

# JUST THE MONEY? DOES THE CRIMINAL LAW APPROPRIATELY TACKLE ROMANCE FRAUDS?

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**Abstract:** This article considers the legal response to romance frauds. This is an issue that attracts increasing scholarship, as digital communication technologies make it easier for people to meet but also for scammers to prey on unsuspecting victims. Initially, these scams would take place solely online, and they could proceed very rapidly. While these still exist, they increasingly take place over a prolonged period and can be very sophisticated, including the establishment of a “real” relationship. Historically, the law responds to this crime through offences relating to fraud, but this arguably leaves parts of the behaviour unpunished.

Using hypothetical case-studies (“vignettes”) this article compares how the law in England & Wales, Scotland and Canada tackles romance fraud. It concludes by suggesting the need for a new offence where sexual activity is procured by deception.

**Keywords:** Cybercrime; fraud; romance fraud; sexual offences; consent

## I. Introduction

This article seeks to undertake a comparative analysis of how the law in three countries (England & Wales, Scotland and Canada) approaches the issue of romance fraud. Section 2, which is the first substantive section of this article will outline briefly what romance frauds are. It will demonstrate that while this is an old behaviour, it has been given a new lease of life through the growth of Information and Communication Technologies, particularly the Internet.

To assist in this analysis, the third section will outline the methodology to be used in this analysis, which is through the creation of theoretical case-studies known as vignettes.

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These vignettes represent exemplars of romance fraud and enable the same facts to be analysed within the three jurisdictions. This can be important because how offences are labelled in the various jurisdictions may differ, meaning that comparing the laws can be difficult.

Section four begins the analysis of the law. Each jurisdiction will be examined in turn, with the section being separated into three parts, each focusing on a type of offence. The first part considers the law of fraud. This is an offence that readily applies to romance fraud. However, the third vignette (which does not involve financial motivation) sits uneasily within the label 'fraud'. Importantly, fraud does not necessarily capture the full behaviours of the romance fraud or, as identified in section two, recognise all of the harms that a victim suffers.

After fraud, the issue of identity fraud will be considered. It will be noted that in romance fraud there can be tangential victims, particularly where a fraudster assumes the identity of another to undertake the fraud. The law focuses on the victim who suffers loss, but surely the person whose identity has been assumed also suffers potential harm?

Finally, the law of sexual offences will be considered, to identify whether they apply to romance fraud. While some frauds will take place online, others will take place over a prolonged period, with the victim groomed into believing that they are in a romantic relationship, including sexually. Victims of such frauds will often identify that they feel violated by the abuse of trust inherent in these crimes, but it will be shown that the law in the three countries rarely consider the fraud to constitute a sexual offence.

The fifth section of this article suggests that the criminal law should recognise breaches of sexual autonomy, even when there is ostensible fraud. It will consider the calls by some academics to treat fraud as a vitiation of consent, meaning that the law of rape applies. Such an approach would be a radical departure from current understandings of rape, and it will be submitted that it is unwise to go down that path. Instead, a new offence should be formulated that recognises the impairment of the victim's sexual autonomy but, for reasons of public policy, does not go as far as negating consent. Even this offence has the potential to be too wide, and the article concludes by arguing that there will be a need for careful prosecutorial discretion if the offence does not involve the criminal law in matters traditionally left to family law.

## **II. Romance Frauds**

While romance fraud has become a contemporary topic of discussion, it is not new behaviour, with its origins arguably dating back to the sixteenth century and the Spanish Prisoner scam.<sup>1</sup> The twentieth century saw a resurgence when post and fax were used to perpetrate this fraud. The twenty-first century saw an exponential growth in digital communication technologies, including for social interaction. This has brought new opportunities for this crime, and reports have increased sharply.<sup>2</sup>

The nature of the modern romance fraud is disputed. While some suggest that it is a derivative of an advance-fee fraud,<sup>3</sup> Cross and Holt argue it is a distinct crime. They note that advance-fee frauds are typically premised on victims seeking financial gains.<sup>4</sup> The same is not true of romance frauds. Here, the “hook” is the desire for a romantic relationship.<sup>5</sup> This is a key distinction (although there are similarities to advance-fee frauds), and it will be seen that this distinction concerns victims who often feel the law only cares about money.

There is no single type of romance fraud.<sup>6</sup> While some core elements remain the same, other aspects differ. Some frauds take place wholly online, with no physical meetings between parties, but in others there can be prolonged contact, including intimacy. While some frauds take place quickly, others will take place over an extended period.<sup>7</sup>

Perhaps unsurprisingly, there is a considerable link between romance frauds and online dating sites, with many frauds often originating in these sites. This is partly because it is not uncommon for offenders to seek vulnerable people, including those who have been recently

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<sup>1</sup> Alisdair A Gillespie, “The Electronic Spanish Prisoner: Romance Frauds on the Internet” (2017) 81 *Journal of Criminal Law* 217.

<sup>2</sup> Cassandra Cross and Thomas J Holt, “The Use of Military Profiles in Romance Fraud Schemes” (2021) 16 *Victims & Offenders* 385, 387.

<sup>3</sup> Gillespie, “The Electronic Spanish Prisoner” (n. 1), 81.

<sup>4</sup> For example, answering so-called “419 frauds” where the victim believes that they are helping someone move money from another country, or that they are the last-survivor of a distant relative.

<sup>5</sup> Cross and Holt, “The Use of Military Profiles” (n. 2) 388.

<sup>6</sup> Monica T Whitty, “Do You Love Me? Psychological Characteristics of Romance Scam Victims” (2018) 21 *Cyberpsychology, behavior, and social networking* 105.

<sup>7</sup> Elisabeth Carter “Distort, Extort, Deceive and Exploit: Exploring the Inner Workings of a Romance Fraud” (2020) 61 *The British Journal of Criminology* 283, 287.

bereaved, divorced or are long-term singles.<sup>8</sup> While it is sometimes thought that there is a stereotypical victim, that is no longer true and romance frauds see people from all backgrounds fall victim.<sup>9</sup>

The process of befriending the victim has been likened to the grooming cycle exploited by some offenders to solicit children.<sup>10</sup> There are undoubtedly similarities. The overarching aim of romance fraudsters is to persuade their victim that they are in a genuine relationship and that they can rely upon the perpetrator for emotional support. Once emotional control is gained, the offender will begin to move to the fraud stage whereby typically money or other assets are extracted from the victim. This may involve a single large sum of money, or smaller sums extorted over a protracted period, accumulating to significant sums.

It has been remarked that the “cruellest part of romance scams is that the offender gains someone’s trust in a relationship and then abuses it”.<sup>11</sup> This goes to the heart of what many argue separates romance fraud from other online frauds. Studies have demonstrated that victims are less bothered about the financial loss than they are about the fact they are betrayed. Some victims suggest that they feel emotions akin to bereavement when the scam ends.<sup>12</sup> Certainly, there is consensus that victims can experience (severe) emotional distress.<sup>13</sup> Victims are often also criticised by their family, who struggle to understand how the victim could be “stupid”.<sup>14</sup> Victim-blaming is a particular issue for victims of fraud, particularly online fraud.<sup>15</sup> This is an

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<sup>8</sup> Whitty, “Do You Love Me?” (n. 6).

<sup>9</sup> Tom Buchanan and Monica T Whitty, “The Online Dating Romance Scam: Causes and Consequences of Victimhood” (2014) 20 *Psychology, Crime & Law* 261, 278.

<sup>10</sup> Carter “Distort, Extort, Deceive” (n. 7).

<sup>11</sup> Richard G Brody and Debra T Sinclair, “Romance Fraud: Tacking a Lack of Ethics to a New Low” [2013] *Ethics and Critical Thinking Journal* 85, 86.

<sup>12</sup> Carter “Distort, Extort, Deceive” (n. 7), 284.

<sup>13</sup> Aunshul Rege, “Whats Love Got to Do with It? Exploring Online Dating Scams and Identity Fraud” (2009) 3 *International Journal of Cyber Criminology* 494; Buchanan and Whitty, “The Online Dating Romance Scam” (n. 9).

<sup>14</sup> Monica T Whitty and Tom Buchanan, “The Online Dating Romance Scam: The Psychological Impact on Victims—Both Financial and Non-Financial” (2016) 16 *Criminology & Criminal Justice* 176, 181.

<sup>15</sup> Carter “Distort, Extort, Deceive” (n. 7), 284.

additional negative impact on the victim, who needs to adjust to the bafflement, disappointment and, in some instances, hostility of family, friends and even law enforcement.<sup>16</sup>

### III. Methodology

The first section of this article predominantly adopts a critical doctrinal approach to the laws in three countries (England & Wales, Scotland and Canada). While Zweigert and Kötz in their classic treatise on comparative law argue that functionalism is at the heart of comparative law,<sup>17</sup> it has been recognised that doctrinal research remains a key part of comparative law.<sup>18</sup> Indeed, in recent years there has been recognition that the rejection of doctrinal scholarship was unwise, and that critical doctrinal research is an independent methodology in its own right.<sup>19</sup>

Comparative law requires a focus on the similarities and differences among the data identified in the analysis.<sup>20</sup> To do this, it is necessary to identify common factors. It is for this reason that Zweigert and Kötz argue that one needs to consider the function of the law as labels and terms will differ between jurisdictions. However, there are other ways of providing a common benchmark allowing analysis. One method is to use vignettes. A vignette can be described as “short, constructed descriptions of a...situation...representing a systematic combination of characteristics”.<sup>21</sup>

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<sup>16</sup> *Ibid.*

<sup>17</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 2nd edn, Cambridge University Press, 1987).

<sup>18</sup> Mark van Hoecke and Mark Warrington, “Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law” (1998) 47 *International and Comparative Law Quarterly* 495.

<sup>19</sup> Terry Hutchinson and Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17 *Deakin Law Review* 83.

<sup>20</sup> Edward J Eberle, “The Methodology of Comparative Law” (2011) 16 *Roger Williams University Law Review* 51, 61.

<sup>21</sup> Herman Aguinis and Kyle J Bradley, “Best Practice Recommendations for Designing and Implementing Experimental Vignette Methodology Studies” (2014) 17 *Organizational research methods* 351, 353.

Vignettes are hypothetical case-studies. They are frequently used in interviews,<sup>22</sup> but the principle can be applied to other forms of qualitative analysis. Vignettes put forward examples that provide a common reference point against which national laws can be compared. While vignettes cannot capture the complexity of real-world situations,<sup>23</sup> they provide illustrations.

Three vignettes are presented. They are hypothetical, but based on academic literature, case law and newspaper reports. They are not intended to present the most common forms of romance fraud. They are three exemplars from a broad range of behaviours:

- **Vignette One:** Hilary, aged 53, has signed up to several dating sites. Recently, Hilary met Tom, a 55-year-old Royal Marine, who is stationed in Ghana. Hilary finds a press report about Tom being decorated for bravery. While has not mentioned this, it is his photograph in the story. While Hilary and Tom talk on the telephone, they have never used video because “the internet is not very reliable in Ghana”. They exchange gifts, although Tom’s are usually modest because expensive gifts would be stolen by postal workers.

Tom is due to retire. He wants to move close to Hilary so that they can get to know each other properly before marrying. They look at flats close to where she lives. Tom has acquired lots of valuable antiques while in Ghana. He asks Hilary for her assistance with shipping costs as he will not get his full salary until he returns from deployment. The sale of the antiques will pay for the deposit for the flat.

Tom does not exist. A group of scammers use this identity. Hilary sends £12,000 to Tom, and then another £5,000 to pay for “customs taxes”.

- **Vignette Two:** Anna, aged 48, is a divorcee. She has a good job, and recently moved to Leeds where she rents a glitzy apartment in the City Centre.

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<sup>22</sup> *Ibid.*, 354.

<sup>23</sup> Niamh Maguire and others, “Using Vignette Methodology to Research the Process of Breach Comparatively” (2015) 7 *European journal of probation* 241, 245.

Arthur, aged 60, is an engineer based in Aberdeen, where he works on the oil rigs. He is originally from Somerset. He is a widower after losing his wife to cancer six years ago. He has no children.

Anna and Arthur meet on a dating site and then email, telephone and video call. These are only possible when Arthur is off the rig, as there's no mobile signal, and the wifi is not strong enough for video calls. About once a month, Anna visits Arthur in Aberdeen. She books a hotel, and they have dinner and drinks. They share a room and have sex during the stay.

Anna tends to pay for most things because Arthur only gets an allowance on the rigs, with his salary being paid in Dubai to save tax. He occasionally buys Anna gifts, often small romantic presents. Last week, he presented her with a diamond necklace that he bought when he was briefly in Dubai (in fact, it is cubic zirconia).

Arthur loses the watch his late-wife bought him. He was very upset. Anna buys him a £5,000 watch, which is as near a replacement as possible.

Arthur is about to retire, and they want to get married. He doesn't want Anna to move into the bungalow that he shared with his wife as it wouldn't seem right. He shows her pictures of a cottage that needs repair. He never got around to it, as he "just lost interest after she was gone". However, he proposes that they do it up, sell it, and use that and his savings to buy a house.

Anna agreed to loan him the money to pay for the repairs. Arthur insists that she pays the builder direct not him, so that she knows he is not conning her. She pays £40,000 to a man pretending to be a builder.

- **Vignette Three:** Susan, aged 24, joined a dating site where she met Vicky, a 27-year-old junior doctor. They clicked and soon talk regularly. Vicky lives with her grandmother, who is very religious and would not approve of Vicky being a lesbian.

Vicky and Susan often go on dates. They occasionally stay in hotel rooms, but sometimes Vicky will come over to Susan's flat. It is usually during the week as being the junior doctor, she needs to work weekends. They always pay for everything 50/50.

After Susan unsuccessfully tries to reach Vicky at work, Vicky admits that she is actually a sales executive for an office furniture shop. She is married to Steve, and has a four-year-old boy. She wanted to “experiment” with Susan, but she is in love with Steve and won’t leave him.

These three vignettes present different behaviours. The first is an online-only relationship that leads to financial loss. The second is more sophisticated in that it was ultimately for financial purposes, but it involved physical romance. The third vignette has no obvious financial intent. Instead, it is a pure “romance fraud” in that the romance was being pursued for deceptive reasons.

#### **IV. THE OFFENCES**

Fraud would seem the most likely offence that could apply in at least two of these scenarios. However, will that suffice? It was noted above that victims often suffer emotional distress and feelings of betrayal. Will this be captured by fraud? Indeed, research has shown that victims are often less concerned about the financial loss.<sup>24</sup> Accordingly, this article will consider alternate forms of liability.

##### ***A. Fraud***

While the financial loss may not be a primary factor for all victims, it is clear that it can be important to society, and thus fraud should be considered first.

##### **(i) England & Wales**

Fraud is set out in the *Fraud Act 2006*. While there is a single offence of fraud, it can be committed in three distinct ways.<sup>25</sup> The more usual form is fraud by false representation.

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<sup>24</sup> Whitty and Buchanan, “The Online Dating Romance Scam” (n. 14).

<sup>25</sup> *Fraud Act 2006*, ss 2-4.

A person is in breach of this section if he-

- (a) dishonestly makes a false representation, and
- (b) intends by making the representation-
  - (i) to make a gain for himself or another, or
  - (ii) to cause loss to another or to expose another to a risk of loss.<sup>26</sup>

A representation is false if it is “untrue or misleading” and “the person making it knows that it is, or might be, untrue and misleading”.<sup>27</sup>

It is unlikely that in most romance frauds there would be any difficulty identifying something that is untrue or misleading. Turning to the vignettes, it is easy to see false representation. “Tom” is not real. A gang has adopted his identity to persuade victims to part with their money. In the second vignette, “Arthur” states that he has a house to sell, and that he is going to sell it in order to move in with Anna. Also, “Arthur” pretends to be the builder.

What of the third vignette? “Vicky” states that she lives with a religious grandmother who would not approve of same-sex relationships. In fact, she is married. This is undoubtedly a false representation, but that by itself is insufficient. The representation must be made with the intention of causing a gain for herself or another, or to cause a loss to another. What is the gain or loss here? Presumably, it could be considered to be a sexual benefit, or companionship. However, that would not suffice. The *Fraud Act 2006* requires the gain or loss to be in respect of “money or other property”.<sup>28</sup>

Susan and Vicky split all bills 50/50. That does not, of course, mean that there is no gain or loss. A person spending 50% of the bill is still paying money, ie making a loss. Similarly, we are told that they exchange gifts which must again show a gain and loss of physical property. These gains and losses are a direct consequence of the false representation of Vicky.

The *Fraud Act 2006* does not require that a person suffers actual gain or loss, it suffices that a person intends for there to be a gain or loss. That is not a problem in the first two vignettes where there is clear evidence of the intent to scam Hilary and Anna, but what of the third? Vicky’s (direct) intention is to procure a romantic relationship with Susan, not to make any

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<sup>26</sup> *Fraud Act 2006*, s 2(1).

<sup>27</sup> *Fraud Act 2006*, s 2(2).

<sup>28</sup> *Fraud Act 2006*, s 5(2)(a).

gain or loss. Ormerod and Laird argue that “intent” should carry its full definition, including oblique intent.<sup>29</sup> If that is the case, Vicky must intend gain or loss as she must know that going on dates is virtually certain to cause Susan to suffer a loss (the cost of 50% of the date).

It is not enough that the false representation is made, it must be made dishonestly.<sup>30</sup> Dishonesty is set out in the common law, most recently in *Ivey v Genting Casinos (UK) Ltd.*<sup>31</sup> While *Ivey* is said to be an objective test, it is set within a subjective context.<sup>32</sup> Thus, the initial question to ask is “what is Vicky’s knowledge or belief of the facts?” She must know that Susan believed that Vicky was single, and that she was gay. That is carried forward to the objective test which becomes whether reasonable and honest persons would consider lying about their being single and about their sexuality would be considered dishonest? The most likely answer is “yes”. While infidelity is not uncommon,<sup>33</sup> it is likely that people would consider such untrusts dishonest. Reasonable and honest persons would expect the truth to be told, and so Vicky is likely to be considered dishonest.

Vicky may, therefore, be guilty of fraud. If Vicky is liable then, presumably, so would anyone who conducts an extramarital affair posing as a single person, where they foresee that it is virtually certain that a person will spend money as part of that romantic relationship. That would see the law stray into territory that is typically left to civil (family) law.

It is sometimes said that there should be a *de minimis* rule within criminal law,<sup>34</sup> i.e. that the law will not concern itself with trivialities. Such a proposition has been rejected by the

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<sup>29</sup> David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, Oxford University Press, 2018), 934.

<sup>30</sup> *Fraud Act 2006*, s 2(1)(a).

<sup>31</sup> [2017] UKSC 67 (SC). While a civil case, the Court of Appeal (Criminal Division) has confirmed its application in the criminal courts (*R v Barton et al* [2020] EWCA Crim 575 (CA) at [105]).

<sup>32</sup> Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n. 29), 884.

<sup>33</sup> Jana Hackathorn and Brien K Ashdown, “The Webs We Weave: Predicting Infidelity Motivations and Extradyadic Relationship Satisfaction” (2021) 58 *The Journal of Sex Research* 170. Perhaps unsurprisingly men are more likely to be unfaithful than women.

<sup>34</sup> A comprehensive discussion is given in Douglas Husak, “The De Minimis ‘Defence’ to Criminal Liability” in RA Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011).

Court of Appeal,<sup>35</sup> although it undoubtedly features in the decision to prosecute.<sup>36</sup> Would the CPS prosecute where any gain or loss is likely to be very modest? The *Fraud Act 2006* has been used in such situations. In *Idrees v DPP*<sup>37</sup> a person unknown attended a driving theory test centre. He was recognised as someone who has taken multiple tests and was denied entry. He left the appellant's (provisional) driving licence. The appellant was tried and convicted of fraud by false representation, the representation being that he was taking the test and not the third-party. The High Court rejected an appeal by way of case-stated, upholding his conviction.

The gain or loss must relate to money or property.<sup>38</sup> What was the property here? The theory test does not by itself provide the right to drive, but in combination with the practical test, it allows a person to gain a driving licence. That was the defendant's objective. To get a driving licence. This is not intangible property – there is no property right in the (lawful) right to drive – the only property would be the physical licence. That is of nominal value but it is undoubtedly property.

Although the wrong in *Idrees* would seem more serious than that committed by Vicky (it seeks to thwart the regulations of the State), it shows that frauds involving token financial worth can still be prosecuted as it can be the only “hook” on which to hang a criminal offence. The actions of Vicky are undoubtedly both deceitful and dishonest. The conduct took place over a protracted period. Thus, it may be in the public interest to prosecute under these circumstances, although whether Fraud is the correct charge is perhaps another question.

#### (ii) Scotland

Fraud in Scotland remains a common law offence. The offence has been summarised as “a false impression [is] conveyed to the victim, with the deliberate aim of achieving some practical, and to the victim, usually prejudicial, result”.<sup>39</sup>

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<sup>35</sup> *R v Scott* [2007] EWCA Crim 2757(CA) at [14].

<sup>36</sup> As a trivial matter would unlikely to be in the public interest.

<sup>37</sup> [2011] EWHC 624 (Admin).

<sup>38</sup> *Fraud Act 2006*, s 5(2)(a).

<sup>39</sup> Sheriff Andrew M Cubie, *Scots Criminal Law* (4th edn, Bloomsbury 2016) 255.

In *MacDonald v HM Advocate*<sup>40</sup> the High Court of Justiciary held that fraud required three things: (1) a false pretence, (2) a definite practical result, and (3) a causal link between the pretence and the result.<sup>41</sup>

The concept of a false pretence is akin to the false representation under English law. Therefore, it is irrelevant whether someone is actually deceived, it is the making of the representation that is important. However, it must be false. As discussed before, finding falsity within the vignettes will not be difficult.

There is no need for actual loss or gain to be suffered under Scots law.<sup>42</sup> It suffices that a practical result is achieved. In *Adcock* a miner swapped his “pin” with another miner, leading the owners of the pit to believe that he had worked coal that he had not. In fact, due to a rule that provided a guaranteed minimum income, no additional pay was given, nor did the other miner lose any money that he was entitled to. The Court of Justiciary held that there had still been a practical result in that the wrong amount of coal had been recorded against their names.

Another example would be *HM Advocate v Wishart* where a solicitor entered into a complicated arrangement with a stockbroker which resulted in the latter’s accounts looking better than they actually were.<sup>43</sup> There was no evidence that there was any gain or loss caused, but the altered accounts undoubtedly constitutes a practical result.<sup>44</sup>

Under Scots law, there is no requirement that the practical result is linked to money or property. This is perhaps best illustrated by *G v HM Advocate*.<sup>45</sup> Here, the appellant and another (Y) were sentenced to three years’ imprisonment for fraud. G had conceived a baby girl when she was in a sexual relationship with a third-party (N). She told N that she had terminated the pregnancy. She and Y then crafted an elaborate plan that saw Y (who was gay) claiming that he had become a parent through a surrogate mother. In fact, it was G’s child. G and Y denied to N for some years that the daughter was his. Ultimately, a (civil) court ordered a DNA test that demonstrated that N was, in fact, the father.

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<sup>40</sup> 1996 SLT 723.

<sup>41</sup> *Ibid.*, at 726.

<sup>42</sup> *Adcock v Archbold* 1925 JC 58 (JC) (*Adcock*) .

<sup>43</sup> Cited in Cubie, *Scots Criminal Law* (n .39), 261.

<sup>44</sup> While it may be thought that better accounts might lead to more favourable rates or additional custom, this was not pleaded before the court.

<sup>45</sup> 2016 SLT 282.

There are no property rights that were denied to N here. Neither was there any financial loss. Indeed, arguably N benefitted financially as he did not have to support the baby. However, N lost his parental rights, and the ability to act as a father to his daughter. Under Scots law this constituted fraud – because it was undoubtedly a “practical result” – whereas it would not under the *Fraud Act 2006*.

It is not enough that a false pretence was made, there must be a causal link between the false pretence and the practical result. In *Richards v HM Advocate*<sup>46</sup> the High Court of Justiciary held the test is whether a person would have acted differently had the pretence not been false. In that case, the defendant asked a third-party to approach the local authority to purchase a property. They did so on the basis that the third-party and his family would use the premises as their residence. In fact, it was the defendant who would have the property conveyed to him, and he wanted to use it for (commercial) reasons.

The High Court held that it was irrelevant that the property was to be sold at that price regardless. The local authority was clear that they would not have sold the property to the purchaser had they known the true circumstances, and this demonstrated the link between the act (the purchase) and the false pretence.

In terms of the mental element, there are two parts.<sup>47</sup> The first is that the defendant must be aware that the pretence was false. In *Mackenzie v Skeen*<sup>48</sup> the foreman of an abattoir estimated the weight of offal. No evidence was adduced that invoices were based on these estimates but, more than this, no evidence was adduced that he knew the barrels he sent were heavier than they should be. The Lord Justice-General noted that in the absence of this knowledge, there could be no fraud.

The second element is that the defendant must intend to bring about the practical result. Cubie notes that fraud cannot arise by accident, and, therefore, the prosecution must prove that bringing about the practical result was the defendant’s purpose.<sup>49</sup>

In respect of the first two vignettes it is unlikely that there would be any difficulty in securing a conviction for fraud under Scots law. In both cases there has been a false pretence,

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<sup>46</sup> 1971 JC 29 (JC).

<sup>47</sup> Cubie, *Scots Criminal Law* (n. 39), 264.

<sup>48</sup> 1971 JC 43 (JC).

<sup>49</sup> Cubie, *Scots Criminal Law* (n. 39), 264.

and this has led to a practical result (the loss of money). There can be little doubt that the defendants were aware of the falsity of the pretence nor that they intended the result.

What of the third vignette? Arguably this is easier under Scots law than in England & Wales. It will be remembered that Scots law does not require property or money to be gained or lost. There must simply be a practical result. In this instance, the practical result is the romantic relationship. That undoubtedly arises from the false pretence. They have established an intimate relationship: an arrangement of shared values and activities. Does this constitute a “practical result”? It must. The definition of “result” is very wide, as evidenced by *G v HM Advocate*, but additionally there is authority to suggest that the establishment of a relationship can constitute a result for the purposes of fraud.<sup>50</sup>

What of the mental element? There can be little doubt that Vicky knew her representation was false. She has crafted a story that is entirely untrue. Similarly, there would be little doubt that she intended the practical result (the relationship) given that she created a profile and went on dates. Thus, it would seem likely that liability for fraud will be found in all three vignettes.

### (iii)Canada

Canada has several offences that relate to fraudulent behaviour, with one specific offence of fraud:

Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service...[is guilty of an offence].<sup>51</sup>

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<sup>50</sup> At least one case has considered the issue of organised child abuse activist groups (“Paedophile Hunters”) and suggested that those who portrayed themselves as a child to entrap those who seek to solicit a child could be at risk of committing the offence of fraud. See *Procurator Fiscal for Dundee v P* [2019] SC DUN 39 (SAC) at [5].

<sup>51</sup> *Criminal Code*, RSC 1985, s 380(1).

The reference to “false pretence within the meaning of this Act” refers to a separate offence within the Criminal Code,<sup>52</sup> which criminalises a false pretence, although it primarily relates to contractual, or quasi-contractual situations, and so it is not directly relevant to romance fraud.

The offence of fraud was discussed extensively by the Supreme Court of Canada in *R v Théroux*.<sup>53</sup> It was noted that the basis of the offence was “commercial affairs are to be conducted honestly”.<sup>54</sup> This demonstrates that fraud in Canada, like in England & Wales, is limited to financial or other property losses. The Supreme Court held that there were two elements to the *actus reus*:

- (1) a dishonest act is established by proof of deceit, falsehood or ‘other fraudulent means’, and
- (2) the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.<sup>55</sup>

They held that the *mens rea* of fraud is the awareness that they were undertaking the prohibited act, and that this would cause deprivation of another, or create a risk of deprivation.<sup>56</sup>

The term “dishonest act” can be construed widely, but “falsehood” is considered to be the most common definition. This means a false statement and it is similar to the concept of “false representation” or “false pretence” in England & Wales and Scotland respectively. In *R v Olan*<sup>57</sup> the Supreme Court of Canada noted that the essence of fraud is “dishonest deprivation”. As deceit and falsehood are inherently not honest, there is no need to prove dishonesty, with the latter only being required for “other fraudulent means”.<sup>58</sup> The latter is further limited in terms of requiring conduct worthy of being criminal. In *R v Gershbain*<sup>59</sup> the

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<sup>52</sup> *Criminal Code*, RSC 1985, s 361.

<sup>53</sup> [1993] 2 SCR 5 (Canada SC).

<sup>54</sup> *Ibid.* at [11].

<sup>55</sup> *Ibid.* at [13].

<sup>56</sup> *Ibid.* at [21].

<sup>57</sup> (1978) 41 CCC (2d) 145 (Canada SC).

<sup>58</sup> *R v Gatley* 1992 CarswellBC 1099 (Canada SC) at [30].

<sup>59</sup> (1989) 62 Man R (2d) 217.

Manitoba Court of Queen’s Bench rejected the suggestion that mere overcharging, even where the amounts are significant, will necessarily constitute a “dishonest act”. It suggests that fraud relates to whether the sums should be paid, with complaints about the value of the service being left to consumer law.

For our purposes, it is likely that most instances of romance fraud fall within “falsehood”. As has been noted previously, there is undoubtedly a falsehood in each of the three vignettes. According to the Canadian courts this will be *a fortiori* dishonest, satisfying this first element.

The second element of the *actus reus* requires deprivation. In this, Canadian law differs from both the laws of England & Wales and Scotland. It will be remembered that in England & Wales it suffices that there is the *intent* to cause a gain or loss. No actual gain or loss is required. In Scotland, there must be a “practical result”, but this need not be the loss of money or property. Canadian law requires deprivation. That said, Canadian law does criminalise attempts,<sup>60</sup> and so intervention before actual loss is possible. However, the mere establishment of profiles etc. would not satisfy the requirements of the substantive offence.

In our vignettes, there was actual loss in the first two case-studies. The third vignette is problematic for the same reason as it was in England & Wales. The only economic loss that can be shown would be the costs incurred in the dates and by exchanging presents. It is not clear that this would suffice under Canadian law, although there is, for reasons set out earlier, technically a loss. However, the position of the *de minimis* rule is more complicated in Canada. While it was once stated that the rule did not apply in the criminal law,<sup>61</sup> the courts have begun to apply it. The courts have recognised the rule in respect of modest amounts of drugs<sup>62</sup> and assaults.<sup>63</sup> The position in respect of theft is more uncertain. In *R v Fowler*<sup>64</sup> the Saskatchewan Provincial Court considered that theft of very low-value items could come within the *de minimis* rule, but in *R v Gale*<sup>65</sup> the Newfoundland and Labrador Provincial Court disagreed, noting that this would mean that shops would be at risk of constant low-level theft that they

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<sup>60</sup> *Criminal Code*, RSC 1985, s 463.

<sup>61</sup> *R v Li* (1984) 16 CCC (3d) 382 (ON SC).

<sup>62</sup> *R v Keizer* (1990) 59 CCC (3d) 440 (NS SC).

<sup>63</sup> *R v Dawydiuk* (2010) 253 CCC (3d) 493 (BC CA).

<sup>64</sup> 2009 SKPC 114 (SK PC).

<sup>65</sup> 2010 CarswellNfld 427 (NL PC).

would be unable to prosecute. The judge suggested that prosecutorial discretion or the award of a discharge would be a better approach to trivial matters.

As the Supreme Court has not clarified the applicability of the *de minimis* rule, it is unclear whether it will apply in the third vignette. Certainly, it could be argued that the rule applies since the dates and dinners etc. saw them split the bills. We are not told what the value of the gifts are but, again, it could be considered to be *de minimis* because they were reciprocal. On the other hand, it could be argued that cumulatively the amount of money that flows from the falsehood (the lie about her relationship status) is not trivial, meaning that the principle should not apply.

### ***B. Identity Theft***

In the first vignette, the gang used a real photograph of Tom, a Royal Marine officer. This is not unusual, particularly in modern times where it is possible to search for people on the internet. For example, Robert Frost – a professional racing car driver – discovered his photograph has been used hundreds of times in fake profiles, leading him to being (mis)recognised by complete strangers.<sup>66</sup>

Neither England & Wales nor Scotland have specific offences of identity fraud. Instead, other offences need to be used, eg the *Fraud Act 2006*. Under English law, no actual gain or loss is required, simply posting the false profile (which must constitute a representation) will suffice so long as the ulterior intent is proven.<sup>67</sup>

The position in Scotland is more difficult. While it was noted earlier that there was no need for there to be any loss of money, there must be a “practical result”. Merely posting the profile picture will probably not suffice, even if the intent to bring about a fraud as there is no “practical result”. This would change when people respond to the profile. The establishment of an online relationship would probably be construed as a “practical result”, and the same is almost certainly true where a physical meeting occurs. Thus, while Scotland does not have an identity theft offence, it is highly likely that fraud could act in similar ways.

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<sup>66</sup> Rege, “Whats Love Got to Do with It?” (n. 13).

<sup>67</sup> Where, for example, it is a collective of individuals, arresting one perpetrator may lead to evidence that could be used against the others.

Canada differs. While it continues to have the offences of theft<sup>68</sup> and fraud,<sup>69</sup> it also has introduced a specific offence to tackle identity fraud. Section 402.2(1) states, “every person commits an offence who obtains or possesses another person’s identity information with intent to use it to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence”.

The offence would not tackle all forms of identity theft because of the requirement for ulterior intent. Thus, it would not apply to the person who posed as another simply to gain credibility online (e.g. posing as a racing car driver on a forum dedicated to cars). However, it does recognise that identity theft and identify fraud are a distinct sub-species of broader behaviour. “Identity information” is defined in s 402.1, and while “photograph” is not expressly included, the wording of the provision is inclusionary and requires it to be “of a type that is commonly used alone or in combination with other information to identify or purport to identify an individual”. Photographs can be used to help identify a person, and so are likely to fall within the provision.

The Canadian courts have noted the importance of tackling identity fraud. In *R c Edugie*<sup>70</sup> Galiastsatos JQC stated, “Identity theft and identify fraud are lucrative industries, particularly in North America...Victims of identity fraud, aside from the financial losses they suffer, often experience distress, anxiety and feelings of violation. It is quite easy to imagine how insecure such an intrusion can make a person feel”.<sup>71</sup> Interestingly, this echoes the sentiments of victims of romance fraud.

An important point about identity theft is that it recognises that there may be more than one victim. If we return to the first vignette, the law in England & Wales and Scotland would focus on Hilary as the victim. She is the one who has lost money. Yet is (the real) Tom not also a victim? His identity – including his good standing as a decorated Royal Marines officer – is being exploited for criminal purposes. It will be remembered that Robert Frost, a racing car driver, found that people accused him of things he had not done because those who assumed his identity had done so.<sup>72</sup>

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<sup>68</sup> *Criminal Code*, RSC 1985, s 322.

<sup>69</sup> *Criminal Code*, RSC 1985, s 380.

<sup>70</sup> 2019 QCCQ 6125 (QCCQ).

<sup>71</sup> *Ibid* at [43], [45].

<sup>72</sup> Rege “Whats Love Got to Do with It?” (n. 13),.501.

Canada's identity theft offence allows the impact on Tom to be recognised. The same is not true of England & Wales or Scotland. It is important for the law to recognise the impact that criminal behaviour can have on all victims, and to that extent Canadian law is to be preferred.

### *C. Sexual Offences*

In the second and third vignettes, sexual activity took place between the parties. To what extent could it be said that the deception practiced by the principals in these vignettes could give rise to liability for sexual offences?

#### (i) England & Wales

The first issue to note is that under English law, there will be a difference between vignettes two and three. In vignette two, there was penile penetration of a female (Anna), yet in vignette three there was not. This matters under English law. A woman cannot be a principal for the offence of rape, as the *actus reus* of the offence requires the penile penetration of the vagina, anus or mouth.<sup>73</sup> Thus, where the allegation is non-consensual sex between females, the relevant offences would be either assault by penetration,<sup>74</sup> or sexual assault.<sup>75</sup> That said, all three offences are linked by the concept of consent or, more particularly, the lack of consent.

Consent in England & Wales was historically a matter for the common law,<sup>76</sup> but the *Sexual Offences Act 2003* codified it. Consent is now defined as "a person consents if he agrees by choice, and has the freedom and capacity to make that choice".<sup>77</sup> This is a significant shift

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<sup>73</sup> *Sexual Offences Act 2003*, s 1. Discussed in Siobhan Weare, "Oh You're a Guy, How Could You Be Raped by a Woman, That Makes No Sense": Towards a Case for Legally Recognising and Labelling 'Forced-to-Penetrate' cases as Rape" (2018) 14 *International Journal of Law in Context* 110. The only time a woman can be convicted as a principal is where she is charged as an accomplice (see *Accessories and Abettors Act 1861*).

<sup>74</sup> *Sexual Offences Act 2003*, s 2.

<sup>75</sup> *Sexual Offences Act 2003*, s 3.

<sup>76</sup> Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n. 29), 758.

<sup>77</sup> *Sexual Offences Act 2003*, s 74.

historical definitions of rape which tended to rely on force, or the fear of force,<sup>78</sup> or questions as to whether the complainant submitted or consented.<sup>79</sup> Indeed, the law tended to tell jurors to just their common-sense, which was considered by some to be an abrogation of the duty of the court.<sup>80</sup> The statutory definition asks the jury to consider whether the complainant has taken a conscious choice to have sex, and whether they had the freedom and capacity to make that choice.

The SOA 2003 includes conclusive<sup>81</sup> and evidential<sup>82</sup> presumptions about consent. The difference between them is that a conclusive presumption means that if the circumstances are proved, there is no consent. An evidential presumption means that it is presumed that D knew that V did not consent unless he can raise an issue to the contrary.<sup>83</sup> There are six evidential presumptions but they are not directly relevant to this discussion. There are two conclusive presumptions that may be relevant. The first is that a person intentionally deceives another about the nature and purpose of the (sexual) act,<sup>84</sup> and the second is that they intentionally deceived the complainant by impersonating a person known personally to the complainant.<sup>85</sup> These two presumptions mirror the previous common-law rules.<sup>86</sup>

Notwithstanding the provisions of sections 75 and 76, the fact that consent is defined as having the freedom and capacity to choose has led some to question whether deceit can negate consent. In fact, this is an argument that precedes the *Sexual Offences Act 2003*. In *R v Linekar*<sup>87</sup> the appellant promised a sex worker £25 in return for sexual intercourse. The appellant never intended to pay the sex worker, and did not do so. His conviction for rape was quashed on the basis that fraud would only vitiate consent where it related to the nature and

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<sup>78</sup> Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n. 29), .757.

<sup>79</sup> *R v Olugboja* [1981] 3 All ER 443 (CA) (*Olugboja*).

<sup>80</sup> Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n. 29), 758.

<sup>81</sup> *Sexual Offences Act 2003*, s 76.

<sup>82</sup> *Sexual Offences Act 2003*, s 75.

<sup>83</sup> *Sexual Offences Act 2003*, s 75(1)(a) and see Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n. 29), 770-771.

<sup>84</sup> *Sexual Offences Act 2003*, s 76(2)(a).

<sup>85</sup> *Sexual Offences Act 2003*, s 76(2)(b).

<sup>86</sup> Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n. 29), .776, 782.

<sup>87</sup> [1995] QB 250 (CA).

quality of the act. Here, the Court of Appeal held, the sex worker knew that she was engaging in sexual intercourse with the appellant and consented to it.

More modern cases are less clear. In *R v Dica*<sup>88</sup> the appellant concealed the fact that he was HIV positive from several women he had sexual intercourse with, causing them to be infected. While Dica was not charged with rape (he was charged with inflicting grievous bodily harm), the Court of Appeal noted, albeit *in obiter*, that "...these victims consented to sexual intercourse. Accordingly, the defendant was not guilty of rape".<sup>89</sup> Again, this was because there was no fraud (including by omission) as to the nature and quality of the act.

In *Assange v Swedish Prosecution Authority*<sup>90</sup> the High Court was asked to consider the issue of dual criminality in respect of an extradition request by Sweden for Julian Assange. He had been charged in Sweden with sexual offences, with the particulars being that the complainants had agreed to have sexual intercourse with him, but only if he wore a condom. In fact, he penetrated them without wearing a condom.<sup>91</sup> Assange argued that this was not a known offence under English law because the deception – pretending that he would penetrate while wearing a condom – did not go to the nature of the act.

The High Court disagreed. The Court held that if consent was given solely on the basis of Assange wearing a condom, then not doing so vitiated her consent which would, in law, constitute rape.<sup>92</sup> They expressly rejected the suggestion that deception must only go to the nature and quality of the act,<sup>93</sup> noting the fact that the deception meant that the females were denied a choice, and that this vitiated her consent.<sup>94</sup>

A similar decision arose in *R (F) v Director of Public Prosecutions*<sup>95</sup> where the Divisional Court held that a person could be guilty of rape where he informed a woman that he

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<sup>88</sup> [2004] QB 1257 (CA).

<sup>89</sup> *Ibid.* 1268. This was later reaffirmed in *R v B* [2007] 1 WLR 1567 (CA).

<sup>90</sup> [2011] EWHC 2849 (Admin) (*Assange*).

<sup>91</sup> This is a not uncommon phenomenon and has the label of "stealthing". An early discussion is to be found in Alexandra Brodsky, "Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal" (2016) 32 *Columbia Journal of Gender and the Law* 183.

<sup>92</sup> *Assange* (n. 90), at [86].

<sup>93</sup> *Ibid.*, at [90].

<sup>94</sup> *Ibid.*, at [86].

<sup>95</sup> [2014] QB 581.

would withdraw before ejaculation but did not have any intention of doing so, and ejaculated inside her. The Court held that this deception – that the man would withdraw before climax – vitiated her consent because it denied her the freedom to choose the circumstances under which she would allow the perpetrator to penetrate her.<sup>96</sup>

Perhaps the most notable modern case of deception is *R v McNally*.<sup>97</sup> The appellant was born female but, at least by the time of the trial, identified as male. They<sup>98</sup> pretended to be a male and formed a relationship with the female victim when she was aged 13 (McNally being 14). When the victim was 16, the two met and engaged in various sexual activities, potentially including the appellant penetrating the complainant with a prosthetic device,<sup>99</sup> but certainly including digital and oral penetration of the complainant.

The complainant stated that she would not have consented had she realised that the appellant was not a (biological) male. The appellant was convicted at trial, and they appealed arguing that any deception did not relate to the nature and quality of the act. The complainant consented to oral and digital penetration, and was orally and digitally penetrated. It was, according to the appellant, irrelevant that the perpetrator was (biologically) female.

The Court of Appeal dismissed the appeal. They held that the deception about the appellant's gender vitiated her consent because she would not have consented to sexual acts if she had known of McNally's birth gender. The Court held that "in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by the defendant into believing that the latter is male".<sup>100</sup> The victim's freedom over whether to engage in sexual activity with a female was taken away from her.

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<sup>96</sup> *Ibid.*, at [26].

<sup>97</sup> [2013] EWCA Crim 1051 (CA) (*McNally*).

<sup>98</sup> It appears that McNally later stopped identifying as a male (Alex Sharpe, "Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent" [2014] *Criminal Law Review* 207, 209) but the position remains complicated so the pronoun "they" will be used without prejudice to anything that McNally now considers.

<sup>99</sup> This allegation was denied and never pursued by the prosecution: *McNally* (n. 97) at [8].

<sup>100</sup> *Ibid.*, at [26].

In reaching their conclusion, the Court of Appeal stated, "...some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent".<sup>101</sup> However, they did not explain why it was "obvious" that some deceptions will vitiate consent and others will not. The decision to rely on "common sense" would seem a particularly unwise approach in an area of the law that is overtly complex. One reading of the cases is that the deception must still be linked to the nature of the sexual intercourse. In *Assange* the deception was in respect of unprotected sexual intercourse. In *R(F)* it was whether to allow the seed of the defendant to enter her body, and in *McNally* it was whether the sexual activity was heterosexual.

Since *McNally* the courts have begun to become more cautious. In *R v Lawrence*<sup>102</sup> the Court of Appeal allowed an appeal against a conviction for rape in circumstances when the appellant had lied about being infertile. The Court of Appeal held that this was distinct from deception as to the nature and quality of the sexual act. It would appear to contradict *R(F) v DPP* because in both cases, there was a desire on behalf of the complainants not to fall pregnant. The Court in *Lawrence* distinguished *R(F)* by stating in *Lawrence*, the woman was prepared for the ejaculate to enter her body, whereas in *R(F)* the complainant was not. This is somewhat unconvincing. If a woman can choose not to allow the man to ejaculate inside her, then it would seem odd that she cannot choose to allow the man to do so only if he is infertile. The boundaries of the consent – sexual intercourse that should not lead to impregnation – is the same in both. It seems more likely the Court of Appeal simply did not want to declare *R(F)* bad law.

Consent obtained through deception was at the heart of the issue in *R (on the application of Monica) v DPP*.<sup>103</sup> In 2015, the then Home Secretary, Theresa May MP, announced an inquiry into undercover police officer activity in the Metropolitan Police's Special Demonstration Squad. This followed allegations of police officers participating in unethical conduct while undercover.

The claimant in this case had formed a sexual relationship with an undercover police officer, believing that he was an environmental activist. She was clear that she would not have consented to sexual activity with the officer had she known that he was really a police officer

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<sup>101</sup> *Ibid.*, at [25].

<sup>102</sup> [2020] EWCA Crim 971 (CA).

<sup>103</sup> [2019] QB 1019 (*Monica*).

and, by extension, spying on her. The Crown Prosecution Service refused to prosecute the police officer, stating that there was no reasonable prospect of conviction.

Dismissing the application for judicial review, the Divisional Court (with the Lord Chief Justice presiding) held that the deception did not vitiate consent. The Court held that while consent is now defined in statute, “there is no reason to suppose that Parliament intended any change in understanding of consent that had developed under the common law”.<sup>104</sup>

The applicant contended that consent was vitiated where “the deception...[was] sufficiently serious in objective terms as to be capable as being regarded as relevant to a woman’s decision-making...[and] that consent would be absent in a case where...the deception went to a matter which the woman regarded as critical or fundamental to her decision-making in line with her individual autonomy”.<sup>105</sup> As an alternative, they argued that the long-established principle that impersonation of a spouse should be broadened to include deception as to identity.<sup>106</sup>

The Divisional Court rejected these arguments. They also rejected a further argument that the common law requires an examination of the women’s state of mind, and the factors that played on it. This argument was based on the premise that *R v Olugboja*<sup>107</sup> had worded it in this way when the court drew a distinction between submission and acquiescence. However, the court rejected this, and suggested this was in the context of not requiring force, or the fear of force, and not in respect of deception. They held that “only two frauds are capable of vitiating consent”.<sup>108</sup>

The Court accepted that *Assange* altered the law, either through progression, or by introducing a new rule. They stated that the rule is that “deception which is loosely connected with “the nature or purpose of the act”, because it relates to sexual intercourse itself rather than the broad circumstances surrounding it, is capable of negating a complainant’s free exercise of choice...”.<sup>109</sup>

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<sup>104</sup> *Ibid.*, at [27].

<sup>105</sup> *Ibid.*, at [36].

<sup>106</sup> *Ibid.*, at [38].

<sup>107</sup> *Olugboja* (n. 79).

<sup>108</sup> *Monica* (n. 103) at [65].

<sup>109</sup> *Ibid.*, at [72].

The Court stated that *R(F)* was consistent with this principle as the deception was closely connected with the sexual act, i.e. whether the man would withdraw before ejaculation. The Court held that *McNally* was also consistent with this approach because, applying the logic of that court, the deception was to the nature of the act, with them saying that heterosexual and homosexual sexual intercourse is intrinsically different,<sup>110</sup> or extended the identify or impersonation rule “given the centrality of an individual’s sexuality to her or his identity”.<sup>111</sup>

The Court noted that if deceit about a central issue were to negate consent, then all bigamists would automatically be guilty of rape, something the law does not recognise.<sup>112</sup> Extending fraud to encompass this deceit is, according to the court, a matter for Parliament and not the courts.

Where does this leave us with the vignettes? It will be remembered that both the second and third vignettes show sexual activity between the parties. The simpler of the two would appear to be the second vignette. The only argument that could be put forward by the prosecution would be that Anna would not have had sexual intercourse with Mark if she knew that he was not a banker or a widower, and that he was simply intending to take her money. However, according to *Monica* these are not deceptions that go to the nature of the act. Neither can it be said to be within the impersonation rule. Anna wanted to have sex with “Mark”, it is just that Mark is not the person she thinks he is. To that extent, the situation is directly analogous to the complainant in *Monica*, and there can be no liability.

What of the third vignette? *McNally* has been criticised by some as being transphobic, and not recognising that a belief in gender fluidity.<sup>113</sup> *Monica* would also seem to be based on the premise of traditional understandings of gender and sexuality. Lord Burnett CJ concludes that *McNally* broadens the cases of fraud to those cases where the deception was to the sexual nature of the activity. His Lordship did not detract from the comments of Leveson LJ that digital penetration by a female was obviously different to digital penetration by a male. In *McNally*, Leveson LJ upheld the conviction by saying, “[the complainant] chose to have sexual

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<sup>110</sup> *Ibid.*, at [76].

<sup>111</sup> *Ibid.*, at [77].

<sup>112</sup> *Ibid.*, at [83].

<sup>113</sup> See, for example, Sharpe, “Criminalising Sexual Intimacy” (n. 98) and Victoria Brooks and Jack Clayton Thompson, “Dude Looks Like a Lady: Gender Deception, Consent and Ethics” (2019) 83 *The Journal of Criminal Law* 258.

encounters with a boy and her preference (her freedom to choose whether or not to have a sexual encounter with a girl) was removed by the appellant's deception".<sup>114</sup> In *Monica*, the Lord Chief Justice agreed that *McNally* could apply to sexuality "given the centrality of an individual's sexuality to her or his identity".<sup>115</sup>

How does this apply to the third vignette? It is unclear that the Lord Chief Justice meant sexuality outside the circumstances of *McNally*. There must be a difference between deceiving someone about their gender in the way that *McNally* did (although the criticisms of that judgment should be noted) and a deception practised in vignette three. Here, arguably, the deception is over whether Vicky is a lesbian or bisexual. Susan has undoubtedly lost her opportunity to decide that she would only form a relationship with a female who is exclusively attracted to females, but that is very different to the deception in *McNally*. Susan believed that she was in a relationship with a woman, and she was in a relationship with a woman.

If the Lord Chief Justice's comment on sexuality were to be taken literally then Vicky would be liable for a sex offence while Alan (vignette two) would not. That would be absurd. That it cannot be ruled out perhaps demonstrates the muddle that English law has become in this area.

## (ii) Scotland

Sexual offences in Scotland are now principally governed by statute. The *Sexual Offences (Scotland) Act 2009* is based on the English *Sexual Offences Act 2003*, although there are differences. As with England & Wales, a woman cannot commit, as principal, the offence of rape as it requires the penile penetration of another.<sup>116</sup> A female is instead charged with sexual assault by penetration,<sup>117</sup> or sexual assault.<sup>118</sup>

As in England & Wales, the absence of consent is the primary element of the offence. "Consent" now has a statutory definition, which is there must be "free agreement".<sup>119</sup> Section

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<sup>114</sup> [2013] EWCA Crim 1051 (CA) at [26].

<sup>115</sup> *Monica* (n. 103) at [77].

<sup>116</sup> *Sexual Offences (Scotland) Act 2009*, s 1(1).

<sup>117</sup> *Sexual Offences (Scotland) Act 2009*, s 2.

<sup>118</sup> *Sexual Offences (Scotland) Act 2009*, s 3.

<sup>119</sup> *Sexual Offences (Scotland) Act 2009*, s 12.

13 of the Act provides a series of factual circumstances where there cannot be free agreement, but it is clear that this does not exclude other situations where there is no free agreement.<sup>120</sup> Where a matter is within s 13 then there can be no consent, and so they are conclusive presumptions.<sup>121</sup> While most are not relevant to our analysis, two are. These are: “where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct”,<sup>122</sup> and “where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B”.<sup>123</sup>

There is no case law on these deceptions, but there is nothing to suggest that Scotland will adopt a broader definition than that which occurred in England & Wales. In their consultation paper on sexual offences, the Scottish Law Commission provides the example of a man who falsely tells a woman that he is a famous footballer and very rich.<sup>124</sup> The Commission suggest no offence would take place here because the deception does not go to the nature or purpose of the conduct, or relate to the impersonation of someone known personally to B. This would suggest that in the second vignette, it would be very difficult to find Arthur liable for a sexual offence.

The Scottish Law Commission notes that deceptions not within s 13 could still be relevant in determining whether there is “free agreement” under s 12,<sup>125</sup> but there is nothing to suggest that the Scottish courts will go further than those in England & Wales. Sharpe cites a first instance case whereby the defendant was charged with sexual activity in circumstances where he held himself out to be male, but was born female, and continued to have female genitalia.<sup>126</sup> While only a first-instance decision, it does suggest that the Scottish courts are

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<sup>120</sup> *Sexual Offences (Scotland) Act 2009*, s 13(1).

<sup>121</sup> Cubie, *Scots Criminal Law* (n. 39), 177.

<sup>122</sup> *Sexual Offences (Scotland) Act 2009*, s 13(2)(d).

<sup>123</sup> *Sexual Offences (Scotland) Act 2009*, s 13(2)(e).

<sup>124</sup> Scottish Law Commission. *Discussion Paper on Rape and Other Sexual Offences* (Discussion Paper 131, 2006) 43.

<sup>125</sup> *Ibid.*, at .34.

<sup>126</sup> The facts of the case of Christopher Wilson is set out in Alex Sharpe, *Sexual Intimacy and Gender Identity Fraud* (Routledge, 2018) 46-47. Sharpe is very critical of this and McNally as examples of the UK courts not understanding transgender issues.

likely to follow the same logic as *McNally*.<sup>127</sup> That said, there is no evidence that the Scottish courts have considered sexuality to be as determinative as the English courts have. To that extent, the law in Scotland is arguably simpler and there is unlikely to be liability in either vignettes two or three.

(iii) Canada

Unlike the position in both England & Wales and Scotland, Canada no longer has a crime of rape. It was abolished in 1983 and subsumed into a gender-neutral offence of “sexual assault”.<sup>128</sup> This was done, in part, because there was a belief that the traditional laws of rape were harmful to women, in part due to the stereotypes that exist about rape.<sup>129</sup>

Consent for the purposes of sexual assault is defined as “the voluntary agreement of the complainant to engage in the sexual activity in question”.<sup>130</sup> Like with Scotland, a series of situations are set out in the statute detailing when there is no consent.<sup>131</sup> None of these situations are relevant to this discussion. However, a sexual assault is considered to be a type of assault. Further examples of an absence of consent are set out in respect of assault, including, “...no consent is obtained where the complainant submits or does not resist by reason of...(c) fraud”.<sup>132</sup> This is potentially more relevant.

Traditionally, the Canadian courts were cautious about vitiating consent on the basis of fraud and, as with England & Wales, would only set it aside for impersonation or fraud as to the nature or quality of the act. In *Bolduc and Bird v The Queen*<sup>133</sup> a doctor intimately examined a woman in the presence of a third-party. The complainant consented to the third-party’s

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<sup>127</sup> Although Sharpe notes this is premised on the basis that gender history is a material fact that should be disclosed, something that she disagrees is required (Sharpe, “Criminalising Sexual Intimacy” (n. 98) 220-222).

<sup>128</sup> Kwong-leung Tang, “Rape Law Reform in Canada: The Success and Limits of Legislation” (1998) 42 *International Journal of Offender Therapy and Comparative Criminology* 258.

<sup>129</sup> *Ibid.*, 260.

<sup>130</sup> *Criminal Code*, RSC 1985, s 273.1(1).

<sup>131</sup> *Criminal Code*, RSC 1985, s 273.1(2).

<sup>132</sup> *Criminal Code*, RSC 1985, s 265(3).

<sup>133</sup> [1967] 2 CCC 272 (SCC).

presence believing that he was a medical intern. In fact, he was not. The conviction for sexual assault was set aside on the basis that there had been no fraud as to the nature and quality of the actual procedure, which was performed appropriately.

In *R v P(NM)*<sup>134</sup> an undercover police officer was involved in an operation against prostitution. Posing as a customer, he waved to the defendant who got into the car, and asked whether he was a police officer, to which he replied “no”, She exposed herself, and told the police officer to prove it by touching her. He did so briefly, and the defendant asked him to “go further” which he declined to do. When arrested, the defendant claimed abuse of process on the basis that the officer had committed sexual assault. The court rejected the suggestion that this was the equivalent of fraud by misrepresentation, stating that it was simply deceit as to the purpose (rather than nature) of the touching which did not invalidate consent.

Subsequently, the courts began to identify circumstances when deception could vitiate consent. In *R v Kirkpatrick*<sup>135</sup> the British Columbia Court of Appeal held that deceiving someone into believing that they were wearing a condom was sexual assault. In a ruling that echoes *Assange*, the court held that unprotected sexual intercourse is intrinsically different to protected intercourse. Thus, it was less about deception and more about the absence of consent to the sexual act.

In *R v Currier*<sup>136</sup> the Supreme Court held that a person who knows he is HIV-positive, and has unprotected sexual intercourse without telling that person of his status, can be guilty of a sexual assault, because the failure to disclosure was dishonest and constituted fraud. This was later confirmed in *R v Mabior*<sup>137</sup> so long as it could be shown that the other person would not have consented had they known. However, in *R v C(D)*<sup>138</sup> a woman who had a low viral load of HIV had her conviction for sexual assault set aside where it was said that the risk of

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<sup>134</sup> 2000 NSCA 46 (NS CA).

<sup>135</sup> 2020 BCCA 136 (BC CA).

<sup>136</sup> 1998 2 SCR 371 (SCC).

<sup>137</sup> 2012 SCC 47 (SCC).

<sup>138</sup> 2010 QCCA 2289 (QCCA).

transmitting the disease was low. This suggests that, at least in respect of HIV status, there is a threshold of harm required to vitiate consent.<sup>139</sup>

A case of more relevance is *R v Dadmand*<sup>140</sup> where the defendant established a (false) persona that he was a modelling agent. He used this persona to persuade various complainants to engage in sexual activity. The complainants believed that they were participating in the sexual acts as part of an audition, and would not have done so had they realised that it was not a proper audition.

The defendant argued that for fraud to vitiate consent, there must be a risk of harm.<sup>141</sup> The judge agreed that this was correct.<sup>142</sup> However, the judge held that in respect of all but one complainant, there was evidence that the complainants had not consented to all acts. Thus, the judge did not need to consider the issue of fraud, but in respect of one complainant the accused was acquitted because fraud by itself was not sufficient to vitiate consent.

This can be contrasted with *R v Sanmugarajah*.<sup>143</sup> Here, the Ontario Court of Justice was faced with a complicated fraud. The defendant posed as the owner of a VIP escort service. He advertised asking for women to join his business, to provide “escort services” to high net-worth individuals. Two women replied to his advert and he then (separately) introduced them to a rich client, who promised to pay large sums of money for sexual services.

He then turned up to the meeting posing as the client. He engaged in various sexual acts, but he caused them pain by biting their breasts and causing them to perform fellatio for longer than they wished. The defendant maintained that they had consented to all activities, and pointed out to a message that said the client “may bite too hard” but that they should not object. The judge, Dellandrea J, held that there was, in fact, no consent to some of the acts that were performed, so she did not need to resolve the issue of fraud. However, as it had been argued extensively, she agreed to reach a finding.

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<sup>139</sup> This was confirmed by the Supreme Court in *R v C(D)* 2012 SCC 48 (SCC), and the principle was extended to other sexually transmitted diseases: see *R v Tysick* 2017 ONCJ 255 (ON CJ).

<sup>140</sup> 2016 BCSC 1565 (BC SC).

<sup>141</sup> Applying *R v Henderson* 2014 SCC 19 (SCC).

<sup>142</sup> 2016 BCSC 1565 (BC SC) at [168].

<sup>143</sup> 2018 ONCJ 661 (ON CJ).

Dellandrea J held that there were several precedents that stated that simple non-payment, or deception about the amount of money that a person would be paid in return for sexual activity, does not vitiate consent. However, here she noted that this was a prolonged and complex “elaborate ruse related to his identity and engaging issues relating to the complainants’ personal safety”.<sup>144</sup> The reference to personal safety echos the earlier cases that suggested a risk of harm was necessary for fraud to vitiate consent.

How then do these cases apply to the vignettes? Both the second and third vignettes present deceitful behaviour that is undoubtedly sophisticated. In both scenarios the perpetrators take great care to, in essence, run a double life. However, despite the sophistication, there is nothing to suggest that either Anna or Susan are at risk of (physical) harm. While there have been reports of people being kidnapped as part of romance frauds,<sup>145</sup> this tends to be in cases akin to vignette one, and where they are lured to a foreign country to assist the person they are in a relationship with.

Nothing the second or third vignettes suggest a risk of harm and thus it is difficult to see how the deception can vitiate consent. Cases such as *Kirkpatrick* draw a distinction between deception and not consenting to the physical act, but that is not relevant here. Accordingly, it would seem unlikely that there would be any liability for sexual offences in Canada.

## V. Recognising Deceit?

The preceding analysis has shown that, perhaps unsurprisingly, the law prioritises financial losses or anticipated losses. The criminal law in all three countries will find culpability for fraud in the first two vignettes and, potentially, in the third. However, it was noted in the first section of this article, that this is the issue that victims often feel less concerned about. They suffer emotional distress arising from feelings of betrayal. This is particularly true where the relationship has been sexual. Focusing on financial loss does not recognise these additional harms, and so it can be aid that the law currently fails victims.

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<sup>144</sup> *Ibid.*, at [196].

<sup>145</sup> Rege, “Whats Love Got to Do with It?” (n. 13), 507.

Ashworth has previously argued that how the criminal law labels crime is an important part of its function.<sup>146</sup> Fair labelling makes “clear what sort of criminal each offender is – what the conviction is *for* [original emphasis]”.<sup>147</sup> Where the law simply focuses on the financial loss of victims of romance fraud the label is arguably misleading. The offenders, at least in vignettes two and three, are not simply financial tricksters. Their actions will have a tangible effect on the victims. Fair labelling “communicate[s] to the victim that her interests were wrongfully set back by the defendant’s conduct, and the State denounces that misconduct”.<sup>148</sup> That does not currently occur in respect of romance fraud as the victim’s interests go beyond money. The public denunciation is also misleading as it focuses on only one of the wrongs.

Sexual autonomy has been increasingly recognised by the courts. Schulhofer, who was one of the first to discuss sexual autonomy as a free-standing concept, notes that it is an intrinsic value and, alongside the right to life, is perhaps one of the most important rights a person possesses.<sup>149</sup> He suggests that there are two “sides” to sexual autonomy; the right to choose to engage in sexual conduct, and the right to choose not to engage in sexual conduct.<sup>150</sup> Madhloom suggests that while there is force to this argument, it is simplistic because there is a tension between the two.<sup>151</sup> This is undoubtedly correct, not least in terms of between individuals (the right of *x* to want to have sex, and the right of *y* to refuse), but also within an individual. A person may be prepared to consent to certain sexual acts but not others. This requires the operation of both facets of autonomy.

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<sup>146</sup> Andrew Ashworth, “The Elasticity of Mens Rea” in Colin Tapper (ed), *Crime, Proof and Punishment: Essays in Honour of Sir Rupert Cross* (Butterworths, 1981) 45, 53-56.

<sup>147</sup> Andrew P Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (6th edn, Hart Publishing, 2016) 33.

<sup>148</sup> *Ibid.*

<sup>149</sup> Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, 2000) 100.

<sup>150</sup> *Ibid.*, 99.

<sup>151</sup> Omar Madhloom, “Deception, Mistake and Non-Disclosure: Challenging the Current Approach to Protecting Sexual Autonomy” (2019) 70 *Northern Ireland Legal Quarterly* 203, 207.

Clough states that the law “interprets rape as a crime of violation of autonomy rather than violence”.<sup>152</sup> Certainly, the law has moved away from its traditional concept of force, or fear of force,<sup>153</sup> but it does not follow that it has moved to protecting autonomy, especially when there is no settled definition of what autonomy means. Munro argues that the definition of consent within the SOA 2003 “suggests a protection of the value of sexual autonomy”,<sup>154</sup> which is subtly different to saying that it protects autonomy. There are undoubtedly infringements of autonomy that will constitute rape but, similarly, there are infringements that will not.

Notwithstanding the rulings of the courts, some academics have argued that deceit should vitiate consent. Herring is perhaps one of the strongest advocates of this approach. He argues that the statutory definition of consent means that “sex is an agreement between like-minded people”.<sup>155</sup> He continues by stating, “in sexual relations, people are entitled to expect their partners not to consider solely their own interests but rather to engage in [a] cooperative and mutually beneficial relationship”.<sup>156</sup> This would seem a romantic ideal of what sex is. While it is undoubtedly true for many, there will be many instances where people are concentrating on their own interests, or do not see an equal, mutual relationship. It does not follow that all such cases constitute rape.

A stronger argument is that freedom and choice requires an understanding of the circumstances in which that choice is being exercised. Under this argument, deception limits the choice of a person to choose. Madhloom suggests that it is akin to violence, which also limits choice.<sup>157</sup> However, that might be going too far. Violence, or the threat of violence, is an express external force that seeks to intimidate a person and gain subjugation in

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<sup>152</sup> Amanda Clough, “Conditional Consent and Purposeful Deception” (2018) 82 *The Journal of Criminal Law* 178.

<sup>153</sup> Although commentators note the difference between what the law says and how it is applied by jurors, with there still being a tendency to adhere to stereotypes. See, for example, Vanessa E Munro, “Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy” (2008) 41 *Akron Law Review* 923, 937.

<sup>154</sup> *Ibid.*, 944.

<sup>155</sup> Jonathan Herring “Mistaken Sex” [2005] *Criminal Law Review* 511.

<sup>156</sup> *Ibid.*, 515.

<sup>157</sup> Madhloom, “Deception, Mistake and Non-Disclosure” (n. 151), 208.

circumstances where there can be no question that a person truly consents. Deception may lead to people submitting in circumstances where they would not have consented. But it does not follow that will always be the case. The deception may not make any difference. While a person may, in isolation, say that a matter is crucial to them they may find that once they are in a relationship it does not. Violence will inevitably vitiate consent but deception depends on whether it is effective.

Herring believes that ignoring deception is inappropriate. He believes that focusing on the nature of the act is mistaken because its nature is wrapped up in cultural understandings, something the law does not currently recognise.<sup>158</sup> He believes that consent is not about “yes” or “no”. It is about whether “the victim [understand] the act that she was consenting to”.<sup>159</sup>

If consent is referred to a shared understanding then deception arguably becomes more relevant, as it ceases to be about the act but is whether the deception impedes that understanding. Like Madhloom, Herring argues that deception limits the choice of an individual. To Herring, there should be few limitations on negating consent, in part because deceit would be an anathema to his belief that it takes place only through mutually-beneficial relationships. He argues that consent should be negated where there is a mistake as to any material fact, that being an issue that would cause the complainant to not consent had she known the true facts.<sup>160</sup> Indeed, Herring suggests that D need not be responsible for the mistake, meaning that failing to disclose something that the complainant considers material would suffice.

Herring provides an example of previous convictions, but it is not clear why that should always be the case. Does it not matter why a person was convicted, and the length of time since conviction? While it would be odd to apply the *Rehabilitation of Offenders Act 1974* to relationships, are we really saying that a person should disclose a driving offence from 20 years ago? Herring implies that if an absence of convictions is important to the complainant, then the answer should be “yes”. It need not be about misconduct, and he argues that he would criminalise the “man who deceives a woman into thinking that he loves her and suggests sexual intercourse as a way of expressing their love”.<sup>161</sup>

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<sup>158</sup> Herring “Mistaken Sex” (n. 155), 514.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*, 517.

<sup>161</sup> *Ibid.*, 519.

Herring's belief that a person cannot deceive about their past mean that someone who is transgender would be required to inform a partner of what their birth gender was.<sup>162</sup> He acknowledges that some transgender people will wish to keep their trans status private, but he argues that the right to privacy is subservient to the right to sexual autonomy. This is something that has been challenged by, amongst others, Brooks and Thompson who question why sexual autonomy should prevail.<sup>163</sup>

Brooks and Thompson argue that a requirement to disclose a person's gender history is contrary to the public policy of allowing the self-determination of gender,<sup>164</sup> or presumably the right to change genders. An argument in support of Herring would be that where the rights compete, if autonomy did not prevail then it would be extinguished by the right of privacy. That is to say, if a person is allowed to say, "I will only have sex with someone who is born female" then that cannot occur if a person is allowed to hide their birth gender.

Presumably the same is true of other aspects of a person's personal life, including criminal convictions. Again, the public policy arguments here are key. A rehabilitated person should be allowed to go on with her life. Medical history is presumably the same. Does a person need to disclose their full medical history to a person they are going to have sex with? Where it concerns a sexually transmitted disease then arguably the harm doctrine takes precedence, but what if it is something else (eg a temperate man not knowing that his new partner was given a liver transplant due to alcohol misuse)?

Madhloom agrees that deception can vitiate consent but articulates the reasons differently. He notes that as breaches of sexual autonomy do not necessarily lead to harm, the wrong must be in the lie that is told.<sup>165</sup> While that is undoubtedly true, it does not necessarily follow that this wrong means that consent is vitiated. Madhloom and Herring believe that compromised sexual autonomy vitiates consent and, therefore, constitutes rape. However, that need not be the case, something considered further below.

Madhloom believes the protection of autonomy requires "freedom from external constraints such as being manipulated by others to do their will".<sup>166</sup> But is this realistic? There

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<sup>162</sup> *Ibid.*, 522.

<sup>163</sup> Brooks and Thompson "Dude Looks Like a Lady" (n. 113), 268.

<sup>164</sup> *Ibid.*, 269.

<sup>165</sup> Madhloom, "Deception, Mistake and Non-Disclosure" (n. 151), 206.

<sup>166</sup> *Ibid.*, 209.

can be many reasons why someone has sex with another, some of which are undoubtedly external forces, including cultural, sociological and financial.<sup>167</sup>

Munro notes that a woman may have “sex with her male partner, not so much because she wants to, but because she knows that he wants her to”.<sup>168</sup> In the absence of coercion it would be difficult to argue that the male partner has wronged the woman. As Munro notes, it could be that the woman has sex because she values the loving relationship they have, and sees sex as part of keeping that relationship alive. Alternatively, she may fear that without the relationship, she will be poor and unable to support herself. In the absence of a statement threatening this, it does not follow that the man is exerting inappropriate emotional force on the woman; indeed, he may not be aware of the fear, but it demonstrates the fact that it is unrealistic to suggest that there are not external factors governing the decision to have sex.

Amongst other proposals, Williams suggests that deception could be restricted to those situations where the deceit would lead to a physical difference.<sup>169</sup> This goes further than the current law of restricting fraud to deception as to the nature of the act or identity of the person, although both of those would undoubtedly be captured. Stealthing, for example, would be captured by Williams proposal because the absence of a condom (by deception) is undoubtedly a physical difference. Presumably deceptions as to fertility (*Lawrence*) may also fall within this rule because there is a physical difference in the semen and also the risk of pregnancy. That said, the nuances of this (“I have a low sperm count” versus “I am infertile”) could prove challenging.

The “physical difference” test would not assist us in understanding deception as to gender. Is the conduct in *McNally* one of physical difference? While it was argued that the actual sex act was not different (setting aside the unlitigated issue about whether the complainant was penetrated by a prosthetic device) it can still be argued that there is a physical difference between male and female perpetrators. If that is correct, gender would be included,

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<sup>167</sup> Schulhofer, *Unwanted Sex* (n. 149), 106.

<sup>168</sup> Munro, “Constructing Consent” (n. 153), 951.

<sup>169</sup> Rebecca A Williams, “Deception, Mistake and Vitiating of the Victim's Consent” (2008) 124 *Law Quarterly Review* 132, 151.

as controversial as that may be.<sup>170</sup> However, deceptions as to marital status, wealth or being an undercover police officer would not.

Herring and Madhloom would undoubtedly question why some forms of deception can vitiate consent and not others. The answer, Williams provides later when putting forward an argument about expanded categories, is that the law must be rational, predictable and acceptable to public policy.<sup>171</sup> The latter is an important point. Law does not operate within an academic vacuum. Munro notes “there are public policy reasons to avoid allowing the law to over-reach into areas of personal living”.<sup>172</sup> The proposals of Herring and Madhloom would lead to this line being crossed. Deception that have hitherto been dealt with as a matter of civil law would become a matter for the criminal law and, indeed, for the law of rape. Williams suggestion would allow for a more sensible balance to be struck.

Not all academics believe that deception should vitiate consent. Chiesa argues that there is a difference between “autonomy” and “freedom”. He argues that it is possible for a person to have their autonomy undermined without having their freedom constrained.<sup>173</sup> If consent is to be defined as freedom then it follows that not all breaches of autonomy will vitiate consent. Jubb similarly believes that not all deceptions negate consent. He accepts that there may be other wrongs involved in telling the deception, but that it does not follow that it should invalidate consent.<sup>174</sup> He argues that there are different levels of deception, and that some are more tolerated than others.<sup>175</sup>

Herring and Madhloom reject the notion that some deceptions are less significant than others. Jubb notes that “being transparent will often be in tension with securing a sense of esteem, since others are not likely to value everything that we do or have done”.<sup>176</sup> This echoes

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<sup>170</sup> Sharpe, *Sexual Intimacy* (n. 126) provides an excellent summary of the argument against treating gender identify as sexual fraud.

<sup>171</sup> Williams, “Deception, Mistake and Vitiating” (n. 169), 156.

<sup>172</sup> Munro, “Constructing Consent” (n. 153), 953.

<sup>173</sup> Luis E Chiesa, “Solving the Riddle of Rape-by-Deception” (2016) 35 *Yale Law and Policy Review* 407, 422.

<sup>174</sup> Robert Jubb, “Consent and Deception” (2017) 12 *Journal of Ethics and Social Philosophy* 223, 226.

<sup>175</sup> *Ibid.*, 218.

<sup>176</sup> *Ibid.*, 228.

the caution of Brooks and Thompson who believed that the (gender) history of a person need not be shared. Leaving aside shame, Jubb's point illustrates that Herring and Madhloom discount the possibility of change. To use Herring's example of criminal convictions: should P, aged 34, tell C that he was convicted of shoplifting aged 15? What about sexual history? If *x* believes in monogamy and that sex should only occur within committed relationships, what should *y* do when asked how many sexual partners he has had, knowing it is over 70? Jubb's point is that there is a tension between *y* admitting that to *x* and fearing that he will be judged on that even if he is now committed to the ideals of *x*, and wants to be *x* with the rest of his life. If *y* does not provide his history, is he a rapist?

The issue of deceit is undoubtedly complicated in respect of romance. Dougherty, although accepting that some deception will negate consent, admits that "much deception in romance is not material to someone's decision to consent to sex".<sup>177</sup> This is particularly pertinent in the discussion relating to romance fraud. Herring and Madhloom's arguments are arguably premised on a single act. The cad who tricks a naïve woman into bed. Yet, it is far from clear that this is the typical scenario. Applied to our second and third vignettes, the suggestion that a material fact can vitiate consent would lead to Mark and Vicky becoming serial sex offenders. If the initial consent is vitiated then, presumably, all subsequent sexual acts are non-consensual. Adopting the logic of the Lord Chief Justice in *Lawrence*, the bigamist becomes a serial rapist. It is difficult to believe that the law could properly regard that as being true.

Writing two decades ago, Schulhofer argued that the wrong of deceiving someone into sex was worthy of criminalisation, but he believed that it should be a separate offence, not dealt with by rape.<sup>178</sup> Perhaps this is the solution? If we consider the vignettes, it could be legitimately argued that the sexual autonomy of both Anna and Susan has been compromised. It is likely that both will consider themselves to have been betrayed by someone that they were

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<sup>177</sup> Tom Dougherty, "No Way around Consent: A Reply to Rubenfield on Rape-by-Deception" (2013) 123 *Yale Law Journal* 321, 333.

<sup>178</sup> Schulhofer, *Unwanted Sex* (n. 149), 104. Admittedly that was, in part, because he believes that there is an intrinsic link between rape and force. For a useful riposte to that argument of Schulhofer see Jennifer Temkin, "Rape and Criminal Justice at the Millenium" in Lois Bibbings and Donald Nicolson (eds), *Feminist Perspectives on Criminal Law* (Routledge, 2000).

in a sexual relationship with. The law should recognise this, but the offence of rape is not the only way to do this. The deception did not go to the nature of the act and neither, to use Williams suggestion, would it make a physical difference.

The *Sexual Offences Act 1956* included the offence of “procurement of a woman by false pretences”.<sup>179</sup> This was repealed without replacement by the *Sexual Offences Act 2003*. No explanation was given as to why it was replaced without repeal, including whether Parliament even recognised it had abolished the offence.

The section 3 offence co-existed with the rape offence and was designed to tackle those instances where a woman was deceived into having sexual intercourse with a man. The offence obviously needs updating, but it could provide a template for a revised offence. However, any such offence would need to carefully consider the extent to which the criminal law should become involved in romance. It was noted before that the actions of Alan (vignette two) and Vicky (vignette three) may be worthy of criminalisation but if the offence is drawn too widely then it could involve the criminal law in behaviour that it would not otherwise concern itself (eg adultery).

The *mens rea* of any offence will be crucial. As a minimum, it will require dishonesty. It may be that ordinary and honest people would expect that minor deceptions form part of romance. However, it is unlikely that the deceit would narrow an offence where the deception was more than trivial. For example, let us assume that P deceives C that he is single when, in fact, he is married. While infidelity is not uncommon, it probably remains the case that ordinary decent people would consider lying about one’s marital status to be dishonest. That would turn the adulterer into a persistent sex offender. Madhloom is untroubled by that result,<sup>180</sup> but it is not clear that wider society would agree. Public policy traditionally limits the reach of the criminal law, and this could be seen as a step too far. However, if it does not do so, then the law does not recognise breaches of sexual autonomy such as that identified in vignette three.

It is likely that knowledge or intent should also apply. A person should be culpable where he knowingly makes a false statement intending to procure a sexual act. Such an approach would capture those who deliberately embark on a sexual relationship based on deceit. Of course, that does not address the adulterer-as-criminal issue as a person will know

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<sup>179</sup> *Sexual Offences Act 1956*, s 3.

<sup>180</sup> Madhloom, “Deception, Mistake and Non-Disclosure” (n. 151), 218.

they are married and, in many instances, know the other is not aware of that. Perhaps this is an issue that must be left to prosecutorial discretion.

## VI. Conclusion

Romance fraud is a horrible crime. It corrupts an inherent part of human behaviour, the desire for romance and partnership. In many instances the principal objective of the fraud will be to extract money from the victim. However, that will not always be the case, and sometimes the fraud is to enable a clandestine relationship. Irrespective of how the crime takes place, the victim often experiences severe emotional distress and feelings of betrayal.

This article has shown that the criminal law in England & Wales, Scotland and Canada can respond to romance fraud using offences relating to fraud. However, by concentrating on the financial element of the crime, the law arguably does a disservice to the victims and wider society. Where an offender is charged only with a financial crime, it is unlikely that the victim will believe that the law is recognising the wider harms that is caused to her.

Where the perpetrator and complainant are in a sexual relationship then it can be questioned whether a sexual offence is committed. The law in all three countries will not easily recognise a sexual offence arising from romance fraud because they limit the circumstances in which deception can be said to vitiate consent. While some academics believe that deceiving the complainant about a material issue should vitiate consent, the courts in the three countries studied show no desire to do this. While the English courts begun to expand the circumstances in which deceit would vitiate consent, that expansion stalled with *Lawrence* and *Monica*. The Lord Chief Justice has been clear that it is Parliament's role to decide on deceit, not the courts.

The Canadian courts have similarly been reluctant to decide that simple deceit should vitiate consent. While the Canadian courts have been prepared to be more expansionist in recognising the circumstances when deceit will be relevant, they require there to be harm, or a risk of harm. In the vast majority of romance frauds this will be missing, and thus liability is unlikely.

Where there is a sexual relationship between the parties then it can be legitimately argued that the sexual autonomy of the complainant is infringed. However, it does not necessarily follow that infringements of sexual autonomy mean that there is no consent. A person consents to sex with that person at that time. A more appropriate solution would be to recognise the infringement of sexual autonomy by way of a specific offence. The old offence

of procuring a woman by false pretences<sup>181</sup> perhaps shows a template for this. A new offence could be established that is gender-neutral (in terms of both perpetrator and complainant). It would be an offence to intentionally procure a sexual act by deception. Questions would still need to be asked about the creation of such an offence, including whether it widens the ambit of the criminal law too far (the adulterer becoming a sex offender), but it would recognise that using someone sexually for deceptive purposes is a (legal) wrong. Prosecutorial guidance is likely to be necessary to ensure such an offence was used appropriately, but it could mean that victims of romance fraud have the wrongs that occur to them recognised by the criminal law.

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<sup>181</sup> *Sexual Offences Act 1956*, s 3.