SIX MISTAKES OF LAW ABOUT CONSENT

Daniel Jackson*

Consent is a crucial concept in the law regarding rape, but New Zealand lacks a clear definition of it in either statute or case law. This article explains two different conceptions of consent and how New Zealand courts have failed to choose clearly between them. It considers the conceptual confusions that have resulted from the law's lack of clarity, and how defendants are therefore being allowed to rely on a mistake of law about consent. It then discusses the principle that a mistake of law is not a defence. It identifies six mistakes of law about consent and explains how these conceptions of consent illustrate why they are mistakes. It then discusses cases where the New Zealand courts have failed to recognise these mistakes as mistakes of law and allowed defendants to rely on them. It concludes by proposing some reforms to address these issues.

I INTRODUCTION

Consent lies at the heart of the law regarding rape.[1] Consent, or reasonable belief in consent,[2] is the most common issue in rape trials. Given this, it might be thought that consent would be a well-understood and clearly defined concept, but in New Zealand neither Parliament nor the courts have given a clear definition of consent as an element of sexual offences. The courts have also failed to recognise the significance of the well-established principle that a mistake of law is not a defence as applied to the context of sexual consent.

* LLB(Hons)/BA, Victoria University of Wellington. Solicitor, Hamish.Fletcher Lawyers. My thanks to the anonymous reviewers for their comments, which have been of great assistance in improving this article, and to Nina White, Madison Russell, Katharine Guilford and Allanah Colley for their work editing the article.

1 While I speak of "rape" in this article, the issues discussed in it also apply to other forms of sexual assault, such as unlawful sexual connection and indecent assault. Indecent assault does not require a belief in consent to be reasonable (*R v Nazif* [1987] 2 NZLR 122 (CA) at 128; and *R v Aylwin* [2007] NZCA 458 at [35]), but, as I will explain, this does not affect the applicability of my argument about mistake of law.

2 While the statutory language refers to the defendant "believing on reasonable grounds that [the complainant] consents" (Crimes Act 1961, s 128(2)), the convenient short-hand expression "reasonable belief in consent" is widely used in case law and commentary. I adopt it.

This has resulted in defendants being allowed to rely on legally erroneous ideas about consent, including rape myths.

I proceed in several sections. First, I describe the absence of a statutory definition of consent in New Zealand and the circularity of judicial definitions. Second, I explain two conceptions of consent:

i) the Mental View, whereby consent is a mental state; and

ii) the Performative View, whereby consent is constituted by a communicative act.

Each view has some support in New Zealand case law, contributing to conceptual confusion about consent. Third, I discuss the principle that a mistake of law is not a defence. This principle extends to mistakes about the interpretation or application of the law and holds that mistakes of law cannot be relied on to negate mens rea. I explain that this means a belief in consent that is based on a mistake of law cannot be relied on in defending a rape charge. Fourth, I set out six mistakes of law about consent and describe how the two conceptions of consent illustrate why they are mistakes. The six mistakes are that:

i) passivity or failure to protest can constitute consent;

ii) believing that the other person would probably, or might, agree to or welcome the sexual activity is a belief in consent (that is, believing that actual agreement is not required);

iii) consent can be at a time other than when the sexual act occurs;

iv) sexual desire or pleasure is the same as consent;

v) "no" means yes; in other words, that an expressed lack of agreement to a sexual act can amount to consent; and

vi) there can be consent to sexual activity while a person is asleep, unconscious or so drunk that they cannot choose whether or not to have sex.

Fifth, I examine some cases that have allowed defendants to rely on these mistakes of law and show the courts relying on rape myths. In these cases the courts have:

i) held that a defendant can have a reasonable belief that a sleeping person has consented;

ii) relied on the notion of "relationship expectations" to convert passivity into consent; and

iii) conflated desire and consent.

I conclude by suggesting some reforms to prevent reliance on mistakes of law and rape myths:

i) a statutory definition of consent (which the Government is considering);[3]

ii) a statutory provision making clear that a belief in consent based on a mistake of law cannot be relied upon by a defendant;

iii) model directions for juries on mistake of law; and

iv) judicial training on sexual violence and rape myths.

II THE LACK OF A DEFINITION OF CONSENT

Sexual violation by rape has three elements in New Zealand law:[4]

i) A penetrates the genitalia of B with A's penis; and

ii) B does not consent to the penetration; and

iii) A does not believe on reasonable grounds that B consents to the penetration.

Element (iii) involves two different enquiries:

i) Did A believe that B consented?

ii) If so, did A have reasonable grounds for that belief?

3 Cabinet Paper "Improving the justice response to victims of sexual violence" (3 April 2019) at [81]–[83]; and Cabinet Minute "Improving the justice response to victims of sexual violence" (3 April 2019) SWC-19-MIN-0031 at [17.3].

4 Crimes Act 1961, s 128(2).

The Crown can prove this element of the offence by establishing beyond reasonable doubt that the answer to either of these questions is "no".[5]

The Crimes Act 1961 does not contain any definition of consent. It does contain a list of circumstances that do not amount to consent:[6]

i) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

ii) A person does not consent to sexual activity if he or she allows the activity because of —

  a) force applied to him or her or some other person; or

  b) the threat (express or implied) of the application of force to him or her or some other person; or

  c) the fear of the application of force to him or her or some other person.

iii) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.

iv) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

v) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

vi) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.

vii) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.

viii) This section does not limit the circumstances in which a person does not consent to sexual activity.

5 *Kumar v R* [2014] NZCA 58 at [38].

6 Crimes Act 1961, s 128A.

This is helpful regarding the particular situations dealt with in each subsection, but it does not tell us what consent is. It does not even tell us in general terms what consent is not, given the express provision that the list is non-exhaustive. So while it clarifies the position in these specific categories of cases, it does not give a general definition of consent.

Judicial definitions of consent are not much more helpful. The question trail provided to juries in rape trials says: "'[c]onsent' means true consent freely given by a person who is in a position to make a rational decision".[7] Similarly, a model direction frequently used by judges in directing juries states: "[c]onsent means true consent if it is freely given by a person who is in a position to give it".[8]

Unfortunately, these definitions are circular: consent is defined as "true consent freely given". The self-referential nature of the definition means that it fails to answer the fundamental question of what consent is.

In *R v Brewer*, the Court of Appeal upheld a direction in very similar terms to that now used in the question trail: "consent means a consent freely and voluntarily given by a person in a position to form a rational judgement".[9] The trial Judge had provided some explanation of what this meant, in response to a jury question:[10]

> A consent would not be a genuine consent only if the degree of coercion was so great that the complainant was not in a position to make a decision of her own free will.

But while this tells us when consent will not be accepted as valid, it does not define it.

In *R v Annas*, the Court of Appeal likewise focused on the qualities consent must have to be valid: "it must be voluntary and deliberate",[11] "it must not be coerced"[12] and it "must be genuine, informed, and freely and

7 "Sexual violation by rape (Section 128 Crimes Act 1961)" Courts of New Zealand <www.courtsofnz.govt.nz> at [2].

8 Stephanie Bishop and others *Garrow and Turkington's Criminal Law in New Zealand* (online ed, LexisNexis) at [CRI128.4].

9 *R v Brewer* CA516/93, 26 May 1994 at 7.

10 At 10.

11 *R v Annas* [2008] NZCA 534 at [23].

12 At [23].

voluntarily given".[13] But the Court noted that the Crimes Act provided no general definition of consent[14] and did not offer one itself.

In *R v Isherwood* the trial Judge had again given a circular definition:[15]

> Consent means a consent given by a woman who is able to understand the significance of what is about to happen and is able to make an informed and rational decision as to whether or not she consents. Consent must be a true consent freely given.

The Court of Appeal approved this direction[16] and added that "a valid consent [required] that a complainant has understood her situation and was capable of making up her mind when she agreed to sexual acts".[17] No general definition of consent was offered.

The courts seem reluctant to venture beyond the specific issues and particular facts of the case at hand to provide a general definition of consent. Having reviewed cases in search of a definition, I have not found any case where a New Zealand court has provided a clear, non-circular and general definition of consent.

III TWO CONCEPTIONS OF CONSENT

The confusion as to the definition of consent is compounded by the existence of two quite different conceptions of consent, which have been extensively debated by philosophers and legal theorists. They have been termed the Mental View and the Performative View.[18]

The Mental View holds that consent is a mental state.[19] Advocates of the Mental View disagree about the nature of the relevant mental state.

13 At [25].
14 At [24].
15 *R v Isherwood* CA182/04, 14 March 2005 at [31].
16 At [36].
17 At [35].
18 Hubert Schnüriger "What is Consent?" in Peter Schaber and Andreas Müller *The Routledge Handbook of the Ethics of Consent* (Routledge, Abingdon, 2018) 21 at 21. See also Peter Westen *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate, Aldershot, 2004) and Jesse Wall "Justifying and Excusing Sex" (2019) 13 Criminal Law and Philosophy 28 for a similar distinction between "attitudinal consent" and "expressive consent".
19 Some scholars have argued that consent should be termed a "mental act" instead of a "mental state", but nothing turns on this terminological distinction for the purposes of this article.

One possibility is that to consent to something is to desire it.[20] But we frequently choose not to do things that we desire to, and we frequently choose to do things that we do not desire to. We may do, or refrain from doing, these things for moral, religious, familial or social reasons. So it seems that it is possible to desire something but not consent to it, or vice versa.

This has led most scholars to reject the consent as desire approach. Those who continue to defend it have defined desire very broadly, arguing that it can encompass everything from unconditionally welcoming the act to regarding it as the lesser of two evils in the circumstances.[21] But this still struggles to account for the fact that consent appears to be a choice that a person makes,[22] whereas we do not choose our desires and may even wish that we did not have them.

The more popular approach is to treat consent as a choice or act of will, but there is still disagreement about what sort of choice it involves. The two most prominent accounts are those of Heidi Hurd and Larry Alexander.

Hurd argues that choosing an action means that the person intends the action. She therefore proposes that to consent to another person's actions is "to intend to allow or enable those actions by means of some act or omission of one's own".[23] This is problematically vague. Given the reference to omissions, it fails to clearly distinguish consent from doing nothing. A person can do nothing and intend thereby to allow someone to do an act, but not have chosen to agree to it.

Alexander provides a more specific and satisfactory account. He argues that consent is waiving one's right not to have an act performed: "mentally accepting without objection another's crossing one's moral or legal boundary".[24] Importantly, Alexander suggests that consent is a mental act and requires the mental state to be positively present. Doing nothing, even though the person may be allowing the other person to do an act, is not consent unless the person has decided to waive their right not to have the act performed.

In contrast to the Mental View, the Performative View takes consent to be a communicative act, as opposed to an internal mental state. It draws on

20 Westen, above n 18, at 29.

21 At 29.

22 Heidi Hurd "The Moral Magic of Consent" (1996) 2 Legal Theory 121 at 126.

23 At 130.

24 Larry Alexander "The Ontology of Consent" (2014) 55 Analytic Philosophy 102 at 108. See also Larry Alexander "The Moral Magic of Consent (II)" (1996) 2 Legal Theory 165.

JL Austin's theory of performative speech acts, which are utterances that bring about the state of affairs they refer to (rather than just describing the state of affairs).[25] For instance, a speaker who says "I name this ship Queen Elizabeth" while smashing a bottle against the stern is not simply describing themself as naming the ship; they are performing the very act of naming the ship by saying those words.[26]

Similarly, on this view a person who says "I consent to X" is actually consenting to that act by that utterance; they are not merely reporting their mental state of consent.

Despite its roots in speech act theory, the Performative View does not require that consent be given by words. It can be given in any way that communicates that the person is consenting, from bodily acts like nodding or handing an item to a person who has asked if they can use it, to signing a contract or medical consent form.

In both the Mental View and the Performative View consent must positively exist, either as an expressive act or as a mental state. However, the Mental View and Performative View of consent will produce different results in some cases. Each will treat a person as giving consent in some cases where the other would not. Where a person mentally agrees to sexual activity but does not communicate their agreement, the Mental View will treat them as consenting but the Performative View will treat them as not consenting. Conversely, where a person expresses consent but mentally does not agree to the sexual activity, the Performative View will treat them as consenting, whereas the Mental View will treat them as not consenting.

Of course, in certain circumstances, such as when the expressed consent is the result of threats or fear, the Performative View may treat an expressed consent as vitiated. But where such circumstances do not exist an expressed consent will be treated as valid despite any mental lack of agreement. The likelihood of expressed consent being vitiated will depend upon how broadly the law defines the circumstances vitiating consent. One possible example is that a person may say yes to sexual activity without mentally agreeing to it because of a feeling of social pressure. There is evidence that some women experience feelings of social pressure to have sex, which sometimes result in them feeling that they have no real choice even as they express their agreement

25 JL Austin *How to Do Things with Words* (2nd ed, Harvard University Press, Cambridge, 1975) at 4–6.
26 At 5.

to sex.[27] Because this pressure comes from the broader social context, rather than the other person engaging in the sexual activity, the law might not treat it as vitiating consent.

In New Zealand there are cases supporting both views. In general, the courts appear to have proceeded on the assumption that the Mental View represents the law. The Supreme Court's finding in *Christian v R* that a positive expression of consent is not always necessary[28] supports the Mental View, as does the statement in *Isherwood* that "the approach is subjective, and the jury is required to assess the actual state of mind of a complainant to decide whether or not the complainant truly consented".[29]

While *Christian* is currently the leading authority on consent, there have previously been statements that support the Performative View. In *R v Cook* the Court of Appeal said:[30]

> If a woman is asked for intercourse and agrees to it a subsequent declaration by her that she had not consented to it, in the absence of any other circumstances, could not be accepted as evidence of non-consent. If she consented at the time it will not be to the point that she later states that she did not mean to or that her mind did not go with her consent unless there are circumstances which make it reasonably open to the jury to decide that her consent was vitiated by one of the features set out in s 128(1).

This statement appears to treat an expression of consent as providing valid consent even if the person mentally did not consent, unless it is vitiated by circumstances such as threats. The statement could alternatively be read as laying down a rule of evidence: while consent is mental, a subsequent declaration that the woman did not mentally consent will not constitute sufficient evidence of non-consent if she expressed her consent at the time. The use of the words "could not be accepted as evidence of non-consent" could be seen as supporting this view. But when the Court says "[i]f she consented at the time" and "her mind did not go with her consent", "consent" is clearly being used to refer to her expressed consent. In the latter reference "consent"

27 Nicola Gavey *Just Sex? The Cultural Scaffolding of Rape* (Routledge, Abingdon, 2005) at 9–10. For further discussion, including particular examples from interview research, see Chapter 4 of the same book.

28 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 [*Christian (SC)*] at [43].

29 *R v Isherwood*, above n 15, at [36].

30 *R v Cook* [1986] 2 NZLR 93 (CA) at 98. These features are now set out in s 128A of the Crimes Act.

is expressly contrasted with her mental state. So the better view is that the Court's statement does support the Performative View.

While the position of New Zealand courts has fluctuated as to what consent is, it appears that the Mental View has currently taken hold as the dominant conception of consent. However, our courts have failed to grapple with how these conceptions of consent allow defendants to rely on mistakes of law.

IV CONSENT AND MISTAKE OF LAW

A Defining a mistake of law

Section 25 of the Crimes Act provides: "[t]he fact that an offender is ignorant of the law is not an excuse for any offence committed by him or her". This codifies a venerable common law principle, expressed in the maxim *ignorantia juris non excusat* ("ignorance of the law is no excuse").[31]

Section 25 applies to mistakes of law as well as simple unawareness of the law. In *Cameron v R*, in the context of drug offending, the Supreme Court said:[32]

> Generally, however, s 25 and its equivalents in other jurisdictions have been applied with rigour and have been seen as excluding defences based on mistake as well as ignorance of law. In particular we are not aware of cases where a mistake as to the existence or application of the criminal law in respect of the defendant's conduct has been held to be a defence.

As the Supreme Court said, the mistake of law doctrine extends to mistakes about the application of the law. Even when the application of a statutory provision is treated as a question of fact for the purposes of appellate jurisdiction,[33] it will still be treated as a question of law for the purposes of the mistake of law doctrine.[34]

A Canadian case about whether certain investment contracts were securities provides an example of the mistake of law doctrine being applied to a mistake about the application of the law:[35]

31 Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [25.01]; and Bryan A Garner (ed) *Black's Law Dictionary* (9th ed, West, St Paul, 2009) at 815.

32 *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [78].

33 See *Brutus v Cozens* [1973] AC 854 (HL) at 861 per Lord Reid.

34 *Taylor v O'Keefe (The Nordic Clansman)* [1984] 1 Lloyds Rep 31 (QB) at 36.

35 *R v MacDonald* (1983) 42 AR 228 (ABCA) per McGillivray JA.

> It seems clear to me that Mr. MacDonald was not mistaken as to the existence of any facts. He was aware of exactly what he was doing. Every facet of what was occurring was present to his mind. What he did not know was that the very thing he was doing amounted to trading in securities.

Vandervort provides a helpful test for distinguishing mistakes of law and fact that makes clear the broad scope of the mistake of law doctrine:[36]

> "Was the accused aware in the requisite sense of what, described in empirical or socio-factual terms, he or she was doing or not?" If the accused had the requisite awareness, then any "mistake" or misapprehension of the legal status, legal description, or legal consequences of what he or she was doing is irrelevant to culpability.

While the principle is usually stated in terms of mistake of law not being a defence, it applies to elements of the offence as well as defences. For instance, in *Cameron* it was an element of the offences that the substance the appellants had imported, sold and possessed was a "controlled drug analogue",[37] but the Court held that the defendants could not rely upon a mistake about the interpretation of this definition.[38]

Generally a mistake of law will not negate mens rea. As the principle that a mistake of law is not a defence applies to the defendant's mental state, it is relevant to mens rea rather than the actus reus. Accordingly, allowing mistakes of law to negate mens rea would deprive the doctrine of any effect.

There are exceptional cases where a mistake of law will negate mens rea, such as where an offence requires a person to have acted without claim of right.[39] Claim of right means a belief that the defendant had a legal right to act as they had done.[40] As the offence is specifically defined to allow a mistaken belief about the law to be relied upon, the principle that a mistake of law is not a defence will not apply. The Supreme Court said in *Cameron* that there "may also be some leeway where the mistake involved a mixed issue of fact and law or relates to status", giving the example of a defendant who thought the

36 Lucinda Vandervort "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987) 2 Can J Women & L 233 at 256.
37 See Misuse of Drugs Act 1975, s 2(1)
38 *Cameron*, above n 32, at [80].
39 At [78].
40 See Crimes Act, s 3(1) (definition of "claim of right").

property he was damaging was his own (because of a mistake of law).[41] It noted that "[s]ituations in which such mistakes may provide a defence typically involve mistakes as to civil law, for instance as to ownership to, or other rights over, property".[42] The Supreme Court said it was not aware of cases outside these categories where mistake of law had been successfully relied on to negate mens rea.[43]

The effect of the mistake of law doctrine is that, if a belief in X will exculpate a defendant, the belief must be in X as defined by the law. If the defendant's belief was in something that is not-X as a matter of law, then it will be treated as a belief in not-X and will not exculpate the defendant. The fact that the defendant regarded it as a belief in X will not prevent the court from treating it as a belief in not-X.

B Mistake of law in the context of consent

A mistake about whether a person has consented to sexual activity can be either a mistake of fact or a mistake of law.[44] Where a defendant makes a mistake as to what the complainant said or did (for instance, because of mishearing or misunderstanding the meaning of a word), that will be a mistake of fact. That mistake of fact will be able to be relied on in defence of a criminal charge. But where a defendant misapprehends the legal meaning of consent, that will be a mistake of law. The defendant is not mistaken regarding the facts of what occurred, but whether those facts amount to consent in law. They have misunderstood the law regarding sexual consent, not what happened.

The Supreme Court of Canada has repeatedly applied the principle that a mistake of law is not a defence to issues of sexual consent.[45] As it said in *R v Barton*:[46]

> … to the extent an accused's defence of honest but mistaken belief in communicated consent rests on a mistake of *law* — including "what counts as consent" from a legal perspective — rather than a mistake of *fact*, the defence is of no avail …

41 *Cameron*, above n 32, at [78].
42 At [78].
43 At [78].
44 Vandervort, above n 36, at 287–298.
45 *R v Ewanchuk* [1999] 1 SCR 330 at [51]; *R v Barton* 2019 SCC 33, (2019) 435 DLR (4th) 191 at [96]–[100]; and *R v JA* 2011 SCC 28, [2011] 2 SCR 440 at [118].
46 *R v Barton*, above n 45, at [96]. The reference to "communicated consent" reflects the Canadian statutory provisions, but does not affect the general point.

A defendant thus cannot rely on a belief in consent that relies on a mistake of law. A defendant's belief in consent must be a belief in some factual circumstances that can constitute consent under the law. A defendant's belief that the factual circumstances constitute consent cannot be relied upon to defend a charge on the basis of mistake of law if it is not what the law regards as consent. Just as the defendants in *Cameron* could not rely on the belief that the substance was not a "controlled drug analogue" because it rested on a misinterpretation of the meaning of that term, a defendant cannot rely on a belief in consent that rests on a misinterpretation of the meaning of consent.

The mens rea of the offence is still met because there is no belief in consent as defined by the law. The law requires a belief in consent, but because the belief is not in consent as defined by the law it is treated as a belief in not-consent. None of the exceptions recognised in *Cameron* (to the principle that a mistake of law does not negate mens rea) are applicable in the case of mistakes of law about sexual consent. Allowing a mistake of law about sexual consent to negate mens rea would be inconsistent with the Supreme Court's recognition that, outside of these exceptional cases, a mistake of law will not negate mens rea.[47]

This is distinct from an approach which treats a mistake of law as making a belief in consent ipso facto unreasonable. The question of whether a defendant had a belief in consent is logically prior to whether the belief was reasonable: there can be no reasonable belief in consent without a belief in consent. If the defendant's putative belief in consent is based upon a misinterpretation of the legal concept of consent, the question of the reasonableness of the belief does not arise because the defendant had no belief in consent as the law defines it. Mistake of law goes to whether the belief is actually a belief in consent, not to its reasonableness. Most serious offences, after all, do not require a defendant's belief to be reasonably held in order to exculpate: their mens rea is subjective. Yet a mistake of law does not negate their mens rea. This also means that the principle that a mistake of law is not a defence will apply to sexual offences that do not require a belief in consent to be reasonable, such as indecent assault.

It is therefore crucial to understand what consent means when considering whether a defendant had a belief in consent. As McLachlin J has said, "[m]uch of the difficulty occasioned by the defence of honest but mistaken belief is related to lack of clarity about what consent entails".[48]

47 *Cameron*, above n 32, at [78].

48 *R v Esau* [1997] 2 SCR 777 at [64].

Unlike in Canada, there has been a lack of consideration by New Zealand courts of mistake of law in the context of sexual consent. The failure of the courts to consider this issue has, as I will show in the next section, allowed mistakes of law about consent to be relied on in defending rape charges.[49]

V THE SIX MISTAKES

I start by setting out the six mistakes of law about consent that I will discuss in this section:

i) that passivity or failure to protest can constitute consent;

ii) that believing the other person would probably, or might, agree to or welcome the sexual activity is a belief in consent (that is, believing that actual agreement is not required);

iii) that consent can be given at a time other than when the sexual act occurs;

iv) that sexual desire or pleasure is the same as consent;

v) that "no" means yes (that is, an expressed lack of agreement to a sexual act can amount to consent); and

vi) that there can be consent to sexual activity while a person is asleep, unconscious or so drunk they cannot choose whether or not to have sex.

A Passivity or failure to protest

Passivity or a failure to protest is expressly defined as not amounting to consent in s 128A(1) of the Crimes Act: "[a] person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity". Accordingly, it should be a mistake of law to treat silence or passivity as consent. But unfortunately, as I will discuss in Section VI(B) below, the courts have eroded this principle by introducing the notion of "relationship expectations" as a justification for treating silence or passivity as consent.

The Supreme Court of Canada has recognised this mistake of law. In *R v Ewanchuk* it said "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence".[50] The essence

49 The defendant, of course, only needs to raise a reasonable doubt to be acquitted.

50 *R v Ewanchuk*, above n 45, at [51].

of this mistake of law is the failure to recognise that consent must actually exist. That is because consent legitimises acts that would otherwise be wrongful. A person has a right to bodily autonomy. Sexual touching violates this right unless the person has given consent to it. The default state is that touching is not permitted. This mistake of law wrongly reverses the burden. It treats people as having a right to sexually touch others unless they have been told not to; but there is no such right. It also reflects the rape myth that victims will always resist or protest. In reality, many victims freeze, or fear the consequences of resisting or protesting.[51]

On the Performative View, there must be a positive communicative act constituting consent. Silence is not a communicative act. Similarly, on the Mental View the mental state must positively exist. Even if one could infer from a failure to protest or resist that a person does not have a mental state of objecting to the sexual act, this would not show that the person had a positive mental state consenting to the act. On both views, resistance or protest is therefore unnecessary for an absence of consent.

B Actual agreement

Consent requires actual agreement. A belief that a person would probably, or might, agree to or welcome the sexual activity if asked is not a belief in consent. Consent must be actual, not hypothetical. A person cannot give consent when they are unaware of the activities in prospect.

This follows from the Mental View's requirement that a person has to have the relevant mental state in order to consent. A person who lacks the mental state is not consenting even if they would consent if they were asked or were aware of the proposed sexual activity. Similarly, the Performative View requires an actual communicative act constituting consent, not just that the person would communicate their consent if they were asked or were aware of the proposed sexual activity.

As L'Heureux-Dubé J said in *R v Park*:[52]

> … it can be dangerous to assume that evidence capable of founding an honest belief on the part of the accused that the complainant *would* consent

51 Anna Möller, Hans Peter Söndergaard and Lotti Helström "Tonic immobility during sexual assault — a common reaction predicting post-traumatic stress disorder and severe depression" (2017) 96 AOGS 932.

52 *R v Park* [1995] 2 SCR 836 at [23].

> to sexual activity is informative of the real question at issue, which is whether the accused believed that the complainant *in fact* consented to that activity.

In *R v JA*, the majority of the Supreme Court of Canada emphasised that the complainant's actual consent is fundamental:[53]

> The jurisprudence of this Court also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not open to the defendant to argue that the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant. There is no defence of implied consent to sexual assault …

And, in *R v Getachew*, the High Court of Australia agreed:[54]

> An accused's belief that the complainant *may* have been consenting, even *probably was* consenting, is no answer to a charge of rape. It is no answer because each of those forms of belief demonstrates that the accused was aware that the complainant might not be consenting or, at least, did not turn his or her mind to whether the complainant might not be consenting.

It might be suggested that this decision depended on the wording of the Victorian legislation, which defined the fault element for rape as "being aware that the person is not consenting or might not be consenting" or "not giving any thought to whether the person is not consenting or might not be consenting".[55] However, the same result can be justified on ordinary principles of criminal law. As McLachlin J said in *R v Esau*, ambiguity cannot be taken as the equivalent of consent:[56]

> If a person, acting honestly and without wilful blindness, perceives his companion's conduct as ambiguous or unclear, his duty is to abstain or obtain clarification on the issue of consent. This appears to be the rule at common law. In this situation, to use the words of Lord Cross of Chelsea in *Morgan*, *supra*, at p. 203, "it is only fair to the woman and not in the least unfair to the man that he should be under a duty to take reasonable care

53 *R v JA*, above n 45, at [47].
54 *R v Getachew* [2012] HCA 10, (2012) 248 CLR 22 at [27].
55 Crimes Amendment (Rape) Act 2007 (Vic), s 38(2).
56 *R v Esau*, above n 48, at [80].

> to ascertain that she is consenting to the intercourse and be at the risk of a prosecution if he fails to take such care". As Glanville Williams, *Textbook of Criminal Law* (1978), at p. 101, put it: "the defendant is guilty if he realised that the woman might not be consenting and took no steps to find out".

C The temporal dimension

Consent must exist at the time the sexual act occurs. On the Mental View, the relevant mental state must exist at the time the act occurs. On the Performative View, the relevant communicative act must have occurred at the time the act occurs. This reflects the fact that sexual consent is situation-specific. As Lady Hale has said:[57]

> My Lords, it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.

In *R v Adams*, the Court of Appeal (quoting the *Criminal Jury Trials Benchbook*) said: "[t]he material time when consent, and belief in consent, is to be considered is at the time the act actually took place".[58]

Similarly, in *Ewanchuk* the Supreme Court of Canada found that consent is determined at the time the sexual act occurred.[59] In *JA*, where the defendant had choked the complainant during sex but claimed she had given prior consent to the sexual activity that occurred while she was unconscious, it affirmed "there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred".[60] And in *Park*, L'Heureux-Dubé J stated:[61]

> … it is important to recall that the two individuals' stories are only relevant to guilt or innocence of sexual assault in so far as they relate in some way to the circumstances affecting the parties at the time of the alleged assault.

57 *R v C* [2009] UKHL 42, [2009] 1 WLR 1786 at [27].
58 *R v Adams* CA70/05, 5 September 2005 at [48].
59 *R v Ewanchuk*, above n 45, at [26].
60 *R v JA*, above n 45, at [47].
61 *R v Park*, above n 52, at [23].

Consent therefore cannot be inferred on the basis of prior sexual activity or the complainant's promiscuity. In *Barton*, the Supreme Court of Canada identified this as a mistake of law:[62]

> The law prohibits the inference that the complainant's prior sexual activities, by reason of their sexual nature, make it more likely that she consented to the sexual activity in question … Accordingly, an accused's belief that the complainant's prior sexual activities, by reason of their sexual nature, made it more likely that she was consenting to the sexual activity in question is a mistake of law.

In *B (SC12/2013) v R*, the majority of the Supreme Court likewise identified the idea that the complainant "is the kind of person who would be more likely to consent to the activity which is the subject of charges" as one of the "erroneous lines of reasoning" that the rape shield law contained in s 44 of the Evidence Act 2006 was designed to prevent.[63]

Consent must exist throughout the sexual activity. As L'Heureux-Dubé J said in *Park*, "consent, even if given at one point, may be withdrawn at any time".[64] A person who fails to stop having initially consensual sex after the other person withdraws consent is guilty of rape. This is made clear by the definition of "sexual connection" (which is used in defining the offence of sexual violation) as including "the continuation of connection of a kind described in [the other paragraphs of the definition]".[65] This codifies the decision of the Privy Council in *R v Kaitamaki*.[66]

The converse point is perhaps less well appreciated. The fact that a person gives consent during the activity does not prevent it from having initially been an assault. This means that consent must have been obtained when the sexual act begins or else it will be an assault. For instance, if a person initiates a sexual act that takes the other person by surprise, the fact the other person reacts

62 *R v Barton*, above n 45, at [100].

63 *B (SC12/2013) v R* [2013] NZSC 151, 1 NZLR 261 at [53]; citing *Bull v R* [2000] HCA 24, (2000) 201 CLR 443 at [53]. Section 44 renders inadmissible evidence about "the sexual experience of the complainant with any person other than the defendant" unless it "is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it".

64 *R v Park*, above n 52, at [24].

65 Crimes Act, s 2(1).

66 *R v Kaitamaki* [1984] 1 NZLR 385 (PC).

positively once they have realised what is happening does not change the initial lack of consent.

This is because, on the Mental View, consent does not exist until the relevant mental state has been formed. When taken by surprise, a person will not have the relevant mental state at the first moment of the act. They will not have it until they realise what is happening, which will take time, however short that may be. Likewise, in the Performative View consent will not exist until a communicative act constituting it has occurred, which will not have happened at the outset of the sexual activity if the person is taken by surprise.

Of course, if someone has welcomed the sex despite their lack of initial consent, they are unlikely to make a criminal complaint. But the point may have a broader significance for cases where there is a contest between the complainant and defendant as to whether the complainant consented. Focusing on whether consent existed when the sexual act began may shift the focus from the complainant's behaviour during the sexual activity (for instance, when they resisted) to whether the defendant had sought consent beforehand.

D Desire and pleasure

As discussed in Section III, desire and consent are not the same. Among advocates of the Mental View, attempts to analyse consent in terms of the mental state of desire have given way to a view of consent as a choice or act of will. On the Performative View, a communicative act constituting consent does not depend on whether the person desires the sexual act.

Sexual consent illustrates the distinction between desire and consent well. To take some common examples, someone may desire to have sex with a person but not consent to it because:

i) they (or their prospective partner) are in a relationship and would be cheating on their partner;

ii) they believe that sex before marriage is immoral;

iii) they are worried about the risk of pregnancy or sexually transmitted infections;

iv) they are afraid of social or familial disapproval or stigma.

Conversely, a person may not desire to have sex but nevertheless consent to it because:

i) it would give their partner pleasure;

ii) they will receive money or other benefits for having it;

iii) they feel it would be awkward to decline the invitation to have sex;

iv) they feel social pressure to have sex.

As Robin West has argued, undesired sex may be harmful in many cases.[67] However, the harm of undesired but consensual sex is distinct from that of non-consensual sex.[68]

Pleasure is yet another distinct phenomenon. It is possible to derive pleasure from something that you do not desire to do and certainly do not consent to doing. This can happen in the sexual context. As stimulation of the genitals can produce an involuntary response, victims of sexual violence may experience sexual pleasure while they are being assaulted. This can often result in feelings of guilt, shame and confusion. It has also been used to discredit their accounts of sexual violence. One rape myth is that that someone who is truly being assaulted will not feel sexual pleasure and that pleasure indicates consent.[69]

The Court of Appeal has recognised the difference between desire and consent. In *Cook*, it said: "[t]here is a difference between not wanting intercourse and consenting or agreeing to it".[70] The converse is equally true: there is a difference between wanting intercourse and consenting to it.

Research indicates that men confuse women's sexual desire with consent.[71] It also suggests that men misperceive women's friendly behaviour as sexual interest or desire.[72] This means that, in the absence of directions from judges on the difference between consent and desire, there is a risk that jurors may treat friendly behaviour by the complainant as indicating consent. Desire is also an internal and subjective state that can exist, or be absent, without any

67 Robin West "Sex, Law and Consent" in Franklin G Miller and Alan Wertheimer (eds) *The Ethics of Consent: Theory and Practice* (Oxford University Press, Oxford, 2010) 221 at 233–240.

68 At 227–228.

69 David Finkelhor and Kersti Yllö *License to Rape: Sexual Abuse of Wives* (Free Press, New York, 1985) at 122–126.

70 *R v Cook*, above n 30, at 98.

71 Ashton M Lofgreen and others "Situational and Dispositional Determinants of College Men's Perception of Women's Sexual Desire and Consent to Sex: A Factorial Vignette Analysis" (2017) 36(2) J Interpers Violence 1064.

72 Coreen Farris and others "Sexual coercion and the misperception of sexual intent" (2008) 28 Clin Psychol Rev 48.

external manifestation. This makes it very easy for defendants to claim that they thought the victim desired sex, whether or not they actually did believe this. These factors make this a particularly dangerous mistake of law.

E "No means yes"

In *Ewanchuk*, the Supreme Court of Canada observed it was a mistake of law for a defendant to "rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact".[73]

The Canadian Criminal Code contains a provision stating that consent does not exist if "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity".[74] New Zealand does not have an equivalent provision. It might therefore be thought that this is not actually a mistake of law in New Zealand. After all, on the Mental View consent depends purely on the relevant mental state. It is theoretically possible for someone to have that mental state while expressing a lack of consent.

In contrast, on the Performative View this clearly involves a mistake of law. Whether consent has been given is determined by the communicative act, which here expressed a lack of consent. But the defendant is ignoring this communicative act and instead presuming that internally the complainant is actually consenting. In other words, the defendant is relying on the Mental View, not the Performative View.

There are several reasons why it should still be regarded as a mistake of law, even if the Mental View is preferred by New Zealand courts.

First, the idea that women say no but mean yes is a rape myth.[75] Our rape law has been reformed to combat rape myths in various ways, including through the rape shield law and the provisions specifying when consent does not exist. While more work undoubtedly remains to be done to combat rape myths, these provisions reflect a legislative policy that rape myths have no place in our criminal justice system. The courts have also recognised this.[76]

73 *R v Ewanchuk*, above n 45, at [51].

74 Criminal Code RSC 1985 c C-46, s 153.1(3)(d).

75 Gavey, above n 27, at 166; Lynne Henderson "Rape and Responsibility" (1992) 11 Law and Philosophy 127 at 141–142.

76 See *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [79]; and *R v Taylor* [2018] NZDC 4854 at [14](d).

Reasoning about consent that is based on a rape myth should therefore be regarded as a mistake of law.

Secondly, it would be odd if treating failure to protest as consent was a mistake of law (under s 128A(1)), but treating protest as consent was not. There is no reason that Parliament would have sought to proscribe the former but not the latter. It is more likely that Parliament thought it went without saying that no did not mean yes.

Thirdly, "no means yes" reasoning will almost invariably involve other mistakes of law. It will frequently involve reasoning based on the past sexual activities or promiscuity of the victim, or other things they have done in the past. This involves the mistake of law that consent can be at a time other than when the sexual act occurs. As illustrated in the two cases that I discuss in Section VI(C), it may also result from the conflation of sexual pleasure or desire with consent.

Even if no means yes reasoning is not strictly a mistake of law, it cannot be reasonable to believe that someone is consenting when they are telling you that they are not.[77] Nor can reliance on rape myths be reasonable. It should therefore not be possible to claim a reasonable belief in consent in the face of the victim saying no.

F Capacity to consent

It is a mistake of law to think that there can be consent to sexual activity when a person is asleep, unconscious or so drunk that they cannot choose whether or not to have sex. This is made clear by s 128A(3) and (4) of the Crimes Act:

> i) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.
>
> ii) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

That this is a mistake of law follows, on the Mental View, from the fact that a person in this situation cannot form the necessary mental state to consent and, on the Performative View, from the person's inability to perform the necessary

77 An exception is in the context of BDSM with safe words. In this context, the participants have changed the linguistic conventions so that "no" does not have its normal meaning and the safe word has the meaning usually expressed by "no".

communicative act. The notion of "advance consent" — that consent could validly be given before the person becomes unconscious, asleep or too drunk to consent — runs into the temporal mistake of law discussed in Section V(C).

The relevance of a mistake of law in this context was noted by Fish J in the Supreme Court of Canada in *JA*, a case where the defendant claimed the complainant had given him advance consent to have sex with her when she was unconscious. The majority of the Supreme Court rejected the notion of advance consent to sex. The defendant did not rely on reasonable belief in consent (as opposed to actual consent), but Fish J commented in his dissenting opinion on the majority's approach:[78]

> The *mens rea* would be conclusively established as well. An honest but mistaken belief in consent, however reasonable in the circumstances, would neither preclude prosecution nor bar conviction. If my colleague's view is correct, the accused's error would constitute a mistake of law, which cannot avail as a defence.

VI THE SIX MISTAKES (NOT) APPLIED

A R v S *and consent when asleep or unconscious*

Unfortunately, New Zealand courts have not followed their Canadian counterparts in recognising the relevance of mistake of law in the case of sleeping or unconscious complainants. In *R v Pakau*, the Court of Appeal did state that there could not be a reasonable belief in consent when the complainant was asleep or unconscious, though it did not frame this in terms of mistake of law: "If sexual intercourse took place when the complainant was asleep or unconscious she could not have consented and Mr Pakau could not reasonably have considered that she did consent".[79]

But in *R v S* a Full Court of the High Court retreated from this position. The defendant said the complainant had told him that he could continue to have sex with her if she fell asleep or became unconscious during it, provided he woke her up before he ejaculated. The complainant denied saying this.[80] The Court unconvincingly distinguished *Pakau*:[81]

78 *R v JA,* above n 45, at [118].
79 *R v Pakau* [2011] NZCA 180 at [30].
80 *R v S* [2015] NZHC 801 at [14].
81 At [30]–[31].

> These comments need to be viewed in light of the facts of the case. …
> … The Court of Appeal therefore made the observations upon which the Solicitor-General now relies in the context of a case involving a complainant being sexually assaulted by a total stranger after being accosted in the street whilst she was extremely drunk. We consider they need to be viewed in that context. There is nothing in the judgment to suggest that the Court intended to establish a principle of universal application in cases where a defendant is charged with sexually violating a complainant who is asleep or unconscious.

The Court said:[82]

> Generally speaking, however, it should not be difficult for the Crown to prove absence of reasonable belief in consent in cases where the sexual activity occurs whilst the complainant is asleep or unconscious.
> … Cases in which a defendant will be able to successfully advance a defence based on reasonable belief in consent where the complainant is asleep or unconscious are likely to be extremely rare. It is difficult, in fact, to conceive of many situations in which it will succeed. It will probably only be available in unusual circumstances such as the present, where the particular nature of the relationship between the parties means that they have had cause to discuss and reach agreement about what should occur if either of them should fall asleep or become unconscious during sexual activity.

This case provides a particularly clear example of a failure to consider the relevance of mistake of law. It was accepted that any advance consent given by the complainant to sexual activity while asleep or unconscious was not legally valid, as consent had to be assessed at the time the act occurred.[83] Yet the High Court allowed the defendant to found a reasonable belief in consent on this advance consent. Considered through the lens of mistake of law, the matter becomes clear: the defendant could not have a reasonable belief in consent because he did not have a belief in something that could constitute consent as a matter of law.

82 At [36]–[37].
83 At [15].

B Christian, Jones *and "relationship expectations"*

1 Christian v R

Christian v R concerned the implications of s 128A(1) of the Crimes Act in the context of reasonable belief in context.[84] That section provides a "person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity".

Prior to the Court's decision in *Christian*, the Court of Appeal in *R v Tawera* had said s 128A(1) was irrelevant when considering reasonable belief in consent:[85]

> … we find it difficult to see how on an objective appraisal it can be said absence of belief in consent on reasonable grounds has been established beyond reasonable doubt. On analysis, there is nothing in the complainant's evidence, the surrounding circumstances, or the appellant's evidence which objectively indicated that the complainant was not consenting. … It may be that the jury became unduly concerned about the direction (correctly given) on s 128A and the fact that a failure to protest or offer physical resistance does not by itself constitute consent. That kind of consideration may of course be highly relevant to whether there was consent, but it does not really bear on the critical issue of belief in consent.

In *Ah-Chong v R*, a majority of the Supreme Court (McGrath, Glazebrook and Arnold JJ) questioned the correctness of this decision in obiter comments. Their Honours stated:[86]

> It is arguable that to allow an honest belief in consent based simply on the complainant's passivity or failure to resist to operate as a defence would undermine significantly the policy that underlies s 128A(1).

After quoting the passage set out above from *R v Tawera*, their Honours observed:[87]

> The Court's focus in this passage on there being nothing to indicate that the complainant was not consenting is arguably at odds with the principle that

84 *Christian v R* [2016] NZCA 450 [*Christian (CA)*]; and *Christian (SC)*, above n 28.
85 *R v Tawera* (1996) 14 CRNZ 290 (CA) at 293.
86 *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [55].
87 At [55].

> s 128A(1) appears to be based upon, namely, that consent to sexual activity is something which must be given in a positive way.

Referring to a hypothetical case where an accused said they believed the complainant was consenting because of their passivity, their Honours said:[88]

> It might be said in such a case that the accused's belief was not based on reasonable grounds given that lack of protest cannot, by law, constitute consent, so that the accused could not rely on it. But even if this analysis does apply where the charge is sexual violation, it may not where an accused is charged with indecent assault, because a belief in consent in that context need only be honestly held to provide a defence — the reasonable grounds requirement does not apply.

However, the point is that if lack of protest cannot constitute consent as a matter of law, a belief that the complainant was consenting because they did not protest is not a belief in consent as it is defined by law. Whether the offence allows for acquittal on the basis of honest belief in consent or only reasonable belief in consent is irrelevant, because there is no belief in consent as the law understands it.

In *Ah-Chong* their Honours referred to the Supreme Court of Canada's conclusion in *Ewanchuk* that a belief in consent based on a failure to protest involved a mistake of law and therefore could not be relied upon.[89] This appears to be the only occasion on which a New Zealand court has mentioned mistake of law in the context of sexual consent. However, their Honours did not endorse or comment on this approach.

The Court of Appeal in *Christian* overruled *Tawera* and endorsed the observations in *Ah-Chong*:[90]

> A lack of protest or resistance will not, on its own, suffice. There must be some evidence of positive consent, either by words or conduct, to provide a narrative capable of supporting the possibility of a reasonable belief in consent.

88 At [54].
89 At [56].
90 *Christian (CA)*, above n 84, at [60].

The Court explained:[91]

> … if lack of protest cannot, by law, constitute consent, it is illogical and inconsistent to hold nonetheless that silence or physically passivity can still provide a sufficient platform for a reasonable belief in the same consent.

However, on appeal, the Supreme Court retreated from this position.

In a minority judgment, Elias CJ considered that "[s]ection 128A is concerned with consent, not with reasonable belief in consent".[92] While its policy might be relevant in assessing reasonableness, it was not determinative:[93]

> A reasonable belief in consent may exist even though s 128A makes it clear that the complainant's actual consent is not given "just because" of failure to protest or resist. Whether the defendant has a reasonable belief that the complainant consents turns on what he believes and whether it is reasonable in context (in which the policy of choice behind s 128A may well be relevant). It does not depend on the meaning of consent.

Chief Justice Elias' statement that whether a defendant has a reasonable belief in consent "does not depend on the meaning of consent" ignores the relevance of the mistake of law doctrine. Given that a mistake of law is not a defence, the existence of a reasonable belief in consent does depend on what consent means.

The majority (William Young, Glazebrook, O'Regan and Ellen France JJ) rejected the approach taken in *Tawera*:[94]

> The word "consent" must have the same meaning when referring to the existence of consent and to the existence of a reasonable belief in consent. If a failure to protest or resist cannot, of itself, constitute consent, a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent.

Their Honours' observation resonates with the mistake of law analysis, without explicitly referring to it.

91 At [50] (footnote omitted).
92 *Christian (SC)*, above n 28, at [105].
93 At [105] (footnotes omitted).
94 At [32].

The majority also rejected the Court of Appeal's approach, which "went too far in stating that consent must be expressed in a positive way, as if that was a requirement regardless of the circumstances".[95] Their Honours held that the wording of s 128A(1) means that consent cannot be inferred only from the fact a person does not protest or offer physical resistance:[96]

> There must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent. As mentioned earlier, we see this as equally applicable to the evaluation of the issue of reasonable belief in consent.
>
> One such factor could be a positive expression of consent. But there could be others. For example, if the participants in the sexual activity are in a relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted.

The only circumstance referred to in either *Christian* or subsequent cases as transforming passivity into consent is relationship expectations, and I find it difficult to see what other circumstances could do so. But, as I explain in the following section, the idea of relationship expectations relies on several mistakes of law.

2 *Jones v R*

The Court of Appeal relied on *Christian*'s notion of relationship expectations in *Jones v R*, which was a pre-trial appeal against the exclusion of certain evidence.[97] At issue was whether the evidence was relevant to consent and/or reasonable belief in consent. Judge Paul declined to admit all the evidence referred to in Mr Jones' application.[98] Mr Jones appealed, with leave, to the Court of Appeal.[99]

Mr Jones, his partner (Ms E) and the complainant were all close friends. The complainant said that, after an evening celebrating a significant occasion at a restaurant and a friend's flat, she became heavily intoxicated and was put

95 At [43].
96 At [45]–[46] (footnote omitted).
97 *Jones v R* [2018] NZCA 288 at [2].
98 At [15].
99 At [3].

to bed at that flat by a friend. Mr Jones later woke her and invited her to spend the night at the apartment he shared with Ms E. The complainant accepted his offer and returned to their apartment. She got into bed next to Ms E (who was asleep) and went to sleep, but awoke to find Mr Jones removing her pants and saying she could not sleep in her clothes. She fell asleep again, but soon awoke to find Mr Jones getting into bed beside her. Mr Jones then "fondled her bottom and breasts … and digitally penetrated her" while "she lay still and pretended to be asleep".[100]

Mr Jones' case was the complainant engaged in a consensual threesome with him and Ms E or, in the alternative, that he "honestly and reasonably believed she was consenting".[101] He denied digitally penetrating her and said the other sexual activity was consensual.[102] He said that, when they returned to the apartment, the complainant and Ms E embraced before the complainant took her pants off. Mr Jones went to have a shower and, when he returned, found the complainant and Ms E "making out". He got into bed and the complainant kissed him. He alleged the sexual activity that followed was consensual.[103]

Mr Jones sought leave to lead evidence and question the complainant about various matters relating to the history of her friendship with himself and Ms E. This evidence was said to demonstrate her flirtatious behaviour towards them and her interest in having a threesome with them.[104] Mr Jones' principal submission was that the proposed evidence was "relevant to the critical trial issues of consent or reasonable belief in consent".[105] He also advanced a secondary argument that the evidence was relevant to the complainant's credibility, as she had made a statement to police saying that she had no sexual interest in women.[106] However, the Court did not address this secondary argument.

The evidence included:

i) When out socialising with Mr Jones and Ms E, the complainant referred to it as being a "date" and described herself as their

100 At [5]–[7].
101 At [8].
102 At [1].
103 At [9].
104 At [13].
105 At [22].
106 At [22].

"girlfriend". She often referred to herself as the third member of their relationship.[107]

ii) During another occasion in 2017 when the complainant was having dinner at the apartment, Ms E and Mr Jones told the complainant of their plans to experiment more by inviting another woman into their relationship. They revealed how they had been exploring the "swing lifestyle" during a recent overseas trip and how they were considering doing the same in New Zealand. The complainant was very interested in this and started being flirtatious whenever she was in their company.[108]

iii) During another occasion in 2017 Ms E mentioned to the complainant that a mutual female friend would be staying the night. The complainant responded that Ms E had denied the complainant a couple of times. The complainant said to Mr Jones and Ms E that she would have a threesome with them.[109]

iv) On the night of the alleged offending, the complainant and Ms E had kissed at the flat party and then engaged in sexual intimacy at the apartment.[110]

The Court admitted all this evidence. As to (i), it said this evidence helped establish Mr Jones' contention about the close friendship and that it was developing into a sexualised relationship:[111]

> These statements mark the beginning of this development. They form part of an unbroken chain of events which must be considered in their entirety to properly assess whether Mr Jones reasonably believed the complainant willingly participated in a sexual encounter with him and Ms E. Adopting the Supreme Court's formulation in *Christian v R*, quoted at [35] above, Mr Jones' case is that "the participants in the sexual activity [were] in a relationship in which expectations [had] developed over time and the sexual activity [was] in accordance with those expectations". We are therefore satisfied the evidence is relevant.

107 At [21](d).
108 At [13](g). The evidence about what Ms E and Mr Jones had said was not opposed, but the evidence about the complainant's reaction was.
109 At [21](h).
110 At [49].
111 At [38].

It admitted the evidence in (ii) based on similar reasoning.[112]

The Crown submitted that the evidence about the complainant's expressed interest in having a threesome with Mr Jones and Ms E could not support a reasonable belief in consent because it was not contemporaneous.[113] The Court rejected this argument, stating there: "was nothing to indicate that the complainant's previously expressed interest in participating in a threesome with them had changed".[114] The Court concluded:[115]

> … it is difficult to see how a statement by the complainant that she was willing to engage in a threesome with Ms E and Mr Jones could be anything other than highly relevant to the issue of honest or reasonable belief in consent on these unusual facts.

The Court admitted the evidence regarding the kissing and sexual intimacy between the complainant and Ms E, stating:[116]

> It bears directly on the issue of whether the Crown can prove that Mr Jones did not honestly and reasonably believe the complainant consented to participate in a threesome at the apartment a short time later.

3 Discussion

The idea of relationship expectations involves a combination of three mistakes of law, that:

i) consent can be at a time other than when the sexual act occurs;

ii) believing that the other person would probably, or might, agree to or welcome the sexual activity is a belief in consent (that is, believing that actual agreement is not required); and

iii) passivity or failure to protest can constitute consent.

Relationship expectations are generated by past conduct or statements, but this fails to respect the principle that consent is situation-specific and must

112 At [43].
113 At [46].
114 At [47].
115 At [48].
116 At [49].

be determined at the time of the act in question. Judge Paul put this well, saying that the "divide between those events and the critical time for consent or reasonable belief simply cannot be bridged by reliance on those facts".[117] It involves the impermissible inference that prior sexual activity means that the person is consenting. Another mistake is suggested by the name "relationship expectations": an expectation that someone would consent is not the same as actual consent. Past conduct may be able to generate expectations, but it cannot generate actual consent. Without these two mistakes of law we are left simply with passivity or failure to resist, which it is a mistake of law to treat as consent.

Jones stretches the concept of relationship expectations to breaking point. It is no exaggeration to say that there was neither a relationship nor expectations in *Jones*. The complainant and Mr Jones were not in a sexual or romantic relationship, notwithstanding her light-hearted comments about being the third member of the relationship. It is difficult to understand how expectations about sexual activity can "have developed over time" if the parties have never engaged in sexual activity.[118] If past expressions of interest in a threesome and flirting can give rise to "relationship expectations", then it would seem that the bar is so low that any sexual activity or expression of sexual interest with a person can give rise to relationship expectations.

The Court's reasoning undermines the idea that previous flirtation or sexual interaction between the parties does not mean that there is consent. It risks taking us back to a time when "date rape" or acquaintance rape was not recognised as "real rape".[119] Decades of feminist activism and law reform have sought to change this perception. It is concerning that some judges still appear to cling to the idea that prior flirtation justifies a defendant presuming that the complainant consents to sexual activity.

The Court of Appeal repeatedly focused on Mr Jones' belief in consent and its reasonableness when considering whether the evidence should be admitted. But even insofar as the evidence was relied upon to prove that the complainant

117 *R v Jones* [2018] NZDC 9461 at [29].

118 The phrasing used in *Christian (SC)*, above n 28, at [46].

119 See Susan Estrich *Real Rape* (Harvard University Press, Cambridge, 1988); Lois Pineau "Date Rape: A Feminist Analysis" (1989) 8 Law and Philosophy 217; David M Adams "Date Rape and Erotic Discourse" in Leslie Francis (ed) *Date Rape: Feminism, Philosophy, and the Law* (Penn State University Press, University Park, 1996) at 27; and Peggy Reeves Sanday *A Woman Scorned: Acquaintance Rape on Trial* (University of California Press, Berkeley, 1997).

had actively participated in the sexual activity, this involved the impermissible inference that the Supreme Court of Canada identified as a mistake of law in *Barton*: "that the complainant's prior sexual activities, by reason of their sexual nature, make it more likely that she was consenting to the sexual activity in question".[120]

The risk of impermissible reasoning by a jury was particularly great in *Jones* given the evidence involved less conventional sexual activity; a threesome and sexual activity with people in a relationship. There was a risk the jury would decide that the complainant was promiscuous and therefore would have consented, which is a mistake of law. Judge Paul was alive to this. The Court of Appeal noted the Judge "was particularly concerned that the admission of this evidence would risk impermissible reasoning by the jury".[121] The Judge considered that evidence and questioning about the complainant and Ms E being engaged in sexual activities at the time Mr Jones got into bed "invites illogical thinking that just because those women were kissing each other they must naturally be inviting [Mr Jones] to join them in their sexual activity".[122]

The evidence about sexual activity between the complainant and Ms E should have been presumptively excluded by the rape shield law, which applies to "the sexual experience of the complainant with any person other than the defendant".[123] However, the Court of Appeal said the rape shield law did not apply to evidence about the threesome:[124]

> This evidence relates to the complainant's sexual experience with Ms E and Mr Jones together. The sexual experience is the same and is not divisible. It is not sexual experience of the complainant *with a person other than the defendant*, as required to engage the section.

But, on the plain words of the section, it does apply. Ms E was a "person other than the defendant". The sexual activity was with her. The fact that Mr Jones was also involved in the threesome does not change this. If the sexual activity was indivisible, it should all have been subject to the rape shield. The Court's

120 *R v Barton*, above n 45, at [100].
121 *Jones v R*, above n 97, at [15].
122 *R v Jones*, above n 117, at [30].
123 Evidence Act 2006, s 44(1).
124 *Jones v R*, above n 97, at [40].

decision rewrites the section by effectively adding "unless the defendant was also involved in the sexual activity" to the provision.

The Court also held that evidence of the sexual activity between the complainant and Ms E in the bed was not covered by the rape shield law, even though Mr Jones was not present at that time, and observed "'[s]exual experience' indicates something that happened on a previous occasion".[125] This statement is inconsistent with many Court of Appeal decisions applying the rape shield law to sexual activity with another person that occurred subsequent to the offending.[126] The wording of the section makes no reference to the time at which sexual activity occurs. The broader interpretation is supported by the purpose of the provision, as the rape myths that it seeks to combat are not limited to sexual activity before the alleged offending. Further, the Court of Appeal had said earlier in its judgment in *Jones* that the provision was to be interpreted broadly so as to fulfil its purpose.[127]

It is concerning that the Court of Appeal narrowed the rape shield law to make it easier to introduce evidence about threesomes, which are particularly likely to involve a risk of prejudicial reasoning about promiscuity. As such reasoning involves the temporal mistake of law by basing a belief in consent on past behaviour, the Court should have been trying to prevent it.

The admission of irrelevant and prejudicial evidence in *Jones* shows that the extension of the rape shield law to sexual experience with the defendant, as proposed in the Sexual Violence Legislation Bill that is currently before Parliament,[128] cannot come too soon. However, this may not eliminate the problem, given there would remain a judicial discretion to admit evidence where it is of such direct relevance that exclusion would be contrary to the interests of justice. As Elisabeth McDonald has noted, the existence of a judicial discretion to admit sexual history evidence is problematic if judicial assessment of evidence is infected by rape myths.[129] Indeed the Court in *Jones* indicated it would have admitted some of the evidence even if it had decided that the rape shield law applied.[130] If judges are still relying on mistakes of law

125 At [50] (footnote omitted).

126 See *Singh v R* [2016] NZCA 552; *Wallace v R* [2018] NZCA 2; *Cowx v R* [2013] NZCA 571; and *R v Palmer* CA202/05, 11 April 2006.

127 *Jones v R*, above n 97, at [32]; citing *Nguyen v R* [2011] NZCA 8, [2011] 2 NZLR 343 at [20]–[24].

128 Sexual Violence Legislation Bill 2019 (185–2), cl 8.

129 Elisabeth McDonald "From 'Real Rape' to Real Justice? Reflections on the Efficacy of More Than 35 Years of Feminism, Activism and Law Reform" (2014) 45 VUWLR 487 at 493–494 and 500–503.

130 *Jones v R*, above n 97, at [48]–[50].

and rape myths to treat prior flirtation and sexual interaction as providing a basis for a reasonable belief in consent, the presumptive exclusion in the rape shield law may not stop them from admitting evidence of this.

C Sharma *and* B *on desire and no meaning yes*

In *Sharma v R*, Mr Sharma had been acquitted of two charges of unlawful sexual connection but convicted on one charge of rape.[131] He appealed on the basis that the verdicts were inconsistent.[132] The Court of Appeal rejected this argument:[133]

> The jury could well have accepted that the complainant said "No" and "Stop" during the first episode, but found that the appellant reasonably believed that she was consenting since the flatmate also thought that consensual sexual activity was taking place.

The flatmate had testified that he heard "pleasurable noises" coming from the bedroom.[134]

But the only evidence here was of sexual pleasure or at most desire, not of consent. If Mr Sharma thought that this meant there was consent, he had made a mistake of law. Concerningly, the Court has given credence to the rape myth that real victims do not experience sexual pleasure. It has also allowed reliance on the rape myth that women say no but mean yes.[135] This should have been recognised as another mistake of law. The appellant's supposedly reasonable belief was based on nothing more than two legally impermissible rape myths.

B (CA862/2011) v R was also an appeal on the ground of inconsistent verdicts.[136] The appellant had been found not guilty of unlawful sexual

131 *Sharma v R* [2019] NZCA 462 at [1].
132 At [1].
133 At [19].
134 At [17].
135 Mr Sharma unsuccessfully sought leave to appeal to the Supreme Court, arguing that the Court of Appeal's view that "reasonable belief in consent in the first episode can co-exist with "no" and "stop" is a rape myth". He contended that the jury must not have believed the complainant's evidence beyond reasonable doubt, which would have affected their decision in relation to the second episode: *Sharma v R* [2020] NZSC 12 at [6].
136 *B (CA862/2011) v R* [2012] NZCA 602 at [4].

connection, but guilty of rape.[137] He and his wife were friends of the complainant.[138]

The complainant testified about what she had said to the appellant:[139]

> The gist of the complainant's evidence at the time Mr B had gone down and was licking her genitalia was to say things like "just stop it, don't be … stupid" and to tell Mr B "to stop it, … go away … don't do this". In particular, she said that she repeatedly told Mr B to think of his wife and family, to which on one occasion she said he responded: "Oh that's all gonna be over with soon anyway".
>
> By contrast, the complainant gave evidence that when Mr B put his penis into her vagina she told him "stop, stop, stop".

The complainant also said that she had tried to push the appellant away.[140]

The Court rejected the argument that the verdicts were inconsistent, stating that the jury could have found that there was either consent or reasonable belief in consent for the oral sex but not the sexual intercourse.[141] In relation to reasonable belief in consent, the Court explained:[142]

> In particular, the jury's not guilty verdict on the first count is explicable on the basis that the jury found Mr B had a reasonable, but mistaken, belief that the complainant was consenting to the oral sex by virtue of what she did — or did not do — despite what she was saying. As to her protestations, [counsel for the Crown] pointed out that most of them were directed toward her concern for Mr B's wife, who was one of the complainant's "closest friends". Those protestations could reasonably have been construed by Mr B as the guilty remarks of a willing, albeit conflicted, adulterer.

This confuses desire and consent. A person can desire to have sex with someone but not consent because the other person would be cheating on their partner. A "no" because it would involve cheating is no less valid than a "no" because of a lack of sexual desire. The complainant's references to her friend explain why she was not consenting; they do not cast doubt on her lack of consent. Even if

137 At [2].
138 At [6].
139 At [12]–[13].
140 At [14].
141 At [16].
142 At [39].

it could be inferred from this that the complainant desired to have sex with the appellant, his belief in consent would be based on a mistake of law resulting from the confusion of desire and consent.

This case again perpetuates the rape myth and mistake of law that no means yes. Telling the appellant "to stop it" and "just stop it" during the oral sex was just as unequivocal as saying "stop, stop, stop" during the sexual intercourse, yet the Court found a "contrast" in this. The Court focused on the complainant pushing the appellant away during the sexual intercourse, but ignored her statement that she tried to push him away during the oral sex. The only difference appears to be the references to his wife and children during the oral sex. The Court of Appeal has sent the very dangerous message that it is acceptable to ignore a woman's protests and even resistance if the defendant thinks "she really wants it".

Unusually, in these cases rape myths were deployed to uphold convictions and challenged by the defence. They illustrate Elisabeth McDonald's point that prosecutors can also reinforce rape myths.[143] As she notes, sometimes rape myths can help prosecutors in an individual case, but giving credibility to rape myths has wider costs to rape victims generally.[144]

VII A WAY FORWARD

How can we address the mistakes discussed in this article? I have four suggestions.

First, enact a statutory definition of consent. Even a definition based on the Mental View would be an improvement by reducing confusion and encouraging judges to focus on the meaning of consent. An example is the English definition of consent, which provides that "a person consents if he agrees by choice, and has the freedom and capacity to make that choice".[145] A definition based on the Performative View would be better. By providing that consent was constituted by a communicative act, the scope for a defendant to argue that they were mistaken about consent would be reduced. It would be harder to rely on mistakes of law and rape myths to form the basis of a reasonable belief.

143 Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 469. The book is available online at <www.canterbury.ac.nz>.

144 At 469.

145 Sexual Offences Act 2003 (UK), s 74.

Secondly, add a statutory provision clarifying that a belief in consent based on a mistake of law about consent cannot be relied upon. The mistakes of law discussed in this article could be included as examples of mistakes of law about consent. A statutory provision would force judges to pay attention to mistake of law in the sexual violence context.

Thirdly, develop model directions for juries on mistake of law. As juries decide most rape cases, it is necessary to explain clearly to them that mistakes about what consent is cannot provide a reasonable belief in consent. They should be given examples, such as the ones discussed in this article.

More broadly, some of the judgments considered in this article display a worrying lack of understanding of the dynamics of sexual violence and even rely on rape myths. Further education of judges on these matters is necessary. This could be done internally through courses and seminars run by the Institute of Judicial Studies. But a statutory requirement for such training would give greater security that it will occur. The Canadian Government currently has a bill before the House of Commons that would require this.[146] Despite suggestions to the contrary,[147] judicial independence is not threatened by requiring judges to undergo training to combat prejudices or ignorance. Indeed the rule of law and public confidence in the judiciary require that judicial biases be addressed.

Nobody knows how many defendants are being acquitted because the courts are failing to apply the doctrine of mistake of law. There are many reforms that are needed to address our woeful rate of sexual violence convictions. But this, unusually, does not require a change in the law — it just requires courts to apply existing legal doctrines.

146 An Act to amend the Judges Act and the Criminal Code 2020 Bill C-3.

147 See Rosemary Cairns-Way and Donna Martinson "Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada" (2019) 97 Can Bar Rev 367 at 391–395.