

Does gender matter?

As [Gayle Newland](#) is convicted of sexual assault¹ over her relationship with a female friend during which she pretended to be a man called Kye, the issue of gender and consent is back in the public eye. There are a lot of sensibilities touched upon by a case like *Newland*, but it is important to consider what this, and other similar cases, are about, beyond the lurid headlines.

There have been a few cases where people who were born female have been convicted of some form of sexual assault over their sexual conduct with females while they have represented themselves to be male. [Gemma Barker](#) was convicted of sexual assault for “kissing, cuddling and groping” with two girls in 2012. [Christine Wilson](#) was convicted in Scotland of obtaining sexual intimacy by fraud in 2013 for having sexual intercourse with two teenage girls using a prosthetic penis. Internationally there have been other cases², all, so far as I am aware, involving defendants born with female genitalia. The case most well-known to English lawyers is, however, that of *Justine McNally*³ because she appealed her conviction to the Court of Appeal.

There has been criticism of such prosecutions as being unfair on transgender defendants.⁴ The criticism is that such prosecutions are “*not to protect sexual autonomy against fraudulent solicitation of sex, but rather to protect gender norms and compulsory heterosexuality*”⁵. This is an understandable criticism, but not necessarily an accurate one, at least when one looks at the English cases. That is not say that there are not complexities in dealing with such cases, which I will return to when we have considered what the law is currently.

The law

Justine McNally was convicted of sexual assault by oral and digital penetration of her female partner’s vagina. The Court of Appeal upheld her conviction stating that

“depending on the circumstances, deception as to gender can vitiate consent” and “while in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of

¹ Probably sexual assault by penetration but news reports differ. The conduct complained of appears to have been penetration by a prosthetic penis.

² See those considered in Aeyal Gross “Gender Outlaws before the Law: the Courts of the Borderland” (2009) 32(1) *Harvard Journal of Law and Gender* 165.

³ *McNally* [2013] 2 Cr App R 28.

⁴ *Ibid* and Alex Sharpe “Criminalising sexual intimacy: Transgender defendants and the legal construction of non-consent” [2014] *Crim LR* 207. Outside of academic journals there has also been criticism, for example Jane Fae “[Is gender dysphoria simply recognised as fraud in the eyes of the law?](#)” *Independent online* 12 April 2013.

⁵ Aeyal Gross “Gender Outlaws before the Law: the Courts of the Borderland” (2009) 32(1) *Harvard Journal of Law and Gender* 165.

*the act is, on any common sense view, different where the complainant is deliberately deceived into believing that the latter is a male.”*⁶

The court’s view was thus not that deception as to gender *will* vitiate consent, but that it *can* do so. It did do so in *McNally* because there was deliberate deception over a course of years by which the complainant was sufficiently persuaded to buy condoms for the forthcoming sexual encounter.

In *Newland* the central issue was again deception; the defendant knew the complainant well and pretended that her alter ego (“Kye Fortune”) was a friend of hers, using a Facebook profile in this fake name. The use of the internet to deceive the complainant featured in *McNally* too as the defendant was pretending to be a boy called “Scott Hill”⁷ when she met and communicated with the complainant online some years before they finally met. In *Newland* there was a further deception in relation to what the complainant was being penetrated with – a prosthetic, strapped on penis rather than one which was physically a part of the defendant. This takes *Newland* beyond *McNally* as the sexual act of being penetrated by an object is physically different to being penetrated by a penis.

McNally did not involve the s.76 SOA 2003 conclusive presumption as to the absence of consent (deception as to nature or purpose of the sexual act). It does not appear that *Newland* did either, although it is certainly arguable that the penetration was of a different nature to that consented to. This is not surprising given the judicial view of deception; the approach in *Jheeta*⁸, followed with approval in *B*⁹, is to deal with deception under s.74 – “a person consents if he agrees by choice, and has the freedom and capacity to make that choice” – rather than relying on the conclusive presumptions in s.76. Both cases then revolve around s.74.

The Court of Appeal’s guidance on s.74 is found in *R(F) v DPP*¹⁰ where Lord Judge CJ stated

*“What the Assange*¹¹ *case underlines is that “choice” is crucial to the issue of “consent... [T]he evidence relating to “choice” and the “freedom” to make any particular choice must be approached in a broad common sense way”.*

Judicial reference to “common sense” tends to draw academic apoplexy. However, it does not seem to have caused a problem in either *McNally* or *Newland* where there are clear, deliberate, active, continuing deceptions which

⁶ *McNally* [2013] 2 Cr App R 28 at [26] and [27].

⁷ Scott Hill was in fact the name of a boy at the defendant’s school who was unconnected to what went on.

⁸ [2007] 2 Cr App R 34.

⁹ [2013] 2 Cr App R 29.

¹⁰ [2013] 2 Cr App R 21.

¹¹ *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

the complainants believed, and those deceptions were made by biological females who were living, at least partly, as females. Section 74 does not, unlike s.76, require that any deception be intentional – it is much broader – but in these two cases the deliberate nature of the deception is central to the removal of the complainant’s freedom to choose. Practically speaking, it seems unlikely that in the absence of deliberate deception, there would be prosecution. The Crown Prosecution Service’s [legal guidance on transgender defendants in sexual cases](#) emphasises the need to “give very careful consideration [to] all the surrounding circumstances, including how the suspect perceives his/her gender” noting that as part of the public interest limb of the Full Code Test, the lawyer should take into account “[w]hether the offending occurred as a result of the suspects (sic) uncertainty or ambivalence about his/her gender identity”.

Transgender defendants at a disadvantage?

The short answer appears to be, no, at the moment. If A wishes to engage in sexual activity with B, the law expects A to allow B enough information about A and the encounter to make their own free choice about whether or not to consent. Whether that is analysed in terms of B’s sexual agency or autonomy, the central importance of B’s freedom to choose is fundamental to the scheme of the SOA 2003. The SOA 2003 was drafted to change consent from something sought by a stronger male and given by a weaker female into something freely given by two persons, whatever their gender: agreement between equals. There are problems with the SOA 2003, but this redefinition of consent is not one of them. The law, in this respect, is not protecting gender norms or making heterosexuality compulsory. The law relating to adults of full capacity is not there to tell people when they can and cannot consent, but to protect their ability to make the choice themselves whether or not to consent. Adults can and do consent to all kinds of couplings with all kinds of adults and the criminal law does not get involved, nor should it.

The SOA 2003 and the Gender Recognition Act 2004 both act to protect transsexual and transgender persons. Those who have had gender reassignment surgery are protected by s.79 SOA 2003 by which a surgically constructed vagina or penis is treated as legally the same as a biologically created one. Further, the Gender Recognition Act 2004 enables a person who has a settled gender identify different to that which s/he was born with due to gender dysphoria to have that new gender legally recognised with no need for gender reassignment surgery.

It is at this point that the obvious potential tension arises, between the legal recognition of a non-birth gender and the criminal law protecting a party’s right to choose with whom they engage in sexual activity. What will the criminal law say to a complainant who says she was deceived as she believed the defendant was male and the defendant has a gender recognition certificate

stating that he is male? It seems unlikely that the criminal law will say that there is no case to answer because of the certificate, but it also seems unlikely in such a situation that a failure to disclose gender history will necessarily vitiate consent. Instead it is likely to come down to the facts. For instance, if during a drunken fumble there is a penis where none was expected (or vice versa) then that is just one of the surprises which can happen during a drunken fumble. The lack of a lengthy period of deliberation and deception makes prosecution highly unlikely in that situation. In the *Newland* situation where a prosthetic penis is used during a penetrative sexual act, that is a physically different act to penetration by a penis physically a part of the defendant. If a defendant has represented that the penis is physiologically a part of them, the case is rather clearer that this has been a deliberate and material deception – whatever is represented about the defendant’s gender – albeit that it would not be advisable to attempt to use the s.76 presumption. At the heart of the decided cases is deception. The reported comments of the complainant in *McNally* on discovering the defendant’s true identity sum it up rather well “*if she had told her from the start she wouldn’t have judged her and things might have been different*”.