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SPEAKING ILL OF THE DEAD WHEN "EROTIC ASPHYXIATION GOES WRONG": New Zealand's Need for a Consistent Approach to Sexual History Evidence for Fatal and Non-Fatal Sexual Cases

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2021

Abstract

Sexual history evidence with respect to deceased victims of sexualised killings is admissible in New Zealand. Arguing the death occurred during consensual "erotic asphyxiation gone wrong" is a popular defence strategy which emphasises the deceased's sexual history. Section 7 of the Evidence Act 2006 provides that evidence is only admissible when, in logical terms, it tends to prove or disprove a material issue. However, it is consistent with logic that a woman can have previously consented to erotic asphyxiation, and not have consented to erotic asphyxiation on a later occasion. There are good reasons to doubt whether consensual sexual history is ever relevant, both when the victim is deceased, and when the complainant is living. This essay analyses why having different rules for the admissibility of sexual history evidence in fatal and non-fatal sexual cases is harmful with Grace Millane's case. Drawing on submissions made in the Peter Ellis appeal, it argues for a consistent approach to the admissibility of sexual history evidence whether the victim is deceased, or the complainant is living. This essay sets out that the current evidence admissibility rules can exclude sexual history evidence if applied consistently with the modern definition of consent. However, courts are finding that the deceased's sexual history evidence is relevant, and this precedent is unlikely to change swiftly. Therefore, this essay recommends that Parliament amend the Evidence Act 2006 to exclude deceased victims' sexual history evidence from femicide trials.

Key words: sexual history evidence, rough sex gone wrong, erotic asphyxiation, consent, femicide

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I Introduction

Imagine the following scenario: it is a murder trial for the sexualised killing of a woman, known as femicide.[1] The defence present evidence showing the deceased previously consented to a sexual partner restricting her breath for her sexual pleasure, known as erotic asphyxiation.[2] As a result, the jury finds her accused killer not guilty. It might appear a significant logical leap to move from evidence of consent to erotic asphyxiation on previous occasions to the conclusion that the deceased consented on the occasion she was killed. However, such evidence is admissible and defence strategies that emphasise the deceased's sexual history are often effective.

Sexual history evidence purports to give credibility to the defence's "erotic asphyxiation gone wrong" (EAGW) narrative or strategy. The EAGW narrative is a subset of the broader "rough sex gone wrong" (RSGW) narrative. Notably, while RSGW defence strategies are open to defendants in cases where the victim has died, in sexual violence cases with living complainants, legislation presumptively excludes evidence of complainants' sexual history. This presumption recognises the irrelevance of sexual history evidence and that its high risk of unfair prejudicial effect outweighs its low probative value.

In Peter Ellis' appeal, the Supreme Court heard arguments on the tikanga perspective that individuals' interests and mana continue after death.[3] If the Court accepts those submissions, the state legal system's distinction between living and deceased appellants may soften. Such a precedent could influence consistent approaches to living and deceased persons in other areas of the law including sexual history evidence.

There is a gap in scholarly discourse with respect to analysing the admissibility of the deceased's sexual history evidence in New Zealand femicide trials in which the defence

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[1] Elizabeth Yardley "The Killing of Women in 'Sex Games Gone Wrong': An Analysis of Femicides in Great Britain 2000–2018" (2021) 27(11) Violence Against Women 1840 at 1842.

[2] Elisabeth Sheff "Kinky Sex Gone Wrong: Legal Prosecutions Concerning Consent, Age Play, and Death via BDSM" (2021) 50(3) Arch Sex Behav 761 at 765.

[3] *Ellis v R* [2020] NZSC Trans 19 [*Ellis Trans 2020*] at 28–31.

advances the EAGW strategy. Moderate research on sexual history evidence in rape trials exists in New Zealand and other jurisdictions.[4] Though some research has analysed RSGW narratives in femicide trials, it has predominantly had an England and Wales focus.[5] Beyond that English scholarship, there has been little academic consideration of how sexual history evidence regarding the deceased in femicide cases is or should be treated.[6] Within this minimal scholarship, a notable 1988 United States article proposed extending rape shield provisions to deceased persons.[7] This essay speaks to this gap in the literature.

This essay has five parts. Part II explains how EAGW narratives work in trial contexts. It draws on the case study of Jesse Kempson's trial for Grace Millane's murder in which the defendant advanced the EAGW narrative. This case study illustrates the harm such defence strategies can cause the deceased, her family and the wider public. Part III examines the exclusion of sexual history evidence from non-fatal sexual cases. Part IV critiques the logic in the application of New Zealand's rules for admitting evidence to sexual history in EAGW femicide trials. Part V analyses the Supreme Court's opportunity to soften the distinction between living and deceased parties to proceedings. Part VI proposes reform.

II Understanding EAGW Narratives

A The Burden of Proof

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[4] See for example Susan Easton "The Use of Sexual History Evidence in Rape Trials" in Mary Childs and Louise Ellison *Feminist Perspectives on Evidence* (Cavendish Publishing, London, 2000) 167; Clare McGlynn "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 JCL 367; Aileen McGolgan "Common Law and the Relevance of Sexual History Evidence" (1996) 16(2) OJLS 275; and Regina A Schuller and Patricia A Hastings "Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions" (2002) 26(3) Psychol Women Q 252.

[5] Yardley, above n 1, at 1841; see for example Susan SM Edwards "Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence" (2020) 84(4) JCL 293; and Hannah Bows and Jonathan Herring "Getting Away With Murder? A Review of the 'Rough Sex Defence'" (2020) 84(6) JCL 525.

[6] Bows and Herring, above n 5, at 532.

[7] Joan L Brown "Blaming the Victim: The Admissibility of Sexual History in Homicides" (1988) 16(2) Fordham Urb L J 263 at 265.

In a murder trial, the prosecution has the burden of proving all offence elements beyond reasonable doubt.[8] The first element is the actus reus: the defendant must have done the act that causes the death. The second element is the mens rea: the defendant must have intentionally killed the deceased, or intentionally caused them bodily harm, knowing that harm was likely to kill them and being reckless as to whether their death ensued.[9]

The defence has no legal burden of proving, or disproving, any element of the offence. However, in practice, the defence usually present evidence and advance a narrative about the facts and evidence. Advancing a narrative accords with the Story Model proposed by Nancy Pennington and Reid Hastie in 1991.[10] According to the Story Model, jurors tend to understand evidence by constructing stories.[11] The story the jurors accept is the one that makes the evidence make the most sense to them.[12] They make their verdict decision according to how that story suits the verdict options.[13] The parties in the trial can influence the jurors' story construction by advancing their own narrative about how the evidence fits together.[14] Given this potential to influence, it is good strategy for the defence to attempt to raise reasonable doubt about one or more offence element by advancing a narrative such as the EAGW narrative.

B The Modern Definition of Sexual Consent

The EAGW narrative is difficult to reconcile with the modern definition of sexual consent. This definition is therefore central to critiquing the logic of finding relevance and probative value in the deceased's sexual history evidence. Modern understandings of sexual consent

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[8] Courts of New Zealand "Murder or manslaughter or self-defence (Sections 48, 167 and 171 Crimes Act 1961)" <www.courtsofnz.govt.nz>.

[9] Crimes Act 1961, s 167(a)–(b).

[10] Nancy Pennington and Reid Hastie "A Cognitive Theory of Juror Decision Making: The Story Model" (1991) 13 Cardozo L Rev 519.

[11] At 521–523.

[12] At 522–523.

[13] At 529–531.

[14] Richard Lempert "Telling Tales in Court: Trial Procedure and the Story Model" (1991) 13 Cardozo L Rev 559 at 561–562.

reflect that the very nature of consensual sex is an activity that is in the moment. While consent education once advocated that "no means no", consent is now framed as "yes means yes".[15] This framing illustrates that consent is not presumed. Rather, when consent is given, it is unequivocal, enthusiastic, ongoing and reciprocal.[16] Therefore, consent is independent of previous sexual experiences. A person can give consent and withdraw consent during a single sexual experience. According to this level of nuance during a single occasion, it is even more the case that consent on a different occasion, with a different partner, does not mean that person consented at the later date.

C Grace Millane and the Harmfulness of Sexual History Evidence

K v R [2020] NZCA 656, Jesse Kempson's appeal judgment drawing upon his High Court trial for the murder of Grace Millane, illustrates the EAGW narrative playing out in a New Zealand court. The facts of *K v R* were that Millane and Kempson met for drinks arranged via Tinder.[17] Later that evening, at Kempson's apartment, they engaged in sexual activity during which Kempson killed Millane. The cause of Millane's death was manual strangulation lasting between five and 10 minutes.[18] This strangulation left a six-by-three centimetres pre-mortem deep bruise on Millane's neck resulting from the application of "sustained and prolonged pressure."[19] After Millane's death, Kempson viewed

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[15] Katie Mettler "'No means no' to 'yes means yes': How our language around sexual consent has changed" *The Washington Post* (online ed, Washington, 15 February 2018).

[16] See generally Eithne Dowds "Rethinking affirmative consent: a *step* in the right direction" in Rachel Killean, Eithne Dowds and Anne-Marie McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, New York, 2021) 162; Rosa Gavey "Affirmative Consent to 'Sex': Is It Enough?" (2019) 3 NZWLJ 35 at 40–41; Daniel Jackson "Six Mistakes of Law About Consent" (2020) 4 NZWLJ 97 at 110–119; and, for how youth culture understands consent, Sinead Gill "Calling Out Consent" *Critic Te Arohi* (online ed, Dunedin, 4 April 2019); Kim Vinnell "New Zealand rape survivors, in their own words (WATCH)" (1 May 2017) The Spinoff <www.thespinoff.co.nz>; and De Elizabeth "Enthusiastic Consent is Changing How We Have Sex" (3 April 2019) MTV <http://www.mtv.com>.

[17] *K v R* [2020] NZCA 656 [*CA Appeal*] at [12].

[18] At [121].

[19] *R v K* [2020] NZHC 233 [*K Sentence*] at [52].

pornography relating to slaves and teenagers, took sexualised photographs of Millane's deceased body and viewed additional pornography.[20] The following day, Kempson met another woman he met on Tinder before burying Millane's body in a suitcase in the Waitākere Ranges.[21]

Kempson attempted to raise reasonable doubt about his mens rea using the EAGW narrative.[22] He accepted the actus reus element of homicide: he killed Millane by allegedly consensual manual strangulation.[23] Kempson denied he had done so intending to kill Millane and denied he was reckless as to the possibility of her death.[24] Rather, he argued that he had intended to engage in consensual erotic asphyxiation during rough sex that went accidentally wrong.[25] Kempson claimed he lacked experience with sex involving domination and sadomasochism (BDSM) and that it was Millane who initiated the erotic asphyxiation.[26]

The defence used Millane's sexual history, particularly her past interest in erotic asphyxiation, to add credibility to those arguments. Two of Millane's previous sexual partners gave evidence about their historical sexual interactions with her.[27] A friend of Millane's, with whom she had discussed her sexual interests relating to erotic asphyxiation and submission, also gave evidence. In addition, the defence presented evidence about the

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[20] At [65]–[67].

[21] At [157].

[22] At [1].

[23] At [17].

[24] Catrin Owen "Grace Millane murder trial: Accused didn't intend to kill backpacker, defence says" (19 November 2019) Stuff <www.stuff.co.nz>.

[25] *Kempson v R* [2020] NZCA 671 at [13]; and *Kempson v R* [2021] NZSC 74 [*SC Appeal*] at [10].

[26] *CA Appeal*, above n 17, at [18]–[19].

[27] Sam Hurley "Grace Millane murder trial: Sexual culture expert testifies, evidence about Whiplr sex app" *The New Zealand Herald* (online ed, Auckland, 20 November 2019); Sam Hurley "Grace Millane murder trial: Sexual preferences and accused's 'life through Tinder' canvassed" *The New Zealand Herald* (online ed, Auckland, 20 November 2019); and Sam Hurley "Grace Millane murder trial: Jury to hear Crown, defence closing arguments" *The New Zealand Herald* (online ed, Auckland, 21 November 2019).

dating websites and mobile phone applications Millane had used. As highlighted by the media, one of these applications was Tinder, New Zealand's most popular dating application.[28] Others included Fetlife, a social networking website used by people in the BDSM community, and Whiplr, a BDSM-focussed dating website. Men she had "matched" with in those applications and on those websites—meaning both persons liked the other's profile, creating a private chatroom—also gave evidence. The connotations of these websites and applications about users' proclivity for BDSM sexual practices purported to give credibility to the defence's narrative about Millane's sexual proclivity for erotic asphyxiation.

Unconvinced by Kempson's EAGW narrative, the jury found him guilty of murder.[29] Despite this guilty verdict, hearing Millane's sexual history evidence harmed Millane and her family. While Kempson benefitted from name suppression, Millane's name, with sensitive and private details of her sexual history, were detailed at length in open court and in the international media.[30] In contrast, the law would have protected Millane from such harms if she had survived the strangulation.[31] *K v R* provides an illuminating case study of the harmful inconsistency between the way New Zealand law treats the sexual history evidence of women femicide victims as compared to complainants in non-fatal sexual violence cases.

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[28] See for example Amber Hicks "How Grace Millane's dream trip turned to tragedy after Tinder date with sick killer" *The Daily Mirror* (online ed, London, 22 November 2019).

[29] *K Sentence*, above n 19, at [1]; and *CA Appeal*, above n 17, at [152].

[30] See for example Zoe Drewett "Grace Millane belonged to BDSM sites and asked ex-boyfriend to choke her, defence claims" *Metro* (online ed, London, 19 November 2019); Bernard Lagan "Grace Millane trial: backpacker liked choking during sex, says ex-lover" *The Times* (online ed, London, 20 November 2019); Lee Brown "Killed backpacker Grace Millane was into choking, BDSM: court evidence" *New York Post* (online ed, New York, 20 November 2019); Chiara Giordano "Grace Millane: British backpacker gave list of fetishes to man on BDSM website, murder trial told" (20 November 2019) The Independent <www.independent.co.uk>; and Catrin Owen "Grace Millane murder trial hears from past date and men she messaged online" (20 November 2019) Stuff <www.stuff.co.nz>.

[31] Evidence Act 2006, s 44.

D Grace Millane's Case Illustrating Greater Dangers

For reasons of space, this essay is tightly focussed on the treatment of sexual history evidence in femicide by strangulation cases in which a male defendant advances the EAGW narrative. However, male-against-female is not the only gender dynamic where such violence can play out. Women can perpetrate fatal and non-fatal strangulation offences.[32] Men can be fatally or non-fatally strangled. Not all femicide cases involve manual strangulation. While the broader RSGW narrative encompasses those other dynamics, this essay's focus is EAGW femicide because of its statistical prevalence. In fatal strangulation incidents, women comprise the majority of victims.[33] Male perpetrators are most often convicted of perpetrating fatal strangulation.[34] In femicide cases in England and Wales, manual strangulation is a common circumstance.[35] In addition, only male defendants have argued RSGW narratives to defend homicide in England and Wales.[36] *K v R* reflects this gender dynamic and the cause of death.[37]

Millane was a "perfect victim". She was white, middle-class, educated, photogenic and heterosexual. Part of what is striking about the *K v R* example is that although Millane's access to certain privileges made her less likely to fall foul of racist, classist and bigoted stereotypes, the legal system still treated her harmfully. Hearing her sexual history evidence allowed for unfair and illogical inferences to be made about Millane as a person. The hearing of this evidence made it seem as if she were the one on trial.[38] This caused her

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[32] Crimes Act 1961, ss 168(1)(c) and 189A.

[33] Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, June 2014) at 100.

[34] At 100.

[35] Bows and Herring, above n 5, at 526.

[36] We Can't Consent To This "Who Claims 'Sex Games Gone Wrong'" (3 July 2019) <www.wecantconsenttothis.uk>.

[37] *K Sentence*, above n 19, at [48].

[38] Anna North "She was fatally strangled. The media is making it about her sex life." (21 November 2019) Vox <ww.vox.com>.

family intense distress. Millane's case indicates the even greater dangers sexual history evidence admissibility presents for persons disadvantaged by intersectional challenges.

III The Rape Shield: Exclusion of Complainants' Sexual History Evidence

A The Rape Shield's Legal Effect

Section 44 of the Evidence Act 2006, known as the "rape shield", presumptively excludes complainants' sexual history with persons *other than* the defendant.[39] This presumption is rebuttable when the judge is satisfied that the evidence is of "such direct relevance … that it would be contrary to the interests of justice to exclude it".[40] When the rape shield is rebutted, defendants effectively construct narratives based on spurious background assumptions, stereotypes and hidden premises.[41] Two of these are that sexually experienced women are "up for it" and are likely to consent to sex, and that they are likely to be untruthful when they say they did not consent.[42]

Section 44 does not exclude all of complainants' sexual history evidence. Complainants' sexual history *with* the defendant is subject to the standard evidence admissibility rules discussed in Part IV. However, the Sexual Violence Legislation Bill is currently before Parliament. If this bill becomes law, evidence of sexual history between the complainant and defendant in non-fatal sexual violence cases will only be admissible in limited circumstances.[43] Namely, to establish the fact that there is sexual history between the complainant and the defendant. In addition, or alternatively, to prove an act or omission

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[39] Law Commission *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at 48; and Elisabeth McDonald and Yvette Tinsley "Reforming the Rules of Evidence in Cases of Sexual Offending: Thoughts for Aotearoa/New Zealand" (2011) 15(4) E&P 311 at 320.

[40] Evidence Act 2006, s 44(3).

[41] Elisabeth McDonald *Rape myths as barriers to fair trial process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Pilot Court* (Canterbury University Press, Christchurch, 2020) at 43–47.

[42] Law Commission, above n 39, at 53; (11 February 2021) 749 NZPD 775–776; McDonald, above n 41, at 47; and, in relation to the Evidence Act 2006's predecessor, (18 August 1976) 405 NZPD 1754.

[43] Sexual Violence Legislation Bill 2019 (185-2), cl 44(1)(a).

that is an offence element or, in a civil proceeding, the cause of action.[44] At the first reading of the Sexual Violence Legislation Bill, Jan Logie MP explained that the reform provides for sexual cases to be tried on their facts and evidence instead of misbeliefs and stereotypes that dispirit and confuse complainants.[45]

B Preventing Logical Leaps in Reasoning

The rape shield reflects that on any given occasion, the factual question of whether a person either does or does not consent to a sexual experience is logically independent of whether, on past or future occasions, he or she did or did not consent to other sexual experiences.[46] In turn, the rape shield reflects modern understandings of consent by shifting the focus from previous sexual activity to ongoing, reciprocal and enthusiastic consent for each sexual act.[47] Hon Andrew Little MP emphasised this understanding of consent at the first reading of the Sexual Violence Legislation Bill.[48] According to Little, the presumptive inadmissibility of complainants' sexual history reinforces that it is too much of a logical leap to infer the complainant consented to the sexual activity at issue from their sexual history.[49]

C Conviction and Sentencing Outcomes

Case law from England and Wales illustrates that sexual history evidence presented as part of a RSGW defence narrative can affect the outcome of a trial.[50] The hearing of sexual history evidence can result in the defendant receiving a lesser sentence and lesser

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[44] Clause 44(1)(a).

[45] Sexual Violence Legislation Bill 2019 (185-1); and (14 November 2019) 742 NZPD 15140.

[46] McGlynn, above n 4, at 369–370; and Bridget Alice Foster Sinclair "New Zealand Rape Shield and the Need for Law Reform to Address Substantial Harm: When Politics and the Law Must Address Social Injury" (LLB(Hons) Dissertation, Victoria University of Wellington, 2016) at 18.

[47] Sinclair, above n 46, at 4–5.

[48] Sexual Violence Legislation Bill 2019 (182-1).

[49] (14 November 2019) 742 NZPD 15136; and, in relation to the Evidence Act 2006's predecessor, (18 August 1976) 405 NZPD 1753–1754.

[50] In relation to England and Wales, see for example Easton, above n 4, at 173.

conviction than they would have otherwise received, or no conviction at all.[51] These conviction and sentencing outcomes were good reasons for the enactment of the rape shield.[52]

IV Femicide: No Evidence Shield

"[W]hen people play consensually, they do not die."[53]

A The Evidence Shield Discrepancy

New Zealand does not have a sexual history evidence shield provision for the deceased in femicide cases. Parliament does not appear to have an impetus to enact such a provision. If the Sexual Violence Legislation Bill enters into force, the new rules it prescribes for admitting sexual history evidence will continue to separate deceased victims from living complainants.

This discrepancy between the treatment of sexual history evidence in sexual violence trials with living complainants, and in femicide trials with deceased victims, raises the question: why? Do principled differences justify the discrepancy between those two crimes? Both crimes are sexual cases by definition.[54] A material issue in both murder and non-fatal sexual violence cases is whether the defendant acted with the requisite mens rea. Although the mens rea in the different crimes pertains to intention or recklessness to do different acts, both concern an intention to harm the alleged victim. The difference between the outcomes is that with rape, the complainant survives the violence inflicted upon them, and with femicide, the deceased does not survive the violent interaction. This essay argues that those differences in outcome are not significant enough in principle to justify the different

[51] Bows and Herring, above n 5, at 527; and Elisabeth McDonald "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's 'Rape Shield' Provision" (1994) 18 Crim LJ 321 at 322.

[52] McDonald, above n 51, at 322–323.

[53] Franki Cookney "The 'rough sex' defence was a gross perversion of BDSM, I'm delighted it's finally been banned" (17 June 2020) The Independent <www.independent.co.uk>.

[54] Nikki Pender "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at [7].

admissibility approaches to sexual history evidence between the respective crimes. Reflecting this argument, three submissions to the Justice Committee on the Sexual Violence Legislation Bill recommended the enactment of a consistent approach to sexual history evidence admissibility.[55] Those submissions recommended extending the rape shield to murder cases in light of *K v R*.[56]

B Conviction and Sentencing Outcomes

The inconsistent approach to sexual history evidence for deceased and living victims is concerning given similar conviction and sentencing outcomes can arise in femicide. In RSGW femicide cases in England and Wales, judges have used the deceased's sexual history evidence to justify convictions for lesser included offences and favourable sentencing.[57]

The Story Model offers an explanation for these trial outcomes. By definition, in advancing the EAGW narrative, the defence aims to latch onto gendered myths, stereotypes and biases reposed by the jurors.[58] *K v R* illustrates the gendered myths the defence's EAGW argument relies on. If the defence had persuaded the jury that Millane consented to erotic asphyxiation in the past and that she enjoyed being dominated during sex, the jury could have extrapolated conclusions. Namely, that she was more likely to have consented, or in fact did consent, to the manual strangulation during the interaction at issue. Understanding sexual consent as the enthusiasm-focussed modern definition is inconsistent with that belief. Indeed, according to Elisabeth McDonald, "sexual history evidence allows juries to

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[55] At 2–3; Office of the Privacy Commissioner "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at [5]–[14]; and Ruth Money "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at 4.

[56] Pender, above n 54, at 3; Office of the Privacy Commissioner, above n 55, at [5]–[14]; and Money, above n 55, at 4.

[57] We Can't Consent to This "Does Claiming a 'Sex Game Gone Wrong' Work?" (18 February 2020) <www.wecantconsenttothis.uk>.

[58] McDonald, above n 41, at 47; and Abuse and Rape Crisis Services Manawatū "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at 2; and McDonald, above n 51, at 324.

make verdict choices based on rape myths."[59] If the jury had accepted Millane's alleged sexual proclivity, then the defence narrative that Kempson only intended to engage in consensual erotic asphyxiation, and had no intention to hurt or kill Millane, would have been likely to strike the jury as more credible. To jurors, this conclusion would have suited the verdict options of not guilty or guilty of a lesser offence. As a result, it would have been more likely that Kempson would be convicted of a lesser offence, such as manslaughter, rather than the more serious murder charge he initially faced.[60]

Kempson received a murder conviction and sentence imposing a minimum non-parole period of 17 years' imprisonment.[61] In the Court of Appeal, Kempson appealed against his conviction for murder on the primary ground that the Crown should have been required to disprove consent, or an honest belief in consent, in order to prove murder.[62] He also appealed against his sentence on the ground that his sentence was manifestly excessive and that the trial judge erred in finding s 104(1) of the Sentencing Act 2002, which required a minimum sentence of 17 years' imprisonment, applied.[63] Although neither of those grounds were successful, the outcome of *K v R* could have been different if the Court of Appeal had quashed the High Court ruling. The outcome could also have been different in the first instance if the High Court trial jurors had been more sympathetic to Kempson and his EAGW narrative and therefore nullified the verdict. Given that New Zealand jurors are prohibited from explaining their reasoning, nullification was available to the jury.[64]

Although not the case for Kempson, case law from England and Wales shows that even when the defendant is convicted of murder, the EAGW narrative *can* lead to reduced

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[59] McDonald, above n 51, at 322.

[60] Theodore Bennett "A Fine Line Between Pleasure and Pain: Would Decriminalising BDSM Permit Nonconsensual Abuse?" (2021) 24(2) Liverpool LR 161 at 170.

[61] *K Sentence*, above n 19, at [83]; *CA Appeal*, above n 17, at [169]–[170]; and *SC Appeal*, above n 25, at [20].

[62] *CA Appeal*, above n 17, at [4].

[63] At [4].

[64] Law Commission *Juries in Criminal Trials: Part Two* (NZLC PP37, 1999) at [252]; and *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 54.

sentences for murder convictions when sexual history evidence is admitted into the trial.[65] Consequently, Susan Edwards argues that with the EAGW narrative, defendants "disguise what is essentially cruel and misogynist conduct as a strategy to manipulate trial and sentencing outcomes."[66] Similarly, Hannah Bows and Jonathan Herring have questioned whether such defence tactics lead to defendants "getting away with murder".[67]

K v R may seem out of step with those outcomes. However, in England and Wales, early relationship situations comprising first dates and just-met circumstances are more likely to result in severe convictions and sentences than when the defendant and the deceased were in an established relationship.[68] Therefore, the fact that Millane's murder occurred during a first date may account for the outcome of *K v R*.[69]

However, even in a case like Millane's in which the admission of sexual history evidence did not result in an acquittal or sentence reduction, the decision to hear the evidence was not without harmful consequences. Millane's sexual history, a matter which most people regard as intimate and private, was laid bare in court and in the media. This added additional harm to the fatal injury she and her family had already experienced.

C The Rules of Evidence: Why the Deceased's Sexual History is Admissible

Given the same motivations for enacting the rape shield are reflected in femicide cases, New Zealand should take a consistent approach to the treatment of sexual history evidence in fatal and non-fatal sexual cases. One way to achieve this consistency is by applying the rules for admitting evidence in a manner consistent with the modern definition of consent and without the influence of gendered myths and stereotypes. If courts did this, they would

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[65] We Can't Consent to This, above n 57; We Can't Consent to This "Submission to the Constitution Committee on the Domestic Abuse Bill 2019–21" (June 2020) at [4.4.2.3]; and Bennett, above n 60, at 170.

[66] Susan S M Edwards "Assault, Strangulation and Murder – Challenging the Sexual Libido Consent Defence Narrative" in Alan Reed and others (eds) *Consent: Domestic and Comparative Perspectives* (Routledge, London, 2016) 88 at 89.

[67] Bows and Herring, above n 5, at 534.

[68] Yardley, above n 1, at 1850–1851 and 1857.

[69] *CA Appeal*, above n 17, at [16].

exclude sexual history evidence for its irrelevance in both fatal and non-fatal sexual cases without the need for evidence shields. This essay examines why the deceased's sexual history is admissible, contrasted with an alternative way the courts could apply New Zealand's evidence admissibility rules.

1 Relevance

Under New Zealand's rules for admitting evidence, relevance is a necessary condition and the lowest common denominator for admissibility. Section 7 of the Evidence Act 2006 establishes that evidence that is not relevant is inadmissible. Section 7(3) defines relevant evidence as that which "has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding."[70]

Relevance is a matter of logic. When the defence seeks to admit evidence of the deceased's sexual history, they claim that such evidence is relevant to the question of whether or not she consented to the erotic asphyxiation that caused her death. This, in turn, is relevant to the question of whether the defendant intended to kill or harm her, or instead only intended to engage in consensual erotic asphyxiation. However, there are reasons to be sceptical of whether evidence of sexual history is either material (in the sense of relating at all) or relevant (in the sense of having a logical tendency to prove or disprove) to whether the deceased consented to the strangulation that killed her. This is because consent to sexual experiences, including erotic asphyxiation, are logically independent**.** The modern understanding of consent demonstrates this logical independence. It follows from consent being enthusiastic, ongoing and reciprocal, that past consent does not indicate a likelihood of future consent.

Previous case law has rejected illogical inferences within prejudicial chains of reasoning. In *R v Alletson* [2009] NZCA 205, the defence argued that evidence about the respondent's history of religiousness and a reverend viewing him as a "decent person" should be

[70] Evidence Act 2006.

admissible because such evidence was relevant and probative.[71] The Court of Appeal found that admitting the evidence would ask the jury to accept the chain of reasoning that:[72]

> the appellant was a religious person in his younger days and considered by a reputable figure in religious circles to be a decent person; a boy who is religious and is considered by a reputable person to be of good character is unlikely to commit sexual offences against young girls; therefore, it is less likely that the appellant did so in this case.

The Court considered the flip side of such a finding: it would begin a slippery slope into concluding that it is logical "that someone who has no religious beliefs and is not highly thought of by an authority figure is more likely to commit sexual offences against young girls."[73] The Court found that conclusion to be illogical. The evidence did not illustrate a lesser likelihood of sexually abusing children like the defence argued. Given the evidence's irrelevance, the Court excluded it.[74]

Both *Alletson* and *K v R* concern propensity evidence. Propensity evidence is adduced to show a person's proclivity to act in a certain way, and therefore give credibility to arguments that the person likely acted in that way, on the occasion at issue in trial.[75] In *Alletson*, the propensity evidence concerned the respondent who was the defendant in the first instance. However, in *K v R*, the propensity evidence concerned the deceased victim. Like in *Alletson*, admission of the deceased's sexual history in *K v R* asked the jury to adopt a chain of reasoning that similarly appears to rely on illogical inferences. Namely, that Millane was an experienced practitioner of BDSM with a sexual predisposition to engage in consensual erotic asphyxiation; women with erotic asphyxiation sexual preferences are more likely than the "average" woman to engage in consensual erotic asphyxiation;

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[71] *R v Alletson* [2009] NZCA 205 at [36].

[72] At [43]; and 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(3) VUWLR 487 at 496–497.

[73] *Alletson*, above n 71, at [44].

[74] At [44].

[75] Evidence Act 2006, s 40(1).

therefore, it is likely she consented to the manual strangulation during the occasion at issue; and that her death was due to an accident during that consensual sexual encounter, rather than due to murderous intent.[76]

This chain of reasoning has poor logic and is prejudicial for three reasons. First, this type of reasoning made the trial seem as if Millane herself were on trial.[77] There is a stigma around BDSM preferences and risky sex that Millane was accused of having a history of engaging in.[78] Given this stigma, and because the defence argued she contributed to her death through "asking for" manual strangulation on the material occasion, this shifted the focus from Kempson's mental state to Millane and her history.[79] Similarly, complainants reported feeling like they were the person on trial before Parliament enacted the rape shield.[80] However, emphasising the deceased's sexual history is not a logical way to raise reasonable doubt. Millane's alleged propensity for consenting to erotic asphyxiation does not go to the issue of whether Kempson acted with mens rea. Kempson and Millane are different people. Kempson's mental state at the material time cannot be inferred from past, different actions of Millane. It follows that the deceased's sexual history evidence derives relevance from a convoluted chain of reasoning about what the defendant believed and whether he acted with mens rea. It could be true that Millane consented to erotic asphyxiation with a certain person (person Y) at a certain point in time in the past. It is not accurate that a logical conclusion from that fact is that Millane consented to manual strangulation during sex, in the same or a similar way as she did with person Y, with Kempson at another time.

The notion that consent is logically independent of previous consent is not a product of any particular political ideology. It is also not exclusive to sexual consent. The popular cup of

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[76] See generally *SC Appeal*, above n 25, at [7].

[77] North, above n 38.

[78] Bennett, above n 60, at 164.

[79] *CA Appeal*, above n 17, at [19].

[80] (18 August 1976) 405 NZPD 1753 and 1756.

tea analogy illustrates this point.[81] The fact that a person wanted a cup of tea on one occasion does not mean, nor make it more likely, that the same person wanted a cup of tea on a different occasion.[82] A plethora of factors can influence why a person does or does not want a cup of tea on any given occasion. A person can want a cup of tea and change their mind before drinking it or part-way through drinking that tea. They are not obliged to finish that cup of tea. These factual statements are consistent with logic. This logic also applies to sexual consent. Therefore, consent to BDSM practices, such as erotic asphyxiation, on one occasion logically tells the jury nothing about consent on a later occasion. The admissibility of Millane's sexual history evidence in *K v R* illustrates that there is a problem at this most basic level: in logical terms, the deceased's sexual history evidence is irrelevant to whether she consented to erotic asphyxiation, and whether the defendant acted with the requisite mens rea.

Secondly, consent lapses once a person becomes unconscious. By virtue of s 128A(3) of the Crimes Act 1961, no one can legally consent to sexual activity, including erotic asphyxiation, once they become unconscious. In addition, New Zealand case law sets out that no one can reasonably consider another person is consenting to sex while the other person is unconscious.[83] Therefore, in *K v R*, even assuming that Millane had initially consented to strangulation, as soon as she lost consciousness, that consent would have lapsed. At this point, Kempson could have no longer had a reasonable belief that Millane was consenting.[84] Although he should have then stopped applying pressure to her neck, he continued applying pressure for several more minutes.[85] Rather than suggesting Kempson did not intend to hurt or kill Millane as he argued, the fact her consent lapsed, if there was consent to erotic asphyxiation from the beginning, but Kempson continued, suggests he

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[81] For examples of the illogicality of treating present consent as logically connected to past consent, Alli Kirkham "What If We Treated All Consent Like Society Treats Sexual Consent?" (23 June 2015) Everyday Feminism <www.everydayfeminism.com>.

[82] (11 February 2021) 749 NZPD 776; and Rob McCann "Consent explained with a cup of tea" (12 July 2015) White Ribbon <www.whiteribbon.org.nz>.

[83] *R v Pakau* [2011] NZCA 180 at [30]; and but see *R v S* [2015] NZHC 801 at [36]–[37].

[84] *K Sentence*, above n 19, at [51].

[85] At [51].

acted with the requisite mens rea. It is therefore not logical for the defence to use Millane's alleged consent in their chain of reasoning about why the jury should have reasonable doubt about whether Kempson acted with mens rea.

Thirdly, the flip side of adopting the chain of reasoning would be a slippery slope into confining consent into patterns and formulae. If what a woman consents to on a given sexual occasion can be inferred from her sexual history, it would appear that her sexual history would predict consent on future occasions. This challenges whether women could consent to experimenting in their sex lives and exercising sexual agency.[86] Past consent does not predict future consent as discussed in Part II. In a sense, this is particularly the case for sex involving BDSM. Erotic asphyxiation involves a restriction of breath. Therefore, consent relies on prior communication between the sexual partners of their respective limits.[87] For Millane, one of her previous sexual partners testified that they used the safe word "turtle" and agreed on a tapping action to communicate withdrawal of consent.[88] Sexual partners who are not in a relationship, and indeed those who have just met, can engage in consensual sex involving BDSM with effective communication. However, whether sexual partners did so is not a conclusion which can logically be extrapolated from sexual history evidence showing past consent to erotic asphyxiation. Consent is specific to each partner on each occasion. Communicating consent to BDSM practices involves more layers than merely saying "yes" or "no".[89] The law should reflect that it is logical that someone who has engaged in erotic asphyxiation in the past does not automatically, presumptively, or even probably, consent to similar BDSM-focussed or rough sexual activity on a different occasion.[90] For Millane, given the purported lack of safety precautions with Kempson in comparison to her sexual history, it is even more accurate that such evidence could not have illustrated that she consented to Kempson

[86] See generally McDonald, above n 51, at 331; and McGlynn, above n 4, at 369.

[87] Cara R Dunkley and Lori A Brotto "The Role of Consent in the Context of BDSM" (2020) 32(6) Sexual Abuse 657 at 660–664.

[88] Stephen D'Antal and Matthew Dresch "Backpacker Grace Millane 'used a safe word while practising BDSM' her ex tells court" *The Daily Mirror* (online ed, London, 19 November 2019).

[89] Dunkley and Brotto, above n 87, at 661.

[90] In relation to non-fatal sexual violence, McGlynn, above n 4, at 391.

applying prolonged pressure to her neck. Understanding the nuance of consent suggests sexual history does not illustrate a propensity to consent to sex, including erotic asphyxiation. Sexual history evidence, according to that logic, is irrelevant. Like excluding religious history evidence in *Alletson*, courts should also exclude the deceased's sexual history evidence in femicide trials. Such evidence does not illustrate a proclivity for enjoying erotic asphyxiation as the defence argues.

The gendered myths discussed in Part III appear to influence the courts' admissibility decisions. In addition, according to Ruthy Lazar, Canadian defence counsel have observed that there are "magic words" used "to rationalize the relevance" of sexual history evidence: context, human nature and common sense.[91] It is too much of a logical leap for a court to find evidence is relevant based on magic words and gendered myths.

Even if sexual history evidence is relevant, which this essay argues it is not, it does not follow that the deceased's sexual history evidence should be admissible. New Zealand's other rules for admissibility decisions should catch such evidence.

2 Probative value–prejudicial effect balancing test

Section 8 of the Evidence Act 2006 sets out a balancing test determining the *legal* relevance of the evidence. The judge *must* exclude evidence when "its probative value is outweighed by the risk that the evidence will … have an unfairly prejudicial effect on the proceeding".[92] Evidence has probative value when it proves or disproves a matter in the trial. Evidence carries a risk of prejudicial effect when it could inappropriately influence the fact finder, either the judge or the jury, in the trial. Although s 8(1)(b) provides that the judge must also exclude evidence when the risk of that evidence needlessly prolonging the proceeding outweighs its probative value, this is not the focus of this essay. Section 8(1)(b) is seldom significant in EAGW femicide trials in comparison to s 8(1)(a). In applying this balancing

[91] Ruthy Lazar "Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada" (2010) 22(2) CJWL 329 at 339.

[92] Evidence Act 2006, s 8(1)(a).

test, the judge must also "take into account the right of the defendant to offer an effective defence."[93]

In relation to complainants' sexual history evidence, the Law Commission has recognised the low probative value in such evidence.[94] Earlier in Part IV, this essay argued that the differences between fatal and non-fatal sexual cases are insufficient to justify the different evidence admissibility rules for the respective crimes. According to that reasoning, the deceased's sexual history evidence also has low probative value.

K v R illustrates that taking into account the defendant's right to offer an effective defence, courts have found that the probative value of the deceased's sexual history evidence outweighs the risk of unfair prejudicial effect. This essay argues that the way courts have struck that balance excludes the modern definition of sexual consent. The calibration should instead recognise that the risk of the deceased's sexual history having a prejudicial effect on the trial is high whilst that evidence has relatively little probative value. This calibration is not new to legal scholarship. In 1994, McDonald argued that "[a]lthough there is low probative value in sexual history evidence, there is a high potential for prejudice when such evidence is admitted to show the victim's consent."[95]

A potential reason for the current miscalibration is courts' obligation to preserve the defendant's right to offer an effective defence under s 8(2) of the Evidence Act 2006. This essay argues that the defendant's right to offer an effective defence should not support the defence's arguments that the deceased's sexual history evidence should be admissible. This is because the balance between probative value and the risk of prejudicial effect is heavily weighed by the high risk of prejudicial effect contrasted with the low probative value. Judges must be careful determining the admissibility of evidence adduced by the defendant. This is because judges must not compromise defendants' fair trial rights or increase the omnipresent power imbalance between defendants and the state.[96] However, sexual history

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[93] Section 8(2).

[94] Law Commission *Evidence: Reform of the Law* (NZLC R55, 1999) at 52.

[95] McDonald, above n 51, at 322.

[96] New Zealand Bill of Rights Act 1990, s 25.

evidence should not bolster the effectiveness of a defendant's EAGW defence strategy given such evidence does not, in logical terms, illustrate a likelihood of consent. Such evidence therefore should not raise reasonable doubt about the defendant's mens rea which is the aim of the EAGW defence strategy. Even if the defendant's sexual history evidence does bolster the effectiveness of a defendant's defence somewhat, admitting such evidence with its high risk of prejudicial effect is an excessively cautious approach which causes significant harm to the deceased and her family.

Furthermore, property law from England and Wales treats one-sided evidence with due suspicion when one party is deceased. This is to avoid such evidence having an unfairly prejudicial effect on the trial. For example, in *Thomas v Times Book Co Ltd* [1966] 1 WLR 911 (Ch), Dylan Thomas allegedly gifted a manuscript to Douglas Cleverdon.[97] When Thomas' administratrix sued for the return of the manuscript, Thomas had died. He was therefore unable to confirm Cleverdon's account of the circumstances in which the gift was allegedly made.[98] Plowman J, careful to emphasise the one-sided nature of the evidence, said:[99]

> I am enjoined by authority to approach [the defendants'] story with suspicion having regard to the fact that the other actor in this story, the late Dylan Thomas, is dead and cannot therefore give his own version of what took place.

Femicide is part of criminal law. More is at stake in criminal law in terms of the criminal defendant's conviction and sentence. The associated penalties and social stigmas risked are more severe than those imposed by civil law. More is also at stake in terms of whether the deceased receives posthumous justice. The deceased cannot advocate for her own interests. Given those higher stakes, it would not be unreasonable to expect judges to apply greater scrutiny to sexual history evidence in the probative value–prejudicial effect balancing test, than evidence in a lower-stakes property law context.

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[97] *Thomas v Times Book Co Ltd* [1966] 1 WLR 911 (Ch) at 242.

[98] At 243.

[99] At 244.

D Logically Speaking: Shields Are Unnecessary

This essay proposes legislative reform in Part VI. Legislative reform would create a new provision and definitively alter the rules of sexual history evidence admissibility. However, ss 7 and 8 of the Evidence Act 2006 can already exclude sexual history evidence.

It would be inaccurate to argue judges have applied ss 7 and 8 incorrectly. There is no legislative requirement that they exclude the deceased's sexual history evidence. Nor is there a legislative requirement that such evidence meet a heightened relevance test like there is for sexual history evidence in non-fatal sexual violence cases.[100] The precedent judges follow for the deceased's sexual history is that such evidence is admissible. Without principled differences justifying departing from precedent, judges are bound, or highly persuaded, by previous judgments.

However, there are good reasons to query judges' logic with the status quo application of ss 7 and 8. *K v R* illustrates that judges are not applying ss 7 and 8 in a manner consistent with the modern definition of consent, nor with the application of logic and relevance discussed in this essay. While that is not incorrect, Parliament has legislated against this application of relevance in the context of non-fatal sexual violence. Parliament noticed a problem in allowing judges to decide to hear complainants' sexual history despite the logical gap between sexual history evidence and whether that person consented on the later occasion. Rather than leaving judges to work through this logical gap, Parliament enacted the rape shield. Parliament is also in the process of bolstering this shield with the Sexual Violence Legislation Bill.

If judges were free of all biases, the application of New Zealand's evidence admissibility rules could potentially produce a different result. According to the application of ss 7 and 8 that this essay has set out, sexual history evidence is irrelevant, has low probative value and carries a high risk of prejudicial effect. Particularly in light of the modern understanding of sexual consent, an alternative application would hold there is no logical link between past consent and the separate question of whether there was consent on the

[100] Evidence Act 2006, s 44.

occasion at issue. It is even more accurate that there is no logical link between the deceased's past consent and the defendant's mens rea. Therefore, logically speaking, such evidence should be inadmissible under ss 7 and 8. There should be no need for an evidence shield for both femicide and non-fatal sexual cases when courts apply ss 7 and 8 in accordance with the modern understanding of consent.[101]

However, this is not the current precedent. New Zealand is a small jurisdiction. Only a limited number of appeals are heard in New Zealand's highest courts. A judgment with enough precedential weight to create this change is therefore unlikely to enter the common law quickly. This essay argues that given the need for the law to treat sexual history evidence consistently in fatal and non-fatal sexual cases because of their lack of principled differences, reform should come from Parliament. This recommendation is with the qualification that, logically speaking, such legislative intervention should be unnecessary. Certainly, a consistent approach could already occur under the current evidence admissibility rules.

V Moving Towards Consistency: Deceased and Living Parties to Proceedings

A Ellis *Submissions*

When an appellant in a trial dies, New Zealand's legal system typically treats their interest in the case as having died with them.[102] A current high-profile case scheduled for hearing in the Supreme Court, *Ellis v R* SC 49/2019, shows New Zealand's law could be moving to shift this orthodox view. This essay argues that if this shift occurs, it could begin to break down the current distinction between living and deceased parties to proceedings. That change would further support this essay's argument that the law should have consistent

[101] Evidence Act 2006.

[102] Canterbury Legal "A new evolution in New Zealand law from the Peter Ellis case" (16 November 2020) <www.canterburylegal.co.nz>.

sexual history evidence admissibility rules for the deceased in femicide trials and living complainants.

In 1993, Ellis was convicted of 16 counts of child sex offences involving seven child complainants who attended the childcare centre he worked at.[103] Ellis always maintained he was innocent.[104] In *Ellis v R* [2019] NZSC 83, the Supreme Court granted Ellis leave to appeal his convictions.[105] Ellis died two months after the Court granted him that leave.[106] The Court then had to consider in light of Ellis' death whether it still had jurisdiction to hear his appeal. At the direction of Glazebrook and Williams JJ, counsel made submissions on the relevance of tikanga.[107] The Solicitor-General argued for revoking the leave to appeal according to the orthodox position that a person's interests in their appeal die with them.[108] According to Williams J, in a tikanga context, a deceased person becomes an ancestor with more mana than a living person.[109] Ellis' lawyer Natalie Coates argued that because Ellis' mana continued when he died, Ellis had just as much of an interest in his appeal posthumously as he would have had if he were still alive.[110]

The Court concluded that it did have jurisdiction to hear Ellis' appeal in spite of his death.[111] The Court's substantive reasons for this decision are yet to be released.[112] If the Court's reasoning accepts Coates' submissions, this would represent an important change in the law. It would show a move in the common law of New Zealand away from its orthodox position about deceased persons' interests ending with their death. This would be an important dimension of tikanga being recognised within the Western state legal system.

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[103] *Ellis v R* [2019] NZSC 83 at [1].

[104] At [11].

[105] At [20].

[106] *Ellis v R* [2020] NZSC 89 [*Ellis 2020*] at [3].

[107] *Ellis v R* [2019] NZSC Trans 31 [*Ellis Trans 2019*] at 20 and 52–54.

[108] At 19–22.

[109] At 53.

[110] *Ellis Trans 2020*, above n 3, at 28–31.

[111] *Ellis 2020*, above n 106, at [4].

[112] At [5].

The facts of *Ellis* do not align precisely with the facts of *K v R*. In *K v R*, Millane was the victim of a sexualised killing. This is different to *Ellis* where Ellis was the appellant appealing his conviction for perpetrating child sexual offences. However, the underlying policy reasoning and tikanga justification are applicable to both cases. Both Millane and Ellis' interests were fundamental to the proceeding despite them being deceased. As ancestors or tupunas, they had greater mana after their deaths.[113]

B Interests After Death According to Tikanga: Setting a Precedent?

The Court is likely to be persuaded by the tikanga view advanced by Coates given tikanga has become an important thread in the state legal system.[114] If the Court's substantive reasons reflect Coates' submissions and the tikanga view on posthumous interests takes precedence in the common law, it is possible that the current distinction between deceased and living persons in relation to proceedings could soften. This softening could produce two crucial results. First, an appellant being able to proceed with their appeal posthumously. Coates argued for this result for Ellis.[115] If the Court recognises that deceased appellants have interests and mana continuing after death, this will set a precedent extending to appellants beyond Ellis. Potentially, that precedent could hold that there are no principled differences between deceased and living appellants. Therefore, the law should take a consistent approach, and the same rules should apply to both.

Secondly, other areas of the law which currently distinguish deceased and living persons could also take a consistent approach. Arnold J recognised the potential changes that the Court's reasoning could lead to.[116] According to Arnold J, if the Court accepts the logic of Coates' submissions and endorses the tikanga perspective on interests after death in the

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[113] *Ellis Trans 2019*, above n 107, at 53.

[114] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [177]; Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZ L Rev 1; Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1; and *Ellis Trans 2020*, above n 3, at 5–8.

[115] *Ellis Trans 2020*, above n 3, at 5.

[116] At 20.

context of criminal appeals, there is a risk of creating inconsistency in other areas of the law.[117] He drew attention to how defamation appeals cannot proceed after death.[118] Coates' response to Arnold J framed this risk as an opportunity.[119] Coates emphasised her broader submission that tikanga is relevant to developing the general law of New Zealand.[120] She suggested that as the tikanga idea of interests after death develops in the law, it could be appropriate to reconsider whether distinguishing living and deceased persons in areas of the law, beyond the issue in the proceeding of criminal appeals, is appropriate.[121]

Another area where extending this view on interests and mana after death could be a logical step forward is in evidence law. Creating consistent evidence admissibility rules for the sexual history evidence of the deceased in femicide trials and the complainant in non-fatal sexual violence cases would be consistent with the tikanga view advanced by Coates in Ellis' appeal.

This essay recommends that the Supreme Court adopt Coates' submissions on interests after death in its substantive reasoning in order to soften the present distinction between living and deceased parties to proceedings. Such parties should include appellants as well as deceased femicide victims and living sexual violence complainants.

VI Proposed Reform

Amending the Evidence Act 2006 would provide a consistent approach to sexual history evidence in fatal and non-fatal sexual cases. At a minimum, Parliament should enact an evidence shield equivalent to the rape shield for femicide cases. To achieve this, one submission to the Justice Committee on the Sexual Violence Legislation Bill recommended that Parliament replace the word "complainant" in s 44 of the Evidence Act 2006 with

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[117] At 20.

[118] At 20.

[119] At 21.

[120] At 21.

[121] At 21.

"complainant or deceased person".[122] The submission also recommended that Parliament extend s 40(3)(b) of the Evidence Act 2006 to include the deceased in homicide cases.[123] According to s 40(3)(b), propensity evidence about "a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44," the rape shield. This change would largely limit propensity evidence's admissibility to that which illustrates a pattern of offending on part of the defendant, rather than that which draws illogical and prejudicial conclusions from the deceased's historical sexual experiences.[124] Parliament did not adopt those recommendations at the second reading of the Sexual Violence Legislation Bill.

However, merely extending the rape shield would be insufficient. The rape shield does not exclude sexual history evidence entirely. Sexual history evidence between the defendant and the complainant is admissible until the Sexual Violence Legislation Bill becomes law. In addition, defendants can rebut the rape shield to admit complainants' sexual history if such evidence is of heightened relevance. To this extent, the rape shield buys into the notion that there can be, in some circumstances, a logical connection between past consensual sexual history and consent on the occasion at issue in the trial. According to the high risk of prejudicial effect such evidence carries, and the modern understanding of sexual consent, that notion is inaccurate. Therefore, the rape shield does not provide protection against the use of sexual history evidence in non-fatal sexual violence trials in a manner that is wholly consistent with logic. In EAGW femicide trials, there is an evidentiary lacuna owing to the fact that the deceased cannot be present in court. She therefore cannot provide her own narrative, testify about her subjective experience of the events and refute the defence's narrative. Complainants have those options, notwithstanding the extreme re-traumatisation adversarial rape trials impose.[125] The additional challenges of the victim being deceased

[122] Pender, above n 54, at 3.

[123] At 6.

[124] Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 31.

[125] Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 26–27.

justify legislative protection going beyond the presumption that femicide victims' sexual history is inadmissible.

Parliament should explicitly exclude the deceased's sexual history from murder trials. This provision should apply to the deceased's sexual history with persons *other than* the defendant as well as *with* the defendant. According to Joan Brown, such reform would move the focus to the defendant's "actions and culpability" rather than the deceased's "moral worth".[126] In turn, this would reduce instances of the deceased's sexual history evidence being used to give unfair credibility to the defence's EAGW arguments and thereby producing lesser sentences and convictions for lesser included offences.

VII Conclusion

The deceased's sexual history evidence is extraneous to consent and the defendant's mens rea in femicide cases. This essay analysed New Zealand's rape shield. It explored the policy reasoning behind excluding complainants' sexual history. It compared these reasons to concerns currently abounding about the evidence admissibility rules in femicide trials. This essay then analysed courts' application of the evidence admissibility rules. It set out why sexual history evidence appears to fall short of the current admissibility rules in light of modern understandings of sexual consent. Contrasts to case law, jurisprudence and statutory provisions supported this analysis. This essay analysed the underlying influences in the application of the rules which contribute to the admissibility of sexual history evidence. It concluded that reform is necessary.

This essay proposed that courts should refine their application of the evidence admissibility rules to reflect relevance and logic given the modern definition of sexual consent. To provide for the event that this does not occur, this essay argued that Parliament should reform the Evidence Act 2006. It found support for this change in tikanga, drawing upon submissions made to the Supreme Court. It is time to learn from the harms *K v R* caused Millane and her family. New Zealand law needs a consistent approach for living complainants and deceased femicide victims' sexual history evidence.

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[126] Brown, above n 7, at 293.

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Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,882 words.