

# What can be consented to?

## Briefing on the use of “rough sex” defences to violence.

This briefing discusses UK killings and injuries which are claimed to be due to consensual sexual activity, how common these claims are, and what we know about the cases where these claims are made.

### Summary

Recent cases of women killed in claimed “rough sex” got much press attention. But this is not a recent problem. We’ve found 67 people in the UK who have been killed in claimed sex “gone wrong”, and yet more injured. All suspects in these killings and injuries are male. 60 of those killed were female. The case that set the law on this - *R v Brown* – was on violent sex among gay men, but nearly all other “rough sex” injury prosecutions have had female victims. Many of the accused men were previously abusive to their partners or had convictions for serious violence. A third of the dead women just met their killers that day. Two thirds of dead women were strangled. Deaths and injuries of women in claimed “rough sex” were 2 a year in 1996. In 2016, there were 20 women killed or injured, just in our data sample, and ten in the last 2 months of 2019. The law should be clear that you can’t consent to serious injury or death, but in practice, but to claim “sex games, gone wrong” gives too good a chance of a lesser charge, lighter sentence, or a death or an assault not being investigated as a crime at all.

### How common are rough sex defences?

In December 2018 there was widespread horror at the sentencing of the partner of a young woman – Natalie Connolly – for 3 years and 8 months for her manslaughter. Natalie died with terrible injuries at their home, and her partner claimed her beating and internal injuries were from consensual rough sex.

Since Natalie Connolly’s death in 2016, 12 other UK women have died in claimed rough sex, gone wrong. Anna Florence Reed’s death in April 2019 is the most recent.

The earliest UK case was the killing of Carole Califano in 1972: Carole had been trying to leave her abusive partner: he was convicted only of manslaughter.

We have found 60 UK women and 7 men killed in claimed “sex, gone wrong”. All those suspected in their deaths are male.

*In the last five years, 18 women and girls have been killed in claimed consensual violent sexual activity. In 10 cases, the man was convicted of their murder, in 6 cases, manslaughter, and in 1, no conviction. In 1 further case, there was a murder conviction only when the victim’s husband confessed to the crime. Police had treated her violent death as non-suspicious. 1 woman’s death has yet to go to court.*

We have found yet more cases of non-fatal assaults which are claimed to be part of consensual sexual activity. The *R v Brown*<sup>ii</sup> case of gay men involved in consensual, sadomasochistic violence made English law on this. But in all but one (i.e. 101) of these other cases of “consensual” violence, so far all of the victims are female, and all accused are male.

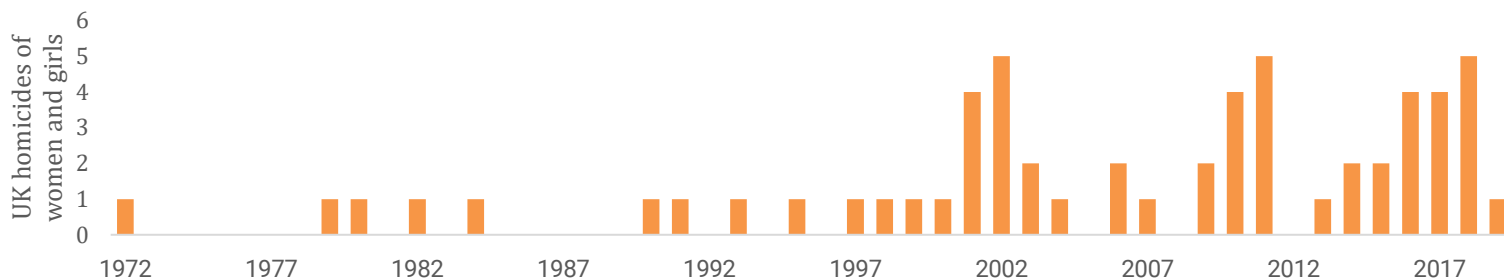
In each case, the accused men claim injuries or deaths happened in a consensual sex game, role play, kinky sex, rough sex, BDSM, or fifty shades, “gone wrong”. And in every non-fatal assault this century, the woman says she did not consent to the violence being charged.

#### NATALIE CONNOLLY, 26

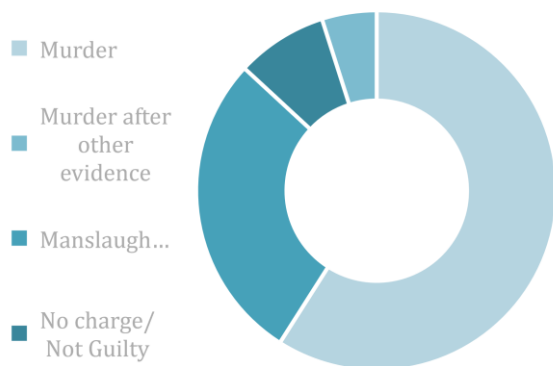
2016, Worcestershire

Natalie was mum to a daughter, and a twin sister. Natalie died with vaginal arterial bleeding and severe alcohol and cocaine intoxication at the bottom of the stairs of the home she shared with her partner of a few months, John Broadhurst, 36. Natalie had suffered 40 separate injuries, including serious internal trauma, a fractured eye socket and facial wounds. Broadhurst claimed her injuries, including “dreadful blunt-force injuries to her head, buttocks and breast before spraying her face with bleach to clean off the blood” were from consensual “rough sex”. The Attorney General was asked to intervene in the sentence given to Natalie’s killer, he declined.

Manslaughter, 3 years 8 months



## Does this claim form part of a successful defence to a killing?



Following the death of the 60 women and girls:

37 successful murder convictions.

However in 3 of those cases the women's deaths were treated as non-suspicious "sex games" until other evidence emerged – a review by a pathologist, the man murdering two other women, and the man confessing, respectively.

17 cases resulted in manslaughter convictions, with sentences ranging from 3 years to 16 years.

Of 5 no charge/not guilty:

1 man was found not guilty of all charges.

In 2 cases no charges were brought.

In 1 case charges were dropped against the man who had confessed, as the woman's death was determined to be a drug overdose.

In 1 the man was found guilty only of dismembering her body.

And 1 case has yet to come to trial.

The law should be clear: you cannot consent to serious injury or death. But if a man can claim the woman was killed accidentally in a consensual act, he may see the following outcomes:

- He is believed and no charges are sought.
- Prosecution pursue a manslaughter charge.
- Mitigation in sentencing - no intent to kill
- Extreme sexual violence is not treated as an aggravating factor in sentencing.<sup>iii</sup>
- Jury find him not guilty of murder, and guilty of manslaughter
- Found not guilty of all charges – or charges dropped.

Notably, two young women killed recently<sup>iv</sup> were said in court to have not consented to being strangled or choked – despite this, the men who killed them were convicted of manslaughter.

### LAURA HUTESON, 21

2018, Hull

Laura is killed by a man she'd just met that day. Jason Gaskell, 24, was charged with Laura's murder but admitted manslaughter. Earlier on the night she died he had strangled her during sex – Laura told her friend she "didn't think he would stop". Gaskell later held a knife to Laura's neck while having sex - he claimed with her consent - and used mild to moderate force to cut through her carotid artery. The court accepted that Gaskell, the only witness, had not intended to use the knife to kill Laura and was engaged only in "bizarre and violent sadomasochistic sexual activity". Gaskell had strangled a woman 11 days before he killed Laura, and was later given a 16 week sentence for that earlier attack.

**Gross Negligence Manslaughter, 6 years**

## Is this different from other Violence Against Women and Girls?



32 women killed by current or ex partners.

21 of the relationships had previous abuse, and 11 women had left or were trying to leave the relationship - often a dangerous time for a woman.

21 women had just met the men who killed them that day

7 of those women were prostitutes meeting the men for paid sex. The others met the men in nightclubs, on a dating app, or through a friend.

7 women died where men suspected/convicted were acquaintances: friends, neighbours, landlord.

Two thirds of the women and girls killed had been strangled. This is around 3 times higher than the average rate of strangulation in the killing of women and girls.

At least 20 of the accused killers have other convictions for serious violence against women. These include murder, rape, attempted rape, kidnapping, assault.

In 4 of the recent killings of women and girls, the men viewed 'extreme porn' featuring violence including strangulation and killing of women before or after the killing of the women.

## Injuries – men claiming GBH, ABH, Assault and Rape injuries due to “rough sex”

We know of 115 cases of non-fatal violence which is claimed to be consensual, in addition to the *R v Brown* case. 8 of these were in UK courts in the last 2 months of 2019. In all cases we’ve found, the suspect is male, and all but one, the victim is female. Even where a woman is able to give evidence, and says she did not consent to this, the men claim that she consented to the violence.

### Non fatal injuries which are claimed to be due to consensual sex:

- Being slashed on the back with a knife, two black eyes, being strangled, punched in the stomach, among other injuries to her legs, arms and face. A neighbour heard him shout “come back or I’ll get a butcher’s knife and skin you alive”. He said it was a “weird sex game” and that she’d demanded he strangle her as part of rough sex. (Not Guilty of all charges)<sup>vi</sup>
- Broken jaw, fractured cheekbones (rape, GBH, 12 years)<sup>vii</sup>
- Drugged and penetrated with an object, now uses a colostomy bag (GBH, indecent assault, quashed on appeal with reference to *R v Brown* on consent. GBH with intent 10 years)<sup>viii</sup>
- Being held against a wall and slashed with a knife “to her permanent disfigurement” (Assault, 2 years 3 months)<sup>ix</sup>
- Having cable ties fixed round her neck, ankles and wrists before having a plastic bag over her head and being subjected “to unwanted sex acts” (rape, assault, 8 years)<sup>x</sup>
- Being punched, strangled to unconsciousness, raped and headbutted (rape, ABH, 12 years)<sup>xi</sup>
- Being electrocuted with mains electricity (not guilty of this charge, nor of headbutting her, nor pushing her during an argument. Guilty of smashing her phone and taking a hammer to the wall of her home).<sup>xii</sup>
- Being throttled with a shoelace by a man she’d met for sex: the “strangulation was so severe that some of her brain cells died when the blood flow was interrupted”. Assuming she had died, he drove around looking to dispose of her body, and dumped her on a farm track, when she woke up. (GBH, 2 years).<sup>xiii</sup>

**CASE STUDY:** A man is cleared of a “Fifty Shades” assault of his partner. She had at first consented to sex involving some pain, but he chained her and whipped her with pain “worse than giving birth” and she texted a friend to call the police. Found not guilty, he was jailed the next year for ABH of his new partner. That was his seventh conviction for domestic violence and abuse<sup>xiv</sup>.

### What goes unreported

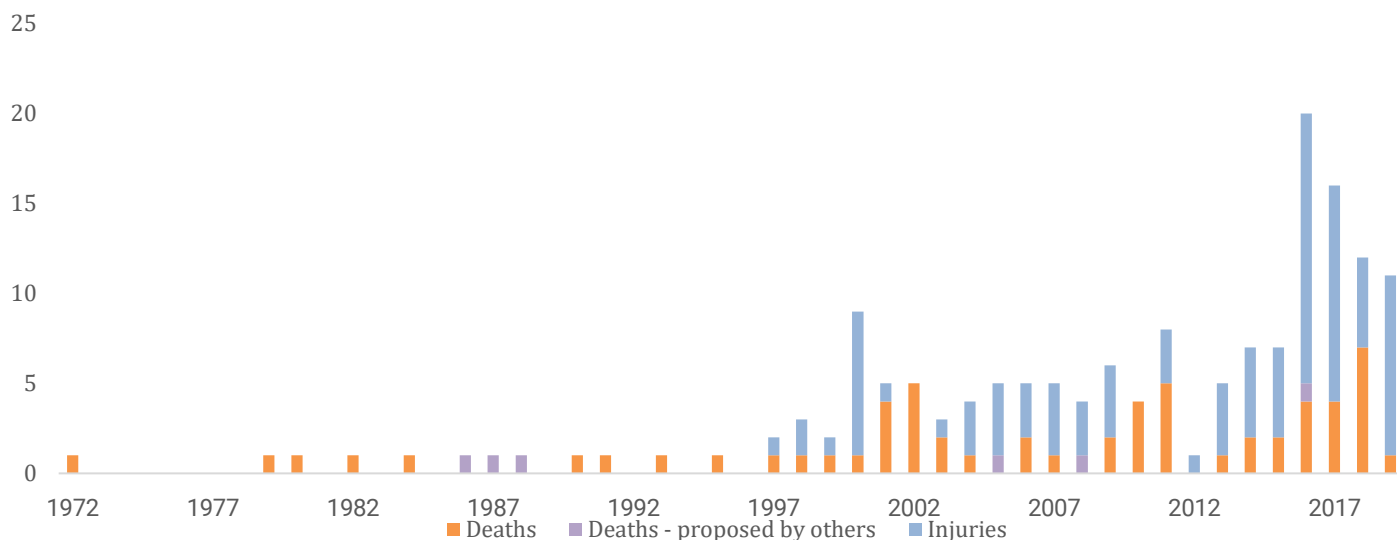
Our campaign has heard from many women that they’ve been strangled during sex by men they’re dating, without consent, and in some cases that they have then been shamed for being “vanilla” or boring for not wanting to be strangled.

2019 research<sup>v</sup> suggested 38% of women under 40 had experienced unbidden violence: choking (strangulation), spitting, gagging or slapping, during otherwise consensual sex. That is 3.6million UK women.

One woman told us her partner would tell their friends how much she enjoyed “rough sex” so that - she is convinced - if she died the next time that he strangled and raped her, he would have support for his defence of a “sex game gone wrong”.

A practitioner in preventing Domestic Homicide has supported many women who have needed emergency medical treatment for “horrific injuries inflicted during sex” by men known to them – and this issue is likely to be “hugely underreported”.

## Significant trend in “she consented” defences



Note that data on cases from 2018 and 2019 are not yet fully available, as there is a lag between assault and news reporting. Includes 3 deaths where “sex game” is proposed by coroners and police as cause of death, 60 deaths, and the 115 sample cases of women and girls violently injured. Data is not always easily available for older cases, and some of the trend may also reflect reporting trend – where newspapers report on these cases more frequently in response to other coverage. However: there is a clear upwards trend in reported frequency of deaths and injuries of women and girls from claimed *rough sex, gone wrong*.

## Background to the law

The most relevant case law in England and Wales is *R v Brown*, where more than "transient or trifling" injuries were deemed not to be able to be consented to. This case – of gay men practicing extreme consensual sadomasochism and who were convicted of GBH – went through appeals to the House of Lords and the European Court.

Notably, four recent English cases were prosecuted as "Gross Negligence" Manslaughter - where the accused has failed to give mind to a duty of care - rather than Unlawful Act Manslaughter (or indeed murder).

In Scotland, no assault should be able to be consented to (Smart v HM Advocate) - but the case of Niall McDonald v HM Advocate<sup>xv</sup> is sometimes proposed as most relevant to consent to violence in sex. That's the case to the right. But in 2017 a conviction was overturned, where an accused man had launched a "special defence of consent" at his original trial to the serious vaginal injuries his wife had sustained. At the appeal hearing new witnesses said the victim had told them she had consented- and so his conviction was overturned<sup>xvi</sup>.

The English Law Commission<sup>xvii</sup> and the Scottish Law Commission<sup>xviii</sup> have both previously proposed significant further relaxation of the law: the ELC that anything less than a "serious or disabling injury" should be able to be consented to, while the SLC thought that any physical attack that was "unlikely to cause serious injury" should be able to be consented to, provided both parties were aged over 16.

Like most discussion on this subject, both proposals considered this issue from the perspective of accommodating sadomasochistic practice within the law, and neither proposal mentions any consideration of the impact on violence against women and girls – who are the vast majority of victims of claimed "consensual" sexual violence in the available data. Note that these Law Commission proposals were not made law.

### MANDY BARCLAY, 32

2000, Aberdeenshire

Mandy was killed by her husband Niall McDonald, 35.

He claimed that Mandy had died when a sex act went wrong.

Defending, Donald Finlay QC said that the incident which led to the death of Mrs McDonald was a "private matter" and that this was sex that "narrow-minded people would call kinky". Mandy - who was 4ft 10 - was found 6 days after her death where her husband had hidden her body, in woods nearby. She had suffered injuries to her face, neck, external lacerations to her genitals and her bowel was perforated through her anus. She died of severe rectal injuries and asphyxia.

Her husband was financially and emotionally abusive to her before her death. She had been talking of leaving him.

Culpable Homicide, 4 years

## What can – and should - be done?

- We strongly support MPs Harriet Harman and Mark Garnier's proposals to add to the Domestic Abuse Bill. These additions to the law will make it more likely that consent cases are successfully prosecuted in England & Wales. They have proposed to move the "clear" case law of *R v. Brown* into statute, and to introduce Director of Public Prosecutions review when prosecutors are proposing to charge a lesser crime, like manslaughter, in a domestic homicide. We are asking candidates to bring these proposals, and the Domestic abuse bill. More detail and the clauses here <https://wecantconsenttothis.uk/actnow>
- We are very concerned that being strangled *without consent* is now a common part of sex for women. We want strangulation to be appropriately recognised as a serious assault.
- We ask whether violent assaults should be prosecuted in addition to manslaughters, rapes and sexual assaults, as a matter of course, and not bundled as part of a rape charge.
- We are further concerned that *non-consensual* strangulation led to the deaths of two girls, despite this, the men who killed them were convicted only of manslaughter and culpable homicide.
- We believe that embedded myths surround "sex games" – in particular that women commonly consent to sexual activity that kills them. We want policy commitments to challenge myths in the criminal justice system – so women are not failed by police, crime scene or pathologists, coroners, or prosecutors.
- We want significantly better data collection in the criminal justice system. We want a commitment to collecting relevant data in all cases of violence against women and girls, so issues like this are identified.
- We want there to be a review of prosecution and sentencing of these cases across the UK jurisdictions. Should evidence of previous sexual activity be relevant in the violent death of a women or girl? Should prosecutors ever accept a manslaughter charge? Should violent sexual assault of a woman be accepted as mitigation in sentencing for her murder, because on the say so of her murderer, "she consented to it"?
- Finally, any policy on this must consider the impact on women and girls – who are overwhelmingly the victims of these assaults.

## About

The We Can't Consent To This campaign highlights the increasing and increasingly successful claim that women consented to sexual violence. We collate data on the incidence and impact of claimed rough sex "gone wrong" and will use this to inform legal and political solutions to the success of these claims – and ensure that violence against women and girls is never accepted.

The data in this briefing has been sourced through search of online local and national news sites, as well as public judgements like sentencing remarks and appeal judgements. We've searched for relevant terms like "rough sex" or "strangulation" and assessed whether each case is relevant - specifically, did the suspect claim the victim had been killed or injured through consensual sexual activity.

Around a third of our data on non-fatal assaults comes from publicly available appeal court judgements - so only those cases we can find where there has been a case taken to court, convicted, and completed an appeal. Otherwise, often (80% of the time) these cases are reported in the press only after a successful conviction. For these reasons, our data can only be treated as a small sample of the scale of this issue, and will necessarily overstate the likelihood of conviction for injuries.

## References

<sup>i</sup> Lesley Potter, 66, was murdered by her husband Derek Potter. He claimed she'd died accidentally – and police believed him. They did not treat her death as suspicious until, one week before she was due to be cremated, Potter told a colleague "I had to strangle her".

<sup>ii</sup> R v Brown House of Lords

<sup>iii</sup> Won an appeal as his first murder sentence may have included the sexual violence as an aggravating factor – his sentence was reduced by 4 years on appeal as the judges seemed content she had consented, and he had not intended to kill her.

<https://app.justis.com/case/r-v-lee-charles-portwine/overview/c4KZmZCJmWWca>

<sup>iv</sup> Chloe Miazek, 20, was choked and killed in 2017 by a 32 year old man she had just met. He claimed she'd died in erotic asphyxiation gone wrong, and was convicted of culpable homicide – a Scottish equivalent of manslaughter – despite him admitting he did not get consent from his victim to choke her. Hannah Pearson, 16, was killed in 2016 by a 24 year old man she had just met. Like Chloe, Hannah had drunk a great deal of alcohol before she died. The man who killed her was convicted of manslaughter despite him strangling Hannah "without warning or permission".

<sup>v</sup> BBC Radio 5 Live Investigations and Savanta ComRes, 2019 <https://www.bbc.co.uk/news/uk-50546184>

<sup>vi</sup> <https://www.walesonline.co.uk/news/wales-news/kane-elliott-cwmbran-trial-verdicts-17186670>

<sup>vii</sup> <https://www.theboltonnews.co.uk/news/6223222.sadistic-rapist-given-14-years/>

<sup>viii</sup> Successfully appealed referencing R v Emmett and R v Brown – original trial judge was "incorrect" in ruling that victim's injuries (requiring a colostomy bag) could not have been consented to: R v Meachen

<https://www.baillii.org/ew/cases/EWCA/Crim/2006/2414.html> and Meachen v R, 2009

<https://www.casemine.com/judgement/uk/5b46f2372c94e0775e7f39dc>

<sup>ix</sup> <https://www.dailyrecord.co.uk/news/scottish-news/stabbed-barmaids-horror-at-court-sex-1082763>

<sup>x</sup> <https://www.belfastlive.co.uk/news/escort-tied-up-raped-plastic-13219311> and <https://amp.belfasttelegraph.co.uk/news/northern-ireland/northern-ireland-man-who-bound-and-raped-sex-worker-in-his-home-sent-to-jail-37821263.html>

<sup>xi</sup> <https://www.sunderlandecho.com/news/dangerous-rapist-strangled-victim-1-1145343>

<sup>xii</sup> <https://www.thecomet.net/news/hitchin-sadomasochist-found-not-guilty-of-electrocuting-woman-s-genitals-during-sex-session-after-she-admits-to-ca> and <https://www.mirror.co.uk/news/uk-news/sadomasochist-electrocuted-partner-through-vagina-10203022>

<sup>xiii</sup> <https://www.mirror.co.uk/news/uk-news/man-choked-prostitute-after-watching-145613>

<sup>xiv</sup> Cleared of "Fifty Shades" assault – conviction the next year for the seventh time for domestic abuse

<https://www.eadt.co.uk/news/ipswich-fifty-shades-of-grey-case-jeweller-is-jailed-after-throwing-his-latest-partner-around-like-a-rag-doll-1-3639799>

<sup>xv</sup> Niall McDonald vs HM Advocate <https://www.scotcourts.gov.uk/search-judgments/judgment?id=28ab87a6-8980-69d2-b500-ff0000d74aa7>

<sup>xvi</sup> <https://www.scotcourts.gov.uk/search-judgments/judgment?id=b7d536a7-8980-69d2-b500-ff0000d74aa7>

<sup>xvii</sup> In 1995: English Law Commission's Criminal Law Consent in the Criminal Law

<sup>xviii</sup> In 2007: The Scottish Law Commission's recommendations were consulted on for adoption in the Sexual Offences (Scotland) Act 2009. Section 5.4 "Public Morality" <https://www2.gov.scot/Topics/archive/law-order/8980/Scottishgovtconsultation/Scottishgovtconsultation4#a4>