**THE DOMESTIC ABUSE ACT - S.70 S 71.**

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Thursday 23rd March 14:30 – 16:30.

Selected References relevant to the presentation

Susan Edwards with David Malone and Gillian Jones KC, *Blackstone’s Guide to The Domestic Abuse Act 2021* [March 2023] Oxford University Press in press

Susan Edwards and Heather Douglas “The Criminalisation of A Dangerous Form Of Coercive Control: Non-Fatal Strangulation In England And Wales And Australia” *Journal of International and Comparative Law* [2021] 87-120.

Susan.SM. Edwards (2020). Consent and the ‘Rough Sex’ Defence in Rape, Murder, Manslaughter and Gross Negligence. The Journal of Criminal Law, 84(4), 293–311. <https://doi.org/10.1177/0022018320943056>

Susan Edwards “The strangulation of female partners.” Crim L.R. (2015). 12. pp. 949-966.

Susan Edwards *Policing Domestic Violence* (Sage, 1989 – reprinted 1991)

Susan Edwards *Sex and Gender in the Legal Process* (Blackstone’s 1996; 4th ed. 2013).

Susan Edwards “Assault, strangulation and murder – challenging the sexual libido consent defence narrative”, in A. Reed & M. Bohlander with N. Wake & E. Smith (eds), *Consent: Domestic and Comparative Perspectives* (Abingdon: Routledge, 2016), ch.6.

Susan Edwards “New Directions in Prosecution” in Browne, T. (ed.) *What Works in Reducing Domestic Violence* London, Whiting and Birch 2001 p. 211-237.

Susan Edwards “Domestic Violence and Harassment: An assessment of the civil remedies (2000) in Browne, T. (ed.) *What Works in Reducing Domestic Violence*? London: Whiting and Birch.pp. 187-210.

Susan Edwards “Domestic Violence and Sexual Assault” in *Care and Control in the Police* Becker & Stephens (eds.) (1993 Falmer Press) pp.89-104.

**THE BACKGROUND - LETHALITY POTENTIAL OF STRANGULATION ETC.**

Edwards research from 1987 to 2019 for E & W found approx. a quarter of all female intimate partner victims were killed by male intimates, and strangulation –manual/ligature /asphyxiation/choking was the primary method causing death.

Data set 1, (1987-1996) (n = 1004), 32 per cent,

Data set 2, (1995-2000) (n = 372), 29 per cent,

Data set 3, (2000-2005) (n = 584), 22 per cent

Data set 4, (2011-2019) (n = 438) 23 per cent.

Over the last twenty years especially in some cases strangulation is a form of sexual gratification for the D who claims the deceased consented. Otherwise it was an accident ‘got angry’ etc

**SOME CASES AND WHY THE NEED TO INTERVENE IN NFS**

**Niall Duncan McDonald** [2004] Scot (D) 17/2 (see Lexis citation). D claimed that the deceased consented to ‘rough sex’. The victim died of **strangulation** and trauma to the recto-sigmoid junction. A conviction for culpable homicide was returned.

***R v Coutts*** [2005] EWCA Crim 52. Graham Coutts was the partner of a friend of the deceased (Jane Longhurst). Her body was found ‘with a **ligature** made from a pair of tights tied twice around the neck, with a knot on the right-hand side’. D claimed the deceased had engaged in consensual erotic asphyxial sex and that death was an accident. Evidence was adduced that D was in the habit of visiting websites containing images of asphyxiation, strangulation, rape, torture and violent sex and that the day before the deceased's death he had logged on to a website ‘Death by asphyxia’ for approximately an hour and three quarters and had a history of such nfs with former partners. Found guilty of murder.

***R v Bailey*** [2019] EWCA Crim 2502, a conviction for murder was upheld. D met deceased in a nightclub that evening. When interviewed under caution he admitted that he had killed the deceased in his bedroom. His account was that they had had consensual vaginal and anal intercourse. He claimed that in the course of consensual ‘rough sex’ **(at her request)** he had **put his hands around her neck and squeezed with moderate force f**or a minute or two. He accepted that he might also have put his hand over her mouth.

**THE DOMESTIC ABUSE ACT**

Section 70 DAA 2021 creates a new offence of non-fatal strangulation or suffocation (‘NFS’), inserted into **Part 5 of the Serious Crime Act 2015 (s.75A):**

**75A Strangulation or Suffocation**

(1) A person (“A”) commits an offence if—

(a) A **intentionally strangles** another person (“B”), OR

(b) A does any other act to B that—(i) affects B’s ability to breathe, and(ii) constitutes battery of B.

Important to intervene at early stage in nfs which often becomes fatal

**PROBLEM WITH THE SECTION LACK OF CLEAR DEFINITION**

Strangulation” is not defined within DAA 2021 or by statute. The **explanatory notes** state the alternative form of the offence can include, but is not limited to, suffocation.

**s. 70 i. Intentionally Strangles** – ordinary meaning - CPS and Stocker – ‘*Without a clear definition of NFS [Non-fatal strangulation] in the legislation there is a risk that NFS will be interpreted narrowly, for example, to require complete stoppage of breath or that unconsciousness results’.* (See further, *Kelly and Ormerod: Non-fatal strangulation and suffocation,* Crim. L.R. 2021, 7, 532-555)**.** But CPS guidance’ no injury required’ and strangles, and impeding breathing can be taken separately

**Evidence required includes** - witness statement, corroborative evidence ‘cant breathe’, no physical injury v physical injury. Consideration of fear = control/coercive = 5 years. ***Power*** [2018] EWCA 1480 sustained attack on woman escort. D put his arms over her face she could not breath s 18 conviction = 7 years upheld

**What to charge?** s.47 or s.75 (A) 1, both 5 years , degree of injury then s.20/18

**Sentencing** – relevance of DA guideline, and new aggravating high culpability factor of strangulation.

**SECTION 70ii**

**s 70 ii. Impedes breathing** – to be interpreted in courts may arise from strangulation etc, but consider also pinned down, e.g. ***Jones*** *[2022] EWCA 1346*; pinned down arm behind back . Knelt astride on shoulders, head lock e.g. ***Jex*** *[2021] EWCA 1708*. D sitting astride on chest ***Chilvers*** [2021] EWCA 1311.

What about police arrest and restraint?

Victims need to report and detail impact even if no visible injury of strangulation and document fear, psychological impact and also any form of restraint since such will likely impede breathing. Need to Educate police prosecutors, judges

**THE MENTAL ELEMENT**

Once a jury has decided *what* it understands **strangulation** to mean, the mental element required is clear – A must intentionally strangle B. It is an offence of specific intent.

The alternative / ‘**other act affecting B’s ability to breath**’ route must also amount to a battery.s 39 CJA 1988 Therefore, the offence necessarily requires A to intentionally or recklessly inflict unlawful force on B. What is *not* clear is whether a *separate* mental element is required to be proved as to B’s ability to breathe being affected by A’s conduct? E.g. A pins B to the floor by kneeling on her chest. Battery intentional, but would A necessarily realise they were affecting B’s ability to breathe?

On the one hand, the offence is of general prohibition and a serious one. On the other, the strangulation of women as an act of domestic abuse (or otherwise) is of such concern that there is a strong argument that the presumption of *mens rea* may be rebutted.

The precise ambit of what is required to prove an offence under the ‘other act’ route is very likely to require resolution by the Court of Appeal.

**DEFENCE**

75A (2) It is a defence to an offence under this section for A to show that B consented to the strangulation or other act.

(3) But subsection (2) does not apply if— (a) B suffers serious harm as a result of the strangulation or other act, and (b) A either—(i) intended to cause B serious harm, or

(ii) was reckless as to whether B would suffer serious harm.

(4) A is to be taken to have shown the fact mentioned in subsection (2) if—(a) sufficient evidence of the fact is adduced to raise an issue with respect to it, and

(b) the contrary is not proved beyond reasonable doubt 75A(5) A person guilty of an offence under this section is liable— (a) on **summary** conviction—(i) to imprisonment for a term not exceeding 12 months (or 6 months, if the offence was committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020), or (ii) to a fine, or both;(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or both.

As of 27 May 2021, new guidance issues by the Sentencing Council in which strangulation is included as a factor attracting higher culpability.

Clear case for offence specific guidance to ensure consistency and appropriate sentences are imposed. some judicial case commentary indicates improved understanding of domestic abuse , strangulation and fear, by judges

*Allen*  [*2020] NICA 25* s.47.strangle ‘could hardly breathe’ - 12months

*Loynes* *[2022] EWCA 420 ‘*[12] you would pull her hair and choke he , **but not severely**.

**SECTION 71 BACKGROUND WHY THE SECTION?**

Aim: to clarify the law by restating, in statute, the broad legal principle established in ***R v Brown*** [[1994] 1 A.C. 212](https://uk.westlaw.com/Document/I38DEC800E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=3875aaa0e5814094b9a50346e3e97b11&contextData=(sc.DocLink))

Consent to serious harm for sexual gratification not a defence - GOV.UK (www.gov.uk)

*Whilst R v Brown and others* [1994] 1AC 212, established held that consent cannot provide a defence to an assault that is more than trifling, invalidating a consent to s. 47 and more serious offences, including when done or caused for the purpose of 'sexual gratification’ . In cases where women died especially the ‘rough sex’ excuse was being used.

**THE CASES THAT MOVED REFORM- CLAIMED ROUGH SEX EXCUSE**

***R v Broadhurst*** [2019] EWCA Crim 2026 ***–*** *served 22 months of a three years’ and eight months sentence.* John Broadhurst, convicted of the GNM of Natalie Connolly. She died as a result of a combination of the alcohol level in her blood (acute alcohol intoxication) and the 40 separate physical injuries and resultant blood loss. Physical injuries included bruising to the head, blow-out fracture to the left eye socket, internal bleeding and tissue haemorrhaging on the bottom and lower back. The insertion and/or the removal of the spray bottle caused lacerations of the vagina which resulted in arterial and venous haemorrhage. D claimed that she derived sexual satisfaction from being assaulted in this way. Problems of proof, including causation and proximate cause of death, resulted in the prosecution accepting a plea to GNM. See [r v john broadhurst sentencing remarks (judiciary.uk)](https://www.judiciary.uk/wp-content/uploads/2018/12/broadhurst-sentencing-remarks.pdf)

***Kempson v R*** [2020] NZCA 656. On 2 December 2018, in Auckland, New Zealand, Jesse Kempson murdered Grace Millane (a British backpacker) by strangulation. The deceased had met D (his identity protected by anonymity) on a Tinder date and that evening was killed by him by strangulation (the prosecution alleged lasting several minutes). D disposed of her body. The defence was no intent and that she consented to ‘rough sex’. Defence was granted leave to adduce sexual history evidence of Grace Millane, from her former boyfriend, a previous sexual partner, and men she had never met but connected with on dating sites. Kempson was convicted of murder.

**THE SECTION**

71 (1) This section applies for the purposes of determining whether a person (“D”) who inflicts serious harm on another person (“V”) is guilty of a relevant offence.

**71 (2)** It is not a defence that V consented to the infliction of the serious harm for the purposes of obtaining sexual gratification.

71 (3) In this section —

“relevant offence” means an offence under section 18, 20 or 47 of the Offences Against the Person Act 1861 (“the 1861 Act”);“serious harm” means —

(a) grievous bodily harm, within the meaning of section 18 of the Offences Against the Person Act 1861,

(b) wounding, within the meaning of that section, or

(c) actual bodily harm, within the meaning of section 47 of that Act.

**NORMALISATION OF RS DEFENCE**

Some men configure and attempt to normalise their violence. It was a ‘rape game’ and ‘the sex I have’ said Andy Anokye at his trial in March 2020.**Rape** - ***Anoyke*** – March 2020, D was convicted of 21 counts of rape (s 1(1) SOA), 5 counts of false

<https://www.tcsnetwork.co.uk/sadistic-bbk-rapper-solo-45-on-trial-for-22-rape-charges/> > ).

**RECENT CASES**

**Warren Coulton** was convicted of **GNM** in May 2021. He claimed to have engaged in consensual ‘rough sex’ with the deceased who died of asphyxiation following being gagged with a sock in her mouth. (Five years).

**R v Pybus** [2021] Crim 1787, was convicted of **unlawful manslaughter** in February 2021. As part of his defence, he alleged that the deceased had consented to being choked and had **encouraged him to strangle her** during consensual sex. He was jailed for four years and eight months following credit for a GP to manslaughter.

**THE DEFENCE OF CONSENT REMAINS IN CASES OF MINOR ASSAULT.**

Even where “serious harm” is caused, it remains open to the defence to argue a lack of intention or recklessness as to the likelihood of serious harm.

In order to show B consented, where in issue, A will inevitably seek to adduce evidence of previous sexual behaviour. This may also be relevant to the question of intent or recklessness, where no serious harm previously resulted from similar conduct.

In the context of a sexual allegation, the defence would have to pass through one of the gateways under s.41 YJCEA 1999 in order to adduce evidence of previous sexual behaviour. No such prohibition arises where the allegations are non-sexual, notwithstanding the context.

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