area is to be placed on an intellectually cogent footing that lends itself to coherent doctrinal development.

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DECEPTION AND CONSENT TO SEX

IF the categories of deceptions which can vitiate consent to sexual activity are limited, as a matter of law, how should we draw the line between consent-vitiation and consent-validity? *R. (Monica) v DPP, ex parte Boyling* [2018] EWHC 3508 (Admin), [2019] 2 W.L.R. 722 is the latest in a line of cases which attempt to answer this question.

In 1997, Andrew Boyling, a former undercover police officer, had a sexual relationship with "Monica", an activist in the protest movement he had infiltrated, using a fake identity. Monica told the police that she would not have consented to sex had she known the truth. In 2017, the CPS decided not to prosecute Boyling for rape, indecent assault, procurement of a woman by false pretences, and misconduct in public office. Review was sought on the grounds that, for the purposes of the potential rape charge, the DPP had erred as a matter of law in determining that Boyling's deception was not capable of vitiating Monica's consent.

The High Court dismissed the application for review. The CPS, on the assumption that the Sexual Offences Act 2003 (hereafter, the 2003 Act) had simply clarified and restated the existing law, looked to the post-2003 Act authorities as a source of indirect guidance on the law on consent and deception as it applied in 1997. Whilst the court rightfully doubted the veracity of this assumption, it provided a welcome opportunity to review the relationship between deception and valid consent under section 74 of the 2003 Act ("a person consents if he agrees by choice and has the freedom and capacity to make that choice").

Prior to *Boyling*, the leading case in this area was *McNally* [2013] EWCA Crim 1051, [2014] Q.B. 593, in which Leveson L.J. held that "active" deception could vitiate consent under section 74, but not mere non-disclosure, and that "[i]n reality, some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent" (at [25]). Approaching "the evidence relating to 'choice' and the 'freedom' to make any particular choice … in a broad commonsense way" will identify the "route through the [line-drawing] dilemma" (at [25]). Controversially, the deception in *McNally* was held to relate to the defendant's gender and vitiated consent because, applying the court's common sense approach, the act of digital penetration differs depending on whether

https://doi.org/10.1017/S0008197319000540 Published online by Cambridge University Press

it is performed by a man or a woman. In other words, the deception relating to McNally's gender removed the complainant's freedom to choose to have sex with a boy, rather than a girl.

Applying *McNally*, it is difficult to explain why it is not equally "commonsense" that Boyling's thoroughgoing and emotionally devastating deception similarly inhibited Monica's freedom and capacity to choose to have sex with someone who held her own fundamental political values, rather than a police officer focused on surveilling the protest movement. The difficulty inherent in answering such a question demonstrates the inevitable uncertainty of the *McNally* test. Unsurprisingly then, both the CPS lawyer and the parties at trial, sought to adopt a more structured approach.

The CPS lawyer considered Boyling's deception insufficient to vitiate consent because it was not closely analogous to the types of deception recognised as consent-vitiating in *Assange v Sweden* [2011] EWHC 2849 (Admin) (condom usage); *R. (F) v DPP*) [2013] EWHC 945 (Admin), [2014] Q.B. 581 (intention to withdraw prior to ejaculation) and *McNally*. In other words, Boyling's deception did not (1) "relate directly to the sexual act"; (2) risk the sexual health of the complainant or (3) "strike at the heart of the complainant's sexuality" and therefore relate to a "fundamental aspect of the identity of the perpetrator" (at [77]). In contrast, the claimant proposed a two-stage test for identifying consent-vitiating deception. First, the deception must be "sufficiently serious in objective terms as to be capable as being regarded as relevant to a woman's decision-making" and, second, it must go to a "matter which the woman regarded as critical or fundamental to her decision-making in line with her individual autonomy" (at [36]).

The two-stage test proposed by the claimant is both without authority and internally incoherent. The claimant purported to rely on the decision of the Court of Appeal in *Olugboja* [1982] Q.B. 320, in which, according to the claimant, consent was held to be a subjective concept, residing entirely in the mind of the individual. By and large, it was argued, the post-2003 case law follows a similar path, so the law since 1981 has offered more protection for sexual autonomy than any categorical approach would allow. Yet this makes far too much of *Olugboja.* The specific issue before the court in that case was whether coerced acquiescence amounted to consent in cases where no explicit threat was made, and the recommendation that the jury be directed to "concentrate on the state of mind of the victim" (*Olugboja*, p. 332) was formulated with that context in mind. Moreover, were such an approach transplanted into the deception context, it would result in a fully subjective test, under which any deception would be capable of vitiating consent. Any objective limitation on the kind of deception which invalidates consent, including that proposed by the claimant, would be ill-principled and unjustified under these terms. Interestingly, the claimant began by arguing in favour of a fully subjective approach, before settling on the two-part formulation set out above. This, no doubt,

came in response to the court showing little appetite for eschewing any line-drawing whatsoever and rightly so, this being contrary to authority as well as principle (a point returned to below).

Despite the decision to adopt a line-drawing approach of some kind, the court held that the two-stage approach proposed by the claimant (and, a fortiori, a fully subjective approach), would represent too significant a departure from the existing case law both before, and after, the 2003 Act. The court, tasked with interpreting both the law as it was in 1997, and the 2003 Act, did not consider it appropriate to take such a leap and thereby criminalise "much conduct which, hitherto, has fallen outside the embrace of the criminal law" (at [86]). Instead, the court endorsed the analogical approach taken by the CPS, observing that deception has only been held to vitiate consent under section 74 in cases where it is "closely connected to the performance of the sexual act, or … intrinsically so fundamental, owing to that connection, that they can be treated as cases of impersonation" (at [80]). Though the court purports simply to restate and clarify the existing law, in reality *Boyling* represents a resilement from the singularly unhelpful "commonsense" approach in *McNally*.

The recognition that the "common sense" is both untenably uncertain and potentially extends far beyond the intended scope of the 2003 Act is, at least, is to be welcomed. However, the decision simply replaces one set of difficulties with another. At the doctrinal level, one is left to wonder what constitutes a matter "closely connected to the performance of the sexual act". Is this confined to deceptions about condom usage and ejaculation? What about false assertions of sexual prowess or deceptions relating to the use of hormonal contraception? Moreover, why is deception as to gender tantamount to impersonation/deception as to D's *identity*, by virtue of fact that D's deception impacts, in some way, upon C's perception of her own sexuality? What other information might be so fundamental to sexual self-understanding as to amount, in effect, to some kind of impersonation? The court assumes that, if D (falsely) tells C that they are married to one another, or that he is single, this would not result in consent-invalidity (at [52], [83]). Yet at least some complainants might conceivably regard this information as "strik[ing] at the heart of [their] sexuality" and therefore going to a "fundamental aspect of [D]'s identity".

At the level of principle, there is no good reason why consent-invalidating deceptions *should* be limited to these categories. That is not to say that every deception should vitiate consent; sexual autonomy is not the only important value at stake. Particularly in the context of the criminal law, a range of competing interests and policy concerns must be taken into account, however difficult that may be. However, Monica's sexual autonomy was undoubtedly violated by the actions of Andrew Boyling. Limitations on the recognition of consent-invalidating deceptions, whilst necessary, require principled justification and none such can be found

here. On the other hand, there are pressing reasons to reconsider the decision in *McNally* itself. The court's approach both to identifying "active deceptions" as to gender and to the question of consent-vitiation in that context reifies outdated and reductive conceptions of both sex and gender, and leaves trans and gender non-conforming citizens in particular in a position of physical, psychological and legal precarity. Although pleas for legislative intervention are perhaps destined to go unheard it is time to recognise that this line-drawing problem is not well-suited for judicial resolution, even at the highest level.

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INTERPRETATION AND IMPLICATION IN THE SUPREME COURT

WELLS was struggling to sell some flats. He mentioned this to a neighbour, who put Wells in touch with Devani. Wells and Devani spoke over the telephone. The trial judge found that Devani told Wells that he was an estate agent, and his usual commission was 2% + VAT. Wells agreed to this, but the parties did not expressly agree upon what was to trigger the commission. Devani subsequently introduced a purchaser to Wells who bought the flats. Was there a binding contract between Wells and Devani? The trial judge found that there was, but the majority of the Court of Appeal, surprisingly, overturned that decision ([2016] EWCA Civ 1106, [2017] Q.B. 959, noted [2018] C.L.J. 22). The Supreme Court has sensibly allowed the appeal: *Wells v Devani* [2019] UKSC 4; [2019] 2 W.L.R. 617.

The majority of the Court of Appeal thought the contract was incomplete because an essential term, namely the event which was to trigger the commission, still had to be agreed. That view was strongly rejected by the Supreme Court and orthodoxy restored. It is often the case that crucial terms, such as the price, are not expressly agreed, and the court can imply a term that a reasonable price be paid (see e.g. *Foley v Classique Coaches* [1934] 2 K.B. 1; *British Bank for Foreign Trade v Novinex* [1949] 1 K.B. 623). As Steyn L.J. observed in *G. Percy Trentham Ltd. v Archital Luxfer Ltd.* [1993] 1 Lloyd's Rep. 25, 27:

> The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential.