, but particularly in relation to battery as any contact which is beyond that which is an acceptable part of everyday life is lawful because and only when it is consented to. It has been emphasised that in the context of the trespass to the person torts, consent must be given ‘freely’ (*Freeman v Home Office; Latter v Braddell* [1880] 50 LJQB 448). And, similarly to the Sexual Offences Act 2003 (SOA) which states that consent must be given ‘freely’ by a person with the ‘freedom and capacity to make a choice’ (section 74), Scott LJ in *Bowater v Rowley Regis Corporation* [1944] KB 476 explained that:

freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence

from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will ([479]).

However, similarly to the criminal law, there is limited guidance as to the conditions in which a person has the freedom and capacity to choose. Nevertheless, there is some indication as to when consent will be vitiated.

In relation to the criminal law, for instance, there are the circumstances which give rise to evidential and conclusive presumptions in sections 75 and 76 of the SOA 2003. So, for example, where the defendant has intentionally deceived the complainant as to the nature or purpose of the relevant act, or intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant, it will be deduced that the claimant did not consent and it was unreasonable for the defendant to believe consent was given.<sup>7</sup> This is illustrated by an earlier case, *R v Williams* [1923] 1 KB 340. Here, a young girl gave her apparent consent to an act of sexual intercourse with her singing teacher on the understanding that it was an exercise which would improve her breathing and voice. It was held that she gave no 'real' consent and thus the act amounted to rape. By contrast, in *Linekar* [1995] QB 250 the claimant had agreed to have sex with the defendant for a fee of £25. Afterwards the defendant left without paying. It was held that this did not amount to rape because the claimant had consented to the nature of the act.<sup>8</sup>

Similarly, in the context of trespass to the person, the claimant must know the broad nature of the act for consent to be 'real', but it is unnecessary for the consent to be 'informed' (*Chatterton v Gerson* [1981] QB 432).<sup>9</sup> Along these lines, in cases of rape a question has arisen as to whether consent can be given where certain information is withheld, particularly information relating to the defendant's sexual health. In *R v Dica* [2004] EWCA Crim 1103 the defendant had unprotected sexual intercourse with two women without informing them that he was HIV positive. It was held that the complainants had consented to the nature and purpose of the act, so it would not amount to rape - despite their submission that they would not have consented had they known this. However, the same facts do not amount to consent for a defence to assault

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<sup>7</sup> Sections 76 2(a) and (b) respectively; as to the common law approach, see *Clarence* (1888) 22 QBD 23; *Elbekkay* [1995] CrimLR 163 and *Flattery* (1877) 2 QBD 410; *Linekar* [1995] QB 250.

<sup>8</sup> But see *R v Tabassum* [2000] Crim LR 686 in which an unqualified medical practitioner gained a number of women's consent to breast examinations for the purpose of medical research. This did not amount to indecent assault as there was no evidence that his purpose was sexually motivated, or for any other reason than he gave them. However, he was convicted for assault on the basis that the complainants believed he was medically qualified and they were consenting to a medical procedure; they consented to the nature of the act but not its quality.

<sup>9</sup> However, where there is no informed consent and the claimant has then suffered damage as a result of the conduct they consented to they may have a case in negligence.

occasioning actual or grievous bodily harm (under sections 18 and 20, Offences Against the Person Act 1861) if the person consequently contracts the HIV virus (see also *Konzani* [2005] 2 Cr App R 14). Following *Chatterton v Gerson* this would similarly result in the civil context: if the broad nature of the sexual act was known but the information regarding the defendant's sexual health was withheld and, consequently, the claimant contracted a sexually transmitted infection, this would give rise to a claim in negligence but not battery (McEvoy 1994).

However, in the civil law the instances in which withheld information may vitiate consent are potentially broader than the criminal law as it may be no defence to battery if information is withheld in bad faith (*Chatterton v Gerson*: 442, *per* Bristow J). This approach was taken in *Appleton v Garrett* (1997) 34 BMLR 23 in which a dentist performed unnecessary dental work on the claimants without informing them it was not required. It was held that this information was withheld in bad faith because the defendant knew that the claimants would not consent otherwise; and, as such, their consent was not 'real'. This could be viewed as contrasting to *Dica* as it could be said the defendant did not tell the claimant about his sexual health because he knew she would not consent otherwise. But, aside from this, the interpretations of what constitutes actual consent in the civil context mirror that of the criminal law.

A potentially significant difference, however, between consent in the context of rape and in relation to the trespass to the person torts is whether a defendant's reasonable belief in consent will absolve him of legal responsibility. In terms of the criminal laws on rape it is clear that this is the case (SOA 2003, section 1(2)). However, there is debate over this point in relation to the trespass to the person torts, and battery in particular (Keren-Paz and Levenkron 2009: 454-6). For example, it is no defence to false imprisonment that the defendant reasonably believed there was lawful authorisation in relation to the imprisonment of the claimant (*R v Governer of Brockhill Prison, ex parte Evans (No. 2)* [2002] 2 AC 19). And there have been comments to the effect that a mistaken, albeit reasonable, belief in consent will not absolve the defendant from liability in relation to any of the trespass to the person torts (*Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841: 24, *per* Sedley LJ). By contrast, with regards to self-defence, in *Ashley v Chief Constable of South Sussex Police* [2007] 1 WLR 398 it was held that a defendant's reasonable belief in the claimant committing a battery, which prompted the defendant to batter the claimant, would be enough to raise the defence of self-defence. However, the law lords gave differing dicta on the issue of whether this was the same for all defences to the trespass to the person torts: Lords Rodger and Neuberger abstained from giving opinion on this point ([55] and [90]), Lords Bingham and Carswell thought

that a reasonable mistake as to a defence to the trespass to the person torts would negate liability ([76] and [3]), whereas Lord Scott opined that it would not ([22]). However, he did also say that while consent may not operate as a defence where the claimant led the defendant to reasonably hold their mistaken belief, giving their 'apparent consent', contributory negligence could lend a partial defence ([20]). This contrasts to Lord Donaldson in *Freeman v Home Office* who suggested that while actual consent 'deprives the act of its tortious character', *volenti non fit injuria* ('no injury is done to a person who consents') 'would be a defence in the unlikely scenario of a patient being held not to have in fact consented to treatment, but having by his conduct caused the doctor to believe that he had consented' ([557]). This is similar to the position which seems to be generally accepted that the 'objective' 'apparent' consent of the claimant will relieve the defendant of liability (*O'Brien v Cunard Steamship Co.* (1891) 154 Mass. 272). If this was the case, arguably by analogy this would also apply to a situation in which the defendant could show his reasonable mistake arose from the conduct or behaviour of the claimant. This differs from the criminal laws on rape as 'all the circumstances' of the case will be taken into account in determining whether or not the defendant reasonably believed the claimant was consenting to the sexual contact (SOA 2003, section 1(2)).

In summary, there is little difference between the criminal and civil law in relation to the fact that consent must be real, and must be given freely. However, in the criminal context, if the defendant reasonably believes that the complainant was consenting, accounting for all the circumstances, then he will not be guilty of rape. By contrast, in the civil context, there is debate as to whether or not this will absolve the defendant of liability, although Tsachi Keren-Paz and Nomi Levenkron conclude on this issue that in the UK the weight of the case law is towards an approach which does not allow a reasonable belief in consent to negate liability for the trespass to the person torts (2009: 454-5). However, it is further unclear if there may be a defence in a situation where the claimant has given their 'apparent' consent - because of their conduct the reasonable person would have believed they were consenting (Keren-Paz and Levenkron 2009: 456). Nevertheless, the confusion over consent in relation to the trespass to the person torts could only provide a narrower range of circumstances in which consent will limit liability in comparison to the criminal laws on rape. Therefore potential responsibility for rape, or acts like rape, in the trespass to the person torts - battery, assault and false imprisonment - can only be greater than in the criminal law.

#### 4.4 Tort Law, Gender and Gendered Harms

Rape can be defined as a battery, assault or false imprisonment; however, there are differences between these torts and the crime of rape which could alter the way in which the wrong and harm is viewed. For example, unlike rape which can only be perpetrated by men (SOA 2003, section 1), the torts comprising trespass to the person are formally gender neutral. On the one hand, it is argued that including this gender element in the definition of rape reflects the reality of the majority of rapes, and that to an extent the wrong is based in gender inequality (for example, see Naffine 1994: 25-30). On the other, it is argued that framing rape in this way only upholds a particular construction of (hetero)sexuality and reinforces these gender inequalities and, consequently, a gender neutral definition which may allow for alternative expressions of sexuality is to be preferred (see chapter 1, section 2.5.a). So, while the criminal law on rape remains in gendered form, tort law allows for a formally gender neutral definition, which encompasses rape and acts like rape, to be explored.

However, the trespass to the person torts go beyond these debates. In contrast to rape and the other sexual offences which the criminal law defines and frames in a hierarchy of severity, battery, assault and false imprisonment encompass a wide range of acts which are not distinguished in such a way. While debates over the dividing lines for the sexual offences continue – such as if other body parts or objects which penetrate another’s bodily orifices are as serious, wrong and harmful as penile penetration (Home Office 2000: 2.3.1, 2.91; and 2002: 44) – tort law does not have the capacity for such questions to be asked. As such, there need be no specific distinctions between acts or sketchy lines drawn between sexual and non-sexual acts.<sup>10</sup> Without these separations and structures, tort law may not construct the conception of (hetero)sexuality that is imbued in the criminal law, potentially allowing for alternative understandings and expressions of sexuality.

Nevertheless, despite the formal gender neutrality of the trespass to the person torts, they may have a gendered content (for example, see Conaghan and Mansell 1999: ch. 7). And, further, it is argued that the concepts upon which tort law is based are gendered (and gendering) and that, although it is presented as a ‘discrete body of legal rules and principles in relative isolation from its social and practical effects’ (Conaghan 2003: 177), tort law’s individualistic ideology has political and (gendered) disparate distributive consequences (Conaghan and Mansell 1999; Chamallas 1998). As such, tort law frequently

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<sup>10</sup> For example, see the definition of what constitutes penetration, the definition of body parts and the definition of ‘sexual’ in the SOA 2003, sections 79 and 78.

operates to women's disadvantage, maintaining and reinforcing unequal social arrangements, and, therefore, its ability to redress gendered harms – such as rape - has been questioned (for an overview, see Conaghan 2003).

#### 4.4.a *The Standard of Reason and Reasoning*

With the example of sexual harassment, Joanne Conaghan and Wade Mansell highlight the extent to which the trespass to the person torts are gendered, in spite of their formal gender neutrality (1999: ch. 7). In relation to battery, some sexual contact is only socially acceptable and lawful because consent has been given – say, sexual intercourse or the touching of another's genitals. However, other sexually expressive acts may not be considered as going beyond the boundaries of normal social interactions, being harmless and inoffensive without necessarily being consented to. The boundaries here are blurred and hazy: at what point a stroke on the arm, pat on the buttocks or other (possibly sexual) gesture is socially unacceptable (or is consented to), and at what point it is objectionable is debateable (Conaghan and Mansell 1999: 167). Such contact, Conaghan and Mansell argue, may be perceived differently by the genders - men may have a different idea as to what is friendly, acceptable contact in contrast to a woman who may perceive it as insulting and offensive (1999: 164-5).

Similarly, in relation to assault views may diverge down gendered lines as to when it is reasonable to apprehend immediate contact, particularly when it comes to sexual advances (Conaghan and Mansell 1999: 169-71). Flirting, seduction, sexual solicitation and so on hint at sexual contact but are common in social life, even if they are sometimes unwanted; and, as Calvert Magruder points out, after all, there is no harm in asking (1936: 1055). So when does a sexual seduction become an assault - intended and reasonably apprehended as such? Or, put another way, when is a sexual solicitation a compensable wrong, and when is it otherwise a harmless part of life? To illustrate this question, Joanne Conaghan and Wade Mansell ask: 'a woman enters a lift with a male colleague at work. He sidles up to her, standing close (but not touching) and whispers 'sweet nothings' (of a sexually intimate nature) in her ear. They are alone in the lift. Is there an assault?' (1999: 170).

However, there may be instances in which there is a closer general consensus as to when it is reasonable for a sexual interference to be immediately apprehended. This could be, for instance, where a stranger approaches a vulnerable woman, making direct sexual threats. In contrast, in other contexts, such as where the claimant and defendant are friends or intimates, it may be seen as unlikely that the defendant would intend the

claimant to believe that he would touch her without her consent, and therefore unreasonable for a woman to fear it. Such assumptions are based upon ideas as to what is acceptable masculine and feminine behaviour which reflect rape myths. In this way, assault may be seen from a gendered point of view, which obscures women's experiences and fear of sexual interference by deeming them 'unreasonable' and expressing such instances as a harmless and acceptable part of social life.

This gendered perspective, it is suggested, also arises in determining whether or not the claimant consented to the defendant's actions. In this regard, social norms and expectations in relation to consent to sexual relations will be relied on and assumed by reference to the behaviour and characteristics of the claimant (and defendant). So, it is typically thought that if the claimant had been drinking, if she had been bantering with the defendant and flirting then it is likely she would have consented to the sexual acts. In addition, her appearance will be questioned and if she was dressed provocatively then this can be interpreted as indicating a willingness to engage in sexual relations (see chapter 3, section 3.2). Of course, what is 'provocative' dress is subjectively evaluated from social norms; and it is viewed as such because the woman is perceived to want to invite sexual attention, not simply because she feels it is aesthetically pleasing, which reinforces the sexual nature of women as objects of men's desires (Conaghan and Mansell 1998: 168). So understood, gendered stereotypes and rape myths may also play a role in civil claims. However, while this may be true of determining the claimant's (lack of) consent, such an argument is particularly reinforced in relation to determining whether or not, in any event, it was reasonable for the defendant to believe the claimant was consenting. But, it is debateable as to whether – or to what extent – a defendant's reasonable mistake as to consent would absolve him of responsibility in the civil law as it does in the criminal rape laws (see above, section 4.3.d). If liability in tort law is not negated in this way, then this may provide an advantage for claimants pursuing civil suits for rape (and acts similar to rape).

In this regard, Elizabeth Adjin-Tettey (2006) argues that reasonable belief in consent is inappropriate as a defence in the context of 'sexual battery' as it is in Canada (*Non-Marine Underwriters, Lloyd's of London v Scalera* [2000] 1 SCR 551). Such a defence, she says, does not adequately protect women's sexual autonomy and dignity because they are frequently denied redress as a result of the sociological framework within which sexual wrongdoing occurs; and, therefore, only a defence of voluntary and affirmative consent should suffice (2006: part 4). Further, in the UK, in *Ashley*, Lord Scott explained the position in tort law that a defendant's reasonable belief in consent would not absolve him of liability could be justified with regards to differences between the criminal and civil

law. He argued that while in the criminal context it is one thing to say that a defendant should not be punished for his mistake, 'why, for civil law purposes, should not a person who proposes to make physical advances of a sexual nature to another be expected first to make sure that the advances will be welcome?', when 'every person is prima facie entitled not to be the object of physical harm intentionally inflicted by another' ([20]).

However, even if this was the position on consent, there is nevertheless a debate as to the situation whereby the claimant herself triggered the defendant's reasonable belief because she gave her 'apparent' consent. But what precisely this would mean in the context of rape and other sexual batteries is unclear, and it may be interpreted that if the claimant was dressing and behaving in a particular way this would apparently signify she was consenting and it would be reasonable for the defendant to believe she was. This would be likely to prompt a problematic reliance on rape myths and assumptions in civil cases in a similar way to the criminal law.

These critical approaches to battery, assault and (reasonable belief in/apparent) consent are particular examples of broader feminist critiques of the standard of reason and reasonableness which underpins much of tort law (Bender 1988: 20-5; Finley 1989; Martyn 1994) – and, indeed, the law in general. While the standard of reason is supposedly objective, neutral and universal, feminists have exposed the gendered nature of it, grounding it to its situated and partial viewpoint (in the context of tort law, see Conaghan 1996b). In this respect, Catharine MacKinnon, argues, claims to universality and objective knowledge only reflect the perspective of the dominant group, and prevailing social arrangements and inequalities, which privileges men's point of view over women's (1986: 50). This may be the case in relation to sexual assault, battery and harassment as Joanne Conaghan and Wade Mansell (1999), and Elizabeth Adjin-Tettey (2006) argue.

However, it is not only in this way it is said the standard of reason may be 'male', but that this mode of reasoning – relying on discrete, abstract principles – may be 'male'. This gendered categorisation of reasoning stems from Carol Gilligan's *In a Different Voice* (1992, 1993) which identified different ways in which a moral dilemma is approached and resolved by boys and girls. From this it is suggested that speaking 'in terms of objectivity or universal abstractions, and of dichotomy and of conflict' is a 'male gendered way of thinking about social problems'; by contrast, the 'female' way of thinking is to view and resolve problems by accounting for their social context and 'webs of relationships' (Finley 1989: 893). As (tort) law embraces the former approach it trivialises the latter – articulating men's perspective and excluding women's voice. But relying on and engendering Gilligan's differing ethics of justice and care – aligning them with a 'male' abstract rights based approach and a 'female' contextual and relationship orientated

approach – has been criticised for claiming to represent women’s point of view which does not reflect the divergences and differences among women, and for adhering to strict gender categories which only serves to further reinforce harmful conceptions of gender relations (for an overview, see Drakopoulou 2000). But, nevertheless, these feminist challenges highlight the extent to which universal standards represent and valorise features of rationality, neutrality and detachment which are associated with masculinity and undervalue characteristics such as empathy, emotion and irrationality which symbolise femininity (Conaghan 1996b).

#### 4.4.b *The Individual, Autonomy and Harm*

In addition to arguments that tortious standards and legal reasoning are gendered and gendering, it is said that this may also be true for the concepts on which tort law is based – such as the individual, autonomy and consent. Tort law emphasises individuals’ separateness from others and their social and relation context, with wrongs and harms centred on the extent to which an individual’s boundaries are breached. For instance, the trespass to the person torts defend against invasions of bodily and mental integrity, with consent drawing the line between lawful and unlawful interactions and purport, in this way, to protect individual autonomy. However, feminists have emphasised women’s connection to others and critiqued the liberal conception of the atomistic, autonomous individual who is free to act and compete with others for their own self interest. They have argued that this conception does not reflect the extent to which social and individual relations contribute to shaping and constituting personhood (for example, Lacey 1995; Nedelsky 1989); it does not reflect the reality of women’s lives as, unlike men, they are inherently connected to others (West 1988); and this conception of the individual embodies ‘masculine’ characteristics, failing to protect (gendered) interests and harms which are situated in social and individual relations (Conaghan 2003: 200-3).

In relation to consent, for example, which plays a significant part in constituting the torts comprising trespass to the person, Catharine MacKinnon has implied that in a patriarchal society which eroticises men’s domination of women it cannot be determined when a woman is freely consenting to sexual relations (1983, 1989; see chapter 2, section 2.4.a). However, this provokes the possibility of denying women agency and reinforces their powerlessness (Abrams 1995: 329-32). Aside from these theoretical tensions, the fact is that (lack of) consent has been retained as an element in the definition of rape, and this is no different in relation to trespass to the person. The question then becomes, when and to what extent relationships of inequality can vitiate consent, or are taken into

account, in determining when consent to sexual relations is given freely (Cowan 2007a and 2007b; see chapter 2, section 2.4.c). A similar question arose in *Freeman v Home Office* which held that in the case of medical interventions in the prison context, the power differentials in such a situation did not always vitiate apparent consent, but the context is a necessary component to consider. Nevertheless, despite the power differentials, Freeman was still found to have 'freely' consented. As such, similarly to consent in relation to the criminal laws on rape, being left open to interpretation these terms are likely to be interpreted narrowly, particularly when the context concerns sexual inequality (Finch and Munro 2006).

This is also exemplified by false imprisonment in which a person's freedom of movement must be confined to a particular space. Typically, however, there must be a complete physical restraint with no reasonable means of escape (*Bird v Jones*; *Robinson v Balmain New Ferry Co Ltd*), which may not incorporate other ways in which an individual could be coerced into staying in a particular place – for instance, by social or emotional pressures. Although rape and other similar sexual assaults are unlikely to involve the type of physical restraint that is required for false imprisonment, 'there is little doubt that the liberty of the individual to express herself – by her mode of dress, her choice of occupation or lifestyle – is threatened' by the prevalence of rape and sexual inequality in society (Conaghan and Mansell 1999: 172).

Furthermore, this conception of the individual upon which tort law relies not only informs elements defining the wrong (for example, consent and freedom), but also contributes to informing the nature and extent of harm caused (Conaghan 1996a; 2003). Tort law traditionally locates harm in the individual because it conceptualises wrongs as breaching the boundaries which define the atomistic individual. In this way, tort law conceives of relationships as incidents occurring between two strangers with limited historical or future ties to each other or others. As such, tort law copes well with physical or tangible injuries, but it struggles to comprehend harms which derive from broken relationships or create unwanted or harmful ones (Conaghan 2003). Put simply, because tort law can only view harm as the violation of a discrete individual, it fails to recognise and redress harms which are situated in individual or social relations.

As a result, tort law has difficulty comprehending and responding to gendered harms which are, by nature, relational. In one sense, this is seen to be because, as Robin West argues, women are 'actually or potentially connected to others' whereas men aren't (1988:3). Without protecting and recognising these connections, and the values and harms they create, the law dismisses and trivialises aspects central to women's lives (1988: 3; 1997: ch. 2). Although this view has been criticised for its reduction to biological sex

differences (Williams 1989), ideas of separation and connection still resonate with social meanings and understandings of male and female (Conaghan 2003). In this sense, Ngaire Naffine (1994) argues that the way in which sexual relations are conceptualised reflect masculinity as possessive and femininity as being possessed; and so the male individual is not broken or moulded by such relations to the same extent that women are. Defining and conceptualising the physical invasion of bodily integrity as the wrong in rape, as the 'wrongfulness in abusive relationships', tort law 'imperfectly express[es] the violation of trust involved' (Conaghan 2003: 193).

Further, tort law fails to comprehend or convey that rape and other gendered harms are a product of and (re)produce social and gender inequalities. As MacKinnon puts it, tort law's preoccupation with the individual renders it incapable of capturing the nature of a group based wrong or harm because 'it rips women's sexuality out of the context of women's social circumstances as a whole' (MacKinnon 1979: 171). Consequently, tort law misrepresents the nature and extent of certain harms because it frames them in terms of isolated acts against an individual – which 'make[s] little sense from the standpoint of those whose disadvantaged state inclines them to view the world in relational rather than atomistic terms' (Conaghan 2003: 203).

In general, it seems that the concepts and principles of tort law are predicated on the same gendered bases as the criminal law so that ideas of individual autonomy, consent and harm which inform rape also inform the trespass to the person torts. As such, tort law may do little better to respond to the wrong and redress the harm of rape. Moreover, relying on such gendered conceptions arguably has a gendering effect, reinforcing ideas of what constitutes masculinity and femininity upon which rape myths rest. Consequently, tort law may serve to support rather than subvert rape myths and gendered assumptions. Yet in spite of tort law's gendered nature, the question is whether it can nevertheless be strategically deployed to address social inequalities (Conaghan 2003: 185).

In this respect, it may be significant that a civil claim for rape would, typically, be brought within the trespass to the person torts which would lose the label 'rape' and perhaps the myths that are so readily invoked by its incantation. There has been considerable debate over whether this label should be kept or rethought in the criminal context because of its strong associations (see chapter 3, section 3.2). However, an argument for retaining the label 'rape' is because of the level of severity that it connotes. Another is that it represents a particular gendered act which reflects the reality of rape, that it is primarily an experience suffered by women (McGlynn 2008). Although this can be seen as an advantage, it also can be viewed as problematic because these understandings support and invoke rape myths and particular meanings of gender. By losing the label

'rape' with all its social baggage, then perhaps 'rape' cases could play out differently in the civil context to the way that they are scripted to follow gendered lines in the criminal justice system. This is in addition to the formal gender neutrality of the trespass to the person torts which, despite their gendered content, may be more flexible in allowing for alternative interpretations and meanings of, for example, sexuality. As such, it may have a greater potential to express women's agency and sexual autonomy and undermine rape myths and assumptions which pervade the criminal justice system. So viewed, Jane Larson has supported the use of common-law doctrines which reflect differences in agency between the claimant and defendant as a way to increase the legal protection of women without reinforcing the dichotomisation of male and female which imbue gendered laws (Larson 1993a; 1993b).

In this regard, the extent to which gender assumptions and stereotypes – and particularly rape myths – influence the application of the trespass to the person torts in civil claims for rape will be analysed in the example of *Lawson v Ann Graves-Smith, Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865. There have been few claims of this type, and of those many of the case law reports relate to appeals against the level of damages awarded or aspects related to procedure such as the application of the burden of proof, rather than relating directly to liability (for example, *W v Meah; D v Meah* [1986] 1 All ER 935; *Griffiths v Williams* (1995) *The Times*, 24<sup>th</sup> November 1995; *A v Hoare (and other appeals)* [2008] UKHL 6). While these elements also constitute tort law's response to rape and will be examined in the following chapters, to consider the way in which meanings of gender and understandings of sexuality may influence civil claims for rape in detail, this single case will be explored.

#### **4.5 Rape Myths and Claims in Tort: A Case Study**

In *Lawson v Ann Graves-Smith, Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865, Amanda Lawson claimed that Christopher Dawes subject her to multiple rapes, attempted rape, indecent assault, forcibly administered crack cocaine and falsely imprisoned her in his hotel on the island of Alderney. Three months into a criminal investigation and facing a potential charge of rape, Dawes died. Lawson sued his estate for damages. Eady J found for the claimant; the facts as accepted by the court are as follows. Lawson was recommended to Dawes by a mutual acquaintance for a job position fronting a modelling agency. An interview was arranged and Lawson was flown to the island of Alderney to meet Dawes, under the expectation that she would return by flight to London the following day (Christmas Eve) – but on arrival she was told the airport was closed for

Christmas. When she met Dawes no such interview was conducted and there was no evidence of a business plan for a modelling agency. Until Boxing Day, when she managed to contact the police, Lawson was transported back and forward between Dawes' properties, threatened with physical violence, was forced to smoke crack cocaine and have non-consensual sexual intercourse on numerous occasions with Dawes. She was aware that she had no way of escaping the island, and was convinced by Dawes that his properties were under surveillance and the phones were 'bugged'. Eady J awarded Lawson £78,000 in general and aggravated damages for rape, attempted rape, indecent assault and false imprisonment. Lawson also claimed she suffered post-traumatic stress disorder and continues to suffer psychological injuries which limits her earning capacity for the rest of her life and consequently claimed special damages for lost earnings, both past and future. While she was awarded £136,000 for past lost income and £25,000 for lost business assets, Eady J concluded that the psychological injuries Lawson claimed would affect her for life could not be supported or attributed directly to her experiences at Alderney; thus no damages were awarded in respect of this. The total damages amounted to £239,000.

Throughout the judgment, Eady J continuously used the word 'rape' to describe Dawes's tortious acts, holding him liable for 'sexual assault', 'rape' and 'false imprisonment'. There is no definition of battery, assault or rape given in the judgment. Although rape does come within the tort of battery, and likely assault, as unlawful (non-consensual) touching and the apprehension of such interference, the term 'rape' itself has a more specific meaning. Further, Eady J did not consider whether the act of 'rape' could be framed as a different tort, for example false imprisonment. This could have been considered given the description of one incident:

He [Dawes] put his arms around her [Lawson] and shortly afterwards raped her. Her evidence was that she repeatedly told him to stop, but that she felt like a 'rag doll' and was unable to move a muscle in her body or offer any resistance. She said that he held her arms down and she felt helpless and trapped ([42]).

Eady J also gave a definition of false imprisonment in his judgment:

the prisoner may be confined within a definite space by being put under lock and key or his movements may simply be constrained at the will of another. The constraint may be actual physical force, amounting to an assault, or merely the apprehension of such force ([109]; quoting from Clerk and Lindsell on Torts: 15.23).

Seemingly then the act described above could amount to false imprisonment, but Eady J made no such link. He only related false imprisonment to Lawson being kept against her will in the hotels at Alderney and not to any of the specific incidents of sexual assault or rape. While this is not to suggest that without being physically restrained there could be no rape, it is to say that at that particular time Lawson was falsely imprisoned.

As such, rather than being referred to or framed as a trespass to the person, acts which mirror the crime of rape are still being described as rape. It could be argued, though, that using the word 'rape' is just a way of describing the acts – similar to saying 'punch', 'kick' or 'unconsented to surgery' which all are batteries but are more specific ways of referring to the particular situation. However, 'rape' is also a criminal term which conveys particular meanings and connotations in addition to appealing to gendered assumptions and stereotypes. As such, using the word 'rape' in the context of the civil law may not only draw on criminal connotations such as the severity of the act, but may mean that rape myths are more readily invoked. However, while it cannot be concluded as to whether or not altering the language used would have made a difference, it is nevertheless apparent that rape myths were drawn upon throughout the case.

In order to undermine Lawson's case, the defence highlighted inconsistencies in her police statements and the evidence she gave to the court, leaving the gaps to be filled by rape myths and assumptions. Originally, it was highlighted, Lawson made no reference in her police statements to being held down by Dawes, or violence and threats being used against her pleadings with him to stop when he tried to, and did manage on occasion to, penetrate her ([85]). However, these accounts presented themselves in the civil case after, it was said, Lawson had been given the impression that there would be no criminal charge pursued. Therefore, when it came to the civil trial years later she 'beefed the story up' in the hope for a successful claim ([84]). First, this could discredit her case, and secondly could imply that if the earlier statement is true, then in the absence of physical force or threats Lawson was not really 'raped'.

In light of this it was argued that Lawson must be lying. This, the defence suggested, is relatively easy in this context, impliedly relying upon the myth that rape is an easy accusation to make and a difficult one to refute, which is why there are so many false allegations ([4]).<sup>11</sup> While Eady J emphasised that liability rested on 'whether [Lawson] is telling the truth' or 'whether she has simply invented the essential elements of her story' ([4],[79]), the defence took this opportunity to put forward that the claimant's allegations were false, that Lawson had been a 'quite willing participant' in the whole affair, and was making this 'easy' claim for financial gain ([14], [18]).<sup>12</sup>

As in criminal rape trials, rape myths were deployed in order to undermine the claimant's case. Although this case was ultimately successful, this is still problematic

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<sup>11</sup> There is no evidence that there are more false allegations for rape than any other crime (Temkin 2002: 5).

<sup>12</sup> There was a case advanced that the sexual activities were undergone with Lawson's consent, however this was not expressly put in cross-examination ([5]).

because it nevertheless reflects the strength of and supports rape myths and stereotypes: if the myths were not believed in they would not be implicitly or explicitly depicted by defence lawyers. But equally – if not more – troubling, is the possibility that bringing civil claims for rape will create new myths or further embellish well known ones – for instance, that women make ‘easy’ rape allegations in the civil courts to secure a windfall. While the popular (mis)conception is that many women make false allegations of rape for reasons such as protecting their reputation, feeling guilty and ashamed after a ‘mistake’, hiding an affair or pregnancy, it may not be too hard to inspire the belief that, as many women lie about rape, a woman could lie about it to make some money. To this idea, the defence stressed that within a week of Dawes’ death Lawson had sold her story to the Mail on Sunday for £16,000.<sup>13</sup> To undermine this, Eady J noted that this money was paid directly to her mother to cover a debt she owed, and it seemed this was her only means of paying her back ([83]). But if this had not been the case, would it have been more believable that Lawson was money-hungry, to the effect of undercutting the veracity of her claim?

However, Eady J also explained that it was unlikely she was financially motivated as she did not initiate civil proceedings immediately after Dawes’ death – it was not until a year later ([83]). He also emphasised that she issued a complaint with the police as soon as she could in the circumstances. By implication then, if Lawson had not approached the police when she did, this would give credence to the claim that her allegations were false. But that women usually report rape and do so immediately afterwards is a myth.<sup>14</sup> As such, it seems that rape myths were played off one another to support and undercut Lawson’s case. This is troubling in the way that the narratives created about rape in the civil law are similar to the rape stories that are heard in the criminal context.

Similar narratives are weaved in relation to consent, with definitions and ideas of ‘real’ consent in tort law being carried over from the criminal law. For example, as it was shown that Lawson was intoxicated at the relevant time, the defence highlighted that ‘drunken consent is still consent’, drawing on criminal cases and the evidential presumptions in section 75 of the Sexual Offences Act 2003 ([87]; see *R v Dougal* (2005) Swansea Crown Court). In response, Lawson argued that she did not consent at any point, highlighting the difference explained in the later criminal case *R v Bree* [2007] EWCA Crim 804 that (not) consenting under the influence of drink or drugs is not the same as being so intoxicated that the capacity to consent is lost ([88]). While this perhaps seems axiomatic,

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<sup>13</sup> Published on 28<sup>th</sup> March 1999 under the headline ‘I was raped and held prisoner for four days by the “Man in Black”’.

<sup>14</sup> There is an extremely high level of non-reporting and reports to the police are commonly delayed, see chapter 3, section 3.3.a.

there is no guidance given as to where the line is drawn (Centre for Law, Gender and Sexuality 2006).

Further, rape myths that pervade the criminal justice system were similarly invoked in Lawson's civil case to give the impression that she consented to all that went on at Alderney. For instance, the claimant's then boyfriend gave evidence - which significantly altered over the course of the police investigation and the civil proceedings - that Lawson had a cocaine habit, was sexually 'adventurous', had a preference for fetish clubs and was a bit of a 'drama queen' ([92], [79]). Although it was never put explicitly and rather was left to 'insinuation', Eady J presumed that the admission of this new evidence was to suggest that Lawson enjoyed taking cocaine, did so willingly at Alderney and would have consented to sex with Dawes to explore her adventurous sexuality ([94]). Clearly, the myths that women who are sexually promiscuous and adventurous are more likely to consent to sex underlie these arguments, as well as the myth that women consent to circumstances not to individual sexual encounters: just because, allegedly, Lawson had taken drugs before and consented to and enjoyed sex in similar circumstances it follows that she consented to sexual intercourse with Dawes.

As such, rape myths that tell us when, in what circumstances and to whom rape happens are similarly brought in to bear on this claim in tort law. The term 'rape' is used throughout the case, without particular reference to the way in which it is a civil - in addition to a criminal - wrong and comes within the torts comprising trespass to the person. It seems, then, that the criminal conception of rape and its social baggage are transported into civil cases.

#### **4.6 Conclusions**

Tort law provides a different response to rape in comparison to the criminal law, typically providing the claimant with compensation rather than punishing the defendant. It has different purposes to the criminal law - for example, corrective justice - however, there are also similarities in that tort law, arguably, can provide a sense of retribution and can operate to deter certain behaviour, for instance. Nevertheless, constructing acts as crimes plays a powerful symbolic role in connoting their wrongfulness and severity, enforced by the sanctions of the criminal law. But tort law does not have this purpose or effect to the same extent and in construing rape as a civil wrong it may be seen as being treated less seriously (see further, chapter 7, sections 7.2 and 7.3). Yet it still provides a means by which rape survivors can hold the tortfeasor responsible for their wrong.

Furthermore, it is clear that civil claims for rape can be brought, as the act of rape also amounts to battery and assault, and occasionally false imprisonment. However, the trespass to the person torts are gendered to the extent that views as to what constitutes a wrong or harm may diverge down gendered lines. In this respect, the standard of reason is gendered, and moreover this mode of reasoning which focuses on abstract principles rather than contextualised values is gendered (and gendering). Also, it is argued that tort law's conception of the atomistic individual, distinct from social and relational context, embodies characteristics associated with masculinity, such as separation, which does not accommodate for values associated with femininity, such as care and connection. In this way, tort law struggles to recognise and redress gendered harms which are situated in and derive from individual and social relations – for instance, rape. However, in spite of this, as a result of differences between the trespass to the person torts and the crime of rape – such as their formal gender neutrality, or their lack of the label 'rape' – rape myths and gendered assumptions may not be so influential in civil cases – or, at least, tort law may have greater disruptive potential.

Yet it appears from *Lawson v Dawes* that meanings of rape and gendered stereotypes nevertheless pervade the civil law, with rape myths underpinning the defence's arguments as well as resonating in the judgment. Despite this, rape myths which were invoked held no strong sway over the case and Lawson's claim was successful. But would a jury have been persuaded and manipulated into relying on these assumptions in their reasoning? Is the fact that the trial is normally by judge in civil cases as opposed to by jury, as in criminal cases, an advantage to the claimant in claims for rape? (see chapter 5, section 5.3.b). Also, it could be questioned whether the civil standard of proof which is lower than the criminal standard made a difference to the outcome of the case (see chapter 5, section 5.2). Or perhaps because the civil response to the wrong is to compensate the claimant rather than punish the defendant this affected the decision. On the one hand, the narrative tort law constructs in relation to rape is similar to that of the criminal law which may only further impress the gender stereotypes and myths of rape that the criminal law inscribes. On the other hand, if tort law can effect successful legal challenges against rape in spite of these inscriptions, can this undercut and disrupt them?

## CHAPTER 5

### PROCEDURAL DIFFERENCES

#### 5.1 Introduction

While the civil law does not provide the typical legal response to rape, it is clear that rape is a tort as well as a crime and case law demonstrates that successful claims for rape have been brought in trespass to the person. There are many reasons for which rape survivors may wish to bring a tortious claim rather than, or in addition to, a criminal complaint (see further chapter 7, section 7.1). In part, this could be due to the apparent failings of the criminal justice system's dealings with rape and the low conviction rate. Further, there are doctrinal differences between the trespass to the person torts and rape laws, which may serve to broaden or limit the potential for tort law to redress rape. And, also, the civil and criminal justice systems differ in procedure which may affect their responses to rape. There are many procedural structures and rules in place which vary between the two systems and some will not be explored here, such as the use of hearsay evidence or expert witnesses or corroboration. The examples which will be focused on are the standard of proof, and two particular elements of 'rape' trials - the use of sexual history evidence and the mode of trial. The ways in which these procedures and standards differ between the criminal and civil justice system will be explored in relation to the extent to which it may affect the outcome of the case, the extent to which rape myths may influence the case and the treatment and representation of the claimant specifically, and of women in general.

This chapter will first consider the extent to which the lower standard of proof in the civil law may be an advantage for claimant's pursuing claims in tort law. At first glance, this may seem a considerable benefit; however, where a tortious act also constitutes a crime, ideas associated with the criminal law can trigger the 'instinctive feeling' that cases involving such 'serious' subject matter need to be proved to a higher degree than the ordinary balance of probabilities (*Bater v Bater* [1950] 2 All ER 458; *Re H and others (Minors) (Sexual Abuse: Standard of Proof)* [1996] 2 WRL 8: 587, *per* Lord Nicholls). As such, the extent to which the ties of rape to the criminal law and rape myths influence the application of the standard of proof in civil cases will be explored, and if this may limit the success of claims in tort law.

Secondly, two particular elements of the trial stage in proceedings will be explored in this chapter – those of sexual history evidence and the mode of trial. In contrast to the criminal law which has limitations on the admissibility of the claimant's sexual history as evidence (section 41, Youth Justice and Criminal Evidence Act 1999), the civil law lacks

such protections. While this could be viewed as beneficial as rape survivors are not treated as victims and are afforded formal equality in the civil legal system, this will be weighed against the possibility that sexual history evidence may be relied upon to invoke certain rape myths and cause the claimant stress and anxiety. However, the fact that civil trials will, for the most part, be heard without a jury will be considered in relation to the possibility that rape myths may be less influential in such cases. This will be considered in light of suggestions that bench trials should be a possibility in criminal rape trials, and with regard to judicial attitudes towards rape.

## **5.2 A Lower Standard of Proof: Justice via the Back Door?**

A significant difference between the civil and criminal law which may provide an advantage for those pursuing claims in tort for rape – or acts like rape – is the standard of proof. As it is lower in the civil law, it would seem that this would provide an ‘easier’ way in which to hold the accused legally responsible for rape. However, perceptions of rape are so inherently linked to it being a criminal act – conveying a certain level of stigma and censure – that these ideas infuse civil rape cases. This has influenced the way in which the civil standard of proof has been applied in cases which involve ‘serious’ subject matter and, to an extent, has ‘eroded’ this advantage (Temkin 2002: 336).

In the civil law, and thus applicable to the trespass to the person torts, the standard of proof is the balance of probabilities: this means that for the defendant to be held liable the claimant must prove that the event was more probable than not. By contrast, in a criminal case the prosecution must prove that the defendant was guilty of the offence beyond reasonable doubt. One reason for the differing standards, it is suggested, is that in the civil law the claimant is arguing the defendant should remedy the wrong they caused; and so if the law mistakenly finds against her then her rights are infringed, but if the law mistakenly finds *for* her then the defendant’s rights are infringed. Normally, there would be no reason to value the claimant or defendant’s rights over the other’s and thus they are balanced equally (Redmayne 1999: 171). However there is not this same balance in the criminal law. The consequences of (mistakenly) finding the defendant guilty infringe the defendant’s rights to a much greater extent than the infringement of the claimant’s rights if the defendant is (mistakenly) acquitted (Redmayne 1999: 171).

A significant reason for this – and probably of primary significance - is that the defendant in a criminal case will be facing punishment and likely a prison sentence if found guilty. As incarceration entails a considerable restriction of liberty the standard of

proof is necessarily high. However, if the defendant is found liable in the civil courts the consequence is paying damages to the claimant, which does not have such a substantial impact on the defendant. Another reason for the differing burdens of proof is that the criminal law plays a symbolic role in labelling and censuring those criminally convicted, whereas civil wrongs do not convey the same level of stigma and blame.

The link between the standard of proof and the sanctions and purposes of the civil and criminal legal systems was illustrated in *Y v Norway* [2005] 41 EHRR 7. Here, the applicant argued to the European Court of Human Rights (ECtHR) that a ruling which acquitted him of homicide and sexual assault but found him civilly liable (under the Norwegian Damage Compensation Act 1969) violated the presumption of innocence under Article 6(2) European Convention of Human Rights (ECHR). It was held that, *prima facie*, this did not breach the convention rights as there are significant distinctions between the civil and criminal law which justify the different burdens of proof. In *Y's* case, however, the ECtHR held that the presumption of innocence had been violated because the High Court of Norway's judgment regarding the civil claim contained language which seemed to doubt that *Y's* acquittal was the correct outcome of the criminal proceedings.<sup>1</sup>

The ECtHR explained that Article 6(2) states: 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. The court made clear that where an act both constitutes a crime and gives rise to a civil claim, in civil proceedings this would not mean that the defendant could be regarded as being 'charged with a criminal offence' ([103]). The reasons were explained:

The purposes of the criminal law and the law on compensation are not identical. While deterrence and restoration are important considerations in both areas of law, the former places emphasis on retribution and the latter on the spreading of financial loss. The two systems also supplement one another in important respects. While criminal law sanctions are particularly designed to deter the actual and potential offenders from committing offences, those of the law of compensation are particularly designed to meet the aggrieved person's need for economic redress ([98]).

Furthermore, the ECtHR pointed out that if they were regarded as the same then a criminal acquittal would lead to an automatic failure of a civil claim which would be an 'arbitrary and disproportionate limitation on his or her access to court under Art 6(1) ECHR', especially given the lower civil standard of proof ([103]).

Therefore, just because an act is both a crime and a tort this does not mean that the civil claim will be characterised as criminal. As a result of the different purposes and

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<sup>1</sup> See also *Orr v Norway* [2008] ECHR 387 which relied on this judgment and came to the conclusion that Article 6(2) was also breached in this case.

functions of the civil and criminal law, the trespass to the person torts do not have the same characteristics as the criminal offence of rape, although they have the same constitutive elements. This means that the lower burden of proof - that of the balance of probabilities - does apply to civil cases which involve matters that could also constitute criminal offences. To do otherwise may violate the claimant's right to access to a court under Article 6(1) ECHR.

### 5.2.a *The Standard of Proof in 'Serious' Civil Cases*

Despite the two supposedly clear and distinct burdens of proof, the (interpretation and application of the) civil standard has been a matter of debate and confusion where the matter is 'serious' - typically, where the matter is also a criminal offence. In such circumstances, it seems as though the courts have required that the case be proved to a greater degree of probability, claiming that the balance of probabilities is a flexible standard (*Bater v Bater* [1950] 2 All ER 458; *Re W (Minors)(Sexual Abuse: Standard of Proof)* [1994] 1 FLR 419). While this was refuted in *Re H and others (Minors)(Sexual Abuse: Standard of Proof)* [1996] 2 WRL 8, it was argued that serious incidents are less likely to occur and therefore more evidence is necessary to prove the case on the balance of probabilities. As such, this may give the appearance of a higher standard. While the link between the seriousness and (im)probability of an event has been doubted in *Re B (Children)(Sexual Abuse: Standard of Proof)* [2008] UKHL 35, it remains unclear as to how the standard of proof is to be applied in civil cases which involve acts which are also crimes (*Re B; Re D* [2008] 1 WLR 1499; see generally Mirfield 2009).

These uncertainties and changes in application of the standard of proof can be seen in civil claims for rape, for example *Griffiths v Williams* (1995) *The Times*, 24<sup>th</sup> November 1995. Griffiths was the defendant's tenant. She lived in one of his flats and worked in the kitchen for some time over the Christmas period in 1990. Although she lost the job at the beginning of the next year, she nevertheless continued to live there. On the 27<sup>th</sup> February 1991 Griffiths and Williams had sexual intercourse - the claimant alleged that she was raped but the defendant maintained the sex was consensual. The defence applied for a trial by jury which was granted, and at Truro County Court a jury found for the claimant.<sup>2</sup> The defendant appealed challenging, *inter alia*, the judge's summing up and direction as to the standard of proof. His appeal was dismissed. It was reiterated that in *Miles v Cain* (1989) *The Times*, 15<sup>th</sup> December 1989, a previous civil claim for rape, Sir

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<sup>2</sup> In certain circumstances a jury trial will be allowed in civil cases under section 69, Supreme Court Act 1981. This is discussed in more detail later in this chapter, see section 5.3.b.

Donaldson MR stated that while the civil standard was always at least the balance of probabilities, a 'higher standard is required in some cases'. Here, he relied upon Denning LJ's comment in *Bater v Bater* that the civil standard is not as high as the criminal standard 'even when it is considering a charge of a criminal nature, but it does still require a degree of probability which is commensurate with the occasion' ([37]). In light of this, Rose LJ explained that the judge had summarised to the jury that the civil standard of proof is not as high as the criminal standard which requires proof beyond reasonable doubt – this, he had said, was because a criminal conviction results in imprisonment which is not a consequence of civil liability. He then went on to emphasise that although the standard of proof is the balance of probabilities, because of the serious nature of the allegation much 'more care' must be taken to deciding whether or not this is proved. As such, Rose LJ concluded that the judge had not erred in his direction to the jury. Millett and Thorpe LJ agreed.

Similarly, *Bater v Bater* was relied upon in *Re W*, a family case involving care and contact orders where there were allegations of sexual abuse. It was repeated that the standard of proof is the balance of probabilities, however where the case concerns 'serious' acts then a higher level of probability is needed to prove it on balance, although this is not as high as the criminal standard. The upshot is that the standard of proof in the civil courts is the balance of probabilities but it is a flexible standard which can be proved to differing degrees, with 'more care' being taken over proving 'serious' acts.

But why should 'more care' be taken to prove a trespass to the person which could also constitute the act of rape than, say, a non-sexual battery? Both are also criminal offences, although rape has more serious consequences in terms of punishment and censuring. And both have the lesser consequence, if held liable, in the civil law of paying damages to compensate the claimant, measured in relation to the harm caused to the claimant rather than in proportion to the severity of the defendant's wrong. The main possible difference which may affect the defendant to a greater degree in the case of a civil claim for rape is the stigma attached to the wrong done. However, the defendant would be being held liable in trespass to the person and not found guilty of the crime of rape. It seems, then, that the meaning of rape and stigma attached is so powerful that these understandings influence the court in civil proceedings to the extent that the standard of proof is applied more stringently so the defendant is not stamped with this label unless the court is 'more sure' that he is responsible.

However, it has subsequently been argued that it is not possible to change the application of the balance of probabilities without changing the standard itself, which is outside the scope of justiciability (Mirfield 2009: 31-2). This was the stance taken in the

leading case of *Re H* which, like *Re W*, concerned sexual abuse. Lord Nicholls explained that, essentially, what was being applied in cases such as *Re W* was a standard between the civil and criminal standards of proof, being adjusted depending on the seriousness of the allegation ([587]). Although, he said, the law only deals with probabilities, not certainties, there are only two degrees recognised by the common law – that of the balance of probabilities and that of beyond reasonable doubt. Lord Nicholls argued that if the former was to be departed from in different cases depending on the severity of the subject matter this would ‘risk causing confusion and uncertainty’ ([587]). Nevertheless, he explained, there is a link between the seriousness of the allegation and the balance of probabilities:

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event is more likely than not ...

The more serious the allegation the less likely it is the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence.

Deliberate physical injury is usually less likely than accidental physical injury ... This does not mean that where a serious allegation is in issue the standard of proof is higher ([586]).

Therefore, in family cases involving sexual abuse it was held that the correct standard was the ordinary balance of probabilities; although it was noted that in serious cases the events were usually inherently less probable and so more evidence is needed to prove the case on balance. So understood, *Re W* was overruled and it was clarified there is only one civil standard of proof.

Far from the end of the story, however, in *Re H* Lord Nicholls somewhat confusingly went on to say that the correlation between severity and likelihood explains ‘one’s instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations than when deciding less serious or trivial matters’ ([587]). In subsequent cases, this statement and the words ‘more sure’ were interpreted to mean that whenever the matter was serious, regardless of whether or not it was inherently improbable, the court should be sure to a greater degree of probability that the event occurred. As such, despite the apparent overruling of *Re W* by *Re H*, Lord Nicholls’ statement gave room for varying the application of the standard of proof.

### 5.2.b *After Re H: The Confusion Continues*

After *Re H* the standard of proof was, yet again, interpreted as being flexible depending upon the seriousness of the allegation. This is evident in a civil case involving rape, *Parrington v Marriott* (1999) Unreported, Court of Appeal, 19<sup>th</sup> February 1999. Here,

Mummery LJ quoted the above statement of Lord Nicholls to demonstrate that in a serious matter the balance of probabilities must be proved to a high degree, consistent with *Miles v Cain*. Yet *Miles v Cain* applied the standard of probability in the same way as *Re W* (both relying on *Bater v Bater*). As *Re W* was apparently overruled by *Re H* it follows that *Miles v Cain* cannot be consistent with *Re H*, contrary to Mummery LJ's opinion.<sup>3</sup> This interpretation, it seems, follows the 'instinctive feeling' that because rape is so serious, has such a stigma, that the standard of proof should be higher in civil claims for rape.

Alternatively, it could be argued, aside from mentioning *Miles v Cain*, that *Parrington v Marriott* was consistent with *Re H* because rather than changing the standard of proof it simply was emphasised that as rape is serious it is less probable to occur and, therefore, more evidence is needed to prove it on the balance of probabilities. But, this point has been undercut by *Re B* – another family case involving sexual abuse.

In *Re B*, it was reiterated that there was only one civil standard of proof – that of the balance of probabilities<sup>4</sup> – and, furthermore, there was no necessary correlation between the severity of an event and its probability. In this respect, Baroness Hale emphasised the word 'usually' in Lord Nicholls' opinion in *Re H*: 'Deliberate physical injury is *usually* less likely than accidental physical injury' ([20]). She went on, '[s]ome seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances', but in some contexts it will not be – for example, if there is a dead body with the throat cut and no nearby weapon ([23]). As such, the (im)probability of the situation, and thus how much evidence is needed to prove the case on the balance of probabilities, depends upon the particular facts and not the seriousness of the allegations.

This makes sense. In terms of rape, while it is serious it is nevertheless a common and mundane occurrence and, arguably, is not sufficiently rare to render it even '*usually* inherently improbable' (see chapter 3, section 3.2). And, following *Re B*, it depends on the facts and circumstances of the case as to whether or not rape is likely and the difficulty of proving that it was more probable than not to have occurred. However, rape myths tell us what circumstances these are: rape is improbable in situations where a woman usually consents to sex – for instance with someone she has engaged with sexually before - but it

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<sup>3</sup> In *Re B*, both Lord Hoffmann and Baroness Hale gave examples of other cases in which Lord Nicholls' statement was referred to in support of the heightened standard approach, explaining that this was a misinterpretation and misapplication of *Re H* ([20], [64] respectively).

<sup>4</sup> It was also said that in some civil cases a higher standard of proof may be justified. However, this will only be such cases where the consequences of liability impose criminal law like sanctions – punishment and deterrence - and therefore the appropriate standard of proof is the criminal 'beyond reasonable doubt' standard: [20] and [22], *per* Baroness Hale; [7], *per* Lord Hoffmann. For example cases see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 – the imposition of a 'sex offender order' under section 2, Crime and Disorder Act 1998 - and *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 which concerned an anti-social behaviour order.

is probable in scenarios which reflect the paradigmatic stranger rape. As such, if rape myths continue to seep into the judgments of those in the civil system then the starting point in such cases may be that the rape was unlikely to have occurred, was less probable, and so will seem harder to prove on balance. This could be reinforced by the possibility that the link between the seriousness of an allegation and the likelihood of its occurrence has not been entirely severed. There are traces of this view to be found in *Re D* [2008] 1 WLR 1499. From this case, leeway is left for confusion over the (im)probability of serious acts and the assumption that they are consequently harder to prove (Mirfield 2009: 38; and generally discussing the contradictions between these cases). However, regardless as to whether these views are given credence in subsequent cases, the lower burden of proof in the civil courts may not provide as much of a benefit to claimants as it would initially appear – for the most part, as a result of understandings of (the crime of) rape and rape myths.

To summarise, initially, the standard of proof was seen to be higher in civil claims which involved serious allegations such as rape, primarily because of the stigma and label ‘rape’. Since the clarification that there is only one way to apply the standard of proof, it has been said that where an event is unlikely then more evidence is required to prove it occurred on the balance of probabilities. Although there is no necessary link between an event being unlikely and its severity (though this idea does still remain; *Re D*), rape is frequently thought improbable because of social (mis)conceptions. As such, in civil claims it is likely to be seen as harder to prove on the balance of probabilities than, say, a non-sexual battery. Nevertheless, it is now clear that the burden of proof is the ordinary balance of probabilities and not a standard intermediate to the criminal standard. And, further, it has always been the case that the civil standard of proof is lower than the criminal standard which may be beneficial for claimants bringing civil actions for rape.

### **5.3 The Civil Justice System and ‘Rape’ Trials**

Recently, it has been emphasised that a significant part of the problem of the legal system’s response to rape is less the substantive law but more so how the laws are implemented and interpreted in practice (Temkin and Krahe 2008). This seems to ring true in the civil law as well as the criminal law which is also influenced by assumptions regarding rape which has, to a certain extent, been demonstrated in relation to the standard of proof. While attention has been drawn to means by which the influence of rape myths could be reduced in the criminal law, these measures have gone without consideration of the civil law as claims for rape are relatively rare.

In the criminal context, the extent to which rape myths pervade the minds of those involved in the criminal process, affecting the way in which the case and rape victim are treated both in court and out, has been explored (see chapter 3). From hostile police receptions of rape complaints to the reluctance of the jury to convict a defendant where he ('reasonably') thought the victim was consenting, women's behaviour, conduct, dress, sexual history and so on is scrutinised and evaluated. She must go through extensive physical examinations, relentless questioning about her experience only to be continually met with disbelief. The process is frequently condemned to be as traumatic as the rape itself and has been termed a 'second rape' (Smart 1989; Madigan and Gamble 1991).

As such, there has been considerable attention drawn to the handling of rape cases and the treatment of victims. For example, from the 1970s there have been efforts to reform the law to limit the admissibility of the sexual history of the complainant as evidence of her consent or the defendant's belief in consent (sections 2(1) and (2), Sexual Offences (Amendment) Act 1976; section 41, Youth Justice and Criminal Evidence Act 1999 (YJCEA)). More recently, there has been an emphasis on victims' rights and providing protection for rape victims (Home Office 2006a). The consultation paper *Convicting Rapists and Protecting Victims – Justice for Victims of Rape* (2006) included proposals to better educate those within and outwith the criminal justice system - from the public who may sit on juries to police to judges - of myths and realities of rape. Also considered were the possibilities of using video recorded evidence, and an option to alter the mode of trial from a jury to a bench trial (Home Office 2006a: 31-33, 16). These measures are aimed at limiting the influence of rape myths which inhibit the success of the criminal justice system, and are intended to reduce the stress and trauma of the process for the rape victim. Consequently, it is hoped, this will encourage victims to report rape, decrease the number of cases which are withdrawn by the complainant themselves and, ultimately, lower the high level of attrition and improve the conviction rate.

But in the civil legal system, there are no such protections. This could be particularly problematic. With less education or training of those generally within the civil law of the realities of rape, and no particular restrictions on the cross examination of the claimant in relation to their sexual history, there may be a greater chance of rape myths influencing attitudes towards a particular case. This could mean that the civil trial may be even more traumatic and exasperating for the claimant. Further, the claimant may be met with hostile responses from those within the civil law - especially, perhaps, considering there could be a negative attitude towards women suing for rape, with an underlying suspicion that the allegation is falsely made for financial gain.

Yet the civil law does have its advantages. In contrast to the criminal law where the complainant is only a witness and has no right to independent legal representation but only rights and protections which reinforce their victim status (Temkin 2002; Adler 1987), the claimant in a civil case has full legal standing and brings the action against the defendant herself (West 1992). Consequently, the civil law provides a formal equality which is lacking from the criminal law. Indeed, it has been argued that the protections afforded by the criminal justice system further contribute to enforcing the victim status of rape complainants and the construction of women as weak, passive and in need of patriarchal protection (West 1992). Viewed in this light, the criminal justice system is not just like a 'second rape' because of a continued repetition of the experience, but as it is a further subjection to male dominance and relinquishment of control (Madigan and Gamble 1991). As such, the criminal process may support the gender inequalities that inform and give rise to rape myths.

In contrast, the civil system does not formally reinforce gender stereotypes. By bringing the action against the defendant herself, the claimant can exercise her agency, taking an active rather than passive stance to invert the gender roles (West 1992: 115). This, Nora West argues, is potentially of great significance in cases of sexual battery where there are underlying power imbalances between the parties which can be challenged by the claimant through the civil process (1992). As such, Bruce Feldthusen suggests that bringing civil claims for rape (or, more broadly, sexual battery) could provide for a more therapeutic justice (Feldthusen 1993). In this way, claimants may not necessarily be motivated by the prospect of damages but by the cathartic relief a civil claim may bring by punishing and publicly vindicating the defendant, encouraging other rape victims to bring civil claims, and possibly contribute to increasing the healing process after a sexually invasive experience (Feldthusen 1993: 211-2).

This could be slightly – or, perhaps, substantially - on the optimistic side. The civil trial may not be therapeutic at all: the claimant must still repeat the facts, the story, the trauma, and face the risk of high costs of a (usually lengthy) claim and a public disbelief of her account if her claim fails (Conaghan 1998: 160). This may actually be more distressing than a criminal trial. As such, the lack of protections afforded to claimants in rape cases may be a significant factor that will deter civil claims. It could be argued, therefore, that if civil claims for rape are to be encouraged then similar provisions should be introduced in the civil justice system. This has, in fact, already happened in one respect. At the time of *W v Meah; D v Meah* ([1986] 1 All ER 935, anonymity which is granted in certain cases only applied to criminal trials (sections 1 and 2, Sexual Offences Act 1992). *Meah* highlighted this inconsistency and the law was amended so the provision also applies to civil trials

(Criminal Justice Act 1998, section 170(2); Schedule 16 repealing section 4(7), Sexual Offences (Amendment) Act 1976). However, it could be argued that the lack of protections afforded to claimants in such cases are an inevitable consequence of taking responsibility and having the formal equality of the civil law which can be seen as a means to empower victims.

However, in spite of the formal equality of the civil system, it may be that the lack of protections allows rape myths to have a greater influence on the case. Of particular concern and relevance here is the use of sexual history evidence in cross-examination, which is not restricted in civil cases. In contrast, the fact that the majority of civil cases are heard by a judge rather than a jury may be a positive difference, as altering the mode of trial has been a suggestion to improve criminal rape trials. Yet judges may be just as likely as jurors to be influenced by rape myths; consequently – and especially as there may be less specific educative regimes in relation to rape for judges involved in civil cases – this may be of little significance. The differences in these aspects of the criminal and civil systems will be examined, as well as how this affects civil claims for rape and if this is beneficial for the claimant or if it would be better if changes were made.

### 5.3.a *Sexual History Evidence*

There has been a considerable amount of attention paid to criminal rape trials and the use of the complainant's sexual history as evidence in cross-examination. According to popular belief, if a woman has been involved sexually with the defendant before, or with another in similar circumstances, or is sexually promiscuous then she is not a credible witness and is likely to have consented to sex with the defendant. In rape trials this has led to forays into the claimant's behaviour, character and sexual history, invoking rape myths to undermine the claimant's credibility and imply that she consented to sex with the defendant, when it has little or no bearing on the event in question (Temkin 1984). This can be traumatic for the complainant (Lees 1996) and the admission of such evidence may undermine the complainant's credibility and influence the jury's decision (Adler 1987). Consequently, there is legislation enacted which states that a claimant cannot be questioned in cross examination with regards to her sexual history, subject to a few exceptions (section 41, Youth Justice and Criminal Evidence Act 1999). While there is debate as to the extent to which the legislative responses to these concerns have had a positive impact (particularly since *R v A (No. 2)* [2002] AC 45; see chapter 3, section 3.4), there are at least some protections for complainants.

In contrast, the civil law has no such provisions and claimants may be extensively cross examined about their sexual history and behaviour. The feminist campaigns to change the criminal law provisions (and the subsequent criticism of their application) highlights the extent to which the (mis)use of sexual history is a problem in these types of cases (Adler 1989; Lees 1996; Temkin 1984 and 2003). Just because the case involves a civil – as opposed to criminal – wrong, it seems unlikely that rape myths will leave hold: the case still concerns the question of whether or not the claimant was consenting to sex with the defendant, raising assumptions regarding what constitutes appropriate and ‘normal’ sexual behaviour (see chapter 4, section 4.5). Without any restrictions, the claimant’s sexual history may be exploited to a greater degree in civil suits. For instance, in *Miles v Cain* Caulfield J exclaimed, ‘I have never heard a woman subject to so thorough and ferocious cross examination as this plaintiff’. This could deter women from bringing civil claims as well as potentially adversely influencing the outcome of the case.

In *Griffiths v Williams*, the admissibility of evidence which went to the claimant’s credibility and the impact this may have on the case was discussed. The claimant, Griffiths, alleged that the defendant, her landlord and previously also her employer, raped her after following her to her room claiming that she had outstanding rent and threatened to evict her if she did not provide a form of payment. Williams claimed the intercourse was consensual. He said she asked if he had ‘a job for her’ before kissing him, closing the door and encouraging him to have sex with her. The defendant was held liable and appealed.

In the Court of Appeal the evidence which had been admitted was discussed in detail by Rose LJ. The defendant had called a number of witnesses, one of whom effectively alleged that the claimant was a prostitute - that she ‘picked up blokes for cash’. Clearly this was to support the defendant’s case that Griffiths asked if he ‘had a job for her’ before kissing him. Furthermore, it was noted that her previous behaviour was also drawn on, particularly that from seventeen years earlier when, aged fifteen, she reported a sexual assault to the police which led to a prosecution for unlawful sexual intercourse. The claimant said that this evidence was inadmissible as it was purely a defence tactic to imply she was sexually promiscuous and likely to have consented to sex with the defendant and was irrelevant to the incident in question. Her argument failed. Although the judge had said these witnesses were ‘principally directed at blackening the claimant’s character’, it seemed the evidence was admissible since ‘credibility was clearly at the heart of the case’. Although ultimately the jury accepted the claimant’s evidence, this is still a matter of considerable concern. Especially in comparison to the criminal law where evidence that is

adduced primarily to discredit the claimant will always be excluded (section 41(3), YJCEA 1999).<sup>5</sup>

Further, such evidence does not just affect views as to the claimant's credibility, but whether or not she consented to the sexual contact – or, at least, the (un)reasonableness of the defendant's belief in consent. For example, in *Lawson v Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865 evidence was brought regarding Lawson's sexual history. Lawson's then boyfriend alleged that she was sexually 'adventurous' and enjoyed going to fetish clubs. Presumably this was to imply that she would have willingly engaged in the sexual encounters at Alderney. But such previous sexual encounters are usually – if not always - irrelevant to the issue of the claimant's (lack of) consent to the particular event(s) in question. While it is unclear as to the precise evidence in this case that would (if any) be excluded from a criminal trial, the extent to which the claimant's sexual behaviour can be used as evidence in civil cases without any restrictions is disconcerting.

For one thing, this could deter rape victims from pursuing a civil claim, and, for another, it could affect the outcome of the case – after all, rape myths would not be drawn upon if it was not thought they had some influence. In the Home Office Report evaluating the impact of section 41, YJCEA 1999, Jennifer Temkin, Liz Kelly and Sue Griffiths found that complainants included the issue of sexual history evidence as a factor in their decision making in relation to reporting rape and withdrawing a complaint. Complainants viewed the use of sexual history evidence as 'unjust and an invasion of privacy' (2006: 62-3, 69). This could mean that because of fewer restrictions on the use of sexual history evidence in the civil law rape victims may be deterred from making a claim, and the stress of pursuing a civil action could be increased. However, Temkin *et al.* also concluded, *inter alia*, that the restrictions on sexual history evidence had no discernable effect on the attrition rate in rape cases (improvement measured by the proportion of reported rapes resulting in a prosecution) (2006: 70). In this respect, the civil law may not be comparably worse than criminal trials as such evidence could still be admitted, in spite of the legislative limitations.

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<sup>5</sup> Evidence that could be viewed as relevant to the defendant's belief in consent could be admissible under sections 41(2) and (5); see also *R v A*. The allegation of prostitution would not appear to fall within the exceptions, particularly as Williams did not argue that he paid her for sex (although he did infer that this was implied on her account) (section 41(3)). The fact of a previous criminal complaint of rape could be admissible evidence – although here it is not clear if it led to a successful prosecution or not; in the *Explanatory Notes: Youth Justice and Criminal Evidence Act 1999* (The Stationery Office: London, 1999), para. 150, it states that past allegations are not evidence of sexual behaviour, but of truthfulness. Here, it is unclear from the Court of Appeal's comments what allegations about the claimant were being made in relation to this fact. (See Temkin, Kelly and Griffiths 2006: 13-14 for an outline of the case law on this).

But this is beside the point. The way in which claimants are cross examined in relation to their sexual history and behaviour illustrates the extent to which rape myths are influential in the minds of judges and jurors alike (Temkin 2003: 222-3; Temkin and Krahe 2008: 146-51). If rape myths did not exist in the first place they would not continue to underline these tactics and there would be no need for victims to be protected with regard to their sexual history. However, as long as they relentlessly pervade the attitudes and minds of those within and outwith the legal system, rape myths will continue to be deployed in the rhetorical strategies of defence lawyers and sexual history drawn on where possible (Temkin 2000). It seems the civil trial is no exception.

It is important to note, however, that these tactics were used unsuccessfully in *Griffiths v Williams* and *Lawson v Dawes*. In both cases the defendant was held liable. On the one hand, it could be argued that where there are successful cases despite the use of such evidence and allegations, the myths and assumptions invoked by such evidence could be undermined and subverted. As such, bringing civil cases could be an advantage. But on the other hand, because this sub-narrative underwrites the trial, the existence and strength of rape myths and gender stereotypes could be reinforced - regardless of the outcome of the case.

Overall, to a certain extent, the lack of limitations on claimants' sexual history in civil trials is problematic. First, it may act to deter civil claims from being brought, with rape victims wishing to avoid the public exploitation of their sexual history and behaviour. Secondly, though, it may also adversely impact the outcome of cases. Consequently, it could be argued that the criminal provisions should be extended to include civil cases involving sexual assaults. However, the lack of protections for claimants in such cases may just be a consequence of their taking control and responsibility. Framing the claimant as inevitably and continually victimised does not necessarily obviate the problem - particularly when the provisions which may do so have little positive impact. Yet because, arguably, the claimant is exercising agency in bringing a civil claim within a system of formal equality, such protections would not necessarily entrench victimhood to the extent that the criminal justice system does. However, until such provisions are implemented effectively, it would seem that there would be little positive gain in applying them to civil, in addition to criminal, trials.

### 5.3.b *Mode of Trial*

As has been documented, rape myths play a part in influencing jurors' perceptions towards the case in question (Temkin and Krahe 2008: ch. 3; Ellison and Munro 2009) and

this has been a part of the arguments to restrict the use of sexual history evidence. With realities of rape frequently being far from assumptions and stereotypes, the myths contribute to maintaining the high acquittal rate. In fact, cases which are pleaded guilty to make up almost half of all convictions; so there are an extremely low number of convictions for rape by juries (Kelly *et al.* 2005: 72). As such, there have been suggestions for an optional trial by a judge without a jury in attempts to dispel the rape myths and limit the impact of them in the court room (Home Office 2006a: 16; Criminal Justice Bill 2003); however, such policies were never adopted. It could be thought, then, that it is an advantage of the civil law that a bench trial is more common rather than criminal cases for rape in which the judge will always sit with a jury.

It is questionable, however, to what extent the mode of trial may affect the outcome of a case. Rape myths do not just influence the attitudes of the general public who sit on juries; they are pervasive throughout society and also set in the minds of those within the legal system, from police officers to lawyers to judges (Temkin and Krahe 2008). As such, they are not just influential in jurors' decision-making but in judicial interpretation and application of the law. This is illustrated by Temkin and Krahe's interviews with judges on corroboration, sexual history and third party disclosure in rape cases (2008: ch. 7). Here, there have been legislative changes in relation to admissible evidence in rape trials in order to counter misconceptions about rape, but the way in which judges have approached the law has limited their countering effect - the myths and assumptions which contribute to drawing the line between rape and sex too strong to be let go of.<sup>6</sup> Similarly, in civil cases, these assumptions operate to influence the judge's evaluation of the credibility of the claimant and defendant.

This is illustrated by *Parrington v Marriott* (1999) Unreported, Court of Appeal, 19<sup>th</sup> February 1999 in which the defendant appealed against a decision holding him liable for raping the claimant on two occasions and sexually harassing her over a period of 18 months. It was the defendant's case that the judge's findings were against the weight of the evidence; he had placed too much reliance on the claimant's impression as a witness when many of her evidential statements were inconsistent and conflicting. In relation to this, Mummery LJ stressed:

A judge sitting alone trying a civil claim of this kind has a difficult and delicate task. The plaintiff and the defendant are the only people in the whole world who know for certain what happened. It is a case of the plaintiff's word against the defendant's word.

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<sup>6</sup> For example, judicial interpretation of section 41, YJCEA 1999 restricting the use of sexual history evidence in *R v A*; see chapter 3, section 3.4

Much, then, hinges on the parties' credibility. As such, Mummery LJ considered the judge's assessment of both parties' veracity. With regard to the defendant the judge had said:

Throughout this case his evidence and his recall was too perfect, too precise and too glib. He stuck to his version in the witness statement as though it was a script that had been learned by him.

He felt much more inclined to believe the claimant:

I am absolutely certain from the body language that I saw in the witness box, and from the tone and manner in which she gave her evidence and the extremes of upset into which she dissolved from time to time, that this was not a woman telling untruths to the court.

But what if the claimant had not fulfilled the stereotype of the rape witness – victimised, distressed, shattered? What if she had not dissolved into extremes of upset but had recalled the incidents without emotion? The judge seems to place reliance on the claimant's credibility by comparing her reaction to the expected reaction of a rape victim and, as it matched, believed her over the defendant (Temkin 2002: 195; Smart 1989: 47). Although this was to the advantage of the claimant here, by implication where the claimant does not match the rape victim stereotype they are less likely to be believed. As such, a bench trial may not necessarily be any more beneficial than a trial by jury.

Yet just because the case is in the civil courts does not necessarily mean the trial will be without a jury.<sup>7</sup> Although this is true for the majority of cases, for a small number of trials – those involving fraud, libel, slander, malicious prosecution and false imprisonment – there is a qualified right to jury, governed by section 69(1) of the Supreme Court Act 1981. Also, section 69(3) of the Supreme Court Act 1981 allows for a jury trial to be ordered in other types of cases, subject to the discretion of the court. In this respect it has been highlighted that a jury should only be used in exceptional cases, for example '[w]henever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying, then trial by jury has no equal' (*Ward v James* [1966] 1 QB 273: 295, *per* Lord Denning). These 'exceptional' cases tend to be when interests such as reputation and/or liberty are threatened. Consequently, it appears that tort law traditionally sees interferences with these interests as causing greater harm than, say, violations of bodily and mental integrity. As the former are interests which are typically associated with and valued more by men whilst the latter with women, tort law prioritises the harms that men suffer and undervalues those experienced more commonly by women (Conaghan 1996; West 1987).

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<sup>7</sup> There has been much criticism of the use of jury trials in the civil courts with some arguing for total abolition and others just suggesting further restrictions, increasing judicial power; see *Report of the Committee on Defamation* (1975), especially at para. 496. As such, allowing more jury trials in civil cases would be going against the grain.

However, a civil claim for rape, *Griffiths v Williams*, was heard by a jury at Truro County Court. The applicant could either have convinced the trial judge that rape amounted to false imprisonment which carries a qualified right to jury trial (section 69(1)), as Tony Weir suggests (2004: 339), or the judge could have exercised the discretion conferred by section 69(3), viewing the case as 'exceptional' and appropriate to be tried by a jury. The jury found for the claimant and awarded £50,000 in damages, against which the defendant appealed. He argued that this was too high and the trial should have been split so the jury only determined the issue of liability. Although, a significant factor to account for in civil trials by jury is the risk that the level of damages may be out of line with comparable cases (*Ward v James*), in the Court of Appeal, Rose LJ stressed that this civil claim for rape was far from the 'ordinary personal injury case'. Therefore, he said, it was not inappropriate for the jury to award damages.

As to the level of damages, a comparison was drawn with defamation. While this was not to the rape directly, it was argued that had the accusations made against the claimant in trial – such as an allegation of prostitution – been the subject of a defamatory publication about her,<sup>8</sup> there would be nothing untoward in awarding £50,000 in damages (Rose and Thorpe LJ). But seemingly there is something untoward about awarding that amount for the rape: all three judges in the Court of Appeal agreed that they would not have assessed damages at such a high level.<sup>9</sup> This, again, illustrates the (gendered) disparities in damage awards between different types of interests. Nevertheless, it was highlighted that a judge should not interfere with a jury's assessment of damages – even if they are 'considerably higher' than they would have awarded as intervention is only justifiable where the damages are 'out of all proportion to the circumstances of the case' (with reference to *Ward v James*). None of Rose, Millett or Thorpe LJ considered it so.

Another significant point to note in cases where a jury trial is used in a civil case for rape is the importance of the judge's directions to the jury. This is, perhaps, particularly relevant in civil claims for rape as - considering the widespread understanding of rape as a serious and particularly heinous crime - a jury may treat the case as criminal. As such, in *Griffiths v Williams* the trial judge drew attention to the difference between the criminal and the civil standards of proof, and the fact that the consequence of finding for the claimant would result in the defendant paying compensation rather than being imprisoned. However, the direction given to the jury was that the case was to be proved to a higher degree than the ordinary balance of

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<sup>8</sup> Court proceedings are exempt from defamation claims, being absolutely privileged under section 14, Defamation Act 1996.

<sup>9</sup> On the level of damages awarded in civil rape cases see chapter 6, section 6.4.a.

probabilities though not as far as beyond reasonable doubt. This application of the burden of proof seemingly stemmed from the intuition that such cases should be treated more carefully because of the strength and meaning of the label 'rape' (see section 5.2, this chapter). This highlights the difficulty a judge may have in clearly directing a jury on a particularly confusing point of law; but this is true in both civil and criminal cases. However, what it also shows is that perceptions of rape influence judges as well as juries and, therefore, it may not be of any discernable benefit to the claimant in a civil case that it is most likely to be a bench and not a jury trial.

In light of the ways in which both judges and juries are influenced by rape myths there have (in relation to criminal law in particular) been proposals to provide better education to those within the legal system and to the general public of the realities of rape (Home Office 2006a). Currently, all judges who try rape cases are required to attend the serious sexual assault seminars organised by the Judicial Studies Board. While it is not specified that judges who are to hear civil cases involving sexual matters such as rape must attend these seminars and courses, care is taken to ensure that a judge hearing this type of case has had the relevant training.<sup>10</sup> As such, there are some precautions taken in the civil law in relation to cases of rape.

On the whole, it cannot be concluded as to whether or not judges or juries will be more or less likely to be influenced by rape myths, and consequently if the mode of trial will make a difference to the outcome of a rape case. However, in combination with other differences between the criminal and civil law, such as the lower burden of proof, the fact that the majority of civil trials will not be heard by a jury may allow for more successful civil suits.

## **5.4 Conclusions**

There are significant procedural differences between the civil and criminal justice systems which may affect the likelihood of civil claims for rape to be brought, in addition to increasing the possibility of their success in comparison to criminal rape cases. While the lower standard of proof in the civil law may appear to provide an immediate advantage to claimants, to some extent this advantage has been lessened as associations of rape with the criminal law may cause judges to treat such cases more seriously. However, it is notable that in whatever way the civil standard of proof is applied it is lower than the criminal standard.

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<sup>10</sup> Information regarding the Judicial Studies Board and training seminars for judges hearing civil claims for rape from email correspondence is held on file with the author.

There are other differences in the way that civil and criminal trials are conducted which may influence rape cases. The criminal law has introduced limitations on the use of sexual history evidence in rape cases in attempts to reduce the trauma of the trial for the complainant and limit the extent to which rape myths can be invoked by such evidence. However, while such protections do not apply to civil trials and, indeed, the case law shows that the claimant's sexual history has been used by the defence at trial, it could be argued that this is an inevitable part of the claimant taking responsibility and control. This is reinforced by the fact the civil trial has a formal equality, with the claimant bringing the action against the defendant, which can provide women with an agentic rather than victim status in contrast to the criminal process.

Further, it could be argued that rape myths and gendered assumptions may be relied on less in civil cases because the trial is more likely to be heard by a judge alone, rather than with a jury. However, in both forums much will depend on the judge as in a trial by jury the judge must give adequate directions. And, it appears that a judge may be just as likely to be influenced by gendered assumptions and stereotypes as jurors. It cannot, therefore, be concluded as to whether a bench or trial by jury will be more beneficial in civil rape cases.

## CHAPTER 6

### FINANCIAL CONSIDERATIONS

#### 6.1 Introduction

In comparison to a criminal case, the role of finance is likely to play a greater part in the civil law. While the prospect of limited resources and an abundance of complaints may well influence the police and Crown Prosecution Service's decisions in relation to investigating and prosecuting cases, (lack of) financial resources – of either the claimant or defendant – can pose direct problems in civil suits. One reason is that civil claims are notoriously (potentially) costly; and, as such, regardless of doctrinal and procedural differences between the civil and criminal laws which may motivate rape survivors to bring claims in tort law, such cases could be precluded or deterred from the outset.

Another financial limitation is that the claimant will only receive damages if the defendant is able to pay. The extent to which this acts as a barrier to redress will be explored, particularly in relation to alternative sources of compensation, such as the Criminal Injuries Compensation Scheme. However, Bruce Feldthusen has argued that compensation may not be the primary motivation for the claimant to sue, which would reduce the importance of the question of the extent of the defendant's solvency (1993). In this regard, the role of compensation will be considered and the level of damages awarded will be examined. The level and categorisation of damages in rape cases will be explored in depth, with particular regard to the way in which this contributes to constructing the tortious conception of the harm of rape.

#### 6.2 Costs

Regardless of the reasons for which rape victims may want to bring a civil action, claimants risk facing extensive legal fees if they lose their case. This may prevent cases from being brought or force claimants to drop their case if they can no longer afford to continue. While there is the option of legal aid, the availability and possibility of it being awarded is extremely limited,<sup>1</sup> highlighted by *Moore v Green* (1990) *The Guardian*, 13<sup>th</sup> September 1990. Here, the Court of Appeal ordered a retrial after the claimant had been initially successful. Both the defendant and claimant initially had legal aid. Following the

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<sup>1</sup> On legal aid and gender disparities in Australia see Graycar and Morgan 1995.

court's decision the Legal Aid Board reconsidered the positions of the parties and legal aid was refused to the claimant, it being seen as unreasonable to continue the funding as any ensuing benefits would far outweigh the costs. The claimant sought judicial review. She was refused leave by Macpherson J, who pointed out that '[s]he is not barred from the seat of justice. She is only barred from the cushion of public finance'. He concluded that whether or not the decision of the Board was right or wrong, they made a 'difficult' decision 'rationally' (*R v Legal Aid Board and Anor, ex parte Moores* (1992) 4<sup>th</sup> March 1992). The claimant appealed (*R v Legal Aid Board, ex parte Moores* (1992) 16<sup>th</sup> December 1992).

In the Court of Appeal, Neil, Mann and Hoffmann LJ were in agreement that although it seemed a great injustice to the claimant to be abandoned by the Legal Aid Board at this point in the proceedings, as Hoffmann LJ put it, the Board are the 'guardians of the public purse' and an unjust decision cannot necessarily be said to be irrational or perverse. However, leave for judicial review was granted on the basis that, contrary to the Civil Legal Aid (General) Regulations (Rule 81), the claimant had not received notice of the decision and was deprived of an opportunity to restate her case for aid.<sup>2</sup> This case brings into sharp relief the difficulties facing claimants regarding costs, which are likely to act as a significant deterrent to civil actions for rape. But it also shows that civil cases focus on justice for the individual, with less concern for the public or any instrumental functions the civil law may fulfil – such as setting acceptable social standards and deterrence. Such factors were not considered in the balance: 'the reasons were economic' (*ex parte Moores*, 4<sup>th</sup> March 1992, *per* Macpherson J). Although the claimant argued that in such a 'serious' case this should not suffice to refuse her funding, this argument was not accepted.

A further potential deterrent to civil claims is that the payment of damages depends upon the defendant's solvency. In three of the civil rape cases that have been pursued, the financial position of the defendants had improved dramatically shortly beforehand, putting them in a much more attractive position to be sued. For example, in *W v Meah; D v Meah* [1986] 1 All ER 935 the two women who brought their claims did so after *Meah* had been successful in a civil case of his own, being awarded £45,000, and in *Lawson v Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865, Lawson did not consider a civil claim until after Dawes had died and left a substantial estate. But the clearest illustration is the recent – and considerably well publicised – case, *A v Hoare (and other appeals)* [2008] UKHL 6 (Boycott 2008; Gibb 2008). Hoare was convicted and sentenced to life imprisonment for the attempted rape and sexual assault of A in 1988. In

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<sup>2</sup> The final outcome of the review and whether or not the claimant proceeded with a retrial is unknown.

August 2004, he bought a ticket for the national lottery and subsequently won £7million – prompting, perhaps unsurprisingly, A to pursue a civil claim. The case primarily concerned limitation periods, however after the House of Lords altered the law in this regard, A’s case proceeded and it was reported that she was entitled to £100,000 in compensation (*A v Hoare* [2008] EWHC 1573; Horsnell 2006). While this did not make a significant inroad into Hoare’s windfall, the £1million charged in legal fees would have (Kelly and Sims 2009). It is unlikely, however, that the majority of defendants in such cases will be so lucrative and the high costs of civil trials are likely to act as a significant deterrent and bar to redress.

### **6.3 Third Parties Who Pay**

#### *6.3.a Vicarious Liability*

As it will often be the case that the tortfeasor does not have the means to pay damages if awarded, vicarious liability is an appealing option if it is a possibility.<sup>3</sup> Where an employee, acting within the course of their employment, commits a tort their employer may be held vicariously liable, even though they themselves are not to blame. In this situation, the claimant can pursue an action directly against the tortfeasor, vicariously against their employer or both; though due to compulsory employer’s liability insurance a vicarious liability action is more likely to result in a considerable payout. However, there have been few vicarious liability actions regarding rape, and none have been successful.

In *Parrington v Marriott* (1999) Unreported, Court of Appeal, 19<sup>th</sup> February 1999 the claimant was sexually harassed and assaulted by her work colleague at their employer’s factory over a period of eighteen months, and raped twice - one taking place on the employer’s premises. A direct action against the defendant for rape and sexual harassment was successful, however a claim that the company was vicariously liable was struck out. As the defendant’s liability was proved, for vicarious liability the claimant had to establish that the rape and harassment occurred in the course of the tortfeasor’s employment. At the time of the case, the courts determined this by looking at whether the

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<sup>3</sup> There is also the possibility of claims being brought against third parties in negligence. This could be, for example, if the police are negligent in providing sufficient safeguards or investigating a concern which may indicate future assault(s) (although see *Hill v Chief Constable of West Yorkshire* [1989] AC 53); or systemic negligence actions where an institution’s structures and procedures facilitate - to the extent it can be said it caused – the trespass(es) against the claimant’s person. However, this is apparently difficult to prove in the case of rape – see, for example, *R v MOD* [2007] EWCA Civ 1472. As the focus here is on conceptualising rape as a trespass to the person and the way in which tort law responds to such cases, these actions will not be explored.

tortfeasor's conduct was authorised by their employer or is another form of an authorised act – the 'Salmond test' (Salmond 1907: 83). Applying this test, it is perhaps unsurprising that the vicarious liability action was struck out as it would hardly be likely to be said that rape was an authorised act in the workplace.

However, since *Parrington v Marriott* this test has been overruled by *Lister v Hesley Hall* [2001] UKHL 2 and the current test is whether there is a 'close connection' between the employment and the employee's tort(s). With regard to intentional tortious acts it could be argued that, by nature, they are committed independently, thus breaking the 'close connection' between the employer and employee. But in *Lister v Hesley Hall* Lord Millett clarified that employers cannot escape liability on this basis:

it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty ([79]).

Further, the reason for introducing the 'close connection' test over the Salmond test was precisely to capture intentional torts more readily within the confines of vicarious liability (*Trotman v North Yorkshire County Council* [1999] LGR 584; *Lister v Hesley Hall*).

Nevertheless the scope of the nexus is less than clear, and cases appear to have produced inconsistent results.

A vicarious liability action was brought against the police in *N v Chief Constable of Merseyside Police* [2006] EWHC 3041 after a police constable, Ian Tolmaer, raped and sexually assaulted the claimant and was sentenced to 12 years imprisonment. Tolmaer had intercepted the claimant after she stumbled, considerably inebriated, out of a nightclub, explaining that he was a police officer and would take her to the police station. Although he was not on duty, he was wearing his full police uniform including his numbered epaulettes, black tie, regulation shirt and trousers and a communications radio on his shirt with its wire protruding. His warrant card was visible on the outside of his chest pocket and he showed his police badge to the claimant a number of times. However, it was emphasised that the 'broad context' of the situation should be taken into account - for example, that the police do not owe a duty of care to accord a potential victim of crime appropriate protection, support, assistance or treatment (*Hill v Chief Constable of West Yorkshire* [1989] AC 53 cited by Mr Justice Nelson, *N v Chief Constable of Merseyside Police*: 33). As such, there was not the same connection between the employer and the claimant as there was in *Lister v Hesley Hall* where the claimant was sexually assaulted in childhood by an employee of the boarding school he lived at and which the defendant owned, owing

the claimant a duty of care.<sup>4</sup> It was held, consequently, that the misuse of a police badge by a 'rogue' police constable did not justify the imposition of vicarious liability as the tortfeasor's acts were 'frolics of his own' (*Joel v Morrison* [1834] 6 C&P501) and, as such, on the facts, the defendant was not liable.

By contrast, in *Weir v Chief Constable of Merseyside Police* [2003] EWCA Civ 111 an off-duty police constable was helping his girlfriend move house when he assaulted a man going through her belongings. He had identified himself to the man as a police officer before locking him in the police van he was using (without authorisation) for the move. It was held that he was acting in his capacity as a police officer and therefore vicarious liability was imposed. Considering the extent to which it could be said that Tolmaer was acting in his capacity as a police officer, these cases are apparently incompatible. And it would seem that there was no difference in connection between the parties in *N* or *Weir*. Perhaps, as Po Jen Yap speculates, 'the close connection test ... merely provides the court with a formula to confirm its result, rather than reach one in the first place' (2008: 200). But what, then, was the 'real' reason for the result in each case and why did they yield different outcomes? Could it be the nature and extent of the tortious act which creates a discomfort with holding a third party vicariously liable – that *N* concerned rape whereas *Weir* battery?<sup>5</sup>

This demonstrates the difficulties in practice of applying the 'close connection' test, particularly in relation to intentional torts. This impracticality, however, is tied to the problematic theoretical basis of vicarious liability of justifying why a blameless party should pay for harm caused by another's fault. It goes against the principle grain of corrective justice which dictates that those who cause harm by tortious acts, who are responsible and blameworthy, should compensate for that harm. As such, a tension is created between tortious ideology and providing a more pragmatic approach – or 'social convenience and rough justice' (*Imperial Chemical Industries v Shatwell* [1965] AC 656: 685, *per* Lord Pearce; and see Giliker 2002).

However, there have been some attempts at justifying vicarious liability; for example, that it distributes losses more widely among society through insurance or high prices (*Lister v Hesley Hall*: 243), or that it ensures employers take measures to reduce future wrongdoing (*Bazely v Curry* [1999] 2 SCR 534: 26). However, first, such arguments are difficult to sustain and, secondly, are at odds with tort law's basis of corrective justice

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<sup>4</sup> However, emphasising this connection between the defendant and claimant begins to blur the boundaries between primary and vicarious liability (Giliker 2002: 275).

<sup>5</sup> Although there has been a successful vicarious liability action for acts of harassment in *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, and it is clear there is a 'close connection' for employers to be liable for sexual abuse in care institutions, for example *Lister v Hesley Hall*.

and fault-based liability. This is aggravated in the context of the intentional torts: as a person has voluntarily and wilfully done a wrongful (tortious) act - rather than, say, causing harm by negligent conduct - it would seem that they are more blameworthy, and it is harder to explain why another should take responsibility for these acts.

This also contradicts and undercuts many of the reasons for which claimants may want to bring a civil claim for rape. It is argued that bringing an action directly against the tortfeasor means that they themselves must compensate the claimant for the wrong they committed and the harm they caused. Further, holding the tortfeasor responsible in this way can provide a sense of therapeutic justice for the claimant, be seen as a form of punishment and deter them and others from future wrongdoing (Feldthusen 1993). But with vicarious liability, it seems that the primary purpose for the claim must be for compensation, as these other functions will not be performed. Yet although the tortfeasor does not have to 'correct' their wrong, ultimately they are still held responsible - while a third party pays, the tortfeasor is still the one deemed to be at fault. And, further, by compensating the claimant the loss is still shifted from them, even if it does not fall to the tortfeasor. In a society where a disproportionate number of sexual assaults and rapes are committed against women, legally recognising in this way that the claimant has been wronged and providing compensation for the harm that was caused may be no bad thing. This proposition is not new - not just specifically for rape, but for all crimes in general as there is the Criminal Injuries Compensation Scheme.

### 6.3.b *The Criminal Injuries Compensation Scheme*

The Criminal Injuries Compensation Scheme is a publically funded system which provides compensation for victims of crime. As such, if rape victims want compensation they do not have to go to the civil law - they can apply to the Criminal Injuries Compensation Authority (CICA) for an award to be made under the Criminal Injuries Compensation Scheme (CICS).<sup>6</sup> In contrast to the tort system, the applicant does not risk paying high litigation costs or have to consider whether the defendant would be able to pay damages if they are awarded. But, similarly, the applicant need not have a successful criminal prosecution brought against the offender to be granted an award (CICS 2008: 10). Furthermore, the civil process is thought to be as traumatic as a criminal trial and rape victims may wish to avoid the stress of the legal system as far as possible. Thus,

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<sup>6</sup> See the Criminal Injuries Compensation Scheme 2008. The CICA and CICS are governed by the Criminal Injuries Compensation Act 1995.

considering the challenges that face claimants in the civil law, the CICS may appear to be a more attractive option.

This, however, may not always be the case. First, there are significant limitations placed on applications under this scheme. For instance, the award can be reduced or refused where the applicant did not take all reasonable steps, without delay, to report the incident which caused the injury to the police or another party considered appropriate by the Authority (CICS 2008: 13(1)(a) and (b)). Considering the extensive evidence that rape victims frequently delay in reporting the incident (Kelly *et al.* 2005), this could pose a problem. Further, awards can be limited where the applicant is considered to be partially responsible for the crime or undeserving of a full award. For example, this could be where excessive consumption of alcohol or use of illicit drugs contributed to the circumstances which resulted in the crime (CICS 2008: 14). As a significant number of rape cases involve intoxicants (HMCPSP 2002: 6.11), these provisions have provoked controversy in this context and have attracted media attention which has condemned the CICA for blaming victims for their own rape (Williams 2008). Furthermore, rape myths more generally can operate to shift part of the responsibility from the perpetrator to the victim which could affect the amount of compensation awarded. However, while tort law does not have these express limitations, these factors may still play a role in shaping and determining civil liability and the level of damages awarded and, thus, these CICS provisions may not be as comparably problematic as they first appear.

Secondly, there is some discontent with this system precisely because it is publically funded.<sup>7</sup> After the recent conviction of John Worboys – the London cab driver who sexually assaulted a considerable number of women – it has been reported that his victims are pursuing civil claims against him; and although it was noted that they could apply to the CICA for compensation, they were reluctant to do so and wanted the damages paid by him (Fresco 2009). Similarly, after the claimant's success in *A v Hoare (and other appeals)* [2008] UKHL 6 she was reported to say the case is 'not about money, but about a just result' (Gibb 2008). She had previously been awarded damages under the CICA, but is to return it after she received compensation from the civil case (CICS 2008: 49). This is so as to hold the defendant responsible for the total harm caused, as highlighted by Coulson J:

it is not a sum of money that has been paid by the tortfeasor, but rather by the British tax payer. It would be contrary to any notion of restorative justice to allow the defendant to

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<sup>7</sup> See Bruce Feldthusen's work which compares sexual assault victims' experiences with applying to the Criminal Injuries Compensation Board in Canada and bringing civil suits (1998). He concluded that, overall, the latter appeared preferable because compensation was not claimants' only motivation although, in general, more research is needed.

place any great weight on a payment which he did not make and has not offered to pay back to the CICB [now the CICA] (*A v Hoare* [2008] EWHC 1573: 80).

As such, this highlights the notion of corrective justice and the point of holding an individual responsible for the harm caused by their tortious conduct: it is not necessarily simply the fact of receiving compensation, but of making the tortfeasor pay – and not just in the literal sense.

In this regard, Bruce Feldthusen argues that compensation may not be the primary motivation for claimants bringing suits for sexual batteries (1993). He points out that a rape victim could want to pursue a civil claim for retributive reasons, making public the wrongful acts of the defendant, and perhaps find a form of cathartic relief (211-12). Although, as has been noted, these motives are seemingly at odds with vicarious actions in trespass to the person for rape, Feldthusen also highlights that the majority of Canadian cases for ‘sexual battery’ are direct actions brought against the tortfeasor (1993: 210). Perhaps then, receiving compensation is not necessarily the most significant reason that rape victims pursue civil claims. However, it is likely that in many potential cases financial concerns such as whether the defendant has the ability to pay damages if awarded, or the risk of high costs of civil claims, will deter or preclude cases from being brought; and it is likely that the prospect of compensation is a considerable motivating factor in pursuing a claim in tort law for rape.

#### **6.4 Damages**

In contrast to the criminal law in which the primary response to wrongdoers is to punish them, tort law responds by awarding compensation to the claimant for harm they have suffered as a result of the defendant’s tort. By focusing on compensating the claimant, tort law brings to light the harms which a rape victim suffers, purporting to put them back in the position – in so far as money will allow – had they not been harmed by the defendant’s tortious act. However, this is limited, to an extent, by tort law’s categorisation and privileging of certain harms. As tortious categories and tort law’s individualist conception of wrongs and harms fails to capture the social dimension to and nature of certain harms, then this may restrict the extent to which tort law can provide redress for gendered harms, such as rape (see chapter 4, section 4.4). This may be reflected in the categorisation and level of damages awarded.

#### 6.4.a *The Level of Damages*

The trespass to the person torts are actionable *per se* – that is, without proof of (actual) damage – and thus the bare fact that a person has suffered a trespass to their person is compensable in itself. But these nominal damages are typically extremely low, which could be seen to undervalue the right to be free from violations from personal integrity. This is highlighted more so when compared to high awards for other wrongs, such as defamation (Conaghan 1996a: 416).

Nevertheless, the level of damages awarded in civil cases of rape has been increasing in attempts to reflect the serious consequences of rape. Given the political attention drawn to rape and the significant criminal justice reforms in response to concerns regarding the severity of the harm of rape, perhaps this is not unsurprising. However, earlier civil claims did not put so high a value on such violations. This is illustrated particularly clearly by *W v Meah; D v Meah* [1986] 1 All ER 935. Here, Meah, had been a passenger in a car involved in an accident which caused him serious head injuries and brain damage. Following this, his personality was markedly altered, and he had a new found tendency to attack women. After sexually assaulting W and D he was imprisoned, serving two life sentences. W had been subjected to a series of perverse sexual assaults at knife point for between four and half and five hours whilst her four year old son was present. As a result she suffered psychological injuries, including depression, and the event further damaged her already troubled marriage. Similarly, D was sexually abused at knife point but was also raped and stabbed several times in the chest. This caused her serious physical injuries and affected her mentally and socially on a daily basis as she suffered from nightmares, found it difficult to make social contacts and lost any trust in men. W was awarded £6,750 and D £10,250 in compensation. By stark contrast, an action was brought by Meah against the driver who negligently caused the car accident claiming for his injuries and, significantly, the liberty he lost after being imprisoned for his crimes (*Meah v McCremer (No. 1)* [1985] 1 All ER 367). He was awarded £45,000. In awarding higher damages for Meah's loss of liberty than W and D's sexual abuse and rape, tort law places a much higher value on this than bodily integrity (Conaghan 1998: 145). So viewed, it would appear that Meah suffered more harm.

Joanne Conaghan argues that this is a reflection of the gender bias inherent in the tort system as it traditionally redresses values which are associated with men, and does not equally redress those suffered by women (Conaghan 1996a, 2002; and in relation to law more generally, West 1997: ch. 2). Consequently, tort law devalues the lives, activities and harms of women – perpetuating gender inequalities - through a hierarchical

construction of tortious categories of both injuries and damages, for example privileging physical injury over relational or psychological harm and pecuniary losses over non-pecuniary losses (Chamallas 1998).

This is further emphasised by the categorisation of the injuries the two women suffered, which reflects the way in which the nature of the harm is perceived. In *Meah*, Woolf LJ explained that while sexual assaults are 'distressing' and 'sensational' and no price can provide adequate compensation, efforts should be made to keep damages in line with 'more conventional' personal injury cases ([942]). In light of this he made the following comparison:

Although these ladies underwent terrible experiences, sadly as a result of a road traffic accident, others undergo experiences which are every bit as cataclysmic ... as those undergone by the plaintiffs and, unfortunately, very often the physical injuries that the victims of traffic accidents sustain are much more serious than the physical injuries that these two ladies suffered ([942]).

So understood, the damages awarded were assessed, predominantly, in relation to the physical injuries the two women suffered. But framing the injuries in this way does not capture the nature of sexual assaults as, more often than not, rape does not cause immediate physical injury; rather, the pain is in the violation of personal integrity and the ensuing psychological, emotional and relational harms (see below in relation to *Parrington v Marriott* (1999) Unreported, Court of Appeal, 19<sup>th</sup> February 1999).

This is also a reflection of tort law's traditional preoccupation with tangible harm or loss suffered by 'separate' individuals and the struggles with recognising and redressing harms which derive from and form harmful connections with others, for example rape.<sup>8</sup> In one sense, this is because rape is a harmful invasion of another, it is a violation of trust and power, frequently occurring between two people who know each other and have a relationship – either intimate, familial or friendship, for instance – damaging that relationship. This can also cause future difficulties in forming and maintaining relationships and social connections (for example, see *Lawson v Dawes*: 114-27). In another sense, this is because rape is a gendered harm. As such, it is a product of and (re)produces unequal gender relations, which also affects the perception of rape and the nature and extent of the harm suffered (Conaghan 1996a, in relation to the gendered harm of sexual harassment). Without recognising this, tort law cannot properly respond to the harms of rape.

However, since *Meah* the level of damages awarded in civil actions for rape have been gradually increasing (although, of course, this will partly be due to inflation), and

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<sup>8</sup> On men's separation from and women's connection to others, see West 1988.

claimants are beginning to recover under different heads of damage which reflects shifting perceptions of the harms of rape. In this respect, it seems that as awareness of the psychological effects of rape has increased so too has the compensation in relation to this. This is demonstrated by *Parrington v Marriott* in which the claimant was raped on two occasions and sexually harassed by a work colleague. Unlike the claimants in *Meah*, Parrington did not suffer many physical injuries, but rather claimed for the 'shame and, humiliation, [and] pain' she felt after the sexual assaults and harassment which caused her depression and post-traumatic stress disorder. She was awarded £25,000 in general damages for this, and £30,000 in aggravated damages (see section 6.4.b, this chapter).

Similarly, in *Lawson v Dawes* Eady J concluded that Lawson suffered disabling trauma and psychological problems after being raped and assaulted by Dawes. Considering this, and the seriousness and the level of distress caused by rape, general and aggravated damages were awarded in the amount of £78,500. In tracking damages since *Meah*, the trend has been an increase in awards.<sup>9</sup> This has resulted from a willingness to account for the severe impact rape can have on a person and an understanding of the psychological harms which can be caused which is in line with the emphasis that has been placed on the mental trauma rape causes (see chapter 2, section 2.4.b).

#### 6.4.b *Compensating or Reifying the Harms of Rape?*

While emphasising the extent to which rape causes harms other than immediate physical injuries and the ensuing consequences, particularly the psychological harms and diagnoses such as Rape Trauma Syndrome, this has created an idea of the typical rape victim which could serve to highlight and reinforce the power of rape to degrade victims (see chapter 2, section 2.4.b). This is evident in *Lawson v Dawes* in which Eady J painted two different pictures of the claimant – one before and one after the rapes. He explained that, prior to Alderney, Lawson had her own hairdressing salon and had built up her business over 10 years which was 'apparently flourishing' from her 'flair and experience' ([28]). In contrast, afterwards she underwent a 'personality change' and went from being 'bubbly, energetic and forthcoming' to a person who was 'withdrawn and lacked confidence' ([28]). He used this evidence, however, to counter the defence's argument that

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<sup>9</sup> Other examples of increased damages are *Miles v Cain* (1989) *The Times*, 15<sup>th</sup> December 1989 where – although a re-trial was ultimately ordered – at first instance the claimant was awarded £25,000. Yet in another case resulting in a re-trial, *Moore v Green* (1990) *The Guardian*, 13<sup>th</sup> September 1990, the claimant was awarded only £12,500 – more in line with the damages in *Meah*. Similarly, in 1997 a wife sued her husband for raping her in the former family home after separation – she was awarded £14,000.

Lawson was lying and creating the story for financial gain. In other words, he used the template of the typical rape victim's response and reactions to determine liability. This template constructs rape as psychologically and personally damaging, as an identity-changing experience, a 'fate worse than death'.<sup>10</sup> Through Eady J's narrative and depictions of Lawson, the rape victim of 'legal discourse' is produced, supporting the categories of gender and reinforcing the power men can exude over women through rape.<sup>11</sup>

However, despite the description of rape's life changing effects, Lawson was not awarded damages for future lost earnings resultant from her lessened earning capacity which, she argued, was caused by the rapes. Eady J pointed out that the 'ordinary vicissitudes of life' would have also influenced Lawson and affected her career since Alderney and, as such, the rapes could not be determined as a single cause of her lessened earning capacity ([126] and [129]). On the one hand, it could be argued that this does not reflect the extent to which rape can influence the rest of a woman's life, including affecting her earning capacity. On the other, it could emphasise that women do survive rape and move on with their lives. This is pertinent when taken in conjunction with the £12,000 that was awarded to Lawson for lost earnings for the year following the trial. This, Eady J said, was because the civil action will have been stressful and traumatic as she had to continually repeat experience but once it had finished she may be able to have some closure and recover ([129]).

So viewed, this case highlights a paradox. As Bruce Feldthusen points out, 'to win "big", the lawyer is encouraged to portray her [the claimant] as, first, a person needing therapy for a long time and, second, a person whose potential will never be fully realized' (1998: 449). This clearly was Lawson's argument. So 'how can the damage awards reflect the seriousness of the harm while respecting the empowering objectives of the survivor?' (Feldthusen 1998: 449). Feldthusen suggests (re)considering the notion of punitive damages because they focus on the defendant's conduct and punish for the wrong done and so there is less emphasis on the harm to the claimant (1998). This could be justified on the basis that civil claims are typically brought where there is no successful criminal prosecution, and the claimant should simply be compensated for taking responsibility to punish the defendant, as well as highlighting society's condemnation of the conduct (1998: 450). However, this would call into question the lines between criminal and tort law and it

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<sup>10</sup> As such, Karen Engle suggests feminists should ask if rape really is a fate worse than death, 2005: 813.

<sup>11</sup> For an example of the ways in which law is gendered and gendering but in the context of motherhood, see Smart 1992.

is precisely because of this that punitive, or exemplary, damages are rarely awarded in the UK.<sup>12</sup> However, in relation to Canadian cases for 'sexual battery' claimants are more likely to recover non-pecuniary losses (even if controversially low) where they take the form of exemplary damages. Yet, back to the paradox, by assessing damages in relation to the wrongfulness of the defendant's conduct rather than the harm suffered by the claimant, this demonstrates a judicial inability to recognise the gender-specific harms of sexual batteries (Feldthusen 1994: 141, 146-7).

A form of damages which could potentially address this issue is aggravated damages. These remedy the mental distress and anxiety a defendant causes in the way the tort is committed or by their subsequent behaviour. As Rose LJ pointed out in *Griffiths v Williams* (1995) *The Times*, 24<sup>th</sup> November 1995, 'the circumstances and consequences of rape ... place it, as I have already said, in a quite different category [to other personal injuries]'. In other words, the nature of rape as a particularly serious intentional interference with the person and the disregard in this of a person's – typically a woman's – integrity is an aggravation in itself. In this respect, Thorpe LJ, in *Griffiths v Williams*, doubted if more than £15,000 could have been for injuries resulting from the rape itself, leaving £35,000 as aggravated damages. Further, in *Lawson v Dawes* Eady J did not distinguish types of damages and awarded Lawson £78,500 which he felt captured all the tortious elements and the aggravation combined ([136]). He emphasised the difficulty in apportioning damages for the 'uniquely terrifying and intrusive criminal offence of rape' ([135]). It could be argued, though, that awarding a high level of aggravated damages highlights the low value placed on bodily and mental integrity; yet, because of the nature of aggravated damages they can serve to represent the abuse of trust and power which is central to rape (Conaghan 1998: 146 (in relation to intra-familial abuse)).

## 6.5 Conclusions

In contrast to the criminal law, financial considerations play a significant role in tort law. From the outset, claimants may not be able to bring a civil claim and risk potentially high costs of litigation; and it is unlikely that legal aid will be available in such cases. Further, the claimant's reception of damages will depend upon the extent to which the defendant is

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<sup>12</sup> See *Rookes v Barnard* [1964] AC 1129. In a context similar to rape, exemplary damages were awarded in *AT, NT, ML and AK v Dulghieru* [2009] EWHC 225 where the defendants had been convicted of criminal offences after trafficking the four claimants from Moldova to the UK for the purpose of sexual exploitation. However, as the defendants had profited from the torts they committed exemplary damages were justified to prevent unjust enrichment. As such, this does not operate to punish the defendants and neither does it emphasise society's disapproval of the conduct.

able to pay and for the majority of rape victims the tortfeasor/defendant will not be so lucrative as in *Meah* or *A v Hoare*. However, the claimant need not necessarily bring the action directly against the tortfeasor and in some cases a third party (who may have a greater capability to pay damages) can be held vicariously liable. However, while there have been successful vicarious liability cases in relation to sexual abuse and harassment for instance, there seems a general reluctance to impose such responsibility with regards to rape. To some extent, though, such cases can be said to undercut many of the reasons for which claimants may wish to pursue a civil claim because the action is not brought against the tortfeasor. However, the claimant may nevertheless want to be compensated for their injuries and losses and this is a possibility that tort law provides.

This is similar to the focus of the Criminal Injuries Compensation Scheme. It may seem that if the purpose of bringing a civil claim for rape is to receive compensation then this may be a more attractive alternative as there need be no risk of high costs or potentially lengthy case and distressing trial. However, the awards made under this scheme are relatively low in contrast to the level of damages in civil cases, and rape myths may place partial responsibility on the applicant and further limit awards. Moreover, it seems that this option is not so appealing because it is state funded, and bringing a civil action against the tortfeasor directly can provide a sense of retribution and therapy (Feldthusen 1993). This can be emphasised by the claimant being compensated for the harm the tortfeasor caused. However, the extent to which tort law can redress rape is limited by its conception and categorisation of damages and harms. Nevertheless, over recent years the level of damages in civil claims for rape has been increasing to recognise the extent of harm rape causes. But this inspires a paradox in that to receive a higher amount of compensation the claimant must enforce that she has suffered, and continues to suffer, serious harm which may only reify the harm of rape and its power to oppress women. Alternatively, compensating the claimant for harm may be viewed as creating a sense of closure after which she can move on from the rape to her life ahead.

## CHAPTER 7

### CONCLUDING THOUGHTS

#### 7.1 Where To From Here: The Criminal or Civil Law?

It is clear that rape is a civil in addition to a criminal wrong and there have been successful civil cases for rape, brought in the torts comprising trespass to the person. Further, substantive and procedural differences between tort and criminal law allow rape survivors to seek justice in the civil law in addition, subsequently or alternatively to making a criminal complaint. If there is a successful criminal prosecution this does not bar rape victims from pursuing compensation in the civil law, nor will an award made from the Criminal Injuries Compensation Authority – although it would have to be paid back out of any damages that are paid. If the defendant is acquitted, the Crown Prosecution Service (CPS) decide not to prosecute or the case is not pursued by the police a civil claim can still be made. Further, a civil claim for rape is still possible in the absence of any criminal complaint. However, despite the differences and the independent nature of the criminal and civil justice systems, the presence or absence of a case in one can have an impact on proceedings in the other. This may influence the likelihood of a successful civil claim for rape and limit the choices of rape survivors as to whether to make a criminal complaint, civil claim or both. In addition, this may affect the ‘types’ of rape cases that are brought in the criminal or civil justice systems, with those being pursued in the latter perceived as less ‘serious’, being framed as a tort rather than a crime. These concerns will be considered in relation to concluding thoughts as to the extent to which tort law can provide an alternative route to justice for victims of rape.

##### 7.1.a *Civil Claims in Addition to a Successful Criminal Prosecution*

As a result of the different ways in which the criminal and civil law respond to wrongs, a successful action can be brought in both systems. A rape victim whose criminal complaint led to a successful prosecution may nonetheless wish to bring a civil claim for damages. In such a case, civil liability may be relatively easy to establish as section 11 of the Civil Evidence Act 1968 allows for a criminal conviction to be admissible as evidence of civil liability where it is relevant to do so. Despite the confusion as to the correct application of the standard of proof – the balance of probabilities - in civil cases of rape, it is clear that it is lower than the criminal ‘beyond reasonable doubt’ standard (see chapter 5, section 5.2). Consequently, in the context of rape, there have been successful civil cases following a

criminal conviction, for example *D v Meah; W v Meah* [1986] 1 All ER 935, *AT, NT, ML, AK v Dulghieru* [2009] EWHC 225 and *A v Hoare* [2008] EWHC 1573. In the first two cases the primary focus was not on liability but on the level of damages awarded, and in *Hoare* limitation periods. Considering that the defendant had been convicted of the relevant offences, and accounting for this by way of the Civil Evidence Act 1968, section 11, presumably there was not much difficulty in proving that the relevant torts were committed on the balance of probabilities.

However, a criminal conviction does not guarantee a successful civil claim – it is only evidence and not conclusive of liability. This is illustrated by *J v Oyston* [1999] 1 WLR 694 in which the defendant had been criminally convicted of sexually assaulting and raping the claimant. Subsequently, the claimant brought a civil action against the defendant, setting out her statement in reliance on the Civil Evidence Act 1968, section 11. Although the defendant had unsuccessfully appealed against his conviction on new evidence which he advanced to undermine the claimant’s credibility, he nevertheless sought to rely on similar evidence to absolve him of civil liability, in spite of the lower standard of proof. The claimant applied to strike out the defendant’s defence as being an abuse of process, or being vexatious and disclosing no reasonable defence. But it was held that section 11 made a conviction only *prima facie* evidence that the person convicted committed the relevant tort. As such, the statute allowed the defendant to challenge this in the civil courts, even though the burden of proof was on him to persuade the judge to take an opposing view to that of the jury.<sup>1</sup> As a result, the claimant who had already been through a criminal trial and proved beyond reasonable doubt that she was raped by the defendant was subject to repeating the process in the civil courts, being cross-examined yet again, and all on similar evidence which did not overturn the defendant’s criminal conviction.<sup>2</sup> This daunting prospect is no doubt a disincentive for civil actions to be pursued, even after a criminal conviction has been upheld.

#### 7.1.b *Civil Claims in Addition to an Unsuccessful Criminal Complaint*

In *Lawson v Executor of the Estate of Dawes (Deceased)* [2006] EWHC 2865, *Parrington v Marriott* (1999) Unreported, Court of Appeal, 19<sup>th</sup> February 1999 and *Griffiths v Williams* (1995) *The Times*, 24<sup>th</sup> November 1995 there was no criminal trial, successfully prosecuted or otherwise, but a civil claim for rape was successful. However, all three

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<sup>1</sup> This position was distinguished from a situation in which the *claimant* had been convicted of a criminal offence and sought to challenge the conviction in the civil courts.

<sup>2</sup> Whether or not a civil action was pursued - and if so the outcome - is unknown.

claimants had made a criminal complaint. In *Lawson v Dawes*, the fact that the rapes had been reported to the police was given great weight. This was in order to challenge the defendant's argument that Lawson's rape allegations were false and pursued only for financial gain. Eady J opined that 'central' to the claimant's veracity is the evidence that she reported the incident to the police as soon as was possible given the circumstances ([85]). This was emphasised throughout the case: she complained of rape to the police at the 'first practical opportunity', 'as soon as she could realistically make contact with them', 'in the immediate aftermath of her experience' ([85], [112] and [74] respectively). This is tinged with the myth that women report rapes soon after the incident. Although it does not necessarily follow that if there is a civil claim for rape brought in the absence of a complaint to the police then this will be used as evidence against the claimant, it could nevertheless factor into the defence counsel's arguments, questioning why if she really has been raped – a serious crime – did she not report it. Coupled with the myth that there are a large number of false allegations of rape, this could contribute to the idea that the claimant may be pursuing the case purely for financial gain. Therefore, although a criminal case or even a complaint is not a prerequisite for a civil claim for rape to be made, it may affect the claimant's credibility.

Similarly, in *Parrington v Marriott* a criminal complaint had been made in addition to a claim in trespass to the person for rape and sexual assault. However, unlike *Lawson v Dawes* in which the criminal case could not continue because the alleged perpetrator had died, here the CPS had decided not to proceed with a prosecution. Furthermore, the claimant did not report the incidents to the police at the time of or close to the time she alleged they occurred. It was not until two years after she filed a complaint with the police. While this was used against the claimant by the defence at trial, Mummery LJ demonstrated an understanding that rape victims often delay in reporting the incident to the police, explaining that the claimant had emotional and financial reasons for not reporting the incidents immediately. The defendant's appeal was dismissed; the claimant was successful.

However, there is another reason why first reporting the rape to the police may increase the chances of a successful civil case and that is the physical evidence and medical examinations which may be recorded. Because the claimant in *Parrington v Marriott* did not report the rapes until years afterwards, there was no physical evidence which would prove that there had been sexual intercourse between the claimant and defendant. As such, the defendant simply claimed that he did not have any sexual activity with the claimant – he did not admit that he had, but argued that she had consented to it. This can be compared with *Griffiths v Williams* in which the rape was reported to the police within

24 hours. Initially when interviewed by the police the defendant denied having sexual intercourse with the claimant, however after they took some forensic samples from him he admitted this but claimed that it was consensual. As such, where there is evidence of the claimant and defendant having had sexual intercourse, and possibly other relevant physical evidence –for example it was noted that there was bruising on Griffiths’ groin – then the focus is shifted entirely to consent. Nevertheless, this may not have a considerable impact on the case as those in the criminal law typically depend upon (non) consent and the majority of these do not end in a conviction. So while reporting rape and evidence filed alongside a report may support the claimant’s case it is not necessarily central to liability; however, it may factor in to increase her credibility.

Yet there is a potential problem facing claimants who choose to bring a civil suit after a criminal case has first been pursued and that is limitation periods. Unlike the criminal law, tort law bars actions which are not brought within a certain time period. For the trespass to the person torts, the primary limitation period within which claims must be brought is three years from either the date on which the tort was committed, or from when the resultant harm manifested and the claimant knew that it was caused by the defendant’s tortious act (Limitation Act 1980, section 11).<sup>3</sup> Considering that reports of rape are frequently delayed and the criminal process takes time, a civil claim brought for rape may be outside the primary limitation period. However, even if a case is brought outside of time there is a discretionary provision which allows the judge to disapply the time bar if it is equitable to do so (section 33). This was done so in the case of *A v Hoare* [2008] EWHC 1573, in which the claimant’s civil claim was not initiated until 16 years after the defendant had sexually assaulted her, on the basis that it was the defendant’s criminal and tortious act which had resulted in his imprisonment and prevented the claimant from pursuing a civil case against him any earlier than she did. Generally, though, the extent to which limitation periods may pose a problem for claimants pursuing civil actions for rape, and the way in which – if at all – engagement with the criminal law affects this, remains to be seen.

### 7.1.c *Civil Claims in the Absence of a Criminal Complaint*

It is possible for civil claims to be successful in the absence of a criminal conviction or even a criminal complaint; however, there have only been two reported civil rape cases in

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<sup>3</sup> Prior to *A v Hoare (and other appeals)* [2008] UKHL 6 the relevant limitation period for intentional torts was six years which would run only from the date on which the tortious act accrued, governed by the Limitation Act 1980, section 2.

which there was no mention of whether or not a criminal complaint had been made. In *Moore v Green* (1991) *The Times*, 6<sup>th</sup> June 1991 the claimant brought a claim against her ex-partner who raped her after she opened the door to her house to tell him to stop harassing her. Initially the claimant was successful, however the Court of Appeal accepted the defendant's appeal and a retrial was ordered. Due to the high costs of civil cases, the Legal Aid Board discontinued the claimant's funding and no retrial could be pursued (see chapter 6, section 6.2). However, it has been reported that a woman successfully sued her husband for raping her in the former matrimonial home (*The Independent*, 10<sup>th</sup> September 1997), although it is unclear as to whether there was also a criminal complaint made.

Given the high rate of non-reporting for rape (Kelly 2002: 9), it might have been hoped that the civil law could perhaps offer an attractive alternative to the criminal justice system. But if a rape victim does not want to make a complaint to the police, it may be unlikely that she would consider a civil case instead. Often women do not want to report rape because they think that they will not be believed by the police, or by friends and family, particularly where it does not marry with the paradigmatic rape (see chapter 3, section 3.3a). Further, where a rape occurs between people who know each other – which is more often than commonly thought – the victim may not want to report it, feeling divided loyalties and/or may be financially and/or emotionally reliant on the perpetrator. For these reasons, civil claims may be just as unlikely to be pursued in such circumstances.

## **7.2 'Less Serious' Rapes?**

In addition to patterns between successful civil and criminal cases of rape, there are patterns within the criminal law of convictions and acquittals, prosecutions, reported and non-reported rapes with different types of rape. The closer the case matches the rape stereotype the more likely it will proceed successfully through the criminal justice system and result in a conviction (Kelly *et al.* 2005). As these patterns and reasons for and against pursuing a criminal complaint will influence whether or not a civil claim is brought, patterns in relation to types of cases could be drawn out. In this regard, this may lead to rape cases which do not reflect the rape stereotype being brought in the civil courts rather than in the criminal justice system, or after an unsuccessful criminal case. So understood, a hierarchy of cases could be formed in which rapes matching the rape template are successfully prosecuted in the criminal law while rapes between people who know each other are pursued in the civil courts. This could further enforce ideas that the rape stereotype reflects 'real' rape and is more serious than other types of rape; the rapist is really a rapist deserving of the punishment and stigma attached to the label rape and it is

the most harmful form of rape for the victim. By contrast, where rape occurs in other contexts it may be seen as less serious, less harmful and not really 'rape' and so a civil claim suffices.

For example, one of the earliest claims in *Meah* was a case in which the perpetrator used physical violence, threatening his victims at knife point to adhere to his sexual demands. With the level of violence and physical injuries, particularly in D's case, there was no doubt that the intercourse was non-consensual and the facts mapped onto the stereotypical rape scenario. As such, Meah was convicted of rape and sexual assault and subsequently a successful civil action was brought. While in this case Meah was an acquaintance of both his victims, where the rape reflects more specifically the rape template and is by a total stranger then the victim would be unable to consider the civil route as an alternative to the criminal law because she would not be able to identify the defendant. Unless a criminal case was initiated and the alleged perpetrator was identified then a civil claim could not be brought. This means these types of cases will come into contact necessarily with the criminal justice system first. This is not to say this is negative point, or to discourage criminal complaints, but rather to locate the position of rape victims in relation to their chance/likelihood of pursuing a civil case.

In *Griffiths v Williams* and *Parrington v Marriott* the parties in both cases had known each other. Both cases were situated in a context in which there was an existing relationship of trust and power – Williams was Griffiths' landlord and had previously been her employer, and Parrington and Marriott were work colleagues. Both cases had been reported to the police but the CPS had decided not to prosecute. Similarly, but even further away from the rape paradigm, a woman successfully sued her husband for raping her in the former matrimonial home (*The Independent*, 10<sup>th</sup> September 1997). Ultimately, this means that the CPS weighed the reliability and admissibility of the evidence, and the credibility of the witnesses and concluded that a conviction was unlikely and it would not be worth the CPS's limited resources to continue with the case (Kelly 2002: 26). Further, part of this decision will be considering whether a jury would believe the complainant's side of the story, or whether they would think the defendant was reasonable in believing the claimant was consenting. Here, rape myths are likely to influence this decision-making (Kelly 2002: 27). As a result, cases which do not match the rape template are seen as weak and are forced out of the criminal justice system. However, despite seeming weak in the criminal justice system, such cases may have a higher chance of success in the civil system – especially considering the claimant was successful in all three of the cases mentioned.

Further from the idea of the stereotypical rape, in *Moore v Green* (1990) *The Guardian*, 13<sup>th</sup> September 1990 the defendant and claimant were ex-partners. There was

no mention of whether or not the rape had been reported to the police, although it was noted that Moores had applied for a non-molestation order and been granted an injunction. On the assumption that there was no police complaint, this shows that a rape victim may not want to report the rape to the police, go through the criminal procedure and criminal trial, possibly resulting in criminal sanctions, but all the same want some form of redress for the wrong done to her.

Yet different types of cases will come across different barriers in the civil law – not least because rape myths still influence the judgments. Although subsequent to the Law Reform (Husband and Wife) Act 1962 a partner in marriage could bring an action in tort against the other, it is still relatively rare. The successful rape claim by a wife against her husband was at a time when they were separated and a divorce followed, and there has also been a case in which a woman sued her husband for assault and battery at the same time as divorce proceedings were in progress – she was awarded £8,565 plus interest (*Church v Church* (1983) 13 Fam Law 254). Although this involved non-sexual assaults, this demonstrates the possibility of a civil claim in trespass to the person for a sexual assault at the same time as divorce proceedings. However there are notable restrictions and difficulties. *Ganesmoorthy v Ganesmoorthy* [2002] EWCA Civ 1748 concerned a divorcing couple and proceedings for ancillary relief in which the wife had complained of physical abuse by her husband. At the same time, she sought to pursue a tortious claim for injuries which she had suffered by his hand. She did not, however, mention this during the course of the ancillary relief proceedings. Despite her argument that the knowledge of her claim in tort would not have altered the amount of ancillary relief, it was held to be an abuse of process as the physical abuse had been factored into the ancillary relief calculation. However, this was not measured in relation to the level of harm the defendant caused, but rather his behaviour towards the claimant, in contrast to damages had they been awarded in the civil law.<sup>4</sup> Furthermore, as a clean break was intended it was decidedly unacceptable for a claim in tort to be pursued after this agreement. So understood, notwithstanding the difficulties of being believed when rape occurs within marriage, there are further legal hurdles which make can make it more difficult for civil claim to be pursued in this context.

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<sup>4</sup> Matrimonial Causes Act 1973, section 25(2)(g) which accounts for the parties conduct where it would be inequitable to disregard it.

### 7.3 The Necessity of the Criminal Law?

One concern with civil claims for rape is that the wrong and harm will be undermined and treated less seriously by framing it as a tort as opposed to a crime. The need for criminal sanctions in rape cases was emphasised in *X and Y v Netherlands* [1985] ECHR 4. Y lived in a privately-run home as she was mentally handicapped. One night, when she was sixteen, she was forced to have sexual intercourse with B – the son-in-law of the owner who lived on the premises of the institution. As a consequence, Y suffered psychologically, the event causing her serious mental disturbance. Because Y was over sixteen she should have made a criminal complaint herself, but due to her medical condition she was incapable of doing so and consequently her father, X, complained on her behalf. However, there was no legislation which allowed a person to act on behalf of a complainant in this particular situation – nobody was legally empowered to file a complaint for Y’s (alleged) rape. There being a gap in the legislation, X applied to the European Commission of Human Rights arguing that Y’s rights under the European Convention on Human Rights (ECHR) had been infringed – Article 3 prohibiting torture, Article 8 which protects the right to privacy and family life, Article 13 which ensures that an effective remedy must be available in national courts and Article 14 as the situation was discriminatory. It was held that there was no breach of Article 3, and it was unnecessary to consider a breach of Article 14 or Article 13 as these issues were dealt with under Article 8. As to Article 8 it was held that the absence of the possibility to have criminal proceedings instigated against B constituted a breach of the state’s positive obligation to protect the right to family and private life.

The government argued that in criminalising sexual acts the legislature had to ensure that while they protected an individual’s physical and mental integrity against sexual interference they did not adhere to an ‘unacceptable paternalism’ and encroach on an individual’s right to respect for his or her sexual life ([25]). Further, there were civil options open to X to apply for on behalf of Y: an action for damages or an injunction against B, or a similar action against the owner of the children’s home could be initiated ([25]). The applicants argued that the civil law remedies were not an adequate response to rape. First, without a criminal investigation it was more difficult to provide the necessary evidence which would facilitate a civil claim ([25]). Secondly, as the claimant would have to take a more active role in civil proceedings this would increase the stress and emotional trauma which the victim already suffered – more so than if a criminal case was proceeded with by the state ([25]). Thirdly, it was argued that the civil law lacked the necessary deterrent effect – even with the possibility of an injunction as it only could be directed towards a closed class of persons ([25]).

The European Court of Human Rights (ECtHR) agreed with the applicants on these points, finding that the protection afforded by the civil law against these types of wrongdoing was insufficient when such fundamental values and core elements of one's private life were involved. As such, it was emphasised that criminal sanctions must be available to protect against this kind of wrong. So, while this case does not say that civil proceedings should not be used as a source of legal redress for rape, it does highlight the necessity of the criminal law in responding to rape and that civil proceedings alone do not provide adequate sanctions.

The need for effective criminal sanctions against rape was further emphasised in *MC v Bulgaria* [2005] 40 EHRR 20. Here, a teenage rape victim argued that the Bulgarian rape laws breached her rights under the ECHR (Articles 3 and 8) by only prosecuting in cases in which there was evidence of physical force or violence. The ECtHR found for the applicant, holding that rape laws and the implementation of rape laws must protect against all acts of non-consensual sexual activity and not only those in which physical violence could be shown. The state's positive obligation to protect the right to family and private life was highlighted, and thus where states failed to provide sufficient legal protection against rape they could be in breach of the ECHR. Taken in conjunction with *X and Y v Netherlands* (which was referred to in this judgment, [494]), this is specific to the criminal law as civil law remedies do not afford the level of protection required. Yet, as Joanne Conaghan speculates:

One cannot help but wonder at what point, if any, a criminal law regime which delivers justice only to a small minority of women who report rape within a context of mass non-reporting (itself linked to perceptions of the (in)effectiveness of the criminal process) risks violating the ECHR (2005: 156).

As such, while the criminal law continues to fail the majority of women who are raped, alternatives must be considered. Although women should still be encouraged to report rape to the police, given the high level of non-reporting for which many reasons are specifically linked to the criminal justice process (although there are considerable reasons why the civil system is as equally – if not more - unattractive), the civil law option should be supported. Furthermore, it should be more readily acknowledged as a potential route to justice where a criminal prosecution has not been brought, or even where it has been prosecuted successfully or otherwise.

## 7.4 Redressing Rape: The Possibilities and Pitfalls of Tort Law

Admittedly, tort law is far from an ideal way to redress rape and provide victims with justice. However, the criminal law also has its pitfalls, and the reality is that the attrition rate for rape remains high and the conviction rate low. This is in spite of concerns regarding the failings in the criminal law's response to rape and the recent reforms, research investigations and proposals that have been put forward to address these problems. While this is not to suggest that the criminal law should be neglected, it is to say that perhaps alternatives should be given real thought to. Considering the systematic failure of the criminal law to provide justice for rape victims, further engendering inequalities which give rise to rape in the first place, immediate ideal solutions seem far out of reach - and, besides, there is no consensus as to what the ideal legal response would be. However, this is not to advocate a 'something is better than nothing' approach, or, even, to give up entirely on ideals: tort law does have its advantages and has the potential to improve its response to rape (although it also has its notable limits). Further, exploring rape from a different perspective may be a way in which to view it in a different light, subvert rape myths and gendered assumptions, provoke new debates and perhaps (re)think of ways forward to redress rape through law.

Over the past four decades, there has been considerable feminist debate over what rape is – how to conceptualise it – and thus how it should be defined in law to be addressed. From its early conception as a form of theft, the rape of a woman the stealing and damaging of another man's property, to its more recent reformulation as the violation of sexual autonomy, rape has been tied to understandings of what constitutes 'normal' (hetero)sexual relations, masculinity and femininity. However, it is argued that constructing rape as sex procured by a man without a woman's consent reflects this 'normal' model of sexuality in which men act upon women as the objects of their desires. Further, as male dominance is eroticised so that women willingly submit to men's sexual advances, Catharine MacKinnon implies that in a society of sexual inequality it becomes difficult to determine when women are consenting freely to sexual relations (1987, 1989). As such, she advances a definition of rape with locates the harm primarily in the systemic gender inequality perpetuated in society. However this, it is argued, defines and reinforces women's subordination, leaving them with little capacity to choose or express their own sexuality (Paglia 1992; Roiphe 1994; Hoff Summers 1995). As such, a consent-based definition of rape has been rethought, with the hope that a more nuanced conception can be developed which will account for the ways in which social and relational contexts constrain and shape women's choices (Cowan 2007a; Munro 2008). Nevertheless, with

such concepts left open-ended, common understandings and shared assumptions of (hetero)sexual normality and 'real' rape influence the interpretation of rape laws so that, in spite of the reforms to sexual offences laws, little positive difference has been made.

In light of this, attention has been drawn to the way in which rape laws are implemented, as a considerable inhibition to the criminal law's response to rape is the extent to which rape myths inhabit the minds of those within and outwith the criminal justice system. These myths tell us the situations in which a woman normally consents to sex, and when it is otherwise rape. However, such situations do not reflect the realities. Infusing the criminal justice process and providing a comparator template for rape, cases which deviate from the stereotype filter out the criminal justice system and are more likely to result in an acquittal (Kelly *et al.* 2005). Consequently, the conviction rate remains low and the attrition rate high. Further, the criminal law represents unsuccessful cases as constituting acceptable sexual relations, and those which result in convictions as ('real') rape and, therefore, in a cyclical manner, perpetuates gendered myths and fails to protect women's sexual autonomy and integrity (Lees 1996: 111; Temkin and Krahé 2008: 70).

While the response to this has been to introduce measures – such as educative regimes – in attempts to dispel rape myths and to continue to encourage women to report rape, little positive impact has been made and the increase in the number of reports has been met without any such rise in the number of convictions (Home Office 2006b). In part, this could be because the criminal law – substantively and procedurally – upholds the model of sexuality and gender stereotypes which fuel the myths. Dispelling rape myths is not enough – they must be 'demythologised' (Carter 1983): the meanings of gender and sexuality which give rape myths their power, and are (re)produced by rape myths, need to be destabilised and disrupted.

Tort law may be a way in which to do this, and/or at least provide an alternative route to justice for victims of rape. With substantive and procedural differences, tort law may frame rape differently and give different meanings to concepts such as consent to better reflect the realities of rape. Unlike the criminal law, the trespass to the person torts which encompass rape are formally gender neutral and, further, make no distinction between sexual and non-sexual wrongs. This does not prescribe and legitimate a particular conception of sexuality to the extent that the criminal law may do – rape laws are said to regulate male sexuality rather than protect women's sexual autonomy as, despite becoming increasingly gender neutral, they still focus on a heterosexual, male conception of sexuality (Centre for Law, Gender and Sexuality 2006; Smart 1989). Further, the label 'rape' is lost and, perhaps, so too the myths which are so readily invoked by its incantation.

But despite tort law's neutral presentation, it is nonetheless gendered and has gendering effects. Tort law's individualistic focus results in it being more responsive to the harms that men suffer, and slower to recognise and redress harms that are located within broken or harmful relations and connections, and which are more commonly suffered by women (Conaghan 2003). Moreover, without attention to the context in which harms arise and are suffered, tort law can do little to address the gendered nature of rape and the extent to which it is tied to and upholds a sociological framework of gender inequality. Furthermore, similarly to the criminal law, tort law relies on standards such as 'reasonableness' and 'socially acceptable conduct in everyday life' which open the door to stereotypes and assumptions of what constitutes 'normal' sexual behaviour. And, like the criminal laws on rape the line between unlawful and lawful contact is drawn with consent. While the relevant question is more down to its interpretation, rather than its formation, with tort law's gendered nature such concepts are given similar meanings to those imbued by the criminal law. Tort law, then, may do little to subvert rape myths and only serve to perpetuate them.

This highlights the power of rape myths, and the label rape itself. In all the civil cases that have been brought, the term rape has been used rather than 'battery' or 'assault', for example. Further, this is emphasised by the application of the standard of proof in civil claims for rape, which, although is lower than the criminal standard, seems to be heightened or require more evidence in 'serious' cases. In claims for rape it would seem that there is no reason for this to be the case: the substantive torts are the trespass to the person torts – they do not distinguish levels of seriousness and the remedy provided to the claimant is compensation; the defendant will not be imprisoned if held liable. The only reason for this 'instinctive feeling' that the judge should be 'more sure' that the defendant is liable in such a case is tied to the symbolism of 'rape', which is carried over from the criminal law.

In addition, this could be seen as eroding – to some extent – the advantage of the civil law that the claimant need only prove the case on the balance of probabilities rather than beyond reasonable doubt. Further, this demonstrates the extent to which rape myths pervade the minds of judges and not only juries. As another perceived advantage of the civil law may be that the case will usually be heard by a judge alone as opposed to with a jury, this is significant. Nevertheless, there are no firm conclusions that can be drawn as to whether a bench trial would be a benefit to the claimant. However, it is important that judges – or juries – are educated in relation to the realities of rape in the hope that this will limit the influence of rape myths.

Yet, in spite of particular meanings attached to the crime of rape which cause a discomfort with the civil standards and framework, and the way in which rape myths similarly infuse tort law, the majority of the civil claims for rape have been successful and those that have been unsuccessful have been discontinued rather than resulting in a finding for the defendant. And, furthermore, the majority of these claims have followed an unsuccessful criminal case. As such, it seems that the civil law can provide justice for rape victims where the criminal law might have otherwise denied it. Tort law can provide an alternative way in which a wrong and harm can be legally recognised as such, where the criminal law may have represented it as a case of legitimate sexual relations and not one of rape.

Holding the tortfeasor responsible in this way may be a significant reason why claimants might choose to pursue a civil suit. While the tortfeasor will not go to prison if held responsible, they will nevertheless have to compensate the claimant for the harm that was caused. As well as being 'correctively just' this also contributes to conveying ideas of conduct that is socially (un)acceptable, setting down principles to guide behaviour and acting as a deterrent. Further, this may also provide the claimant with a sense of retribution, the compensation being viewed as a form of punishment, and vindication as the wrong the tortfeasor has caused is publically recognised (Feldthusen 1993). Of course, this means that in bringing such a case there is also the possibility that it will result in a public denial that harm has been caused – a risk the claimant may not want to take (Conaghan 1998: 160).

However, it may not be in all cases that the claimant will bring the action against the tortfeasor. Given the unlikelihood that they will have the means to pay damages, claims are sometimes brought against third parties. While this can be seen as undercutting the notion of individual responsibility which underpins corrective justice, and calls into question some of the functions that tort law can perform, the majority of the cases brought for rape have been direct actions. It has been suggested that part of this may be down to the cathartic relief – the therapeutic justice – that could be felt in pursuing a tort action against an intentional wrongdoer, and making them pay – and not just in the literal sense – for the harm they have caused (Feldthusen 1993).

The notion of therapy is supported further by the fact that the claimant brings the action against the defendant herself, taking an active rather than passive role (West 1992). At the same time, however, this process could undermine any idea that it is therapeutic, being timely, costly and stressful for the claimant. This is aggravated by the nature of the case, in that, like the criminal law, the claimant will have her private life and intimate details about herself on public display and subject to intensive scrutiny. Not only is this

traumatic, but it also allows rape myths, stereotypes and assumptions to influence perceptions of the case and the complainant. As a result of this, there have been measures and procedures put in place in the criminal law in attempts to reduce the trauma of the process, as well as dispel the rape myths (Home Office 2006a). The civil law, in comparison, provides few protections. While this can be viewed as a negative element, it can also be seen in a positive light. A part of the problem with the criminal justice system, it is suggested, is that in giving the complainant rights, they are only rights of the victim which supports the gender hierarchy reflected in rape (West 1992). By contrast, the civil system provides a formal equality which can challenge this representation of inequality and provide a mode of empowerment (West 1992; Feldthusen 1993). These benefits, however, may be outweighed by the extent to which this furthers the stress of the trial for the claimant.

While there are other reasons claimants might wish to pursue a civil case, the remedy of compensation is likely to be a considerable factor. Although it has been debated as to whether this is claimants' primary motivation, given the high costs of civil suits, and the time and stress of them, it would seem unlikely that claimants would bring a case without the possibility of receiving damages. However, the extent to which tort law can compensate for rape is limited by the way in which it conceives of wrongs and harms, which is typically to women's disadvantage (Conaghan 2003). Nevertheless, there has been an increase in the level of damages that have been awarded for rape, in line with the increasing political attention drawn to rape and the harms it causes. But to award high levels of damages is to recognise that an extensive amount of harm has been caused and will continue to be suffered throughout the victim's life. Representing rape in this way – as a 'fate worse than death' – may do more harm to women than good. Yet, with the focus on the claimant's interests and needs, in comparison to the criminal law which centres on punishing the defendant in the interests of the public, this may provide an alternative perspective from which to view the harms of rape – or, at least, interrogate the way in which harm is socially and legally constructed and situated.

However, responding to wrongs by compensating the claimant, rather than punishing the defendant may undermine the severity of the wrong of rape that the criminal law conveys. But while there has been an emphasis on the necessity of the criminal law to respond adequately to rape, the reality is that it does not. And, despite the pitfalls of tort law, it is still another possible way in which a wrong and harm is legally recognised and redressed. Further, with differences between rape and the torts comprising trespass to the person, and between the criminal and civil contexts more generally, tort law may provide a more flexible framework within which problematic

constructions of rape and gendered concepts can be challenged. This may improve our understanding of rape in the criminal law, or perhaps spark new debates or reform old ones, and, in so doing, allow us to (re)think of ways to deal with rape in the legal system.

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