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Sober Regrets and Shared Risk Taking: Navigating Intoxicated Consent and Rape in the Courtroom

Amanda Clough

Introduction

How do we protect the sexual autonomy of an intoxicated person? Alternatively, perhaps a more pressing question is whether we need to protect intoxicated people from their own decisions. When it comes to intoxication and rape, the law seems to mostly be concerned with protecting victims from decisions others have made for them, essentially removing their freedom and capacity to choose who, when, where and how to have sexual relations. Somehow, the criminal law has to navigate a way to respect an individual's right to seek out such relations, whilst also upholding their right to refuse.¹ It is with this giving or withholding of consent that we exercise our autonomy and navigate our lives.² As Wallerstein has pointed out:

“(positive) sexual autonomy is valuable only insofar as it allows a capable individual to make valuable decisions as to her sexual activity.”³

Whilst the introduction of a definition of consent within the Sexual Offences Act 2003 was welcomed, whether it has adequately encompassed the voluntarily intoxicated victim and accused is an area which has given the courts food for thought. The voluntarily intoxicated victim must rely only upon the standard consent definition contained in section 74 Sexual Offences Act 2003 unless they were unconscious when the sexual act was performed. It has been suggested that the decision in *Dougal*⁴ led to government concern if there is sufficient protection within the 2003 Act for victims who are vulnerable and genuinely lack capacity.⁵ However, what the courts have been unable to establish from the wording of the statutory definition is exactly where the line is to be drawn so that an individual who is not yet unconscious may have lost the capacity to give a meaningful and legal valid consent to sexual intercourse.

Involuntary but not voluntary

The Sexual Offences Act 2003 established a rebuttable presumption for the victim involuntarily intoxicated that consent will not be present;⁶ however, no such presumption has been laid out for victims who are responsible for their own intoxicated state. Although the government report 'Setting the Boundaries' suggested that intoxicated victims should be included alongside those who are asleep or unconscious,⁷ without mention of *how* they came to be intoxicated, this was not included in the 2003 Act for fear of 'malicious accusations'.⁸ This has caused academics to recognise the Report as being much more progressive than the legislation we were finally left with in

¹ C Elliott and C De Than, 'The Case For a Rational Reconstruction of Consent in Criminal Law', (2007) 70 Modern Law Review 225, 231

² H M Malm, 'The Ontological Status of Consent and its Implications for the Law on Rape', (1996) 2 Legal Theory 147, 151

³ S Wallerstein, 'A Drunken Consent is Still Consent – Or is it? A Critical Analysis of the Law on a Drunken Consent to Sex Following Bree', (2009) 73(4) Journal of Criminal Law 318-344, 335

⁴ Unreported, Swansea Crown Court (2005)

⁵ *Supra* n(1) 240

⁶ S75(2)(f)

⁷ Home Office, Setting the Boundaries: Reforming the Law on Sexual Offences, July 2000, Para 2.10.9

⁸ *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: A Consultation Paper* (Office for Criminal Justice Reform, London, 2006) 128, See C Gunby A Carline and C Beynon, 'Alcohol-Related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and its Impact on Practice', (2010) 74(6) Journal of Criminal Law 579-600, 584,

recognising the perils of twenty-first century courtship.⁹ However, even if it had been included in section 75, there would still be the same difficulty in deciding the amount of intoxication sufficient and insufficient to invalidate consent.¹⁰

Although this area of the law remains fraught with tension, it is not necessarily a common element. That is to say, cases where it is questioned if the victim had the capacity to consent are vastly outweighed by cases where it was questioned if the intoxicated victim did in fact consent at all, though it is speculated by some that such incapacity cases are under-represented because it is difficult to build a case in a situation where memory lapses are often prominent.¹¹ Though the cases of this nature which see a prosecution may be few, there is still a need to fully understand both when a person loses their capacity to consent through intoxication, and how to proceed when two people, under an 'intoxicated fog' at the time of the incident,¹² give very different accounts of whether or not consent was present. Essentially, we need to assess if there was no capacity to consent, or no consent despite capacity, and we do not have a clear road ahead.¹³ As the Home Office stated in their Report:

*"The law should be as clear as possible so that the boundaries of what is acceptable, and criminally culpable behaviour are well understood – especially in the difficult area of sexual relations"*¹⁴

It was also noted that this does not negate the role of the common law to develop and assess new issues as they arise,¹⁵ but is that the correct arena for intoxicated rape, given the majority of cases involve alcohol consumption? The silence of the Sexual Offences Act 2003 on rape accusations involving excessive drinking on the part of the victim (or perhaps the defendant too) is deafening. Leaving voluntarily intoxicated victims to be dealt with this way, while the involuntarily intoxicated victim is automatically presumed to have not consented to sexual relations, implies a hierarchy, with special protection for those who do not choose to intoxicate of their own accord.¹⁶ How does this mesh with the objective of the Sexual Offences Act 2003 to assist and encourage victims to come forward?¹⁷ The low conviction rates suggest that the law remains inadequate with plenty of room for improvement.¹⁸

Alcohol-fuelled Sexual Relations

The fact remains that many rape accusations involve a scenario where the victim was intoxicated, with one American study finding 60% of victims had consumed alcohol prior to the incident, with a

⁹ E Finch and V E Munro, 'Breaking-Boundaries – Sexual Consent in the Jury Room', (2006) 26 Legal Studies 303-320, 303 and 305

¹⁰ K Cole, 'Sex and the Single-Malt Girl: How Voluntary Intoxication Affects Consent', (2017) 78 Montana Law Review 155, 161

¹¹ Gunby et al, Supra n(6) 590

¹² V M Ryan, 'Intoxicating Encounters: Allocating Responsibility in the Law of Rape', (2004) 40 California Western Law Review 407, 407

¹³ R v Gael Tameu Kamk [2013] EWCA Crim 2335 [15]

¹⁴ Home Office, Supra n(7) Para 2.7.3

¹⁵ Ibid, 2.7.4

¹⁶ B Simpson, 'Why Has the Concept of Consent Proven so Difficult to Clarify?', (2016) 80(2) Journal of Criminal Law 97-123, 115

¹⁷ J Temkin and A Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults, and the Problem of Consent', (2004) Criminal Law Review 328-346, 329

¹⁸ J Elvin, 'Intoxication, Capacity to Consent, and the Sexual Offences Act 2003', (2008) 19 King's Law Journal 151, 154

much higher percentage of 81% within the student population.¹⁹ Alcohol plays a major part of adult social interactions in Western Society. One media outlet referred to such cases as going to ‘the heart of contemporary mores, and the place where alcohol, sexual adventurism and the law collide’.²⁰ Those who do choose to indulge and do so on a regular basis will likely be aware of the impact alcohol may have on their behaviour and decision-making process. Perhaps this is the goal for some; to lower their inhibitions and let their proverbial hair down. The difficulty comes when two people, who may have even consumed alcohol *together* have different recollections of ‘what happened next’. Although ‘acquaintance rape’ always means identifying the suspect is a much easier task, in reality it may be much more difficult to prosecute and convict.²¹ The American Model Penal Code’s Commentary notes that ‘liquor and drugs...are common ingredients in the ritual of courtship’.²² Kramer has even identified commercial companies openly depicting alcohol ‘as an aphrodisiac’.²³

When we talk about the capacity of an intoxicated person to choose whether or not to engage in sexual relations, some speculate that this may not only include not understanding the activities they are engaging in, but an ‘inauthentic’ consent which is out of character for the victim and will undoubtedly be heavily regretted when sober.²⁴ Is it just the capacity to understand that this is sexual intercourse, or is some ‘actual subjective deliberative process’ required too?²⁵ Bree appears to have set the threshold very high when it comes to this argument.²⁶

Capacity is often linked to concepts of knowledge and understanding, but this definition is more akin to issues of age and mental illness or disability²⁷ – much as the explanatory notes for the Sexual Offences Act 2003 explain the word ‘capacity’ within section 74 to cover.²⁸ In cases of intoxication, does capacity have a different meaning? As Firth notes, the Bench Book offers little guidance, simply stating that the jury decides on the issue of capacity.²⁹ This is true – it will depend on the facts, but what can we look for in the facts to *signify* incapacity?

We do not legally allow someone to get a tattoo whilst intoxicated, but this is likely akin with public opinion, as Goodman has noted.³⁰ This same opinion is unlikely to extend to making intoxicated consent to sex invalid, as long as we are capable of making up our minds.³¹ What we need to ask of the voluntarily intoxicated victim, or in fact, any intoxicated victim, is could she make a choice, and if yes, what did she choose? As the trial judge stated in *Kamki*:

“In a state of dim and drunken awareness, a person may not be in a condition to make choices”.³²

¹⁹ S Cowan, ‘*The Trouble With Drink: Intoxication, Incapacity, and the Evaporation of Consent to Sex*’, (2008) 41 Akron Law Review 899, 905

²⁰ R Ackland, ‘This Doesn’t Get to be Over for Me; The Rape Case That Put Consent on Trial’, *The Guardian*, 20th July 2017

²¹ Ryan, *Supra* n(12) 410

²² American Law Institute, *Model Penal Code and Commentaries*, 315 (1980)

²³ K M Kramer, ‘*Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rape*’, (1004) 47 *Stanford Law Review* 115, 123

²⁴ Cole *Supra* n(10) 156

²⁵ *ibid*

²⁶ Bree

²⁷ Gunby et al, *Supra* n(8) 582

²⁸ Explanatory Notes [139]

²⁹ G Firth, ‘*Not an Invitation to Rape: The Sexual Offences Act 2003, Consent and the Case of the Drunken Victim*’, (2011) 62 *Northern Ireland Legal Quarterly* 99, 107

³⁰ C Chambers Goodman, *Brigham Young University Law Review*, 57, 73

³¹ This particular phrase was used by Scarman LJ in *Lang* (1976) 62 Cr App R 50, 52

³² *R v Gael Tameu Kamki* [2013] EWCA Crim 2335 [17]

What would certainly be beneficial here is an indication as to what signifies when a person is in such a condition as to render them unable to make choices. As Elliott and De Than note, 'a legislative response to the meaning of capacity would be appropriate' for purposes of providing clarity, rather than situations it might cover.³³ In medical law, capacity requires an ability to comprehend or retain information material to making that decision.³⁴ Though the *Bree* decision is championed as the holy grail of voluntary intoxication and rape,³⁵ there remains no sure way of detecting if a victim is beyond the realm of making choices. Indeed, even if large quantities of alcohol have been consumed, the victim may remain absolutely capable of giving valid legal consent.³⁶ If we cannot have a 'grid system' as was noted in *Bree*, are there other physical precursors that may be used as a checklist? This will be discussed.

Bad Decisions

Many of the cases on alcohol-related rapes find a sympathetic ear in light of the victim and the situation they found themselves in. Being separated from friends,³⁷ trying to get home, and making decisions even the victim would deem 'bad' in retrospect. Bad decisions and regrets must be distinguished from the situation at the moment of penetration, as difficult as this can sometimes be. Regret seems to play a prominent role in discussion of false reporting. Though the victim may be responsible for getting drunk, they may not be responsible for their consent – if they consented at all.³⁸ However, if the victim did have capacity and did consent, that is a consequence of their voluntary intoxication they must deal with, even if regrettable.

It is noted that by Ryan that women take risks when intoxicated that they would normally avoid,³⁹ but this risk-taking may be just be one reckless aspect of the reckless act of intoxication itself. That is not to say that the victim is necessarily responsible for the circumstances that may come about. As Kramer speculates, the consumption of alcohol can interfere with the ability of a victim to remove themselves from a situation which is unwelcomed, or even dangerous.⁴⁰ If a person chooses to drink, or even get drunk, this does not mean they also choose to have sex,⁴¹ and the trauma of rape should never be marginalised over a victim's choices.⁴²

Double Standards

A prevalent problem, particularly in cases of the mutual voluntary intoxication of acquaintances, is that while the accused will be given the benefit of 'reasonable doubt' in assessing a situation while intoxicated, the victim will be held partially responsible for their own demise. Much as provoking conduct has traditionally relegated a murder charge to manslaughter, the alleged rape victim who is drunk, alone, and wearing little is also deemed accountable for this 'provocative conduct'.

Victim-Blaming and Accused Exculpation

³³ Elliot and De Than, *Supra* n(1)241

³⁴ *Re MB* (1997) 2 FLR 426, Sloss LJ

³⁵ C Dyer, 'Judge Says New Law on Rape and Alcohol is Unnecessary', *The Guardian* 27th March 2007

³⁶ A Reed, '*Rape and Drunken Consent*', (2007) 176 *Criminal Lawyer* 3-4, 3

³⁷ *R v H* [2007] EWCA Crim 2056

³⁸ Wallerstein, *Supra* n(3) 328

³⁹ Ryan, *Supra* n(12) 412

⁴⁰ Kramer, *Supra* n(23) 146

⁴¹ Firth, *Supra* n(29) 111

⁴² Gunby et al, *Supra* n(8) 97

In other areas of criminal law, cognition of the accused takes centre stage,⁴³ as opposed to behaviour control. If a defendant is intoxicated, we ask if they could form the necessary mens rea for the crime, rather than asking if they would have acted in the same manner had they been sober.

For the victims, their level of intoxication is also a very important fact. It could bring into play both memory loss and incapacity. The relevance here ends – why they chose to drink, what they chose to drink and where they chose to go are not necessarily relevant. However, this seems to be at the forefront of not only the jury's mind, but the judiciary too.⁴⁴ Though there may be evidentiary issues with alcohol-related memory-loss rape victims, this sends a very different message as to who is to blame for the assault. Rather than seeing the situation as the risk of rape being increased when a victim is intoxicated, the prevailing thought seems to be that if the victim created the situation, then they are responsible for it. A study in 2005 found that 30% of participants thought a woman was partially or wholly responsible if raped when intoxicated,⁴⁵ presumably because 'she is the author of her own misfortune'.⁴⁶

As Wallerstein infers, although getting drunk and therefore making yourself vulnerable may be an act of 'stupidity',⁴⁷ this does not diminish the responsibility of the accused, and if anything, should increase it. However, it is questionable if the defendant is responsible for the victim's drunken behaviour rather than just his own.⁴⁸ Ryan questions if intoxication 'inculpates or exculpates the man accused of rape'.⁴⁹ It is true to say that an intoxicated man may be 'less attuned' to the victim's desires when intoxicated,⁵⁰ but this is the risk he also takes with his choice to become intoxicated. Just as the victim is aware their behaviour may be affected, so is he.

Much of these thoughts may be linked to the stereotypical and very traditionalist views of men and women in patriarchal society. As Kramer notes:

"The traditional belief that men must be the sexual aggressors while women must try to appear chaste saying "no" even when they do not mean it, remains pervasive".⁵¹

Alcohol is often believed to increase the man's adherence to his gender role, whilst it has the opposite effect on the female victim, lowering her inhibitions and allowing her typically feminine behaviour to alter. Therefore, his culpability is reduced, whilst hers is increased, because 'society views women who drink as sexually promiscuous and acceptable targets for sexual assault'.⁵² Subscribing to this theory is a spectacularly worrying thought. It allows cases to be labelled as 'seduction' rather than rape.⁵³ Our perceptions of men and women have evolved far beyond this in the twenty-first century, and the criminal law must reflect this.⁵⁴ As Firth shrewdly observes:

⁴³ Cole, Supra n() 156

⁴⁴ H Saul 'Former Judge Says Rape Conviction Rates Will Not Improve Until Women Stop Getting So Drunk' *The Independent* 26th August 2014 See also A Topping, 'The Blurred Lines of Capacity to Consent in Rape', (2016) 4 North East Law Review 72

⁴⁵ ICM, 'Sexual Assault Research: Summary Report', (2005) 8

⁴⁶ Topping, Supra n(44) 88

⁴⁷ Wallerstein, Supra n() 327

⁴⁸ Ryan, Supra n() 407

⁴⁹ Ibid 408

⁵⁰ Ibid 412

⁵¹ Kramer, Supra n() 118

⁵² Ibid, 121

⁵³ Ibid, 146, see also State v Thomas No. B9198729 Nov 13 1991 (California)

⁵⁴ Home Office Report, Supra n() 1.1.4

*“Rape involving alcohol becomes re-presented as a problem of female drinking rather than male violence”.*⁵⁵

This narrow interpretation of the true crux of the matter ignores both male reactions and male rape.⁵⁶ Indeed, in a study with focus groups faced with a case of similar facts to *Bree*, more attention was given to the defendant being wrongly accused than to the harm this event caused to the victim.⁵⁷ There was more concern for the attributing of the label ‘rapist’ rather than evaluating if rape had actually occurred.⁵⁸

Though these acquaintance-rapes featuring voluntary intoxication are often viewed as less serious, research shows that the effects of such encounters are often greater victimisation, and longer recovery time.⁵⁹ There are also feelings of ‘being at fault’ for lack of caution and unwarranted trust.⁶⁰ The victim already blames herself, but it is not necessary for the criminal law to follow suit if she did not consent or lacked the capacity to do so. In *Bromwich*,⁶¹ the defence’s cross-examination of the victim made sure to have her admit that she had gone out with her friends on the night in question with the purpose of getting drunk. Why is that relevant? The culpability does not lie with this choice but the choices made at the time of the act of sexual intercourse. Elvin has suggested that the judges in *Bree* missed a vital opportunity to elaborate on the fact that assessing the circumstances for the purposes of determining reasonable belief in consent does not include the victim impairing their own judgment by drinking alcohol.⁶²

The reality is that the end result of voluntary intoxication may be just the same as all of the other situations covered by the list of rebuttable presumptions in s75 Sexual Offences Act 2003, namely that sexual autonomy is eroded.⁶³ This erosion is not caused by the victim’s drinking, but by the accused’s actions in violation of their counterpart’s wishes. He chooses for his victim, regardless of their capacity to choose themselves or their lack of consent. If the victim chooses intoxication, this does not and should not negate protection of the law.⁶⁴

Both or Neither?

Are they both reckless? Are they both vulnerable? Perhaps, if it is a situation where both the accused and victim got intoxicated together, this is a path to consider. Hurd ponders this same thought, stating that responsibility should not vary among actors:

*“so that the drunken man who has sex with a woman he knows is not consenting is responsible for rape while the drunken woman who invites sex is not sufficiently responsible to make such sex consensual”.*⁶⁵

⁵⁵ Firth, *Supra* n() 113

⁵⁶ *Ibid*, 114

⁵⁷ C Gunby, A Carline C Beynon, ‘*Regretting it After: Focus Group Perspectives On Alcohol Consumption, Non-Consensual Sex and False Allegations of Rape*’, (2013) 22 *Social and Legal Studies* 87, 97

⁵⁸ *Ibid*, 97

⁵⁹ Home Office Report, *Supra* n() 2.8.7

⁶⁰ Goodman, *Supra* n() 83.

⁶¹ *R v Bromwich* [2012] EWCA Crim 673

⁶² Elvin, *Supra* n() 156

⁶³ PNS Rumney and RA Fenton, ‘*Intoxicated Consent in Rape: Bree and Jury Decision-Making*’, (2008) 71 *Modern Law Review* 279, 288

⁶⁴ *Ibid*, 288

⁶⁵ H Hurd, ‘*The Moral Magic of Consent*’, (1996) 2 *Legal Theory* 121, 141

This might take the notion a little too far, but may be worth considering for the drunken man who misses non-consent precursors due to his intoxicated state. We already know that drunk intent is still intent and this offers no excuse,⁶⁶ and that the reckless act of intoxication itself sufficiently covers reckless mens rea and basic intent crimes. Wallerstein argues this must be distinguished from victims because while both involve deliberate choice, there are vast differences between intention and consent.⁶⁷ Is their 'fault' in voluntarily getting drunk for one and not the other?⁶⁸ If intoxication increases the risk that something might go wrong, or there could be unwanted consequences which flow directly or indirectly from the intoxication, who is responsible for 'shared risk-taking', when the accused and victim get drunk together?⁶⁹ Ryan asserts that if this is the scenario, then 'both are victims or neither are victims'.⁷⁰ There is no reason why one should have the responsibility of staying sober enough to judge the situation correctly.⁷¹ This is almost affirmed in *Bree*, where it was held that the victim would not be relinquished from choices made whilst drunk just as the accused would not be.⁷²

This argument is countered by Kramer, who asserts that women should be able to drink without 'fearing assault or an accusation that they asked to be raped'.⁷³ Whilst this is correct, it can also be said to extend to men, who would wish to be able to get drunk without the fear of being accused of rape by a victim who regrets their intoxicated actions. The law seems to be at odds with the double standard society seems to hold in this area.⁷⁴ The most difficult task of the criminal law here is trying to decipher intentions and actions at a time when both the victim and the accused had a temporary distorted reality where judgments are clouded and social constraints are less of a worry due to lowered inhibitions.⁷⁵

Reasonable Belief in the Victim's Capacity

The statutory definition of rape contained within the Sexual Offences Act 2003 considers not mere non-consent, but the accused's reasonable belief that consent was present.⁷⁶ The usual concept with any kind of objective standard within criminal law is to remove intoxication from the situation. For example, within the rules of self-defence and mistake, we ask if the mistaken belief that violence was necessary was a result of the defendant's intoxication – if it was, then the defendant cannot rely on that mistake, even if it was honestly made.⁷⁷ Intoxication appears to remove the 'reasonable' element from any belief held because heavy alcohol consumption does not make us reasonable beings. An intoxicated man may genuinely believe that the victim is consenting to sex, or that the victim has the capacity to consent to sex, but is that belief reasonably held?

There are many signs that would likely send a signal to the accused that the victim is in a heavily intoxicated state. For example, excessive vomiting, or being unable to walk or stand unaided.⁷⁸ Can the accused hold a reasonable belief that the victim gave genuine consent or had the capacity to do

⁶⁶ Kingston, (1994) WLR 519, (1995) 2 AC 355 see also *Bree* Supra n() [32]-[36]

⁶⁷ Wallerstein, Supra n() 324

⁶⁸ *Ibid*, 326

⁶⁹ Ryan, Supra n() 408

⁷⁰ *Ibid*, 422

⁷¹ *Ibid*, 423

⁷² *Bree* [32]

⁷³ Kramer, Supra n() 122

⁷⁴ *Ibid*, 130

⁷⁵ Ruan, Supra n() 412

⁷⁶ S1 ref

⁷⁷ Self-defence ref

⁷⁸ Topping, supra n() 93

so in such circumstances? Many academics have advocated for a level beyond which capacity, and the accused's reasonable belief in capacity to consent or consent itself, would be in serious doubt.⁷⁹ Do the facts in a case such as *Bree*, where the victim was vomiting, and had to be showered and put to bed, not suggest a person who is intoxicated beyond the point of capacity to consent?⁸⁰ To a sober person this may be obvious, but to an intoxicated person in a similar position, perhaps not. Focus group studies on similar facts have found this to be the general opinion of participants., with most evaluating that the accused should be acquitted.⁸¹ Some participants did recognise that the accused should have realised he should not have had sexual intercourse with the victim when she had been vomiting, but that alone was not enough to suggest that she actually lacked capacity to consent.⁸² In fact, some pointed out that it was 'unreasonable' to expect an accused who had been mutually drinking with the victim to be able to appreciate the point at which she lacked the ability to give genuine legal consent.⁸³

However, not all victims may be so visibly drunk, and perhaps an accused's belief may be more likely deemed reasonable if this was the case, with other witnesses also miscalculating the victim's heavy state of intoxication.⁸⁴ Of course, *Bree* was not decided this way, and this leaves a spectacularly high threshold for how intoxicated a victim must be before capacity to consent is negated.⁸⁵ Perhaps consent will be mistakenly conferred in such circumstances, giving the accused a reasonable belief in consent. So we might also need to ask if the victim had the capacity to correct such a mistake?

One of the biggest problem with intoxicated sexual relations is that cues may be vague and indirect. Ryan asserts that in a drunken state, the accused might acknowledge only those which are consistent with his belief that the victim wants to engage in sex.⁸⁶ Of course, ignoring any that indicate otherwise is a reckless act and would be likely to negate reasonable belief. At the time of penetration, no means no, even if the accused recognised several other 'yes' indicators prior to this. However, one study has shown that 39% of the women surveyed had in fact used 'token resistance' at least once with potential suitors,⁸⁷ so the intoxicated confusion over precursors is certainly a grey area.

This conundrum is by no means unique to our jurisdiction, and is debated in courts throughout the Western world. A pair of contrasting cases in California discussed the topic of the accused's intoxicated belief that the victim had capacity to give consent. Whilst one case considered an honest and reasonable but mistaken belief that the victim retained her capacity was held to be a defence to rape in one case,⁸⁸ an earlier case had held that such an intoxicated belief in genuine consent would not be reasonable or in good faith.⁸⁹ If the accused and the victim are equally intoxicated, navigating this path to apportion blame is difficult. If the victim was much more excessively intoxicated than the accused, this may be a much easier scenario to deal with. Such circumstances may also negate any belief being reasonable because the accused would be in a much better position to assess the

⁷⁹ See for example Cowan, *Supra* n(19) 901

⁸⁰ *Ibid*, 915. The vomiting argument may be countered with a belief of the accused that this 'sobered up' the victim, as shows the evidence given by the defendant in *Bree*.

⁸¹ Gunby et al focus groups n() 93

⁸² *Ibid*, 99

⁸³ *Ibid*.

⁸⁴ F Stark, '*Bringing the Background to the Fore in Sexual History Evidence*', (2017) 8 *Archbold Review* 4-8, 5

⁸⁵ Wallerstein, *Supra* n() 322

⁸⁶ Ryan, *Supra* n() 413

⁸⁷ See Kramer, *Supra* n() 119

⁸⁸ *People v Giardino* (2000) 98 Cl. Rptr. 2d 315, 320

⁸⁹ *People v Potter* (1978) 143 Cal. Rptr. 379, 382

situation.⁹⁰ Evidence of this could be adduced to negate reasonable belief in consent, such as paying the bill, carrying the victim to a car or into a hotel or even driving.⁹¹

It would not be just to ask for only honest belief from the intoxicated accused, and reasonable belief of the sober accused. Assessing 'all the circumstances' to decipher an accused's belief in legally valid consent does not include voluntary intoxication.⁹² The need for a belief to reasonable rather than just honest was included in the Sexual Offences Act 2003 with good reason.⁹³ Honest belief remains as a mere background circumstance to assessing if the accused's belief could be deemed reasonable.⁹⁴ So remains the problem that if an accused takes advantage of a drunk victim, aware that her choices may be affected by her intoxication, only the broad scope of section 74 is available to guide the courts on these issues of consent.⁹⁵ An interesting idea is summed up by Goodman:

*"Ambiguous consent becomes more ambiguous and less able to constitute adequate consent to negate a charge of rape, the more alcohol a female has consumed"*⁹⁶

She articulates that any dissent, even mild forms, should be enough to have the accused realise that proceeding with sexual relations could be non-consensual.⁹⁷ Perhaps the notion that affirmative consent is required, rather than a lack of dissent, is an idea to be seriously explored.

It is unlikely the accused is the only person in the unfortunate situation to miss cues and precursors we might less easily recognise when drunk. The victim too may, due to intoxication, fail to realise the accused's intentions until the situation is upon her. In the case of *Bree*, the defendant brought the victim a glass of water and helped her to bed. This is hardly something even a sober person would recognise is a seductive precursor to sexual activity. If the victim misses cues that the accused is interested in having sexual relations with her because of her voluntarily intoxicated state, does this have any impact on his reasonable belief based upon her lack of dissent?⁹⁸ This may add more weight to the argument for the necessity of an affirmative consent being required in cases of intoxicated intercourse.

Retrospective Regret and Memory Loss

Another difficulty of cases involving voluntary intoxication on the part of the victim is distinguishing non-consent at the time to regret after the fact. This problem is often exacerbated by memory loss on the part of the victim in determining what happened, and perhaps having to fill in the gaps using sober judgment. The victim, whether consciously or not, may decide what they would have done based upon their sober perceptions rather than their intoxicated state. However, it is questionable whether this same memory loss may also be indicative of the victim being in a state of incapacity at the time of penetration.

Sexual relations are often regretted – whether sober or intoxicated.⁹⁹ Wertheimer has suggested that women know when they decide to drink excessive amounts of alcohol that they may make

⁹⁰ As noted in Gael Tameu Kamki [2013]EWCA Crim 2335

⁹¹ Ryan, Supra n() 421

⁹² Whitta (2007) 1 Cr App R (5) 122

⁹³ Morgan case

⁹⁴ Reed, Supra n() 208

⁹⁵ Simpson, Supra n() 111

⁹⁶ Goodman, Supra n() 59

⁹⁷ Ibid, 66

⁹⁸ Ibid, 79

⁹⁹ Cole, Supra n() 160

decisions they would not make sober.¹⁰⁰ The decisions made when intoxicated are unlikely to be good reflection of a person's sober goals and values,¹⁰¹ but not still having sight of said values when drunk does not mean that capacity has evaporated. If a decision was made when intoxicated in direct contrast with a victim's normal behaviour, that is not to say it was not a legally valid choice she made at the time. However, her sober self might equate such a making such a choice as being incapable of making the *right* choice. She was not incapable of choosing, but incapable of choosing in line with her sober self.

False accusations of rape are made for a number of reasons. Indeed, false accusations are one of many issues tested every time a crime is reported.¹⁰² Ryan explains some of these specific to rape to be the jealous girlfriend having an affair with a married man, the teenager who does not want her parents to know she consented to sex, and the woman who regrets her actions.¹⁰³ Of these three scenarios, the latter may not be a conscious false reporting, but a disbelief on the part of the victim that she could have chosen to engage in such behaviour even when heavily intoxicated. Feeling 'shame' is a prominent feature of the accounts of rape victims.¹⁰⁴ This may extend to those who are in absolute denial about decisions they made at a time when they were unable to weigh up the pros and cons of sexual relations the way they might have sober.¹⁰⁵ The point at which such an ability leaves the realm of less inhibited, and becomes incapacity needs to be clear.¹⁰⁶

Only One Account Available

When alcohol blurs memory, it may often prove to be a barrier for the prosecution in establishing a credible case. Unless the victim was unconscious or involuntarily intoxicated so as to give rise to one of the rebuttable presumptions, the burden of proof will remain with the prosecution to prove that the victim did not consent. That is no easy task with only one consistent account of the events. The victim in *Bree* stated that there were periods of time for which she had no recollection at all. The appeal court said the issue was whether there was no consent, not if the victim could remember what happened, or if she regrets it.¹⁰⁷ Does memory loss signify moments of unconsciousness? A state in which the line between capacity and incapacity has been crossed? Or just the after effects of an alcohol fuelled night during which the victim made her own decisions? The court in *Tambedou* stated:

"The jury was entitled to consider absence of consent and to distinguish it from evidence of absence of memory".¹⁰⁸

Memory loss does not equate lack of consent, nor does it necessarily indicate lack of capacity to give legally valid consent. It is merely evidence to be considered when deciding on such matters. A study of barristers showed an overwhelming response from participants that legislation could not assist in this matter further due to the unique nature of alcohol and how it affects each individual.¹⁰⁹ The confusion over what happened to the victim is no doubt for her both frustrating and frightening.

¹⁰⁰ A Wertheimer, *Consent To Sexual Relations*, (2003) 233, 251

¹⁰¹ Malm, *Supra n()* 148

¹⁰² Home Office, *Supra n()* 1.1.11

¹⁰³ Ryan, *Supra n()* 428

¹⁰⁴ For example, the infamous case of Ito Shiori – See 'Shifting Attitudes Toward Sexual Violence in Japan' *Japan Times*, 6th Jan 2018

¹⁰⁵ Goodman, *Supra n()* 89

¹⁰⁶ See Lord Armstrong in *C v G*, c71

¹⁰⁷ *Bree* [26]

¹⁰⁸ *Seedy Tambedou* [2014] EWCA Crim 954 [16]

¹⁰⁹ Gunby et al – barristers 588

Even more frightening is the prospect that in cases where the victim cannot remember but was conscious at the time, consent will be presumed, or at least reasonable belief in it.¹¹⁰ As Cowan notes:

*“The complainant’s inability to remember...becomes the space where the defendant’s belief in consent occupies and takes root”.*¹¹¹

This leaves the courts with an incredulous predicament. Either allow the sober victim to fill in gaps in her memory based on her own judgment of the usual behaviour of her intoxicated self, or allow the defendant to fill these holes with a memory which may also be fogged with intoxication. The victim must then deal with the added trauma of others making a presumption that she did consent because she was drunk, which rarely happens with other crimes.¹¹² Research indicates that the public believe women are more likely to lie about being raped when alcohol is involved.¹¹³

The Sober Victim Dealing with The Drunk Victim’s Actions

There is no doubt that the sober victim having to deal with a situation where they cannot remember fully what occurred, and they do not believe they would have consented to sex with the accused, must be disturbing and devastating. This does not mean that we should not respect her autonomous decisions made in such circumstances. Though some academics have advocated for the courts not to legally recognise drunk consent as consent¹¹⁴, it is difficult to see how this could be feasible without undermining a person’s right to become intoxicated and make their own decisions. Kramer’s contention is that this stems from the view that women are not supposed to want sexual intercourse or be sexually deviant, yet do have sexual desires, giving them motive for crying rape.¹¹⁵

In the case of *Dougal*,¹¹⁶ the victim repeatedly claimed that she would not have had sex in the circumstances claimed by the accused – namely in a corridor. It is difficult to determine the exact situation a person would or would not be open to enjoying or willing to try when excess alcohol is involved. It may be easier to establish this if the victim immediately reacts and reports the rape. For example, in the case of *Bromwich*, the victim was crying hysterically, went to hospital, and still appeared drunk and rambling four hours later when speaking with police. The hospital staff said she appeared to be suffering from amnesia,¹¹⁷ and she later claimed to have no recollection except for vomiting. Similar facts occurred in *Hamadi* of immediate drunk and hysterical rape claims.¹¹⁸ This is not sober regret, but a much more immediate realisation of what has happened. This is in contrast to the victim in *Bree*, who first phoned a friend the next morning to say she had been ‘used’ before questioning if she consented or had the capacity to legally do so.¹¹⁹ This seems to be a reclassification of consensual sex in order to rationalise regretted drunken behaviour.¹²⁰ However, as Lewis has noted in her response to the 2006 Consultation Paper ‘Convicting Rapists and Protecting Victims’, there are misconceptions about the timing of reporting and behaviour of victims who claim

¹¹⁰ Cowan, *Supra* n() 914

¹¹¹ *Ibid* 915

¹¹² Kramer, *Supra* n() 128

¹¹³ C Gunby A Carline C Beynon, ‘*Alcohol-Related Rape Cases: Barristers’ Perspectives on the Sexual Offences Act 2003 and its Impact on Practice*’, (2010) 74(6) *Journal of Criminal Law* 579-600, 584

¹¹⁴ Wallerstein, *Supra* n() 335

¹¹⁵ Kramer, *Supra* n() 129

¹¹⁶ *Dougal* (2005) unreported, Swansea Crown Court

¹¹⁷ *Bromwich* [2012] EWCA Crim 673 [10]

¹¹⁸ *Zeeyad Hamadi* [2007] EWCA Crim 3048

¹¹⁹ *Bree* [2007] EWCA Crim 804

¹²⁰ Gunby focus groups 87

to have been raped. She contemplates the usefulness of a jury direction that delay is not evidence of a false complaint.¹²¹

Distancing the Choice to Have Sex

It is questionable, if consent is given by a heavily intoxicated victim, if this is a reflection of only the intoxication rather than her preferences, or is in fact 'truer than that expressed under conditions of sobriety' because social restraints which govern the sober are removed.¹²² The jury are likely to consider the account of the victim (if female) giving regard to stereotypical views of how a female should behave.¹²³ Cole has commented on the possibility that the indulgence in alcohol may purposely be chosen so women can distance themselves from the decision to have sex, and she makes the conscious decision to allow her intoxicated self to go on and make such decisions.¹²⁴ At the other end of the spectrum, some men may consume vast quantities of alcohol as a way to lessen their reservations about pressuring or forcing women into sex they might not necessarily want.¹²⁵

Alcohol and the Human Body

Though in *Bree*, it was stated that a 'grid system' for capacity would not be possible,¹²⁶ being able to distinguish between different levels of intoxication for the purpose of discovering if the victim had capacity to consent would certainly solve some problems.¹²⁷ Unfortunately, because alcohol effects are dependent upon a number of factors, a legislative structure to operate in this capacity is highly improbable. The point at which a person crosses the elusive threshold from retaining capacity to consent and legally incapacity so as to adhere to the section 74 definition 'is as individual as she is'.¹²⁸ It cannot be scientifically calibrated.¹²⁹

Variants on the effect of alcohol will include weight, age, body type, drinking history, how fast you drink, if you have eaten and any medication you are taking.¹³⁰ Genetic factors can also come into play, with some of us having less enzymes that break down the alcohol, a variant often seen in people of Asian descent.¹³¹ It is also known to often affect women more than men, due to a higher level of body fat. Alcohol is known to slow the brain's functioning, in particular the prefrontal cortex which regulates reasoning and decision making.¹³²

A study of almost thirty-thousand respondents in twenty-one different countries of adults aged thirty-four and under was conducted to establish the emotions people associated with different types of alcohol. The findings showed that people usually drink 'to achieve a particular goal' often associated with an emotive state,¹³³ but this may also increase the chances of out-of-character

¹²¹ Penny Lewis, Response to Consultation Paper *Convicting Rapists and Protecting Victims*, Spring 2006 [17]

¹²² Finch and Munro clr 2004 790

¹²³ A Carline and C Gunby, 'How an Ordinary Juror Makes Sense of it is a Mystery: Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003', (2011) 32 (3) Liverpool Law Review 237-250, 246

¹²⁴ Cole, Supra n() 163-163

¹²⁵ Ryan, Supra n() 412

¹²⁶ *Bree* (2007) 2 All ER 676, 685

¹²⁷ Cole Supra n() 167

¹²⁸ Reed Supra n() 208

¹²⁹ J Miles, 10 Archbold News, 6-9, 8

¹³⁰ www.aboutalcohol.ie accessed 5th June 2018

¹³¹ *ibid*

¹³² N Lee, 'Do Different Drinks Make you Different Drunk', www.theconversation.com

¹³³ K Ashton MA Bellis AR Davies K Hughes A Winstock, 'Do Emotions Related to Alcohol Consumption Differ by Alcohol Type? An International Cross-Sectional Survey of Emotions Associated with Alcohol Consumption and Influence on Drink Choice in Different Settings', www.bmjopen.bmj.com

actions and behaviour. Almost half of respondents reported that drinking spirits made them feel 'sexy' and confident,¹³⁴ and drinking to achieve such emotions was reported more by women than men. They also found that whilst respondents were aware of the negative impact particular types of alcohol might have, such as causing aggressive behaviour, they craved the 'positive' emotions that went with them. This is supported by Kramer's belief that there is an expectancy that alcohol will increase sexual arousal and lower inhibitions for women whilst increasing men's feelings of dominance,¹³⁵ creating an 'alcohol myopia' which deviates from socially acceptable behaviour.¹³⁶

The Way Forward

Cases are generally not as concerned with actually lacking capacity as they are with a victim lacking the capacity to choose as her sober self would have. When a victim cannot remember if she consented to sexual intercourse with the accused or not, or if she was even capable of consenting, do we allow her to judge this by her sober standards, or allow the defendant's account to mesh with hers and fill in the gaps? Neither are an appealing prospect, but without the benefit of an eye-witness, other options are lacking.

There is no clear way to establish between different levels of intoxicated states to decide if a person legally had the capacity to consent to sexual intercourse at the time it took place. There is also no exact way to establish if consent occurred at all for an intoxicated victim who cannot fully remember the events. Though a victim's decision to have intoxicated sex may not 'square' with what she might have chosen sober,¹³⁷ if she has indeed chosen and was capable of doing so this must be respected, even if her sober mind is unhappy with this outcome.

It might be advantageous to have a non-exhaustive list of precursors that might be used as evidence of incapacity to consent. This could include physical manifestations of heavy intoxication such as vomiting, inability to stand and walk, having to be undressed and a wish to lay down. That fact that the victim's drinking made the rape possible does not lay blame at the victim's feet. Equally, just because the likelihood of a victim having consented to sex might have increased with their consumption of alcohol, this does not mean that they did, nor that we should presume this.

For the victim who is capable of giving consent but has partaken in excessive alcohol consumption, there are opportunities for reform. Goodman's recommendation of a sliding scale, requiring a more explicit affirmation of consent the more a person is intoxicated, has much merit.¹³⁸ This is equally applicable to the alcohol consumption of the accused – the less he has had to drink, the more he is responsible for gaining effective legal consent.¹³⁹ This may assist in shifting the focus from blaming the victim for their alcohol consumption, to requiring specific express consent in such a situation to make her desires very clear. This will still not necessarily match with her sober desires, but will give the courts a clear way forward. Of course, there are other paths. If excessive voluntary intoxication was included in the list of rebuttable presumptions as the Home Office Report had suggested, we would begin with a presumption of non-consent, with the burden then being on the defendant to prove otherwise.

¹³⁴ *ibid*

¹³⁵ Kramer *Supra* n() 120

¹³⁶ Goodman *Supra* n() 84

¹³⁷ Cole *Supra* n() 160

¹³⁸ Goodman *Supra* n() 58

¹³⁹ *Ibid* 59

There is merit in sending a clear message to the public about intoxicated behaviour and sexual relationships, specifically circumstances in which sexual activity is likely to be wrong.¹⁴⁰ This may be especially important for situations of acquaintance rape and mutual risk-taking. A woman has the right to express her sexual desires, but also to refuse sexual situations as she sees fit. However, we must proceed with caution, and allow the judiciary to maintain flexibility when dealing with the extremes of human behaviour.¹⁴¹ A statute establishing the definition of capacity and incapacity to consent may present a narrow context which, though may bring consistency, would also bring its own complications.¹⁴²

¹⁴⁰ Protecting The Public Para 32

¹⁴¹ C Sjolín, 'Ten Years On: Consent Under the Sexual Offences Act 2003', (2015) 79(1) *Journal of Criminal Law* 20-35, 27

¹⁴² Simpson *Supra* n() 115