SHOULD DEFENDANTS BE ALLOWED TO RELY ON THE "ROUGH SEX DEFENCE" IN NEW ZEALAND TRIALS?

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The 2019 trial for the murder of Grace Millane made national and international headlines. The defendant's reliance upon the "rough sex defence" attracted particular attention. Jesse Kempson claimed that during "consensual rough sex" between Mr Kempson and Ms Millane, Ms Millane accidentally died, and thus, he did not intend to kill her, and the jury should find him not guilty of her murder. Although Mr Kempson's argument was unsuccessful, defendants around the world use this defence to absolve themselves of blame for the victim's death, often benefitting from a reduced sentence, charge or an acquittal. This article analyses the "rough sex defence" in the context of both New Zealand's and the United Kingdom's law. It draws upon international instances of the "rough sex defence" highlighted by the organisation We Can't Consent to This. This article examines arguments for and against the abolishment of the "rough sex defence" in New Zealand, particularly the perpetuation of a victim blaming rhetoric and defendants' right to a fair trial. This article proposes two solutions to the harm that the defence causes the victim and their family. First, abolish the "rough sex defence" in an approach similar to that of England and Wales and second, extend s 44 of the Evidence Act 2006 to apply to homicide cases.

I INTRODUCTION

The disappearance and murder of Grace Millane appalled and captivated the people of New Zealand. The case was avidly followed both nationally and internationally, from the first reports of her missing until her killer Jesse Kempson was sentenced. The author attended the trial for a couple of days – that is, when a seat was available in the overflowing public gallery. On the days where the court was full, the author followed the case through the media.

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The defence advanced the "rough sex defence" strategy, in which defendants argue that during consensual "rough sex" or BDSM, the victim accidentally died.[1] The defence claimed this happened to Ms Millane during consensual erotic asphyxiation, which Ms Millane had a history of participating in.[2] Erotic asphyxiation is the act of strangling another for sexual pleasure.[3] It is a form of bondage and discipline, dominance and submission, sadism, and masochism (BDSM), which encompasses a variety of sexual behaviours performed for sexual pleasure.[4] The "rough sex defence" is an argument increasingly run by defendants across the world.[5] The defendants claim that either the defence of consent applies and the prosecution has failed to prove the relevant charge, or they did not have the necessary intent to kill the victim and thus should not be found guilty of murder.[6]

In Ms Millane's case (herein referred to as the Millane case), Mr Kempson claimed that Ms Millane "accidentally" died during a consensual sexual interaction.[7] He claimed he did not intend to kill Ms Millane, nor did he foresee the risk of her death, and as a result, he should be found not guilty of her murder.[8] Because it was a murder trial, the jury only heard Mr Kempson's view of events, where he framed Ms Millane's death as a tragic accident.

Ms Millane is recorded as the fifty-ninth British woman where the defendant relied on the "rough sex defence" in trial.[9] This statistic is from the United Kingdom feminist organisation "We Can't Consent To This" (WCCTT), established in 2018, which has published a documented list of

1 Susan SM Edwards "Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence" (2020) 84(4) JCL 293 at 302; Caroline Lowbridge "Rough sex murder defence: Why campaigners want it banned" (22 January 2020) BBC News <www.bbc.com>; and Fiona Mackenzie Consent Defences and the Criminal Justice System (We Can't Consent to This, Research Briefing – England and Wales, June 2020) at 6.

2 *Kempson v R* [2020] NZCA 656 at [37] and [41]; Anneke Smith "Grace Millane trial: Defence says death result of consensual choking" (19 November 2019) RNZ <www.rnz.co.nz>.

3 Karen Busby "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24(2) CJWL 328 at 339.

4 Ashley Brown, Edward D Barker and Qazi Rahman "A Systematic Scoping Review of the Prevalence, Etiological, Psychological and Interpersonal Factors Associated with BDSM" (2020) 57(6) J Sex Res 781 at 781.

5 Hannah Bows and Jonathan Herring "Getting Away With Murder? A Review of the 'Rough Sex Defence'" (2020) 84(6) JCL 525 at 526.

6 At 529.

7 *Kempson v R*, above n 2, at [37]; Smith, above n 2.

8 *Kempson v R*, above n 2, at [37].

9 Louise Perry "The defence approach in the Grace Millane trial is no one-off. It is increasingly, shockingly common" (26 November 2019) The Spinoff <www.thespinoff.co.nz>.

cases in which the "rough sex defence" has been utilised. The list reveals a vast number of women killed by their sexual partners, all by a purported "accident".[10]

This article focuses on the use of the "rough sex defence" in circumstances where the victim has died and weighs competing arguments about whether the defence should be abolished.[11] Although this article focuses on the Millane case, where it was argued that the defendant died as a result of erotic asphyxiation, the "rough sex" defence strategy has also been used in other cases where the victim died due to other injuries caused during sex, including multiple injuries that were inflicted on the victim's body and damage caused to the victim's vaginal wall. [12]

This article begins with a brief overview of the "rough sex defence" and how it can be relied on in trial by a defendant under New Zealand law. To illustrate the "rough sex defence" in action, this article details the way it played out in the Millane case – the highest profile murder case in New Zealand history where the "rough sex defence" has been used. This article then reviews the defence of consent and the use of the "rough sex defence" in the United Kingdom.

Finally, this article sets out competing arguments as to whether defendants should be able to rely on the "rough sex defence". The success of the "rough sex defence" and the perpetuation of victim blaming rhetoric in such trials are arguments supporting the abolishment of the defence. However, although sexual history evidence can perpetuate rape myths and stereotypes, it also plays an important role in ensuring a defendant's right to a fair trial is protected.[13] While the tension between the victim's rights and the defendant's rights is never fully resolved, this article ultimately makes two key proposals for reform. First, that the victim's rights should prevail in these circumstances and that Parliament should abolish the "rough sex defence". Defendants should not be able to use the "rough sex defence" to disguise violent conduct and manipulate

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10 "The Women & Girls" We Can't Consent To This (WCCTT) <www.wecantconsenttothis.uk>.

11 There are documented instances where the "rough sex defence" has been relied on by defendants in circumstances where the complainant has survived. However, those cases are beyond the scope of this article.

12 Claudia Aoraha "'It's not justice' twin of woman, 26, killed by millionaire in what he said was 'rough sex' feels 'physically sick' he'll be freed in days" *The Sun* (online ed, London, 3 October 2020); WCCTT, above n 10; and Christie Blatchford "Christie Blatchford: Her name was not 'native woman' – a look at the Supreme Court's Cindy Gladue ruling" *National Post* (online ed, Toronto, 24 May 2019).

13 Christina Laing "Sexual Experience and Reputation Evidence in Civil Proceedings: A Case for Reform" (2018) 24 Auckland U L Rev 175 at 175; and New Zealand Bill of Rights Act 1990 [NZBORA], s 25.

the outcomes of trials.[14] New Zealand should introduce a provision into statute, similar to the Domestic Abuse Act (UK) 2021, that prohibits the defence of consent for "the infliction of … serious harm[15] for the purposes of obtaining sexual gratification".[16] Second, that the evidential protection provided in s 44 of the Evidence Act 2006, known as the "rape shield", should be extended to homicide cases.[17]

II THE "ROUGH SEX DEFENCE"

A The defence: an overview

The "rough sex defence" is also known as the "fifty shades defence", a term referring to the rise in BDSM violence since the release of the "50 Shades of Grey" movie franchise.[18] Specifically, men are claiming their sexual partners accidentally died in the occurrence of consensual sexual practices, and have in some instances been successful.[19]

The "rough sex defence" is distinct from substantive defences, such as self-defence, which renders a criminal act permissible.[20] Rather, it is a defence strategy.[21] By relying on the defence in cases where a victim died, defendants can argue either that a lack of consent is not proven or that, due to the victim's consent, they did not have the necessary state of mind to be found guilty of

14 Susan SM Edwards "Assault, strangulation and murder – Challenging the sexual libido consent defence narrative" in Alan Reed and others (eds) *Consent: Domestic and Comparative Perspectives* (Routledge, London, 2016) 88 at 89.

15 Defined in s 71(3) Domestic Abuse Act (UK) 2021 as grievous bodily harm, wounding or actual bodily harm.

16 Section 71 (footnote added).

17 Section 44 of the Evidence Act 2006 is an evidential rule that controls the admissibility of evidence about a complainant's previous sexual experiences and reputation. It currently only applies to cases where the charge is sexual in nature (not murder or manslaughter cases).

18 Amy Woodyatt "Grace Millane and the rise of the '50 Shades' defense in murder trials" (21 February 2020) CNN <www.edition.cnn.com>.

19 Mackenzie, above n 1, at 6. This article uses male pronouns to describe defendants and female pronouns to describe victims, because historically females have predominantly been the victims of sexual violence in trials and men the perpetrators. The literature also suggests that females are predominantly the victims of offences where the "rough sex defence" has been used and male defendants. However, the author acknowledges that any person of any sex or gender can be the victim of sexual violence. Due to the dearth of case law and literature on the use of the "rough sex defence" through a queer lens, the article necessarily proceeds on the basis the victim and defendant are a heteronormative couple.

20 A P Simester and W J Brookbanks Principles of Criminal Law (5th ed, Thomson Reuters, Wellington, 2019) at 657–658.

21 To recognise this distinction between substantive defences and defence strategies, the author has used quotation marks throughout this article when referring to the "rough sex defence".

the charge.[22] Instead the defendant intended to engage in consensual BDSM, which tragically resulted in the victim's death. In other words, the victim's death was an unforeseen consequence of "consensual rough sex".

There is no specific legislation preventing defendants in New Zealand from relying upon the "rough sex defence", in contrast to England and Wales' Domestic Abuse Act.[23] Instead, defendants in New Zealand may defend their charges by raising the common law defence of consent, as preserved by s 20 of the Crimes Act 1961. In practice, the defendant has the evidential burden of raising the issue of the victim's consent in court. The Crown has the burden of proving, beyond reasonable doubt, that the victim did not consent.[24]

WCCTT has collected data from across the world, with a particular focus on British cases, where defendants have used the "rough sex defence" to avoid charges or reduce the seriousness of their charge.[25] WCCTT was created in response to the death of a British woman in 2016, Natalie Connolly, whose killer was convicted only of manslaughter and sentenced to three years and eight months' imprisonment after arguing the "rough sex defence" in court.[26] WCCTT has traced the defence back to the 1970s, yet have noted a 90 per cent rise in its use since 2010.[27] The organisation found that over half of the women were killed by current or former partners, and the cause of death for two thirds of the women was strangulation.[28] In 60 out of 67 cases the victim was female, and the organisation is yet to find a case where the perpetrator has not been male.[29] WCCTT claim the defence was effective in 45 per cent of the cases that took place in the past five years, meaning the defendant received a lesser sentence for murder, had their charge reduced to manslaughter, or

22 Bows and Herring, above n 5, at 529.

23 Domestic Abuse Act (UK), s 71.

24 *R v Lee* [2006] 3 NZLR 42 (CA) at [161].

25 Mackenzie, above n 1, at 4. The author notes that as there is minimal scholarship in New Zealand on the "rough sex defence" and its increasing popularity over the past few decades, this article relies heavily on WCCTT's data. However, the author recognises the limitations of the data: WCTT's statements are based on their own research of predominantly British cases and the supposed success of the "rough sex defence" may be due to other factors. For example, just because a defendant's charge is reduced from murder to manslaughter does not mean that the "rough sex defence" was successful. The charge may have been reduced for other reasons, such as a lack of evidence. Having said that WCCTT's data is valuable because it shows how frequently women are killed and harmed at the hands of their partner, and how often a defence is mounted on the premise of "sex games gone wrong".

26 Anna Moore and Coco Khan "The fatal, hateful rise of choking during sex" The Guardian (online ed, London, 25 July 2019).

27 Bows and Herring, above n 5, at 526.

28 Mackenzie, above n 1, at 6.

29 At 7; and Bows and Herring, above n 5, at 527.

the death was not prosecuted at all.[30] WCCTT infer that the "rough sex defence" can influence the offence the defendant is charged with. For example, raising questions of consent may make it difficult for the Crown to prove the defendant's mens rea (state of mind), and reducing the defendant's charge may be a pragmatic resolution.

Professor Elizabeth Yardley, a criminal justice expert at the University of Birmingham, has also undertaken research on women killed between 2000 and 2018 where defendants advanced the "rough sex defence", or as she refers to it the "sex game gone wrong" defence.[31] Of the 43 women identified as killed by men in this context where the defence was engaged, just over 75 per cent of defendants were convicted of murder and just over 20 per cent of manslaughter or culpable homicide.[32] Notably, 100 per cent of males who had a relationship with the victim as ex-partner, friend or client were convicted of murder.[33] In contrast, 75 per cent of the males who had a current partner relationship with the victim were convicted of murder.[34] Yardley also found that men who relied on this defence were more likely than not to have convictions for domestic abuse, violence and property crimes.[35]

The "rough sex defence" has been criticised as the current day "crime of passion" or the updated "she asked for it" defence.[36] Previously, men used such defences to argue they were provoked to kill women by the women themselves. Nowadays, Yardley asserts the "sex game gone wrong" defence has replaced the defence of provocation, as that defence lost legal standing.[37] The growing use of the "rough sex defence" in England and Wales triggered the British public, politicians and feminist advocates to call on the government for law reform.[38] The advocacy was successful, with Parliament enacting s 71 of the

30 Mackenzie, above n 1, at 6.
31 Elizabeth Yardley "The Killing of Women in "Sex Games Gone Wrong": An Analysis of Femicides in Great Britain 2000-2018" (2021) 27(11) VAW 1840 at 1840.
32 At 1854. Note that Yardley's research relates to Great Britain, which has different offences compared to New Zealand.
33 At 1854.
34 At 1854.
35 At 1857.
36 Diane Taylor "Rough sex excuse in women's deaths is variation of 'crime of passion' - study" *The Guardian* (online ed, London, 10 November 2020); and George E Buzash "The 'Rough Sex' defense" (1989) 80 J Crim Law Criminology 557 at 557.
37 Yardley, above n 31, at 1844.
38 Bows and Herring, above n 5, at 534.

Domestic Abuse Act (UK).[39] Ms Millane's family, and the detective inspector who oversaw the Millane case, call on New Zealand to do the same.[40]

B The "rough sex defence" strategies under New Zealand law

WCCTT's and Yardley's research indicate the use of the "rough sex defence" is a rising phenomenon in society, illustrating the need for it to be analysed in the context of New Zealand law. In deploying the "rough sex defence" there are generally two similar, but narrowly distinct, defence strategies that are commonly used in "rough sex" trials.

1 Defence strategy one: the defence of consent

New Zealand law prohibits a person from consenting to their own death.[41] However, this does not necessarily eliminate the "rough sex defence" from being put to the jury in murder cases. The common law position is that consent is a defence to injury short of death, except if: the defendant was acting with reckless disregard for another's safety; intended to inflict grievous bodily harm; or persuasive policy grounds exclude the defence.[42] If the defence is available, the defendant's honest but mistaken belief in consent will also provide a defence to harm, even if the belief is unreasonable.[43]

The New Zealand courts have consistently erred on the side of protecting autonomy.[44] In furtherance of this position, New Zealand has adopted the United Kingdom position as set out in *R v Lee*.[45] This Court of Appeal decision set out three tiers of harm and explains, within these tiers, whether or not the defence applies.[46] First, if the defendant intends to cause or is reckless as to actual bodily harm, the defendant is generally entitled to the defence of consent.[47] Secondly, if grievous bodily harm is intended or risked by the defendant, the judge may withdraw the defence of consent from the jury.[48]

39 Caroline Williams "Grace Millane: UK to ban 'rough sex' defence under new domestic abuse law" (18 June 2020) Stuff <www.stuff.co.nz>; and Domestic Abuse Act (UK), s 71. Note under s 89 of the Domestic Abuse Act (UK), s 71 only applies to England and Wales.

40 "Grace Millane's family calls for NZ to end rough sex defence as UK law passes" *The New Zealand Herald* (online ed, Auckland, 8 July 2020).

41 Crimes Act, s 63.

42 *R v Lee*, above n 24, at [301].

43 *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [50(b)].

44 *R v Lee*, above n 24, at [300]; and Simester and Brookbanks, above n 20, at 796–797.

45 *R v Lee*, above n 24, at [300]–[318].

46 At [300]–[316].

47 At [314]–[315]. Crimes Act, s 2 defines to injure as "to cause actual bodily harm".

48 *R v Lee,* above n 24, at [316].

The Court of Appeal in *R v Waters* held "really serious hurt" or "really serious harm" constitutes grievous bodily harm.[49] The Court also provided guidance when making the decision to include or exclude the defence in the jury trial, noting the trial judge should consider policy factors including:[50]

> the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors in the particular case.

Notably, the Supreme Court in *Ah-Chong v R* held if grievous bodily harm was intended, "it will be rare for a court to accept that consent is available as a defence".[51] However, the Court also said where the activity "involves the risk of serious injury" a court is "more likely to accept that consent is available".[52]

The last tier concludes that if the defendant intends to cause death, or was reckless as to whether death occurred, consent is no defence in any circumstance.[53] This is also codified in s 63 of the Crimes Act, which prohibits a person from consenting to their own death:[54]

> if any person is killed, the fact that he or she gave … consent shall not affect the criminal responsibility of any person who is a party to the killing.

This section has been held to apply to the offence of murder under ss 167(a)–(b), usually the most relevant provisions in fatal "rough sex" trials.[55] For the Crown to prove a murder charge on these bases, it must prove either the defendant meant to cause the death of the victim, or the defendant meant to cause bodily injury that he knew would cause death and was reckless as to whether death occurred.[56] However, if the defendant is convicted of manslaughter, it is likely s 63 would not bar such a defence.[57] As one academic put it, s 63 does not apply

49 *R v Waters* [1979] 1 NZLR 375 (CA) at 379.
50 *R v Lee*, above n 24, at [316].
51 *Ah-Chong v R*, above n 43, at [50(e)].
52 *Ah-Chong v R*, above n 43, at [50].
53 *R v Lee*, above n 24, at [289].
54 Section 63.
55 Simester and Brookbanks, above n 20, at 795; *Kempson v R* (CA), above n 2, at [63]; and *Kempson v R* [2021] NZSC 74 at [18].
56 Crimes Act, s 167.
57 *R v Lee*, above n 24, at [289].

to "homicide by misadventure in cases where the common law regards consent as rendering lawful an act which otherwise would not be lawful".[58]

The defence of consent is complicated when it comes to "rough sex". A good illustration of that is the Millane case and, in particular, Moore J's directions to the jury on the availability of the defence of consent to Mr Kempson.

In the Millane case, Moore J directed the jury that if they were satisfied Mr Kempson had the murderous intent required to prove the charge of murder under ss 167(a) or (b) of the Crimes Act, the jury could not consider the defence of consent.[59] Alternatively, if the jury was not satisfied Mr Kempson was guilty of murder, the defence of consent was available to the lesser included charge of manslaughter[60] – a charge placed in *R v Lee's* second tier of harm. His Honour held there was an evidential basis, albeit slim, for the claim that Ms Millane consented to the strangulation that had led to her death. His Honour did note Ms Millane was obviously unable to consent to strangulation while unconscious,[61] but considered:[62]

> it [was] plausible that in the throes of passion and heavily intoxicated, [the defendant] did not realise that Ms Millane had lost consciousness until after she had died or was fatally injured before he removed his hands from her neck.

His Honour undertook the careful policy analysis required by *R v Lee* and concluded that public policy required the defence be available after considering, among other things, the high value placed on individual autonomy, the social utility arising from erotic asphyxiation, the lack of a power imbalance in Mr Kempson and Ms Millane's relationship, the pair's experience in erotic asphyxiation and the low level of harm.[63] This case illustrates the complexity of the defence of consent. Moore J noted that Ms Millane may have consented to Mr Kempson's initial application of pressure onto her neck.[64] However, it

58 At [165], citing Francis Boyd Adams *Criminal Law and Practice in New Zealand* (2nd ed, annotated to 1 March 1982) at 601.
59 *R v K* [2019] NZHC 3219, 6 December 2019, (Ruling of Moore J on whether consent should be put to jury) at [46].
60 At [1].
61 At [24].
62 At [27].
63 At [46].
64 At [21].

was for the jury to consider whether Ms Millane's consent continued once she lost consciousness or if it ceased at some point, and whether Mr Kempson had a honest belief in Ms Millane's consent.[65] In this case, although consent was withdrawn for the charge of murder, the jury was required to consider it for manslaughter.[66]

2 *Defence strategy two: lack of requisite intention*

Another argument under the "rough sex defence", that is linked inextricably to the defence of consent, is that a defendant did not have the required state of mind for the offence, because he did not intend to cause the victim death or grievous bodily harm.[67] Consent is highly relevant as it provides background to the circumstances of the death or injury and the state of mind of the defendant. However, in contrast to the above option, this line of defence is available to the defendant to defend both murder and manslaughter charges. For example, in the Millane case, the Court of Appeal held:[68]

> While consent was not available as a defence to murder, it was nevertheless open to the defence to contend (as they did) that the evidence did not establish beyond reasonable doubt that the appellant had the requisite intent for murder pursuant to either s 167(a) or (b).

As Bows and Herring assert, if the defendant's conduct "was committed for the purposes of sexual pleasure", the defendant may claim that instead of murder they should be guilty of manslaughter or even acquitted.[69] The defendant can argue they lacked the intent to cause death or serious harm, instead the defendant intended to engage in consensual sex.[70]

C The "rough sex defence" in New Zealand: The Millane case

Grace Millane, a British backpacker, was killed by Jesse Kempson sometime between the late hours of 1 December 2018 and the early hours of 2 December 2018.[71] Ms Millane was 21 years old and arrived in New Zealand on 20

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65 At [22]—[26].

66 At [53].

67 Bows and Herring, above n 5, at 529.

68 *Kempson v R (CA)*, above n 2, at [37].

69 Bows and Herring, above n 5, at 529, citing *R v Slingsby* [1995] Crim LR 571.

70 Buzash, above n 36, at 569.

71 Jamie Ensor "Grace Millane murder trial: Timeline of British backpacker's final hours" (22 November 2019) Newshub <www.newshub.co.nz>.

November 2018 after travelling in South America.[72] On 30 November 2018, Ms Millane and Mr Kempson matched on the dating application Tinder.[73] The pair met up on 1 December 2018 and visited several bars that Saturday evening, before going to Mr Kempson's apartment in the CityLife hotel.[74] Ms Millane's family did not hear from her the following day, which was her 22nd birthday.[75] Alarmed at this out-of-character lack of communication, they alerted the New Zealand Police.[76] A week later, police found Ms Millane's body, buried in a suitcase in the Waitākere Ranges.[77]

After a three-week trial, a jury found Mr Kempson had murdered Ms Millane.[78] A defining feature of the case was Mr Kempson's conduct after he killed Ms Millane; Mr Kempson conducted internet searches for pornography and the Waitākere Ranges, and took intimate photos of Ms Millane while deceased.[79] The jury also heard Mr Kempson organised a date with a woman on 2 December 2018, the night after he murdered Ms Millane.[80] The woman relayed to the court the conversations she had with Mr Kempson, including discussions about a man who has killed a woman after "rough sex" and missing bodies in the Waitākere Ranges.[81]

The trial of Ms Millane's murderer attracted global attention, predominantly from the New Zealand and British media. Of particular concern to the media was the defence's strategy at trial. Like others across the world, defence lawyers Mr Ian Brookie and Mr Ron Mansfield relied on the "rough sex defence" to defend Mr Kempson.[82] The evidence showed that Ms Millane was killed by pressure to the neck through manual strangulation, which the defence claimed was the accidental consequence of consensual erotic asphyxiation.[83] The defence made an effort to denounce victim-blaming and instead framed the sexual interactions between Ms Millane and Mr Kempson

72 Ensor, above n 71.
73 Ensor, above n 71.
74 Ensor, above n 71.
75 Edward Gay "The complete evidence in the Grace Millane murder trial: Inside the case that gripped a nation" (21 February 2020) Stuff <www.stuff.co.nz>.
76 Gay, above n 75.
77 Ensor, above n 71.
78 Gay, above n 75.
79 Gay, above n 75.
80 Gay, above n 75.
81 Gay, above n 75.
82 Nicola Gavey "Men's violence against women: the blind spots in the Grace Millane trial" (26 November 2019) The Spinoff <www.thespinoff.co.nz>; and Bows and Herring, above n 5, at 526.
83 Smith, above n 2.

as progressive, and an example of female empowerment in the bedroom.[84] They relied on expert evidence that BDSM was common practice in the bedrooms of the younger generation, with young females and males alike engaging in these sexual practices.[85] Professor Clarissa Smith, an expert on sexual cultures from the University of Sunderland, was quoted as stating BDSM is "common practice, and [that it] was not an interest driven only by men".[86] Professor Smith claimed it was liberating for women to engage in such an activity because women were communicating their desires in the bedroom and "we're no longer living in the era of, you know, 'lay back and think of England'".[87] Defence counsel framed the rise of BDSM as empowering for women, while noting that unfortunately with these activities comes a risk of accidental death, as indeed occurred in this case.

It may be that Ms Millane consented to erotic asphyxiation, as Mr Kempson claimed. However, the practical reality of this being a murder case is that only Mr Kempson's version of that night can be told to the jury. In addition, Ms Millane's past sexual history was investigated in minute detail.[88] The defence called evidence from past sexual partners of Ms Millane, examining the witnesses on Ms Millane's sexual history and her experience with, and interest in, BDSM.[89] One witness claimed Ms Millane liked her partners to put their hands around her neck and another claimed Ms Millane often requested "choking" during sex, which stopped on the utterance of a safe word.[90] Ms Millane's membership of Whiplr and FetLife, dating websites for those interested in BDSM, were made public, as well as her past interactions with men she met on Tinder.[91] Ms Millane's sexual history was reported over numerous platforms. Much of this reporting negatively painted her past and interests. Unfortunately, Ms Millane was not present to share her side of

84 Gavey, above n 82.

85 Gavey, above n 82.

86 Gavey, above n 82; Anneke Smith "Millane trial: Expert on sexual culture testifies" (20 November 2019) RNZ <www.rnz.co.nz>.

87 Gavey, above n 82.

88 Woodyatt, above n 18.

89 Lisa Owen "Grace Millane case: Defence's first day" (19 November 2019) RNZ <www.rnz.co.nz>.

90 Interview with Sarah Robson, Journalist (Lisa Owen, Checkpoint, Grace Millane case: Defence finishes evidence, RNZ, 20 November 2019). A safe word is used as a codeword for the participants' emotional and physical state. It is usually used to interrupt the practice of BDSM. Urban Dictionary "Safeword" <www.urbandictionary.com>.

91 Robson, above n 90.

events. Mr Kempson's past sexual history was also relayed in court.[92] However, by nature of his name suppression information about his sexual history did not attract the same attention in the media as Ms Millane's.[93]

The Crown responded to the defence's position that the strangulation was consensual by arguing Ms Millane's death was in fact murder through reckless disregard for her life.[94] Mr Brian Dickey and Mr Robin McCoubrey for the Crown told the jury that the defendant strangled Ms Millane for five to 10 minutes. No doubt during that time she had succumbed to unconsciousness, yet Mr Kempson continued to apply pressure to her neck.[95] Three weeks after the trial began, after deliberating for just over five hours, the jury found Mr Kempson guilty of murder.[96] The jury found Mr Kempson, at the very least, had caused Ms Millane bodily injury which he knew was likely to cause death, and was reckless as to whether or not she died.[97] In February of 2020, Mr Kempson was sentenced to life imprisonment with a non-parole period of at least 17 years.[98]

However, the public ordeal was not yet over for Ms Millane's family and friends. After being convicted of the murder of Ms Millane, Mr Kempson unsuccessfully appealed his conviction and sentence to the Court of Appeal. His appeal was dismissed on 18 December 2020.[99] Mr Kempson's name suppression lapsed when the Court of Appeal issued its December judgment, despite his application for its continuation.[100]

D The "Rough Sex Defence" in the United Kingdom

The Millane case is one of the few cases where the "rough sex defence" has been used in New Zealand. However, as noted earlier it is increasingly being used in the United Kingdom, typically by males attempting to defend murder and assault charges.[101]

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92 Gay, above n 82.

93 Mr Kempson's name was suppressed in the case because he was facing two other criminal trials at the time of the Millane trial, see Kempson v R (SC), above n 55, at [1].

94 Lisa Owen "Grace Millane case: Prosecution, defence make final statements" (21 November 2019) Youtube <www.youtube.com>; and Crimes Act, s 167.

95 Owen, above n 94.

96 Anna Leask "Grace Millane trial: Jury retires to consider verdict" *The New Zealand Herald* (online ed, Auckland, 22 November 2019).

97 *R v K* [2020] NZHC 233 at [49].

98 At [83].

99 *Kempson v R* (SC), above n 55, at [2].

100 At [2].

101 Bows and Herring, above n 5, at 526.

1 *The United Kingdom's law on consent*

Notably, the New Zealand common law on consent is distinct from that of the United Kingdom. The United Kingdom will disregard the defence of consent unless there are good reasons to include it, whilst New Zealand will put the defence to the jury unless there are good reasons to exclude it.[102] The House of Lords in *R v Brown* held that where actual bodily harm is intended, a defendant cannot rely on the consent of the victim unless the activity in question falls into an exception to the rule.[103] Exceptions include games with well set out rules, sports, surgery, bodily decoration, chastisement of children and religious mortification.[104] Interestingly, the House of Lords held it was against public policy to allow the defence of consent for violent acts in sadomasochistic conduct; in other words sadomasochistic conduct did not fall within one of the above exceptions.[105]

However, the case of *R v Wilson* has since raised ambiguity about the scope of *Brown.*[106] In *Wilson* the defendant was charged with assault after branding his initials into his wife's buttocks.[107] The trial judge held the defence of consent was not available and directed the jury to convict the defendant.[108] However, the defendant successfully appealed to the Court of Appeal, which held the consensual branding between a man and wife in their own home was similar to tattooing and was not criminal behaviour.[109] Thus, it would seem that *Wilson* allowed the defence of consent for an act of sadomasochism. However, regardless of the impact *Wilson* has had on the authority set out in *Brown,* the Domestic Abuse Act has made it clear that defendants in England and Wales are barred from claiming the "rough sex defence" in the context of BDSM practices. The Act rules out consent "for the purposes of obtaining sexual gratification" as a defence to harm.[110]

102 Simester and Brookbanks, above n 20, at 797.
103 *R v Brown* [1993] 2 All ER 75, [1994] 1 AC 212 (HL) at 231.
104 At 231, 233 and 267.
105 At 213.
106 *R v Wilson* [1997] QB 47.
107 At 49.
108 At 49.
109 At 50.
110 Domestic Abuse Act, s 71.

2 The "rough sex defence" in the United Kingdom

As previously mentioned, WCCTT has recorded at least 60 cases where the "rough sex defence" has been used.[111] All of the cases concerned either victims from the United Kingdom or took place in the United Kingdom.[112] WCCTT was founded in response to the specific tragic death of Natalie Connolly and her killer's conviction.[113] In that case, Ms Connolly suffered over 40 injuries to her head, buttocks and breasts, as well as internal injuries, at the hand of her partner, millionaire Mr John Broadhurst.[114] Mr Broadhurst left Ms Connolly to die at the bottom of his steps while he went to sleep.[115] At trial, Mr Broadhurst's argued that Ms Connolly consented to such harm and died as a result of a "sex game gone wrong".[116] Mr Broadhurst was not charged with her murder, rather he pleaded guilty to manslaughter by gross negligence for failing to get Ms Connolly the required medical assistance.[117] He was sentenced to just three years and eight months' imprisonment.[118]

Ms Connolly's case is just one of at least 15 trials recorded by WCCTT where the defendant was convicted of manslaughter or culpable homicide, when the "rough sex defence" was used.[119] WCCTT has also recorded two cases where the defendant was found not guilty when the "rough sex defence" was used, two cases where no charges were brought against the defendant and a case where the charges against the defendant were dropped.[120] Of course, it cannot be said with certainty that the use of the "rough sex defence" is directly correlated with the outcome of these cases, as such outcomes could be the result of other factors.

Since the 1970s, WCCTT have identified a rising trend of reliance on the "rough sex defence" by defendants in the United Kingdom, influencing England and Wales to take action and abolish the defence.[121] This article now turns to discuss whether New Zealand should follow suit.

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111 WCCTT, above n 10.
112 WCCTT, above n 10.
113 Moore and Khan, above n 26.
114 WCCTT, above n 10.
115 Aoraha , above n 12.
116 Aoraha, above n 12.
117 *R v Broadhurst* (sentencing remarks of Knowles J Birmingham Crown Court, 17 December 2018).
118 At [44].
119 WCCTT, above n 10.
120 WCCTT, above n 10.
121 Bows and Herring, above n 5, at 526 and 534; and Domestic Abuse Act, s 71.

III PROBLEMS WITH THE "ROUGH SEX DEFENCE"

1 *Excuse for violence*

One argument in favour of abolishing the "rough sex defence" is that it is used by perpetrators as an excuse for violent behaviour.[122] Many BDSM practitioners argue BDSM has measures in place to minimise the risk of danger; 'true' BDSM is based on negotiation and boundary making.[123] However, as BDSM has become normalised in mainstream society,[124] uneducated and violent men are using BDSM as an excuse to "get away with murder".[125] Of the 60 cases WCCTT has recorded where defendants used the "rough sex defence" to explain the death of their partner, five of those were acquitted or had their charges dropped.[126] By claiming women consented to BDSM, the defence relies on rape myths and gender stereotypes, as discussed below.[127] Such stereotypes increase the possibility the jury will reduce the defendant's charge or even acquit the defendant.[128] To put this concern into concrete terms, WCCTT has recorded circumstances where the defendant has inflicted intentional acts of violence against their partner, resulting in her death, such as the case of Natalie Connolly.[129] Nevertheless, the jury agrees with the defence's argument that the death was caused by an accident, finding the defendant not guilty.

The success of the "rough sex defence" can have serious consequences for women and society. To put this in perspective for New Zealanders, if not for Mr Kempson's conduct after Ms Millane's death (such as taking photos of Ms Millane's deceased body and searching for pornography), it is conceivable that the jury would have reasonable doubt about Mr Kempson's intention to cause Ms Millane's death or bodily injury, and his recklessness as to whether she died as a result. Given only two people were in the room when Ms Millane died, it would have been difficult to prove her death was not an accident and that Mr Kempson had intended to kill or harm Ms Millane. The defence's theory of the case might have been quite persuasive; Ms Millane had consented to BDSM

122 Yardley, above n 31, at 1859; Lowbridge, above n 1; Taylor, above n 36; and Busby, above n 3, at 352.
123 Lowbridge, above n 1.
124 Lowbridge, above n 1.
125 Bows and Herring, above n 5, at 533–534. The author notes that feminist scholarship has highlighted other concerns arising from BDSM, however that discussion is not within the scope of the article.
126 WCCTT, above n 10.
127 Bows and Herring, above n 5, at 532.
128 At 532.
129 Moore and Khan, above n 26.

before, had expressed an interest in BDSM with multiple partners (both short and long-term) and entered Mr Kempson's apartment purportedly of her own volition, although she was highly intoxicated.[130] The circumstances all point to Ms Millane engaging in consensual BDSM, allowing the defence to frame the death as a tragic instance of a "sex act gone wrong".

2 *Victim blaming*

The occurrence of victim blaming and its perpetuation of patriarchal narratives supports the contention the "rough sex defence" should be abolished. Many of the cases where the "rough sex defence" has been used involve a victim blaming rhetoric in trial which is extensively repeated in the media.[131] For example, Ms Chloe Miazek's father stated his daughter's reputation was "trashed" in the media because of an "agreed narrative" employed by both the prosecution and defence counsel in her killer's trial.[132] In this case, Mark Bruce strangled 20 year old Chloe Miazek during sex after meeting him on a night out.[133] Defence counsel advanced the "rough sex defence", arguing that Ms Miazek and Mr Bruce had consensually engaged in erotic asphyxiation, in which Ms Miazek accidentally died.[134] Defence counsel focused on the fact that both Ms Miazek and Mr Bruce had expressed an interest in erotic asphyxiation.[135] Mr Bruce's defence advocate stated during the trial, "I don't wish to sound like I'm suggesting she was the author of her own misfortun[e] but it is a significant factor".[136] Mr Bruce pleaded guilty to culpable homicide (the Scottish version of manslaughter).[137] He was sentenced to six years in prison, despite the fact that after his conviction and before his sentencing, Mr Bruce admitted he did not have consent from Ms Miazek before engaging in the erotic asphyxiation that led to her death.[138]

There are three aspects of victim blaming present within the "rough sex

130 Alison Mau "The New "She Asked for it" Rough Sex, Victim Blaming and the Grace Millane Trial" (November 2019) Stuff <www.stuff.co.nz>.

131 WCCTT, above n 10.

132 Myles Bonnars "Father rejects killer's rough sex defence" (24 March 2020) BBC News <www.bbc.com>.

133 WCCTT, above n 10.

134 Bonnar, above n 132.

135 Phoebe Southworth "'I've done something terrible': Killer strangled woman, 20, to death during sex game just hours after meeting her and then handed himself in at police station" Daily Mail (online ed, London, 13 March 2018).

136 Southworth, above n 135.

137 WCCTT, above n 10.

138 WCCTT, above n 10.

defence". First, the "rough sex defence" is a form of the "she asked for it" defence, which in itself presents issues with fairness towards the victim and their families.[139] Secondly, when using the "rough sex defence" to defend murder or manslaughter charges, the defendant benefits from being the only first-hand perspective presented to the jury.[140] Men can use this advantage to reduce their charge, sentence or even receive an acquittal.[141] Finally, the use of sexual history and reputation evidence that goes hand-in-hand with the "rough sex defence" unfairly prejudices the jury against the victim in a situation in which, by the very nature of the offence, she is not present to defend herself.[142]

(a) The "she asked for it" defence

Inherent in the "rough sex defence" is the idea that the victim "asked for it". The defence usually run a case arguing the victim asked for the conduct that led to her death or harm, blaming the victim for her loss of life or suffering.[143] For example, in the Millane case, the defence's strategy focused on proving consensual sex occurred and that Ms Millane asked Mr Kempson to apply pressure to her neck.[144] By allowing someone else to put their hands around your neck and engage in erotic asphyxiation, the defence argued it was foreseeable to Ms Millane that fatal or serious medical consequences could result. Implicitly, the defence suggested to the jury that Ms Millane was at least partially responsible for her death.[145] In another previously discussed case, Ms Miazek was also implicitly blamed for her alleged engagement and interest in erotic asphyxiation, by defence counsel during her killer's trial.[146] In reality, both Ms Millane and Ms Miazek, whether consenting to breath play or not, did not consent to their own death – nor could they consent to their death in law.[147] The "blame the victim" strategy that has been employed by defence teams has attracted widespread criticism from victims' advocates and groups who believe the criminal justice system is tougher on the victim and their families than it is for the defendant.[148]

139 Buzash, above n 36, at 558.
140 Bows and Herring, above n 5, at 531.
141 Mackenzie, above n 1, at 4.
142 Laing, above n 13, at 176.
143 Buzash, above n 36, at 558.
144 Mau, above n 130.
145 Mau, above n 130.
146 Southworth, above n 135.
147 Crimes Act, s 63.
148 Buzash, above n 36, at 558.

However, some commentators argue that the "rough sex defence" does not always blame the victim. As New Zealand criminal barrister Simon Shamy contends, just raising the "rough sex defence" does not necessarily imply that the victim's death or injury was her fault.[149] The "rough sex defence" is merely an avenue for the defendant to recount their account of events and argue that during consensual sexual relations, the victim tragically died.

(b) A one-sided story

When the defendant has killed the victim, only one perspective can be told in court: his.[150] As a result, the jury may be biased in favour of the defendant's case, as he is able to explain his actions and account of the incident in person.[151] This is especially dangerous if the jury is sympathetic to the defendant. The defendant's perspective is near impossible to verify in these types of intimate offences, as it often lacks witnesses and scientific evidence.[152] For example, if some acts during sexual intercourse between the victim and defendant were consensual and other acts were not, it is difficult (if not impossible) to extract scientific evidence demonstrating that the part resulting in her death was non-consensual.[153] Spermatozoa may be present, however that is not necessarily relevant to the question of whether the victim consented to acts of BDSM, such as erotic asphyxiation.[154] As a result, the defendant is free to frame the incident however he pleases, usually framing it as an incident involving sexual desire instead of violence.[155]

Feminist scholars have referred to such conduct as "euphemising", a technique which enables male violence to be presented in a way that obscures the defendant's responsibility.[156] The technique positions the victim as responsible for her death, as defendants are able to manipulate sadomasochist narratives to "disguise what is essentially cruel and misogynist[ic] conduct".[157] Thus, it could be argued the "rough sex defence" should be abolished because it unfairly weights the evidence in favour of the defendant.

149 Ruth Hill "'Grace Millane murder: 'Rough sex' defence should not be outlawed, legal experts say" T*he New Zealand Herald (online ed, Auckland, 22 February 2020)*.

150 Bows and Herring, above n 5, at 531.

151 At 531.

152 Buzash, above n 36, at 561.

153 At 561.

154 At 561.

155 Bows and Herring, above n 5, at 531.

156 At 531.

157 Edwards, above n 14, at 89.

On the other hand, the right to a fair trial is a foundational principle of New Zealand's criminal justice system.[158] Defendants have a presumption of innocence and a right to defend themselves.[159] It is the Crown's duty to prove the defendant's charges beyond reasonable doubt, in order to prevent innocent people from going to prison. Abolishment of the "rough sex defence" is supported by some because it allows the defendant to tell his perspective of the event in question, without an opposing account from the victim.[160] It is acknowledged that the victim's inability to share her side of the story does not warrant the erosion of the defendant's fundamental right to defend themselves. It must be recalled that the purpose of criminal trials is to protect society and determine the guilt of the defendant, not to shelter and protect victims.[161] Thus, the "rough sex defence" plays a crucial role in ensuring that defendants benefit from their right to a fair trial.

However, it is noted that the "rough sex defence" is only one strategy available for the defendant. The defendant still has other defences and strategies available, for example self-defence or arguing that there is an absence of evidence to prove the charge beyond reasonable doubt.

(c) Use of sexual experience evidence and perpetuation or "rape myths"

Another aspect of victim blaming in "rough sex" trials occurs through the use of the victim's sexual history and reputation evidence.[162] Defendants use this evidence in order to show the victim's propensity to engage in such sexual behaviour, strengthening their argument that the victim and defendant did engage in BDSM. The evidence makes the contention that the victim's death occurred by accident more credible because she had engaged in such conduct before.

In non-fatal sexual cases, s 44 of the Evidence Act, or the "rape shield", protects sexual assault victims from having their sexual reputation and their sexual experience presented in trial.[163] While the former evidence is absolutely barred from entering court, the latter can be allowed into court with the judge's permission.[164] The judge must be satisfied the evidence has direct relevance

158 NZBORA, s 25.
159 Section 25.
160 Bows and Herring, above n 5, at 531.
161 Stephen Todd and others *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 4.
162 Bows and Herring, above n 5, at 532.
163 Evidence Act, s 44.
164 Section 44.

to the issues in the proceeding, and that excluding the evidence "would be contrary to the interests of justice".[165] The "rape shield" prevents counsel from using the victim's sexual reputation and experience history to perpetuate myths and biases in trial.[166] Such evidence can prejudice fact finders against the victim, influencing the outcome of the case.[167]

However, the "rape shield" only applies to "sexual cases".[168] Homicide offences do not fall within such a bracket.[169] Thus in "rough sex" trials that do not involve rape or sexual assault charges, such as the Millane case, evidence relating to the victim's sexual history and/or reputation may be deemed relevant and admitted into court. In the Millane case, Ms Millane's past experiences with former partners and matches on dating websites were deemed relevant and were scrutinised by the defence.[170] The defence team called past sexual partners, friends and acquaintances met through dating apps to be witnesses.[171] The evidence was relied on to illustrate Ms Millane's propensity to engage in BDSM and made Mr Kempson's claim that Ms Millane died during consensual "rough sex" more credible.[172] The focus on such evidence implies that Ms Millane knew what she was risking and, in some way, "asked for it".[173]

Evidence of the victim's sexual history and reputation can have significant consequences on the outcome of cases. Studies have found sexual history evidence biases the jury and judge against the victim, resulting in more not guilty verdicts.[174] The use of evidence regarding the victim's past relationships makes the reputation and actions of the woman the central focus of the trial and media coverage, instead of the culpability of the defendant.[175] The decision makers, subconsciously or consciously, internalise this evidence and make judgments about what characterises an "ideal" and "not ideal" witness.[176] If

165 Section 44(3).
166 Laing, above n 13, at 176.
167 At 176.
168 Evidence Act, s 44.
169 The definition in s 4 of "sexual case" does not include homicide.
170 Khylee Quince "Defending the Indefensible? On the Grace Millane trial and victim blaming (25 November 2019) The Spinoff <www.thespinoff.co.nz>; and Owen, above n 89.
171 Owen, above n 89.
172 Quince, above n 170.
173 Mau, above n 130.
174 Bows and Herring, above n 5, at 532, citing Louise Ellison and Vanessa E Munro "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49 Br J Crim 202 at 204.
175 Bows and Herring, above n 5, at 532.
176 Yardley, above n 31, at 1843.

the witness is "not ideal", they are more likely to be accorded blame.[177] Yardley claims a "not ideal" witness usually includes women who were killed by a person who had legitimate access to them.[178] For example, a "not ideal" witness is a woman who "allowed" their future killer into their apartment or a woman who "allowed" themselves to be in a vulnerable position. Women identified as "not ideal" victims are accorded low value in the victim hierarchy and given less sympathy by the jury and public.[179] This discourse blames women for violence, diverting blame from the defendant, and can often result in the defendant being found not guilty.[180]

The Millane case and that of Ms Cindy Gladue, a Canadian woman, illustrate such biases at work. Ms Millane was young, white and educated, all factors which point towards her classification as an "ideal victim", although she did enter into Mr Kempson's apartment of her own volition (though intoxicated).[181] In comparison, Ms Cindy Gladue, an Indigenous Canadian woman and a sex worker, was clearly classified as a "not ideal" victim in her murder trial.[182] In 2011, Ms Gladue died from an 11 centimetre wound in her vaginal wall inflicted by Mr Bradley Barton.[183] During the 2015 trial, the judge and lawyers referred to Ms Gladue as a sex worker and prostitute over 50 times,[184] and repeatedly referred to her as a "native".[185] The jury acquitted Mr Barton of first degree murder and manslaughter, although her case was appealed to the Supreme Court of Canada.[186] The Supreme Court of Canada deemed the myths and biases perpetuated in Ms Gladue's trial warranted a retrial on the charge of manslaughter, of which Mr Barton was eventually found guilty.[187] The comparison of the Millane case and that of Ms Gladue highlights the impact that the classification of the victim can have on the outcome of a case. Not to mention, the impact such discourses can have on the victim's family

177 Bows and Herring, above n 5, at 532.
178 Yardley, above n 31, at 1843.
179 At 1843.
180 Bows and Herring, above n 5, at 532.
181 Russell Hope "Grace Millane: A 'gregarious, talented' student who dreamed of travelling the world" (21 February 2020) Sky News <news.sky.com>
182 Blatchford, above n 12.
183 Blatchford, above n 12.
184 Brandi Morin "Cindy Gladue deserved to be valued as a human in life – and in death" *The Toronto Star* (online ed, Toronto, 3 February 2021).
185 Blatchford, above n 12.
186 Fakiha Baig "Alberta judge sentences trucker to 12 1/2 years in the death of Cindy Gladue" (27 July 2021) Global News <www.globalnews.ca>
187 Blatchford, above n 12; and Baig, above n 186.

is unmerited. Not only does the victim's family have to deal with grief, but as Mrs Gillian Millane, mother to Grace Millane is alleged to have stated, her daughter was on trial instead of the defendant.[188]

Despite the harmful consequences of sexual history evidence, in murder trials such evidence may be necessary to ensure the trial complies with the defendant's right to a fair trial.[189] In fatal BDSM cases, like Ms Millane's, sexual history evidence can be relevant to the victim's propensity to engage in BDSM, giving credibility to the defendant's claim that the victim died in consensual "rough sex". Ms Quince believes the use of sexual history evidence in the Millane case was necessary to ensure that Mr Kempson received a fair trial.[190] Ms Quince concedes the rising use of the "rough sex defence" is concerning, however claims the use of the sexual history evidence in the Millane trial was justified because it was directly relevant as to whether Ms Millane did indeed engage in BDSM with Mr Kempson.[191] As illustrated in the Millane case, sexual history evidence can form a critical component of the defendant's right to defend themselves.[192] Thus, although a person's life has been lost during sexual interactions, another person cannot be unjustly deprived of a fundamental right because hearing such evidence would cause the victim and their family undeserved pain and suffering.[193] As Ms Quince argues, "we should not sanitise trials merely to quell public distaste".[194]

Evidently, the use of victims' sexual history evidence in court can bias and prejudice decision makers against the victim. However, such evidence plays an important role in ensuring the trial complies with the right to a fair trial. That is why s 44 provides for a heightened direct relevance test in sexual cases; to ensure the victim's and defendant's rights are appropriately balanced and the jury has the most relevant and probative information before it.

IV PROPOSED SOLUTIONS

This article proposes two solutions to the difficulties identified above: abolish the "rough sex defence" in New Zealand and extend the "rape shield" to apply to homicide cases.

188 Mau, above n 130.
189 NZBORA, s 25.
190 Quince, above n 170.
191 Quince, above n 170.
192 Owen, above n 89.
193 Hill, above n 149.
194 Quince, above n 170.

A Abolish the "Rough Sex Defence"

As the law in New Zealand currently stands, although a person cannot consent to their own death, in murder cases it is still likely the jury will hear the "rough sex defence".[195] Even when the defendant kills the victim and is charged with murder under s 167 of the Crimes Act, the "rough sex defence" can still be heard by the jury because it may be relevant to the lesser included charge of manslaughter. Further, regardless of the offence the defendant is charged with, the defendant can claim he did not have the required state of mind for the charge and thus be found not guilty.

This article proposes that Parliament abolish the "rough sex defence", following the approach of England and Wales.[196] As previously discussed, the Domestic Abuse Act abolishes the defence of consent for serious harm inflicted "for the purposes of obtaining sexual gratification".[197] This article proposes a similar provision should be introduced into the New Zealand Crimes Act. The solution codifies the *R v Brown* decision would abolish the "rough sex defence" for fatal-BDSM cases. However, the United Kingdom provision defines "rough sex" as "serious harm for the purposes of obtaining sexual gratification".[198] "Serious harm" is defined as grievous bodily harm, wounding and actual bodily harm in the Act.[199] In New Zealand, "really serious harm" constitutes grievous bodily harm and injuring means actual bodily harm.[200] Thus, some amendments are necessary for the New Zealand context. This article proposes that New Zealand legislators should amend the wording of the Domestic Abuse Act to include both actual and grievous bodily harm. Further, New Zealand Parliament could introduce a section into the Crimes Act stating, "it is not a defence to murder or manslaughter that the victim consented to the infliction of actual or grievous bodily harm for the purposes of obtaining sexual gratification".

A weakness of this solution is that it prohibits those in the BDSM community from engaging in BDSM. Not all BDSM practitioners are violent and abusive men using BDSM as an excuse to "get away with murder".[201]

195 Crimes Act, s 63.
196 Domestic Abuse Act, s 71.
197 Section 71.
198 Section 71.
199 Section 71(3).
200 *R v Waters*, above n 49, at 379; and Crimes Act, s 2.
201 Bows and Herring, above n 5, at 534.

Instead, some have chosen to join the BDSM community which is founded upon boundaries and negotiation.[202] Those in the community argue their engagement in BDSM is safe and only proceeds with the informed consent of both parties.[203] Thus, prohibiting people from being able to consent to "the infliction of actual or grievous bodily harm for the purposes of obtaining sexual gratification" hinders BDSM practitioners' agency. However, this does not mean that BDSM practitioners cannot engage in the activity, it just means that they cannot rely upon the defence of consent if BDSM activities turn fatal. However, the abolishment of the defence of consent has practical implications. For example, it is possible that there will be legitimate cases of accidental death as a result of BDSM activities and so a person would not be able to rely on the defence, and it also may discourage people from calling enforcement agencies in the case of an emergency, for fear of being prosecuted.

Although potentially infringing upon the BDSM community's agency, the purpose of the proposed provision is to prohibit violent men from relying upon the "rough sex defence" and "getting away with murder". Defendants are increasingly excusing violent actions by claiming women accidentally died in "sex acts gone wrong", warranting such an infringement on the BDSM community.

B Preventing Victim Blaming

The abolishment of the "rough sex defence" through statute will aid in reducing victim blaming in trial. However, for completeness and to mitigate the circumstances where victim blaming strategies are utilised in murder cases, the "rape shield" should also be amended to extend to homicide cases. This amendment would reduce the risk that decision makers are unfairly prejudiced by sexual history evidence and would assist in protecting victims' families from re-traumatisation. Nonetheless, the "rape shield" is not absolute. With permission of the judge, the victim's sexual experience evidence may be admitted into court.[204] Thus, to ensure murder victims are not the subject of a blaming rhetoric, this solution is proposed in conjunction with the abolishment of the "rough sex defence".

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202 Rebecca Reid "I spent years in the fetish and BDSM scene – I know exactly why people die during kinky sex" *The Independent* (online ed, London, 13 April 2019).

203 Reid, above n 202; and Cara R Dunkley and Lori A Brotto "The Role of Consent in the Context of BDSM" (2020) 32 Sexual Abuse 657 at 660.

204 Evidence Act, s 44.

V CONCLUSION

Although not yet prevalent in New Zealand, WCCTT has highlighted over 60 cases where men have used the "rough sex defence" in an attempt to receive a lesser sentence or acquittal.[205] The Millane case provides a good case study for how the courts will deal with BDSM in New Zealand and highlights how controversial the "rough sex defence" can be. The rising popularity of the defence across the world emphasises the need for New Zealand legislators to consider the defence and its appropriateness in law.

This article argues that the "rough sex defence" should be abolished through statute, similar to the English and Welsh approach. The "rough sex defence" is being used by violent and uneducated men to 'get away with murder' and perpetuates a victim blaming rhetoric. By following the English and Welsh approach, defendants would not be able to rely on the defence of consent in murder and manslaughter trials. By association, if the "rough sex defence" was abolished, the victim blaming rhetoric that forms part of the "rough sex defence", would not unfairly prejudice a trial. However, for completeness, the "rape shield" should also be extended to apply to homicide victims to ensure only directly relevant evidence is before a decisionmaker.

205 Mackenzie, above n 1, at 4.