



GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY



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Volume 7 Issue 1

2019

Published in September 2019, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

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**THE DANGERS OF ABSOLUTES — AND A FEW OTHER MATTERS: A
RESPONSE TO ANNA KERR'S REPLY**

ANDREW DYER*

*This paper is not subject to peer-review and is the final instalment of this
Right to Reply series, published in this issue.*

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I INTRODUCTION

I am not sure that a lawyer should never say ‘never’, but s/he would be unwise to say it as often as Anna Kerr does in her latest piece of writing. The accused who has non-consensual intercourse, Kerr maintains, should never be acquitted of sexual assault.¹ A substantially intoxicated person, she continues, has never consented to sexual activity.² And, for Kerr, a person should never escape conviction if his/her sexual partner has participated in sexual intercourse with him/her because of a mistake as to, or his/her ignorance about, some fact.³ In this reply, I argue that the law should adopt none of the absolute rules that Kerr favours.

II KERR’S ABSOLUTES

Kerr continues to believe that sexual assault should be an absolute liability offence.⁴ This distinguishes her from some other supporters of ‘affirmative consent’, who seem loath to face up to the draconian nature of their proposals.⁵ For example, Rape & Domestic Violence Australia (R&DVSA) has accused certain commentators of ‘conflat[ing] the affirmative model with a model of strict or absolute liability’.⁶ ‘In fact’, it continues:⁷

[T]he affirmative model of consent does not require any shift to the legal burden of proof. Rather, an affirmative model may still require the prosecution to prove all elements of the offence beyond reasonable doubt, including the mental element.

¹ Anna Kerr, ‘Reply to Andrew Dyer’s Response’ (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue).

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Though some commentators openly advocate absolute liability: Jonathan Crowe and Bri Lee, ‘Reform’, *Consent Law in Queensland* (Web Page, 2 May 2019) <<https://www.consentlawqld.com/reform>>. Others have noted without disapproval, suggestions that sexual assault be made an absolute liability offence: Wendy Larcombe et al, ‘I Think it’s Rape and I Think He Would be Found Not Guilty’: Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law’ (2016) 25(5) *Social & Legal Studies* 611, 623. Strangely, such commentators appear to believe that such a reform would be ‘progressive’: at 624.

⁶ Rape & Domestic Violence Services Australia, Submission No CO28 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (21 February 2019).

⁷ Ibid.

Leaving aside R&DVSA's apparent ignorance of the distinction between strict and absolute liability,⁸ its claim is misconceived. No one is arguing that, under an 'affirmative consent' standard, the burden of proof would be altered. Rather, if we were to convict of sexual assault all those who had non-consensual intercourse with another, without first having received a clear indication from that person that s/he was consenting, no one who performed the actus reus of that offence would be acquitted. Only if a person obtained such a clear indication would s/he avoid conviction, but all those who obtain such an indication have had *consensual* intercourse (that is, have *not* performed the actus reus of sexual assault).

In any case, Kerr is wrong to argue that it is never reasonable for a man mistakenly to believe that a woman is consenting.⁹ 'Dyer seems to think that having an intellectual disability or even Asperger's syndrome should enable an individual to rape women with impunity,'¹⁰ she announces. I think nothing of the sort. My argument instead is that, when determining whether a person with such a disability *has* committed rape,¹¹ the trier of fact should take his/her disability into account. If it was unreasonable *for him/her* to believe that the complainant was consenting, a conviction should follow. If, however, his/her belief in consent was reasonable for someone with his/her disability, s/he should be acquitted. Kerr does not substantiate her claim that this latter accused is at all morally culpable. Indeed, any such claim would be impossible to defend. The person who, because of some disability, has had no 'fair opportunity to act otherwise'¹² should not be convicted of a serious offence.

Moreover, Kerr is wrong to state that, 'in practice a person suffering a mental disability (whether an intellectual disability or mental illness) would be dealt with under mental health provisions'.¹³ There are many cases where an accused with an intellectual

⁸ As to which, see *Wampfler v R* (1987) 11 NSWLR 541, 546, and my discussion of that case in Andrew Dyer, 'No! to Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue).

⁹ Kerr (n 1). Though Kerr refers only to heterosexual relations here, presumably she would extend no more latitude to gay men or lesbians.

¹⁰ *Ibid.*

¹¹ Or 'sexual assault', to use the terminology favoured in NSW: see *Crimes Act 1900* (NSW) s 61I.

¹² H.L.A. Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008) 153.

¹³ Kerr (n 1).

disability,¹⁴ or a mental illness,¹⁵ has been tried for rape. I cited three of them in the article to which Kerr was responding.¹⁶

Turning now to Kerr's remarks about the accused who performs the actus reus of sexual assault while in a state of non-self-induced intoxication, this, she thinks, is a 'somewhat unconvincing hypothetical'.¹⁷ It could not actually arise. Really? In *R v Kingston*¹⁸ it was open to the jury to find that the respondent only 'indulged in gross sexual acts' with an unconscious 15 year-old boy because his co-accused had 'secretly administered drugs not only to the boy but also to the respondent'.¹⁹ Such scenarios are rare; however, when legislating, we must keep in mind all cases that might arise. Moreover, Kerr makes no attempt to support her claim that the accused who fails to form criminal intent due to non-self-induced intoxication is anything other than morally innocent. She merely states that, 'if a man is so paralytic that he is unable to form criminal intent, he is also equally unlikely to be able to carry out a ... sexual assault'.²⁰ However, many people have performed prohibited conduct though seemingly prevented by their intoxication from forming criminal intent.²¹ Any law that allows for the conviction of such a person, whose intoxication is involuntary, is patently unjust.²²

We can now consider Kerr's remarks about a *complainant's* self-induced intoxication, and about situations where a complainant has consented to sexual activity because of some factual mistake that s/he has made. For Kerr, a complainant's consent to sexual activity should 'automatically' be negated whenever the complainant gave that consent while

¹⁴ See, eg, *R v Mrzljak* [2005] 1 Qd R 308; *Butler v The State of Western Australia* [2013] WASCA 242 (18 October 2013).

¹⁵ See, eg, *R v B(MA)* [2013] 1 Cr App R 36; *R v Dunrobin* [2008] QCA 116.

¹⁶ Dyer (n 8).

¹⁷ Kerr (n 1).

¹⁸ [1995] 2 AC 355.

¹⁹ *Ibid* 360. Such a claim is of course a claim of disinhibition; it is not a claim that the accused was prevented from forming intent. But the defence also made a claim of the latter kind at trial in *Kingston*, and it is far from clear that such a claim is never capable of succeeding in practice.

²⁰ Kerr (n 1).

²¹ See, eg, *R v O'Connor* (1980) 146 CLR 64; *DPP v Majewski* [1977] AC 43. Contrary to what Kerr suggests, the question in a case of this sort is not whether the accused was *incapable* of forming intent; it is whether s/he did not *in fact* form such intent: *R v Makisi* (2004) 151 A Crim R 245, 250-1 [12]-[13].

²² It is true that *Crimes Act 1900* (NSW) s 428D might currently prevent the conviction of such an accused. After all, s/he has not had intercourse intentionally, and s 428D provides that an accused's non-self-induced intoxication may be taken into account when determining whether an accused had the mens rea for 'an offence other than an offence of specific intent' (such as sexual assault). But Kerr would seem to believe that the law *should* state that the accused who fails to ask permission to have sex — for whatever reason — must be convicted of sexual assault if his/her partner is not consenting.

s/he was substantially intoxicated.²³ This claim is unsustainable. A person consents to an activity — whether it be driving to his/her parents' house,²⁴ or sex, or something else — if s/he makes an autonomous decision to proceed.²⁵ In *Burns v The Queen*,²⁶ five High Court Justices held that a person's decision can be truly autonomous even though s/he was substantially intoxicated when s/he made it. This is obviously right. Take, for example, the man who has ten beers before having intercourse with his long-term sexual partner. He is clearly consenting to that intercourse.²⁷

It appears that Kerr argues what she does because of *Lazarus*. Saxon Mullins was substantially intoxicated. Therefore, says Kerr, she was not consenting.²⁸ But Luke Lazarus had consumed a fair quantity of alcohol, too. Indeed, Tupman DCJ thought that, if he had been sober, he might not have engaged in the relevant activity.²⁹ Presumably, however, Kerr would not accept that, assuming that Mr Lazarus was 'substantially intoxicated' within the meaning of s 61HE(8)(b) of the *Crimes Act 1900* (NSW),³⁰ he too was not consenting to the penile-anal intercourse. Further, Kerr seems to be confused about what Tupman DCJ actually found at the second *Lazarus* trial. She seemingly implies that, if Tupman DCJ had been satisfied that the Crown had proved that Ms Mullins was not consenting, she would have convicted Mr Lazarus. However, Kerr appears to suggest, Tupman DCJ did not make this finding — even though Ms Mullins was intoxicated at the time of the intercourse. In fact, Tupman DCJ *did* find that Ms Mullins was not consenting.³¹ The prosecution foundered on the Crown's inability to prove that, additionally, Mr Lazarus lacked an honest and reasonable but mistaken belief that Ms Mullins was consenting.³²

Concerning mistakes, Kerr agrees with me that the person who has sexual intercourse with another because of her/his mistaken belief that the other person is not HIV positive

²³ Kerr (n 1).

²⁴ A topic to which I will return.

²⁵ See, eg, Simon Gardner, 'Appreciating *Olugboga*' (1996) 16(3) *Legal Studies* 275, 281-282; Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1392-1394.

²⁶ [2012] 236 CLR 334, 364 [87] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁷ Unless, of course, there is something besides his intoxication that renders his conduct other than free and voluntary.

²⁸ Kerr (n 1).

²⁹ *R v Lazarus* (District Court of NSW, Tupman DCJ, 4 May 2017) ('*Lazarus*').

³⁰ The relevant provision at the time was *Crimes Act 1900* (NSW) s 61HA(6)(a).

³¹ *Lazarus* (n 29). As I thought I had made clear in my earlier piece: Dyer (n 8).

³² *Lazarus* (n 29).

or will wear a (non-sabotaged) condom during the intercourse, has not really consented.³³ But:

[I]n Dyer's view the right to privacy can trump a woman's right to informed consent, or at least when it comes to disclosing sexual or gender history. Ultimately this would seem to reflect a male perspective which prioritises sex as a fundamental need that eclipses women's right to safety and autonomy.³⁴

Again, Kerr's position is unsustainable. Certainly, Herring has argued that the law should state that:

If at the time of the sexual activity a person:

(a) is mistaken as to a fact; and

(b) had s/he known the truth about that fact would not have consented to it

then she did not consent to the sexual activity. If the defendant knows (or ought to know) that s/he did not consent (in the sense just described) then s/he is guilty of an offence.³⁵

But, as Horder has observed, this would make a rapist of the person who continued with conjugal relations though s/he was having an affair, or the man who continued having intercourse with his wife despite having fallen in love with another man.³⁶ My belief that liability should not arise in such circumstances has nothing whatsoever to do with the privileging of a 'male perspective'. For, a rule of the type just proposed does not just make criminals of men. It makes criminals of *anyone* who has intercourse with a person who only participates in the relevant activity because of his/her mistake about (or, for Kerr, his/her ignorance of)³⁷ some fact. Often, such people *should* be convicted of sexual

³³ Kerr (n 1). I provide a full defence of my proposal concerning complainants' mistakes in Andrew Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159.

³⁴ Kerr (n 8).

³⁵ Jonathan Herring, 'Mistaken Sex' (Legal Research Paper Series, Oxford Criminal Law Review, Oxford, 2005) 511, 517.

³⁶ Jeremy Horder, *Ashworth's Principles of Criminal Law*, (Oxford University Press, 8th ed, 2016) 360.

³⁷ Kerr (n 1).

assault. But not where the accused's interest in privacy — and/or a compelling public policy concern — outweighs the complainant's right to sexual autonomy.

Returning to the gender history example, Sharpe has noted that there are good reasons why a transgender woman, say, might not wish to disclose that s/he was once considered by society to be a man.³⁸ 'In addition to the not inconsiderable physical risks', she says, 'we need to recognise the psychological and emotional impact [on her]'.³⁹ However, it is not just the accused's privacy interest that is engaged. There are also public policy concerns that point decisively against the view that such a woman should be convicted of sexual assault if she proceeds to have intercourse with a man, say, who is unaware that she is transgender. If the man later finds out about this fact and expresses outrage, is he not being distinctly transphobic? Surely the courts should not lend their endorsement to such attitudes?

III SOME OTHER PROBLEMS WITH KERR'S ANALYSIS

There are several other difficulties with Kerr's argument.

Firstly, regarding sado-masochistic sexual activity,⁴⁰ nothing that she says alters my view that defendants in cases such as *Brown v DPP*⁴¹ should be innocent of sexual assault. Because the 'victims' consented, sexual assault liability would have been even more bizarre than the activities in which they engaged.⁴²

Secondly, Kerr thinks that I 'could be regarded' as 'trivialising the issue by comparing a woman coerced into having sex with [my] ... being persuaded to drive [my] ... wife in the heavy rain'.⁴³ I made no such comparison. I simply argued that, contrary to Kerr's position, a person *can* consent to intercourse even though s/he has been persuaded to engage in it or has engaged in it reluctantly. The person who engages in boring fertility treatment sex is a good example of this.⁴⁴ It is not to trivialise rape to use a non-sexual example to show that a person can reluctantly make an autonomous decision. By

³⁸ Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (Legal Research Paper Series, Oxford Criminal Law Review, Oxford, 2014) 207, 220.

³⁹ *Ibid.*

⁴⁰ Kerr (n 1).

⁴¹ [1994] 1 AC 212.

⁴² As to which, see *R v Brown* [1992] 1 QB 491, 495-7.

⁴³ Kerr (n 1).

⁴⁴ Dyer (n 8).

suggesting the contrary, Kerr could be regarded as not being sufficiently attuned to the relevant concepts.

Thirdly, nothing that Kerr says in her reply changes my view that her remarks about joyriding in her original article were misconceived. It is only in ‘atypical’ sexual assault cases where the complainant sustains ‘injury beyond unwanted penetration’.⁴⁵ This is why consent is ‘specifically an issue’⁴⁶ more often in such matters than in larceny prosecutions. It is common for people to consent to intercourse that does not result in physical injury. It is uncommon for a person to allow another to ‘hotwire’ his/her car for the purposes of going on a joyride. Accordingly, in the many sexual assault cases where the complainant has sustained no physical injuries, the accused’s claim that there was consent will often be plausible. Of course, it might be a total lie, but we would be entering dangerous territory if we were to prevent the accused from putting forward his/her version of events.⁴⁷

Fourthly, Kerr’s reform proposal is problematic.⁴⁸ For example, a person would be guilty of her lesser offence if s/he had ‘sexual intercourse with another person’ and was ‘negligent in obtaining their (sic) consent’.⁴⁹ Such a provision would seem to criminalise the person who had *consensual* sex with another, but failed to take reasonable steps to ensure that consent had been granted. If a negligent sexual assault offence is to be introduced in NSW,⁵⁰ non-consent should be an element of that offence.

⁴⁵ Rachael Burgin, ‘Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform’ (2019) 59(2) *British Journal of Criminology* 296, 300.

⁴⁶ Kerr (n 1).

⁴⁷ It is no answer to this to say, as Kerr does, that ‘there are many scenarios in which people consent to be struck’: *ibid*. Her apparent point is that, given that people sometimes consent to such contact, and given that consent is nevertheless rarely an issue at an assault trial, why should consent so often be in issue in a sexual assault trial? The answer to this is that where a footballer, for example, claims that s/he was not consenting to violence that the accused inflicted on him/her in the course of the game consent *is* in issue: See *Giumelli v Johnston* (1991) Aust Torts Reports 81-805. This is because, as with sexual activity, in many cases of bodily contact on a football field, the footballers have consented to the relevant contact.

⁴⁸ Kerr (n 1).

⁴⁹ *Ibid*.

⁵⁰ And I do not agree that it should be: See Andrew Dyer, Submission No C002 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019).

IV CONCLUSION

While I support sexual assault law reform in NSW, any reforms must be cautious and carefully considered. Though Anna Kerr is undoubtedly well-intentioned, her suggested reforms satisfy neither of these criteria.

REFERENCE LIST

A Articles/Books/Reports

- Burgin, Rachael, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296
- Dyer, Andrew, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159
- Dyer, Andrew, 'No! to Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in the issue)
- Gardner, Simon, 'Appreciating *Olugboga*' (1996) 16(3) *Legal Studies* 275, 281-282
- Hart, H.L.A. 'Negligence, *Mens Rea* and Criminal Responsibility' in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008)
- Holder, Jeremy, *Ashworth's Principles of Criminal Law*, (Oxford University Press, 8th ed, 2016) 360
- Kerr, Anna, 'Reply to Andrew Dyer's Response' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue)
- Larcombe, Wendy et al, 'I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social & Legal Studies* 611
- Rubinfeld, Jed, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372

B Cases

- Brown v DPP* [1994] 1 AC 212
- Burns v The Queen* (2012) 236 CLR 334
- Butler v The State of Western Australia* [2013] WASCA 242 (18 October 2013)
- DPP v Majewski* [1977] AC 43

Giumelli v Johnston (1991) Aust Torts Reports 81-805

R v Brown [1992] 1 QB 491 *Butler v The State of Western Australia* [2013] WASCA 242
(18 October 2013)

R v B(MA) [2013] 1 Cr App R 36

R v Dunrobin [2008] QCA 116

R v Kingston [1995] 2 AC 355

R v Lazarus (District Court of NSW, Tupman DCJ, 4 May 2017)

R v Makisi (2004) 151 A Crim R 245

R v Mrzljak [2005] 1 Qd R 308

R v O'Connor (1980) 146 CLR 64

Wampfler v R (1987) 11 NSWLR 541

C Legislation

Crimes Act 1900 (NSW)

E Other

Crowe, Jonathan and Bri Lee 'Reform', *Consent Law in Queensland* (Web Page, 2 May 2019) <<https://www.consentlawqld.com/reform>>

Dyer, Andrew Submission No CO02 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019)

Herring, Jonathan 'Mistaken Sex' (Legal Research Paper Series, Oxford Criminal Law Review, Oxford, 2005) 511

Sharpe, Alex 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (Legal Research Paper Series, Oxford Criminal Law Review, Oxford, 2014) 207

Rape & Domestic Violence Services Australia, Submission No C028 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (21 February 2019)