Stealthing: Sexual Assault

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Introduction

Katharine was left feeling angry and humiliated after she discovered that her partner had stealthed her.[1] She took her case to the police, and was initially told that they were not interested in taking her case, but a few days later they agreed to investigate. At her first interview, victim-blaming comments were made about her being too trusting of her partner. Katharine reports that this investigation made her feel responsible for her own suffering, and she felt like her case was trivial and insignificant. Katharine considered that the justice system had failed her, and others who found themselves in a similar position.

Stealthing, also referred to as non-consensual condom removal, occurs when a man avoids wearing a condom during sexual intercourse, contrary to his partner's expressed consent, either by removing the condom before or during sexual intercourse, or by neglecting to put one on.[2] This definition is not without controversy and different definitions have been adopted by other academics. For example, Allira Boadle defines stealthing as the practice of 'a male partner removing a condom during sex without consent and knowledge,'[3] while Konrad Czechowski defines stealthing as 'the removal of a condom before or during sexual intercourse without one's partner's consent.'[4]

The first controversial matter goes to whether stealthing should be limited solely to the removal of the condom during intercourse, or whether it should also extend to removing the condom before commencing intercourse, and failing to put a condom on at all. The definition adopted in this dissertation encompasses all three scenarios, because to refer solely to the removal of the condom during sexual intercourse denies the wrong that is suffered by victims when the condom is removed before sexual intercourse, or where one is never worn at all. It also overlooks the fact that the harm suffered in these situations is indistinguishable – all of these scenarios undermine the victim's autonomy and expose them to risks that they did not consent to.

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[1] "'I felt judged' – woman's anger after taking stealthing case to the police" *The Otago Daily Times* (Online ed, New Zealand, 25 April 2021).

[2] Stealthing is considered to be a form of 'condom use resistance.' The proceeding legal analysis set out in this dissertation may well apply to other forms of condom use resistance, such as condom sabotage (i.e. the tearing or breaking of a condom). However, the focus of this dissertation will be on stealthing.

[3] Allira Boadle, Catherine Gierer, Simone Buzwell "Young women subjected to nonconsensual condom removal: prevalence, risk factors, and sexual self-perceptions" (2021) 5 SAGE Publications 1 at 1.

[4] Konrad Czechowski and others "'That's not what was originally agreed to': perceptions, outcomes, and legal contextualization of non-consensual condom removal in a Canadian sample" (2019) 14(7) PLoS One 1 at 1.

The second controversy is whether stealthing requires both a lack of consent and knowledge as to the absence of the condom of the time of the sexual activity, or whether stealthing simply requires a lack of consent. A requirement for a lack of knowledge implies that a woman cannot be stealthed if she has knowledge that a condom is not being worn. It implies that if she has knowledge she is required to object, otherwise she will be taken to have consented. This is inconsistent with the legislative framework in New Zealand and the direction that a person is not taken to have consented merely because they did not 'protest or offer physical resistance.'[5] Therefore the definition adopted in this article refers only to a lack of consent; a person can know that they are being raped, and still be raped. Stealthing is therefore the practice of a man removing the condom before or during sexual intercourse, or failing to put a condom on, without the consent of his partner.

It is important at this point to acknowledge that this dissertation focuses on men who stealth women. This is not intended to deny the experiences of other people who may experience stealthing, rather this is merely intended to reflect the fact that sexual assault is overwhelming experienced by women. Indeed, the Ministry of Justice found that three quarters of sexual assaults in 2021 were suffered by women.[6]

Stealthing is a social practice to which little regard has been paid in the legal sphere. Indeed there is only one case to date on stealthing in New Zealand.[7] In this case, Mr Campos engaged in sexual intercourse with a sex worker. She made it clear from the outset that a condom was to be worn at all times.[8] Part way through the intercourse Mr Campos requested sex in the 'doggy style' position and he took this opportunity to remove the condom.[9] The victim stopped the intercourse immediately, seeing his actions through a mirror, and demanded that he put a condom on. He did so and they re-engaged in sexual intercourse, but Mr Campos removed the condom again, this time grabbing her hips and pulling her towards him, and he ejaculated inside

[5] Crimes Act 1961, s 128A(1).
[6] Andrew Kibblewhite *New Zealand Crime and Victims Survey. Key findings. Descriptive statistics. June 2021. Results drawn from Cycle 3 (2019/20) of the New Zealand Crime and Victims Survey* (Ministry of Justice, June 2021) at 92.
[7] *R v Campos* [2021] NZDC 7422
[8] At [7].
[9] At [10].

of her.[10] Justice Stephen Harrop found Mr Campos guilty of rape and sentenced him to three years and nine months imprisonment.[11]

Campos is merely a District Court decision. It is therefore possible that another judge might come to a different conclusion, and *Campos* may yet be appealed to a higher court who may also reverse the decision. The legal position of stealthing in New Zealand is therefore still very uncertain. Despite this uncertainty, stealthing is a significant phenomenon which affects a great deal of women. One study found that 10% of women had been stealthed,[12] and 32% of women were found to have been stealthed in another (although this study was performed in a sexual health clinic).[13]

Stealthing victims face the fear of suffering unwanted pregnancies and STIs.[14] However, the potential harm suffered by victims of stealthing is not limited to the physical. Victims are often also left feeling disempowered and violated. Stealthing undermines a victim's autonomy and dignity. This is reflected in the following victim's account:[15]

> "I was aware of what was happening, but I didn't say anything at the time – I felt way too intimidated and nervous. I remember just hoping it would be over soon and feeling shocked that he would have such little disregard for me or his wife's health since I could have had an STD that he might pass to her. It completely changed how I felt about him and the encounter. *I went from enjoying myself to feeling violated and dirty*."

Another stealthing victim explains that the experience left her feeling disrespected:[16]

> "During our second time, he took the condom off towards the end, without bothering to ask, or even tell me …I didn't know until the end, when he pulled out that the condom had been off for that last 45 seconds or so. Very distraught, I asked him, 'What happened to the condom?' He lied and said, 'oh wow, it must've broken. But don't worry, I pulled out anyways so you won't get pregnant.' I have never felt soo

[10] At [11].
[11] At [38].
[12] Above n 3 at 1.
[13] Rosie L Latimer and others "Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia" (2018) 13(12) PLoS ONE 1 at 5.
[14] Alexandra Brodsky "Rape-adjacent: imagining legal responses to nonconsensual condom removal" (2017) 32 Colum J Gender & L 183 at 186.
[15] Sumayya Ebrahim "I'm not sure this is rape, but: an exposition of the stealthing trend" (2019) SAGE 1 at 7.
[16] Above n 14 at 186.

> disrespected in my entire life. I believe that he removed it deliberately, and only after prodding him for a week did he admit that he 'might've known that it had broken, and should have told me.'"

It is suggested that the lack of clarity regarding the legal position of stealthing in New Zealand only exacerbates the harm victims of stealthing face because they are unable to achieve justice. Rosie Latimer found that only one percent of the women in her study who had been stealthed had reported the offending to the police.[17] This lack of reporting is likely a result of the uncertain legal position, because women are unlikely to report the offending if they are not confident that an offence was committed. Indeed, women who do feel comfortable enough to report the offending to the police risk having their violation diminished and belittled. It is therefore crucial that the legal position of stealthing is clarified so that women like Katharine can achieve justice.

The purpose of this dissertation is to advocate for the criminalisation of stealthing in New Zealand. In particular, it is argued that stealthing is rape because the absence of the condom, or the removal of the condom vitiates the consent which the complainant gave to the sexual activity. If stealthing were to be criminalised, it would be recognised as a wrong by society and it would be correspondingly condemned. Victims like Katharine would no longer have to worry that the police would not take them seriously. Victims would no longer feel like they were 'sort of raped'; rather, the law would say that they were raped, thus vindicating their lived experience.[18] In this way, recognition of stealthing as a criminal offence could in turn help victims recover and come to terms with the harm they have suffered.[19] In order to clarify the legal position of stealthing in New Zealand, this dissertation will be composed of two main parts:

I. Why should stealthing be criminalised?

Part One explores justifications for criminalising stealthing. While it may seem uncontroversial that stealthing should be criminalised, it is nevertheless worth exploring why stealthing should be criminalised, as this analysis will help determine how stealthing should be criminalised in

[17] Above n 13 at 7.
[18] Above n 14 at 188.
[19] Melissa Marie Blanco "Sex trend or sexual assault: the dangers of stealthing and the concept of conditional consent" (2018) 123 Penn St L Rev 217 at 225.

Part Two. It is argued that it would be legitimate to impose criminal sanction on men who stealth because stealthing is a manifestation of male dominance which violates women's sexual autonomy and degrades their dignity.

II. How should stealthing be criminalised?

In Part Two I will examine how stealthing should be criminalised in New Zealand. I will discuss whether there is adequate provision in the Crimes Act to criminalise stealthing, or whether a new provision ought to be introduced to specifically criminalise stealthing. I will then consider how the absence of the condom vitiates the complainant's consent. In doing so I will look at the impact of condom use on consent overseas and use this to help inform how stealthing vitiates consent in New Zealand. Ultimately this part suggests that stealthing is rape because the complainant's consent to the sexual activity was conditional on the use of a condom.

Part I: Why Should Stealthing Be Criminalised?

Chapter I: A Feminist Analysis Of Stealthing

Looking at stealthing through a feminist lens informs why stealthing should be criminalised. This chapter will focus on Catharine MacKinnon's dominance theory. The dominance theory explains that stealthing should be criminalised because it is an act of male dominance which violates women's dignity. Stealthing treats a women as "less than," and directs that their sexual preferences are less important than their partner's sexual gratification. Through stealthing women's needs and wishes are not permitted to matter, and as a result, men are placed in a superior position. Stealthing is therefore a manifestation of male dominance.

The dominance theory emerged in response to deficiencies in the Aristotelean theory. It is useful therefore to outline the Aristotelean theory and its drawbacks:

The Aristotelean Theory

This Aristotelean theory is premised on the maxim that 'likes ought to be treated alike, and unlikes treated unlike insofar as they are different.'[20] Within the Aristotelian theory exist two standards: the sameness standard and the difference standard.[21] Under the sameness standard, often termed formal equality, women are treated the same as men.[22] The law thereby operates in a gender neutral manner, refusing to prioritise one gender above the other, so that the practical realities which make women more in need of special treatment are not permitted to matter.[23] The sameness standard treats all genders as equal, because to do otherwise would be a call for different treatment based on gender. In contrast, the difference standard exists specifically to compensate women for that which makes them different from men.[24] Thus, the sameness standard treats men and women alike because they are alike, and the difference standard treats men and women different because they are different.

[20] Sonia Liff and Judy Wajcman "'Sameness' and 'Difference' Revisited: Which Way Forward for Equal Opportunity Initiatives" (1996) 33 Journal of Management Studies 79 at 81.
[21] Catharine MacKinnon "Difference and dominance: on sex discrimination [1984" in Katharine Bartlett and Rosanne Kennedy (eds) *Feminist legal theory* (Routledge, New York, 2018) 81 at 81-82.
[22] At 82.
[23] Cynthia Bowman and others *Feminist Jurisprudence Cases and Materials* (4th ed, Thomson Reuters, Minnesota, 2011) at 116.
[24] Above n 21 at 82.

There is live debate about whether the sameness or the difference standard of this approach should be emphasised over the other, but the apparent consensus seems to be that they are intended to operate in tandem. Sonia Liff and Judy Wajcman discuss how these standards should operate, and suggest that the dual approach appreciates the realities that women face – women are not always the same as men, or always different from men.[25] The practical realities of society require that women are treated the same as men in some circumstances, and different in others.

Under both the sameness and the difference standards of the Aristotelean theory women are accorded value in accordance with how similar or dissimilar they are from men. [26] Catharine MacKinnon questions why men are the standard upon which women's equality is to be judged.[27] She suggests that the sameness/difference approach is insufficient to cope with matters of equality because it ignores the fact that women's equality is defined by the male standard. Thus, the Aristotelean approach continues to perpetuate women's inequality, because women are afforded equality only in so far as the male standard allows.[28] In response to these inadequacies, MacKinnon proposed a new theory which purports to achieve equality for women by virtue of being human beings, not by virtue of being the same or different from men.[29]

The Dominance Theory

Catharine MacKinnon views equality as a question of power, [30] rather than as a question of difference as in the Aristotelean theory. [31] The dominance theory places the focus not on how different the genders are, but rather on the fact that one gender has unjustifiably dominated the other.[32] MacKinnon suggests that men have power over everything in society, and through this power, women are made to be subordinate to men.[33] MacKinnon aims to achieve equality by overcoming this power imbalance, demanding that women are granted equality by virtue of

[25] Above n 20 at 86.
[26] Above n 21 at 82.
[27] At 85.
[28] Kathryn Rand "Making a real difference: the dominance approach in the opinions of Justice Beryl Levine" (1996) 72 ND L Rev 1031 at 1034.
[29] Katharine Bartlett "MacKinnon's feminism: power on whose terms" (1987) 75 Calif L Rev 1559 at 1561.
[30] Above n 21 at 87.
[31] At 82.
[32] Above n 28 at 1035.
[33] Above n 29 at 1559.

being women, not by virtue of being the same or different from men.[34] The dominance theory therefore, by virtue of focusing on power, leaves no room for treating women as lesser beings purely because they are different from men.

Men's power and dominance currently goes unquestioned in society and is entrenched through the use of 'neutral' principles, which aim to treat the genders equally. MacKinnon suggests that while these principles appear to be neutral they are not. Rather, they are designed to create and maintain men's power in society.[35] Katharine Bartlett suggests that these 'neutral' principles are the key to men's dominance over women.[36] She suggests that if women cannot fit their claim into these male-defined standards, their problems are not permitted to matter.[37] For example, if a victim cannot prove that she was raped, the court will dismiss the case, effectively telling the victim that she was not raped. This is not to suggest that men should always be convicted when women accuse them of rape, rather it is to suggest that the law often fails to acknowledge women's violation because the law is based on the male standard. If a man does not consider their actions to be violating, they will not be recognised in law as being violating.

We could expect, therefore, that an application of the law as it presently stands would be unable to criminalise stealthing, because the criminal law has developed in a patriarchal system which has traditionally overlooked the experiences of women. Indeed in Part Two we will see that a traditional application of the criminal law would be unable to criminalise stealthing. However, the dominance theory would demand legal intervention because stealthing is an act of male dominance. The following accounts of men who stealth clearly illustrate the power that men hold over women in society, as well as the unflinching disregard these men have for their partner's sexual autonomy and dignity.

Alexandra Brodsky demonstrates that men who stealth view themselves as entitled to do so. Indeed one man went so far as to root his entitlement to stealth in religion, stating 'that's how God created the universe, we are born to do it.'[38] Sumayya Ebrahim refers to the account of one man who admitted on radio to having stealthed his partner. He said that he stealthed his

[34] At 1561.
[35] Above n 21 at 82.
[36] Above n 29 at 1560.
[37] At 1560.
[38] Above n 14 at 188.

partner because 'it felt better.'[39] Another perpetrator admitted that he stealthed women 'because they deserve it.'[40] These accounts show a complete disregard for female autonomy, disregarding their choice in favour of their own sexual gratification. Importantly, none of these accounts recognise that stealthing may be a violation; instead they view stealthing as their male-born entitlement.

This dominance is further illustrated by examining the origins of stealthing. Melissa Blanco suggests that stealthing emerged as a response to the sex-positive feminist movement in which women sought to reclaim their bodies and dismantle rape culture.[41] From this movement emerged the Men's Right Movement which sought to 'regain masculinity, and reassign the lost value to traditional male values.'[42] The Men's Right Movement resulted in the development of the so-called manosphere – an online community where men are encouraged to believe that 'sexual entitlement to women is a right.'[43] In the manosphere, the practice of stealthing is encouraged as a means of punishment for women.[44] Thus we can see that stealthing emerged as a way for men to reclaim and solidify their dominance over women in society.

The purpose of the dominance theory is to rebut the norm of male dominance. As such, because stealthing is a manifestation of male dominance, according to the dominance theory, stealthing should be criminalised. Indeed, to fail to criminalise stealthing would act to further solidify male dominance because the law would continue to ignore the lived experiences of women simply because the 'neutral' principles have not traditionally recognised stealthing as a criminal offence.

Chapter II: Is Criminal Intervention Justified?

We must be mindful of the significant impact that a criminal conviction has on an individual's freedoms and liberties. Indeed Joel Feinberg has stated that the criminal law 'brands [an offender] with society's most powerful stigma', which can have a significant impact on his future career and family prosects.[45] John Stuart Mill has articulated that 'the only purpose for

[39] Above n 15 at 6.
[40] At 6.
[41] Above n 19 at 226.
[42] At 221.
[43] At 222.
[44] At 222.
[45] Joel Feinberg *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press, New York, 1984) at 4.

which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'[46] This is widely recognised as Mill's harm principle, and it is the idea that criminal intervention can only be justified if it will prevent harm to others. Simply because something is morally wrong is not sufficient to justify criminal intervention. Feinberg explains that to criminalise everything which is morally wrong would place an unjustifiable strain on court, police, and corrections resources.[47] However, Mill's harm principle leaves harm undefined, which leaves room for debate as to whether criminal intervention is limited solely to physical harms, or whether it includes broader moral harms as well.

Hampton's Theorisation Of Harm

Jean Hampton engages in a thorough analysis of harm to determine when criminal intervention is justified, and she concludes that criminal intervention is justified only where there has been damage to the realization or the acknowledgment of a victim's value, and/or when the wrongdoer represents himself as elevated with respect to the victim's value.[48] In coming to this conclusion, Hampton has regard to Kant's non-instrumentalist egalitarian theory of worth, which provides that we, as human beings, have worth insofar as we are human beings.[49] Simply by virtue of being human beings, we have worth, and no one has more worth than another; we are all equal in value.

The harm which justifies criminal intervention arises, Hampton suggests, not from any actual degradation of value, but from the appearance of degradation. Indeed, Hampton acknowledges that actual degradation of value is not possible, according to the Kantian theory. The term 'Kantian theory of value' has taken on a number of different variations, but what they all have in common is that value is permanent.[50] In one theory Hampton refers to, diminishment of value, however slight, is impossible because 'each of us is a child of God,' so nothing we can do to the other can degrade that value.[51] In another theory, value can be destroyed, but never

[46] A.P. Simester and Andreas von Hirsch *Crimes, harms, and wrongs: on the principles of criminalisation* (Hart Publishing Ltd, Oxford, 2011) at 21.
[47] Above n 45 at 10. (Joel Feinberg)
[48] Jean Hampton "Correction harms versus righting wrongs: the goal of retribution" (1992) 39 UCLA L Rev 1659 at 1677.
[49] Above n 48 at 1667-1668.
[50] At 1673.
[51] At 1673.

degraded.[52] According to these theories, value can be completely extinguished, but never partially diminished. However, Hampton suggests that both of these theories allow for the *appearance* of degradation, or an apparent diminishment of value.[53] This appearance of degradation, Hampton suggests, is a harm which justifies criminal intervention.

Hampton uses a horrific example to demonstrate the practical application of her theory. In this example, a farmer employed an African American farmhand and his children. The farmhands angered the farmer, so he hung the farmhands in a sack and lit a fire under them. One of the farmhands asked for a cigarette, and the farmer responded by cutting off that farmhand's penis and putting it in his mouth.[54] One could hardly imagine a scenario more worthy of criminal intervention than burning people alive, and castrating them (although, notably, there was no criminal intervention in this case). Hampton suggests that criminal intervention would be legitimate in this case because of the regard that the farmer had for the farmhands - he viewed them as worthless, and he conveyed that worthlessness through his actions.[55]

Harm which justifies criminal intervention is not limited solely to the degradation of the victim's value. Hampton goes on to suggest that harm also includes misrepresentations as to the wrongdoer's own value compared to the value of the victim, or the value of the community.[56] In the farmhand example, the farmer represented himself as being superior to the farmhands. The farmer acted as if he owned the farmhands, as if they were mere possessions capable of being owned – he assumed authority to decide whether the farmhands lived or died.[57] Thus, according to Hampton, acts which justify criminal intervention are those which diminish the value of another and/or acts in which one represents oneself as being of greater value than the victim.

One might question whether Hampton's theory of wrongdoing is of universal application. It certainly applies to horrendous acts, such as that of the farmer, but what of offending where no one is directly harmed, like petty theft or tax avoidance? Hampton gives another, more innocuous, example of a girl who steals a book from a library. In this situation it can be argued

[52] At 1673.
[53] At 1673.
[54] At 1675.
[55] At 1676.
[56] At 1677.
[57] At 1677.

that there is no harm done to the value of any particular person. However, by taking the book, the girl is holding herself out as being of greater value than the rest of the community generally. She is suggesting that her needs in relation to that book are greater than anyone else's in society. This, Hampton suggests, will be sufficient to ground criminal liability.[58]

Although Mill's harm principle leaves harm undefined, it does state that moral wrongs alone are insufficient to justify criminal intervention. It is arguable that by focusing on the diminishment of value, Hampton's theorization of harm is analogous to moral wrongdoing, and is thereby insufficient to justify criminal intervention. This is because there tends to be an overlap of behaviours which are generally immoral and behaviours which diminish one's value i.e. it may be said that the farmhands actions were immoral because they diminished the farmhand's value.

We can see similar ideas reflected in the works of other academics. Joel Feinberg, for example, suggests that criminal intervention is only legitimate in two scenario: first, where there has been a 'thwarting, setting back, or defeating of an interest,'[59] and second, where one person wrongs another by violating another's right or interest.[60] Simester and Hirsch suggest that 'satisfaction of the harm principle requires an adverse effect upon something that makes one's life go well.'[61] Indeed, Simester and Hirsh suggest that tax evasion is rightly a crime, notwithstanding that there is no particular victim who is physically harmed, because the wrongdoer takes from and wrongs his fellow citizens.[62] Despite there being no physical harm, Simester and Hirsh are able to justify criminal intervention on the basis that the wrongdoer has held themselves out as being of more value than others in society.

Both Feinberg and Simester and Hirsh have developed theories which reflect similar moral justifications for criminal intervention, as in Hampton's theorization of harm. All of these theories focus on the effect of the wrongdoers actions upon the victim's interests. In this way, Hampton's theorization of harm is not radical, and it is therefore clear that Mill's harm principle does include, or has since been developed to include moral harms. Therefore, in order

[58] At 1681.
[59] Above n 45 at 33.
[60] At 34.
[61] Above n 46 at 36.
[62] At 38.

to justify criminal intervention there must be harm to the recognition of the victim's value, or a corresponding betterment in the wrongdoer's value.

According to Hampton's theory, should stealthing be criminalised? The question is whether the victim's value appears to be diminished, and/or the offender's value appears to be strengthened, when the man removes the condom without his partner's consent. This dissertation argues that stealthing should be criminalised because men who stealth seek to establish that they are of greater value than women. We have seen from the history of stealthing that stealthing emerged as a means of punishment and a means to restore male superiority.

When a woman is stealthed, the man intends to treat the woman as worthless. Even where a man removes the condom simply because it feels better, he is prioritising his own sexual gratification over his partner's consent; how she chooses to be touched comes second to his sexual gratification. When a man stealths a women he treats her as less of a human being, and directs that her desires come second to his. In this way he denies her dignity and directs that they are not equal – he directs that he is superior to her. He asserts that he is of increased value in comparison to her. Therefore it is argued that, as an act of male dominance through which a man directs that he is of greater value than his partner, criminal intervention of stealthing would be justified.

Would Tort Law More Efficiently Condemn Stealthing?

While there is certainly a positive case for criminalising stealthing, Simester and Hirsh suggest that given the significant consequences of the criminal law, if some other form of intervention would efficiently condemn the matter, then that form of intervention must be preferred.[63] It is therefore necessary, despite the above finding that stealthing should criminalised, to determine whether tort law would efficiently regulate stealthing. A stealthing victim may be able to find recourse in tort law by bringing a claim in negligence. However, due to the corrective nature of tort law, in order to be successful, a claimant must establish that they have suffered some sort of harm.[64] There are three possible types of harm that arise in relation to stealthing; a complainant may contract an STI, they may fall pregnant, or they may suffer a mental injury.

[63] Above n 46 at 193.
[64] Above n 48 at 1663.

As Brodsky suggests, the simplest tort claims will be those which result in STI transmission, as there is clearly a physical harm to the complainant.[65] It becomes more complicated where the resulting injury is a pregnancy. A claim for an unwanted pregnancy in the context of medical negligence was brought in *McFarlane v Tayside*.[66] In this case a woman became pregnant after her husband had undergone a vasectomy.[67] The issue in this case was whether the parents were entitled to costs for the upbringing of their child. The Court was comfortable awarding compensation for harms directly related to the pregnancy, but rejected the claim for the costs of raising the child on the basis that it was not 'fair, just or reasonable' to impose such costs on the practitioner.[68]

On a case of similar facts, the High Court of Australia concluded that the complainant could indeed claim damages for the costs relating to the upbringing of the child.[69] The Court considered that it would be discriminatory to preclude damages for the child's upbringing, as consequential liability would be available for any other injury which has long term consequences.[70] Consequentially, legislatures in Queensland, New South Wales and South Australia intervened and introduced new laws prohibiting recovery for wrongful conception. Therefore, it is likely that a stealthing victim may be able to claim in tort for the physical harm caused by the pregnancy and the child birth, but not for the costs of upbringing of the child. Finally, where stealthing does not result in a physical harm, but rather results in a mental harm, damages are unlikely, as damages for pure emotional distress are 'notoriously rare.'[71] This is because damages in tort law rely upon some physical harm suffered by the complainant.[72]

The Accident Compensation Scheme

We have seen that tortious actions will likely only be available where the complainant contracts an STI, or becomes pregnant. Avenues for redress in tort therefore are clearly limited. In addition to being limited, it is suggested that it would be inefficacious to bring tortious proceedings for stealthing in New Zealand given the Accident Compensation Scheme. The

[65] Above n 18 at 198.
[66] *McFarlane v Tayside* [2000] 2 AC 59.
[67] As above.
[68] As above.
[69] *Cattanach v Melchior* [2003] HCA 38 at 138.
[70] At 78.
[71] Above n 14 at 200.
[72] Above n 48 at 1661.

Accident Compensation Act prohibits tortious actions where a claimant suffers a personal injury.[73]

A victim will not be entitled to ACC coverage where stealthing results in an STI, because the Act directs that personal injury does not include an injury which is caused 'wholly or substantially by … infection.'[74] As an STI is clearly an infection, a victim who contracts an STI will be able to bring a tortious claim for that harm, but they will not be entitled to ACC coverage.

A victim will likely be entitled to ACC compensation where stealthing results in a pregnancy. In *Allenby v H* Ms H underwent a sterilization procedure and subsequently became pregnant.[75] While this case was decided in the context of a negligent sterilization, the Supreme Court compares this to sexual assault in order to find that Ms H was entitled to coverage under the Act. There are two main issues which must be established before pregnancy which results from stealthing will be covered by the Act. Firstly, victims must have suffered a personal injury, and secondly, the pregnancy must be caused by an accident.[76] Personal injury as defined includes 'physical injuries suffered by a person.'[77] The Court was satisfied that the physical consequences of the pregnancy amounted to a personal injury, given that pregnancy results in physical injuries which are of far greater concern than the examples given in the Act of a strain or a sprain.[78] Thus the Court accepted that the physical consequences of impregnation by rape would be covered by the Act, provided the pregnancy was caused by an accident.[79]

Accident is broadly defined in the Act. It is said to include 'a specific series of events that involve the application of force, or resistance, external to the human body.'[80] Justice Blanchard was satisfied that the term 'accident' does encompass sexual assault.[81] He notes that despite accident being a term which generally implies a lack of intention, it has frequently been held that the definition in the Act includes deliberate acts.[82] Justice Blanchard suggests that because

[73] Accident Compensation Act 2001, s 317(1).
[74] Accident Compensation Act 2001, s 26(2).
[75] *Allenby v H* [2012] NZSC 33.
[76] Accident Compensation Act 2001, s 20(1).
[77] Accident Compensation Act 2001, s 26(1)(a).
[78] Above n 75 at [19].
[79] At [26].
[80] Accident Compensation Act 2001, s 25(1)(a)(i).
[81] Above n 75 at [72].
[82] At [72].

impregnation is a physical consequence of sexual assault, which is an application of force to another, pregnancy should be regarded as a personal injury.[83] He suggests that it would be absurd if a sexual assault victim could obtain cover for any other injury suffered by the sexual assault, but not for the pregnancy.[84] While this statement is merely obiter and therefore not binding on a court, it is an obiter statement from the Supreme Court of New Zealand, and is therefore highly persuasive authority. Thus, a stealthing victim is likely prevented from suing for the physical harm associated with the pregnancy if they become pregnant.

Victims of stealthing may also suffer mental distress as a result of the violation. The Act provides claimants with coverage where they suffer a mental injury. To be successful a claimant must show that:[85]

1. They suffered a mental injury;
2. The mental injury is caused by an act performed by another person;
3. The act amounts to sexual assault.

The application of this provision was at issue in *KSB v ACC*.[86] In this case the claimant's partner failed to disclose his positive HIV status, and they engaged in sexual intercourse. The claimant did not contract HIV, but she sought to claim ACC compensation for the mental harm that she suffered as a result of her partners non-disclosure. The Accident Compensation Corporation denied her claim on the basis that her partner's failure to disclose his positive HIV status did not amount to sexual assault. The claimant appealed to the Court of Appeal. The Court accepted that Parliament could not have intended to provide cover for mental injury resulting from consensual sexual intercourse,[87] but, for reasons discussed in Part Two, concluded that failure to disclose one's positive HIV status did constitute sexual assault.[88] While this is in the context of HIV non-disclosure, it demonstrates that the courts may be willing to give a broad interpretation to sexual assault and consent in the context of ACC claims. Thus it is arguable that a court would find that a claimant was entitled to ACC coverage if they were stealthed, regardless of whether or not stealthing is found to be a sexual violation.

[83] At [72].
[84] At [74].
[85] Accident Compensation Act 2001, 21.
[86] *KSB v Accident Compensation Corporation* [2012] NZCA 82.
[87] At [29].
[88] At [99].

Mental injury is defined as a 'clinically significant, behavioural, cognitive, or psychological dysfunction.'[89] Thus, for the first and second elements to be satisfied the claimant must prove that they have suffered some recognisable mental injury as a result of the sexual violation, such as PTSD. Pure emotional distress will not be enough. This view is confirmed in *KSB*, where the Court notes that by the 1992 amendments, Parliament intended to cut back and tighten up cover for mental injury.[90] Thus, in order to obtain ACC coverage, the claimant must first be diagnosed with a clinically recognisable mental injury. There will therefore be no ACC coverage whether the claimant suffers 'pure emotional distress.'

Exemplary damages are left out of the statutory bar on tortious proceedings, meaning a stealthing victim may be able to bring a claim for exemplary damages, irrespective of whether any harm results.[91] However, it will only be in the rarest of cases that the court will accept an action for exemplary damages in respect of personal injury.[92] It would therefore be undesirable to rely on exemplary damages to condemn stealthing.

As we have seen, a victim will only be able to bring tortious proceedings where stealthing results in the transmission of an STI because of the accident compensation scheme. Further, there is no adequate remedy where a victim does not contract a physical injury, but rather suffers pure emotional distress as a result of the violation. Not only does this leave a legal vacuum where a victim does not contract an STI, but there are a number of other concerns in dealing with stealthing in the civil arena. Indeed, Brianna Chesser and April Zahra reject tort law as an adequate means for condemning stealthing for a number of reasons. Firstly, they note that tort law is a complicated means of redress.[93] It is a highly costly process, and in comparison to the criminal law where costs are shouldered by the state, claimants shoulder the costs themselves.[94] Claimants are also exposed to potential defences like contributory negligence which may make them feel partially responsible for the harm they have endured.[95]

[89] Accident Compensation Act 2001, s 27.
[90] Above n 86 at [28].
[91] Accident Compensation Act 2001, s 319.
[92] Joanna Manning "Reflections on exemplary damages and personal injury liability in New Zealand" (2002) 2002:2 NZ L Rev 143 at 144.
[93] Brianna Chesser and April Zahra "Stealthing: a criminal offence?" (2019) 31:2 T&F Online 217 at 229.
[94] Above n 46 at 198.
[95] Above n 93.

Secondly, damages are the only available remedy if a stealthing victim is able to successfully bring a tortious action. This is an unsatisfactory response to the harm suffered by the victim as there is no element of punishment or deterrence. [96] As such, stealthing will not be perceived by society as being a wrong and indeed, it is not the purpose of tort law to shape public perceptions. Instead, tort law operates to financially compensate victims for harms they have suffered.[97] In contrast, the purpose of the criminal law is specifically to punish and deter wrongdoers, and condemn acts which cause harm to society. A criminal conviction shapes public perceptions and declares to the world that the act is a wrong which is worth of criminal intervention.[98] Relatedly, pursuing stealthing in the civil area may act to isolate our understanding of the harm suffered by the complainant.[99] By not bringing criminal prosecutions, society may perceive stealthing as less serious than other sexual offences, thus dismissing and diminishing the victims experience. Therefore, it is suggested that the only adequate means for condemning stealthing is criminalisation.

Conclusion

Why then should stealthing be criminalised? This dissertation argues that stealthing is a manifestation of male dominance through which men treat themselves as superior to women. When a woman is stealthed she is effectively told that her consent and her choices do not matter – rather intercourse is to be carried out on her partner's terms. Stealthing is an act of male dominance because it fails to treat the genders as equal, and allows the male to assert his superiority through his actions – it removes women's right to determine how the sexual activity is to be carried out. Jean Hampton states that for criminal intervention to be justified there must be a diminishment of the victim's value and/or a betterment of the wrongdoer's value. There is no way in which stealthing treats men and women as equals, instead, stealthing grants men superiority by enabling them to control whether a condom is worn. Therefore stealthing should be criminalised because it is a practice through which men are able to assert their superiority over their partner, and through which women's dignity and sexual autonomy is violated.

Despite this finding, this dissertation then explored whether tort law would more effectively condemn stealthing, given the significant restrictions that a criminal conviction imposes on an

[96] At 229.
[97] Above n 48 at 1663.
[98] Above n 46 at 197.
[99] Above n 93 at 229.

individual. Ultimately it was found that, as well as being unable to adequately respond to the harms suffered by stealthing as a result of the accident compensation scheme. Tort law was an insufficient means of punishment because of its compensatory nature and the significant amount of costs to be covered by the complainant.

Therefore, this dissertation suggests that stealthing should be criminalised because, as well as the criminal law being the only means available to respond to the offending, stealthing is a practice through which men are able to assert their superiority and simultaneously degrade women's dignity. Thus, through stealthing women's value is diminished, and men's value is correspondingly improved. Therefore, it is suggested that criminal intervention of stealthing would be justified.

Part II: How Should Stealthing Be Criminalised?

Chapter III: Is Stealthing Rape?

This part explores how stealthing should be criminalised in New Zealand. There is currently no provision in the Crimes Act which explicitly criminalises stealthing. It may therefore be argued that we should petition Parliament to introduce a new provision which would specifically operate to criminalise stealthing. Alternatively, we could rely on the existing sexual violation provisions in the Crimes Act to criminalise stealthing

Parliament in Singapore took the first option, opting to introduce a new section which specifically criminalises stealthing. This provision provides that:[100]

(1) Any person (*A*) shall be guilty of an offence if –

a. *A* intentionally touches another person (*B*) or intentionally incites *B* to touch *A* or *B* or another person;
b. the touching is sexual and *B* consents to the touching;
c. *A* fraudulently obtains *B*'s consent by means of deception or false representation practised or made by *A* for that purpose;
d. the deception or false representation mentioned in paragraph (c) relates to –
    i. The use or manner of use of any sexually protective measure; or
    ii. Whether *A* or another person whom *B* is incited to touch is suffering from or is a carrier of a sexually transmitted disease; and
e. *A* knows or has reason to believe that the consent was given in consequence of such deception or false representation

This provision would certainly criminalise stealthing because it provides that a person is guilty of procurement of sexual activity where they deceive their partner, or falsely represent that a condom is worn. However, this provision is arguably too narrow because of its reliance upon 'a deception or false representation'. Would this, for example, cover the scenario where a defendant does not put a condom on and does not attempt to hide this from their partner, despite their express request that a condom be worn?

[100] The Criminal Law Reform Act 2019 (SG), s 376H.

Perhaps it would be preferable to adopt a provision such as is currently proposed in California. The Bill proposes to make it a sexual battery for anyone to "cause contact between an intimate part of the person and a sexual organ of another from which the person removed a condom without verbal consent."[101] This provision is preferable in that it removes any reference to deception or false representation, however, this also faces difficulties in that it limits stealthing solely to the removal of the condom.

A preferable section might look something like this:

Nonconsensual Unprotected Sexual Activity –

(1) It is unlawful to have unprotected sexual activity with A without A's express consent.

(2) Unprotected sexual activity is defined as sex without a condom.

Ultimately, however, it is unnecessary to ascertain the perfect section because, while enacting a section which specifically criminalises stealthing would be beneficial in that it would confirm that stealthing is a sexual offence, it would also operate to segregate stealthing from rape. It would declare that stealthing is distinct from sexual violation: it would deny that the victims were sexually violated. It would suggest that they were 'stealthed', rather than violated. It is suggested that criminalising stealthing under pre-existing provisions would operate to validate, rather than deny victim's feelings of violation. Indeed, Frankie states that the confirmation in New Zealand that stealthing is rape, rather than a distinct rape-like offence, 'confirms [that her] own experience was a serious sex crime for which [her] perpetrator should be held accountable.'[102]

Thus this dissertation recommends relying upon the current sexual violation provisions to criminalise stealthing. Section 128 of the Crimes Act provides that[103] –

(1) Sexual violation is the act of a person who –

(a) **Rapes** another person; or

(b) Has **unlawful sexual connection** with another person.

[101] AB-453 Sexual Battery: Nonconsensual Condom Removal 2021 (453).
[102] Frankie Bennett "It's not 'stealthing' – it is rape" (20 April 2021) The Spinoff https://thespinoff.co.nz/society/20-04-2021/its-not-stealthing-its-rape/.
[103] Crimes Act 1961, s 128.

(2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis, –

(a) Without person B's consent to the connection; and

(b) Without believing on reasonable grounds that person B consents to the connection.

(3) Person A has unlawful sexual connection with person B if person A has sexual connection with person B –

(a) Without person B's consent to the connection; and

(b) Without believing on reasonable grounds that person B consents to the connection.

Notably, sexual violation can take the form of either rape or unlawful sexual connection, both of which are subject to imprisonment of a term up to 20 years.[104] This dissertation argues that stealthing is most appropriately characterised as rape. This is consistent with Justice Harrop's findings in *R v Campos*.[105] Initially, I was concerned that to term stealthing 'rape' would act to undermine the moral severity of rape, and lead to the criminalisation of conduct that lacks the reprehensible character which is associated with rape. Decisions, like those in Germany, which held that stealthing was not rape because the complainant had consented to the physical act of sexual intercourse, strengthened this view.[106] However, it is suggested that such a narrative would validate "rape-myths" and the idea that the only legitimate rape is one which is violent and takes place in a dark alley way. Rape is much more than this; it is any form of nonconsensual penetration. It is not good enough that the law tells victims that their experience wasn't as bad as someone else's experience simply because they agreed to the physical sexual act.

That stealthing is rape is confirmed by the analysis in Part One, which found that stealthing should be criminalised because it is a violation of women's dignity, through which the male partner maintains his hegemony and devalues his partner. To say that stealthing is rape confirms that rape is an act of violation, not of violence. It recognises that rape is a crime because non-consensual penetration is a violation of an individual's autonomy, because it acts

[104] Crimes Act 1961, s 128B.
[105] Above n 7 at [38].
[106] Matthew Robinson "Police officer found guilty of condom 'stealthing' in landmark trial" (December 20 2018) CNN https://edition.cnn.com/2018/12/20/health/stealthing-germany-sexual-assault-scli-intl/index.html.

to show that their needs are of less worth than their partner's. It treats women as an item of property with which men have a right to use as they please, regardless of their consent.

Stealthing plainly involves the penetration of the accused's penis into the complainant's genitals. However, in order for liability to ensue, it must be established that the complainant did not consent to that penetration. An overview of the position of stealthing overseas will help to determine how stealthing vitiates consent in New Zealand.

Chapter IV: The Position Of Stealthing In Overseas Jurisdictions

The courts in both Canada and the United Kingdom have recognised that condom use is fundamental to one's consent, and therefore the failure to wear a condom can vitiate consent given to the sexual activity. While these decisions are not binding on a New Zealand court, the reasoning adopted by these courts will help determine how stealthing vitiates consent in New Zealand.

The United Kingdom position

In *Assange v Swedish Prosecution Authority* AA agreed to have sexual intercourse with Mr Assange on the basis that he wear a condom.[107] It was alleged that Mr Assange damaged the condom during sexual intercourse, thus rendering the condom ineffective.[108] The issue for the Court was whether, if the alleged facts were proven, the actions of Mr Assange vitiated AA's consent to the sexual activity.

There are two main provisions of the United Kingdom's Sexual Offences Act which are relevant to whether AA's consent was vitiated. The first is section 74 which states that a person consents if they agree by choice, and have the freedom and capacity to make that choice.[109] The second is section 76 which provides for a presumption that the complainant did not consent if the defendant intentionally deceived the complainant as to the nature and purpose of the relevant act.[110]

[107] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 at [39].
[108] At [93].
[109] Sexual Offences Act 2003 (UK), s 74.
[110] Sexual Offences Act 2003 (UK), s 76.

Mr Assange argued that AA's consent was not vitiated because his damaging of the condom did not affect the nature and purpose of the sexual activity.[111] Further, because the nature and purpose of the sexual activity was not affected, AA had consented to the sexual activity, and that consent cannot be vitiated by section 74.[112] Support for this proposition comes from the case of *R v B*.[113] In this case the defendant failed to disclose to his sexual partner that he was HIV-positive. The Court held that his non-disclosure did not change the nature and purpose of the act, and, as such, the act remained consensual.[114] The Court then considered that because consent was not vitiated through section 76, his non-disclosure was in no way relevant to section 74.[115]

Mr Assange therefore argued that his tearing of the condom did not change the nature of the act consented to, so section 76 did not apply, and therefore section 74 was of no relevance.[116] As such AA had consented to the sexual activity, and her consent was not vitiated when Mr Assange damaged the condom. Significantly, Mr Assange accepted that this conclusion may not be a conclusion which would be accepted by society, but argued that it is the only available interpretation of the legislation.[117]

The Court began its analysis by looking at section 76. They accept that it may be argued that damaging the condom changes the nature of the sexual activity consented to because there is a change in the degree of intimacy and an increased risk of disease and pregnancy.[118] However, they conclude that because section 76 leads to the conclusive presumption that the complainant did not consent, section 76 must be strictly interpreted in accordance with previous case law.[119] Courts have given a narrow interpretation to section 76 since the case of *R v Clarence.*[120] In this case, Mr Clarence knowingly infected his wife with gonorrhoea, and the issue for the Court was whether his wife consented to the sexual activity, or whether his non-disclosure changed the nature of the sexual activity agreed to.[121]

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[111] Above n 107 at [84].
[112] At [84].
[113] *R v B* [2006] EWCA Crim 2945.
[114] At [17].
[115] Above n 107 at [83].
[116] At [84].
[117] At [84].
[118] At [87].
[119] At [87].
[120] *R v Clarence* [1886-90] All ER Rep 133.
[121] At 136.

The Court ultimately confined the nature and purpose of the sexual activity to mistakes about the sexual character of the activity, because the Court was unwilling to find a man liable for rape on the basis of a mere 'suppression of the truth.'[122] So, as long as the complainant is aware that what she has consented to amounts to sexual intercourse, any deceptions which resulted in that consent will not vitiate that consent. Thus, in the present case, the Court found that because AA agreed to have sexual intercourse with Mr Assange, his deceptive damaging of the condom did not change the nature and purpose of the act, and therefore did not vitiate her consent.[123]

The Court suggests that recourse may more appropriately be achieved using section 74.[124] While this was merely a summary judgment, the Court held that it would be reasonably open for a jury to find that the complainant's consent was vitiated when Mr Assange removed or tore the condom without her consent.[125] They suggest that such a conclusion was not barred by *R v B* because that decision went no further than to suggest that HIV infection is not relevant to section 74.[126] The Court considered that Mr Assange's conduct in damaging the condom vitiated his partner's consent, because AA had consented only to protected sexual intercourse.[127] The Court was satisfied that 'his conduct in having sexual intercourse without a condom in circumstances where she had made it clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the Sexual Offences Act.'[128]

Melissa Blanco suggests that the Court in this case adopted a conditional consent standard.[129] By this it is meant that an individual may place conditions on their consent, and if those conditions are not complied with, their consent will be vitiated. In the context of stealthing, the complainant's consent is conditional upon the use of a condom and the removal or failure to wear a condom vitiates their consent. Blanco suggests that a conditional consent standard is the most effective means of criminalising stealthing, and she recommends adopting a

[122] At 145.
[123] Above n 107 at [87].
[124] At [86].
[125] At [86].
[126] At [90].
[127] At [86].
[128] At [86].
[129] Above n 19 at 238.

conditional consent standard because to do so would 'formalise the belief that consent is no longer valid once the condition to consent is violated.'[130]

In summary, the United Kingdom adopted a conditional consent standard to criminalise deceptions as to condom use – while at the same time rejecting the idea that condom use goes to the nature and purpose of the sexual activity. While this case was in the context of condom sabotage, rather than stealthing, it is arguable that a similar conditional consent analysis may be applied to condemn stealthing. Indeed the Court in *Assange* stated that confirmed that it was immaterial to their analysis whether the condom was torn or removed.[131]

The Canadian Position

The legal position of stealthing in Canada is far more complex than that of the United Kingdom. The majority of the court in *Hutchinson* held that deceptions as to condom use were not relevant to the sexual activity, but considered that condom use, or a lack thereof, could vitiate consent through fraud.[132] In contrast, the majority in *Kirkpatrick* considered that the failure to wear a condom was indeed relevant to the sexual activity.[133]

I R v Hutchinson

In this case, Mr Hutchinson poked holes in the condom and the complainant became pregnant.[134] The trial judge found Mr Hutchinson guilty of sexual assault, and this was upheld by the Court of Appeal.[135] Mr Hutchinson appealed to the Supreme Court, which unanimously upheld the conviction on the basis that there was no consent given to the sexual activity.

The Canadian Criminal Code sets out a two-step approach for determining whether consent has been given to the sexual activity:[136]

[130] At 245.
[131] Above n 107 at [95].
[132] *R v Hutchinson* [2014] SCC 19.
[133] *R v Kirkpatrick* 2020 BCCA 136.
[134] Above n 132 at [2].
[135] At [2].
[136] At [4].

1. Was there voluntary agreement of the complainant to engage in the sexual activity in question[137]
2. Were there any circumstances which vitiated her consent?[138]

The Majority's Decision

The majority explains that there are two ways to define the first step. It may be defined in broad terms, to look at whether the complainant consented to the 'essential features' of the activity.[139] Provided that condom use was an essential feature of the activity, removal of that condom would mean that there was no voluntary agreement given to the sexual activity. Alternatively, the first step may be defined in narrow terms to say that the sexual activity is limited solely to the physical act agreed upon at the time.[140] So, because the complainant agreed to engage in sexual intercourse with the defendant, the removal of the condom does not vitiate that consent.

The Court ultimately adopted the narrow approach to the question of whether there was voluntary agreement to the sexual activity. They state that adopting the essential features test would make the law unduly uncertain.[141] As there is no requirement of disclosure it would be up to the individual to determine what their partner considers to be essential to their consent - certainly what an individual considers to be essential will vary from person to person. The Court therefore suggests that it would be impossible, under the essential features test, for an individual to predict what another considers to be essential to their consent, thus making the law inherently uncertain.[142]

Relatedly, the Court expressed concerns that adopting the essential features test would act to unjustifiably broaden the scope of criminalisation, operating to 'criminalise conduct that lacks the reprehensible character, casting the net of the criminal law too broadly.'[143] The Court was concerned that the essential features test would criminalise not only trivial acts, such as what brand of condom is used, [144] but suggests that it will also lead to over criminalisation of HIV.[145]

[137] Criminal Code 1985 (CN), s 273.1(1).
[138] Criminal Code 1985 (CN), s 265(3).
[139] Above n 132 at [21].
[140] At [22].
[141] At [41].
[142] At [44].
[143] At [53].
[144] At [41].
[145] At [42].

The majority therefore adopted a narrow interpretation to the sexual activity in question – narrowly requiring voluntary agreement only to the physical sexual act. This is similar to the United Kingdom's interpretation of section 76 in *Assange* wherein the Court confined the nature and purpose of the sexual activity to the physical acts of the sexual activity. Indeed, the majority in the present case referred to *R v Clarence* in order to justify its decision to give a restrictive interpretation to the sexual activity in question, and exclude condom use from the inquiry.[146]

The issue then became whether there were are any circumstances which vitiated the complainant's consent. In particular the Court looked at whether the complainant's consent was vitiated as a result of fraud, under section 265(3)(c) of the Criminal Code.[147] The definition of fraud was at issue in *R v Cuerrier.* In this case Mr Cuerrier knew he was HIV positive, but he failed to disclose this to his sexual partners.[148] He was charged with aggravated assault, and the issue was whether his non-disclosure vitiated the women's consent to the sexual activity.[149]

Of significance in this case was the fact that Parliament had amended the fraud provisions, removing the reference to 'false and fraudulent representations as to the nature and quality of the act.'[150] There were three different judgments in this decision, all of which defined fraud differently. Of particular relevance for the present case was the judgment of Justice Cory who considered that by the amendments, Parliament had intended to abandon the narrow *Clarence* framework, and instead it was intended replace it with the definition of fraud as it is understood in the commercial context.[151] It follows that for fraud to be established, the following two elements must be established: there must be evidence of dishonesty, and there must be a serious risk of harm.[152]

The Court stated that dishonesty was not in issue in this case, and indeed it was admitted.[153] The issue therefore was whether the accused's actions exposed the complainant to a serious

[146] At [62].
[147] At [66]; Criminal Code 1985 (CN), 265(3)(c).
[148] *R v Cuerrier* [1998] 2 R.C.S. at [24].
[149] At [24].
[150] At [3].
[151] At [117].
[152] At [125].
[153] Above n 132 at [68].

risk of bodily harm. The Court was satisfied that the concept of serious bodily harm included depriving a woman of the choice of whether or not to become pregnant, or exposing women to a higher risk of becoming pregnant.[154] There was no doubt therefore that the accused's actions, in sabotaging the condom, increased the complainant's risk of becoming pregnant, so the Court held that the complainant had suffered a serious risk of bodily harm.[155] As a result, while the complainant had consented to the sexual activity, her consent was vitiated by fraud.[156] The appeal was therefore dismissed and Mr Hutchinson was found guilty of sexual assault.[157]

The Minority's Decision

The minority agreed that the appeal should be dismissed, but they disagreed as to why. The minority considered that sex with a sabotaged condom was fundamentally different from sex with an intact condom, and as a result there was no consent given to the activity.[158] Thus the minority considered that there was no consent given to the sexual activity at the first step, and, as a result, there was no need to have regard to whether the complainant's consent was vitiated by fraud. Lise Gotell suggests that the minority employed a sort-of consent standard, in that, like the Court in *Assange* the minority recognised that an individual may place conditions on their consent, but they restricted this to conditions relating to how the individual is touched.[159]

The minority's reasoning is premised on the idea that a person is entitled to determine how they are touched. They distinguish how a person is touched from the consequences of that touching or the characteristics of the sexual partner, stating that

> "The complainant's voluntary agreement to the manner in which the sexual touching was carried out requires the complainant's consent to where on her body she was touched and with what. It does not however, require consent to the consequences of that touching, or the characteristics of the sexual partner, such as age, wealth, marital status and health."[160]

[154] At [70].
[155] At [73].
[156] At [74].
[157] At [74].
[158] At [79].
[159] Lise Gotell "Thinly Construing the Nature of the Act Legally Consented to: the Corrosive Impact of *R v Hutchinson* on the Law of Consent" (2020) 53 UBC L Rev 53 at 73.
[160] At [88].

Thus, on the minority's approach, whether a condom is worn is relevant to the voluntary agreement of the sexual activity because this goes directly to how the complainant is touched. The minority's approach thus confirms that when individuals agree to sexual activity they are agreeing not only to have sexual intercourse, but they are agreeing to how that intercourse should be carried out.[161] This is consistent with Canada's affirmative consent standard,[162] which was confirmed in *Ewanchuk.*[163] In this case, the accused interviewed the complainant for a job.[164] The accused began to touch the complainant, starting at her hands, arms, and shoulders, and gradually moving towards her breasts and genitalia.[165] The complainant repeatedly said no to the touching, and the accused would stop immediately upon her request, but he would later resume the touching.[166] Eventually, the accused began grinding on top of the complainant, and he then took out his penis.[167] This time, the complainant demanded that the sexual activity come to an end, and she left.[168]

The issue for the Court was whether the complainant had consented to the sexual activity. The Court was satisfied that she had not consented, stating that an individual cannot be said to have consented unless and until the accused takes steps to ascertain their partner's consent.[169] The Court considered that some positive evidence of consent is required before the complainant will be said to have consented, and ruled that 'silence, passivity, or ambiguous conduct cannot be taken as indications of consent.'[170] Thus, for consent to be established in Canada, it is not enough that the complainant simply did not say no, rather there must be specific evidence that the complainant consented. This affirmative consent standard effectively places the burden on the accused to prove that the complainant consented. In this way, the Court in *Ewanchuk*, like the minority in *Hutchinson* emphasises control over one's body is touched.

The minority was critical of the majority's reliance on *Cuerrier* in concluding that condom use was not relevant to the first step. The minority suggests that *Cuerrier* was properly decided under that second step because the complainant in that case had consented to the sexual nature

[161] At [98].
[162] Above n 159 at 58.
[163] *R v Ewanchuk* [1999] 1 SCR 330.
[164] At [3].
[165] At [5], [7].
[166] At [5]-[6], [9].
[167] At [9].
[168] At [10]-[11].
[169] At [99].
[170] At [51].

of the touching.[171] However, they state that the Court's decision in *Cuerrier* to vitiate consent using the second step was not intended to replace the governing affirmative consent standard, established in *Ewanchuk*.[172] The minority suggests that by stating that condom use is not relevant to the sexual activity in question, the majority "erodes a person's right confirmed in *R v Ewanchuk* to decide what sexual activity takes place."[173]

II R v Kirkpatrick

The Court of Appeal in *Kirkpatrick* then attempted to return the law to its affirmative, pre-*Hutchinson* position, whilst working within the bounds of its authority. The complainant in this case agreed to have sexual intercourse with the defendant on the basis that a condom was worn. She made it very clear from the outset that she would only consent if a condom was worn, and there were messages to this effect.[174] The accused and the complainant had sexual intercourse on two occasions. On the first occasion the defendant rolled over to the side cabinet and put a condom on.[175] On the second occasion, the defendant rolled over to the cabinet, as if to put a condom on like he did on the first occasion, but he did not.[176] Like in *Hutchinson,* the Court unanimously held that there was no consent given to the sexual activity, but their reasoning differed.

The Majority's Decision

The majority considered that there was no fraud in this case because the defendant did not try to deceive the complainant.[177] Indeed, there was evidence that the defendant had asked the complainant to guide his penis into her vagina, so he was not trying to convince her that he was wearing a condom.[178] Therefore, in order for Mr Kirkpatrick to be liable, the Court had to find that the complainant did not voluntarily consent to the sexual activity. If the Court strictly applied *Hutchinson*, it would be forced to conclude that condom use was not relevant to the sexual activity in question, because condom use is not relevant to the specific sex act. However, the Court suggests that this is not how *Hutchinson* was meant to be interpreted. Indeed, the

[171] Above n 132 at [94].
[172] At [95].
[173] At [96].
[174] Above n 133 at [5].
[175] At [6].
[176] At [8].
[177] At [42].
[178] At [13].

Court suggests that such an interpretation would be perverse because it would suggest that a person cannot place limits on their consent.[179]

Instead, the Court suggests that *Hutchinson* did not intend to exclude the 'important physical aspects' of the sexual activity, such as whether a condom is worn, rather the Court merely intended to ensure that issues of deception were dealt with separately from the issue of what physical activities the parties agreed to engage in.[180] The Court suggests that unprotected sexual intercourse is fundamentally different from sex with a condom, albeit a broken condom.[181]Therefore, whether a condom is worn forms part of the important physical aspects of the sexual activity, while a sabotaged condom is a matter of deception, which ought to be dealt with separately. Given this distinction, the Court was satisfied that the complainant did not consent to the sexual activity in question.[182]

The Minority's Decision

The minority considered that there was no plausible interpretation of *Hutchinson* by which it could be said that condom use could be included within the meaning of sexual activity.[183] Indeed, the majority of the Court in *Hutchinson* explicitly stated that use of a condom is a means of contraception, not a sex act, and therefore is not relevant to the sexual activity in question.[184]

As such, because *Hutchinson* is binding on the Court of Appeal by virtue of the doctrine of stare decisis,[185] the only available conclusion is that the complainant consented to the sexual activity in question because she voluntarily agreed to have sexual intercourse with the defendant.[186] However, the minority considered that there was fraud here, in the form of passive deception; on the basis that the accused's failure to disclose that he was not wearing a condom, in the face of the complainant's express request that a condom be worn, would amount

[179] At [59].
[180] At [26]-[27], [29].
[181] At [31].
[182] At [37].
[183] At [46].
[184] Above n 132 at [64].
[185] Timothy Oyen "Stare Decisis" (March 2017) Legal Information Institute https://www.law.cornell.edu/wex/stare_decisis.
[186] Above n 133 at [51].

to dishonesty.[187] The minority thereby allowed the appeal, on the basis of fraud vitiating consent, and ordered a new trial.[188]

Lise Gotell agrees that the majority in *Kirkpatrick* exceeded its jurisdiction by acting inconsistently with Supreme Court authority,[189] however she suggests that the decision is nevertheless satisfactory because it is consistent Canada's affirmative consent standard, by permitting individuals to determine how they are touched.[190] The accused has applied to appeal *Kirkpatrick* to the Supreme Court of Canada, which, Gotell suggests, 'presents the Court with a unique opportunity to rethink its decision in *Hutchinson*,' and return the law to its previous affirmative position.[191]

Gotell suggests that despite the 'overgenerous' interpretation taken by the majority in *Kirkpatrick*, the Supreme Court should, at the very least, uphold the majority's reasoning on appeal.[192] Ultimately, however, what is required, Gotell suggests, is a firm departure from the Court's reasoning in *Hutchinson*.[193] The most satisfactory decision would therefore be one which confirms the complainant's right to decide how they are touched; a decision which recognises that the lack of a condom changes the nature of the sexual activity in question.

The analysis of overseas case law reveals three main avenues for criminalising stealthing in New Zealand. Firstly, like the England and Wales High Court decided in *Assange v Swedish Prosecution Authority,* it could be argued that stealthing should be criminalised because it breaches the conditions that the victim has placed upon their consent. Secondly, and relatedly, courts in New Zealand could adopt a limited conditional consent approach, such as was adopted by the minority in *Hutchinson,* which restricts the conditions one can place on their consent. Finally, and most controversially, it may be argued that New Zealand courts should adopt an expansive interpretation of 'nature and purpose' such as was advocated for by Gotell, and was applied in a limited sense in *Kirkpatrick.*

[187] At [52].
[188] At [122].
[189] Lise Gotell and Isabella Grant "Does 'No, Not Without a Condom' Mean 'Yes, Even Without a Condom'?: the fallout from *R v Hutchinson* (2020) 43 Dalhousie LJ 1 at 3.
[190] At 25.
[191] At 3.
[192] At 25.
[193] At 25.

Chapter V: Does Stealthing Vitiate Consent?

This chapter will explore how stealthing vitiates consent in New Zealand. Of importance is section 128A which sets out circumstances where allowing sexual activity will not amount to consent in New Zealand –

> …
>
> (7) A person does not consent to sexual activity with another person if he or she allows the act because he or she is mistaken about its nature and quality.[194]
>
> (8) This section does not limit the circumstances in which a person does not consent to sexual activity.[195]

Nature and Purpose

As we have seen overseas jurisdictions have tended to take a narrow approach to the nature and purpose of the sexual activity, confining it to the specific sexual activity. Nevertheless it is argued that subsection 7 can be used to criminalise stealthing in New Zealand, because condom use is relevant to the nature and quality of the sexual activity. Indeed, the Court of Appeal in *KSB v ACC* was willing to broaden subsection 7, in the civil context, in order to find that HIV non-disclosure changed the nature and quality of the sexual activity.[196] The Court acknowledged that overseas courts have tended to take a narrow interpretation to the nature and quality of the sexual activity, but suggests that it is open to the court to take a different approach because the thrust of authority in New Zealand has not ruled out a broader approach.[197]

The Court canvasses three cases, all of which concerned sexual activity which was procured under the pretence of medical treatment. All three cases held that consent was vitiated because the complainant had not consented to the nature and quality of the sexual activity –they had only consented to such touching for the purposes of medical treatment, not for the purpose of sexual gratification.[198] These cases, the Court argues, are not enough to illustrate that New Zealand courts have adopted the narrow overseas position, rather the court suggests that the

[194] Crimes Act 1961, s 128A(7).
[195] Crimes Act 1961, s 128A(8).
[196] Above n 86 at [99].
[197] At [62].
[198] *R v Pearson* (1908) 11 GLR 139 (SC); *R v Moffitt* CA382/93, 22 November 1993; *R v Ibrahim* CA352/98, 17 December 1998.

position has not been adequately tested, and as a consequence it is open to the court to give a broad interpretation to subsection 7.

In determining how subsection 7 should be interpreted, the Court had regard to the reasoning of Justice McLachlin in *R v Cuerrier.*[199] Justice McLachlin considered that despite the amendments to the Criminal Code, which removed the reference to nature and purpose, the Court was nevertheless bound to limit fraud to the nature and purpose of the sexual activity, because the law had been settled for more than a century.[200] However, Justice McLachlin suggested that the Court has a duty to make incremental changes to the law to ensure that it accurately represents society's everchanging values.

Justice McLachlin was satisfied that the Court had the authority to redefine fraud because society would not be satisfied if non-disclosure of one's HIV positive status did not vitiate their partner's consent. Thus Justice McLachlin considered that "the law permits fraud to vitiate consent to the sexual character of the act; deception as to the identity of the perpetrator; or deception as to the presence of sexually transmitted disease giving rise to serious risk or probability of infecting the complainant."[201]

The Court in *KSB* concluded therefore that failure to disclose one's positive HIV status changes the nature and quality of the act consented to because of the increased risk of serious bodily harm.[202] While this is clearly in the context of HIV non-disclosure, it is argued that this analysis can equally be applied to stealthing. The Court, in deciding that non-disclosure vitiates the complainant's consent, emphasised that non-disclosure changes the natures and quality of the activity because of the increased risk of harm. [203]

Similarly, unprotected sexual intercourse increases the risk of STI transmission or unwanted pregnancies. There is therefore an argument, based on *KSB*, that where a complainant has consented to protected sexual activity, but their partner removes, or fails to wear a condom, that failure changes the nature and quality of the sexual activity agreed to because of the

[199] Above n 86 at [73].
[200] Above n 148 at [25].
[201] At [70].
[202] Above n 86 at [74].
[203] Above n 148 at [72].

increased risk of serious bodily harm. Thus under subsection 7, a court may find that there was no consent given to the sexual activity.

Conditional Consent

As we have seen, a conditional consent standard was applied in the United Kingdom to find that damaging a condom, so as to render it ineffective, vitiated the complainant's consent. To the best of my knowledge,[204] a conditional consent standard has not yet been adopted in New Zealand in the criminal sphere, and there is no explicit reference to a conditional consent standard in section 128A. However, as directed by subsection 8, the circumstances in section 128A are not exhaustive.[205]

It is therefore argued that a conditional consent standard may be brought in to the law through subsection 8. To do so would be consistent with the common law definition of consent which requires that the complainant gives 'full, voluntary, free and informed consent' to the sexual activity.[206] This is similar to section 74 of the United Kingdom Sexual Offences Act, which requires that the complainant has both the freedom and capacity to consent. It is therefore argued that the common law definition of consent allows the court to import a conditional consent standard, through subsection 8, for the purpose of criminalising stealthing.

Alexandra Brodsky cautions against adopting a consent standard which requires 'full reproductive transparency,' which would require individuals to disclose everything that could possibly be relevant to the sexual activity.[207] It is suggested that adopting a conditional consent standard does not require full reproductive transparency because it requires individuals to express any conditions they wish to place on their consent prior to engaging in sexual activity. Thus an individual is only required to disclose information which is relevant to those conditions. Therefore, if their partners consent is conditional on the use of a condom, the individual must wear a condom, or they must tell their partner that they do not want to wear a condom and obtain fresh consent on that basis.[208]

[204] Following a search on Westlaw, LexisNexis, as well as an exploration of Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters).
[205] Crimes Act 1961, s 128A(8).
[206] *R v Cox* CA213/96 at 8.
[207] Above n 18 at 193.
[208] Above n 19 at 239-240.

There are also concerns that a conditional consent standard would operate to validate bigoted behaviours such as transphobia, as an individual may state that they only consent to sex with a man. It could therefore be argued that a transgender man (someone who was born with female genitalia but has since transitioned to a man) would sexually violate that individual if they did not disclose the sex with which they were born. A conditional consent standard may therefore require disclosure of information which is as worthy of protection as an individual's sexual autonomy, and could land individuals in a potentially dangerous and life-threatening situation.[209]

For this reason, this dissertation advocates for a narrow conditional consent standard, such as was adopted by the minority in *Hutchinson* – one which focuses specifically on how the individual is touched. This would include conditions as to whether a condom is used, but exclude such conditions as to what sex the individual was born with. This narrow conditional consent standard would operate to criminalise stealthing because it would suggest that when a complainant has expressly agreed to engage in sexual activity with a condom, that condition must be respected or the complainant's consent will be vitiated.

Analysis

As we have seen either subsection 7 or 8 may be used to successfully criminalise stealthing – however, it is suggested that subsection 8 will more effectively criminalise stealthing. It is suggested that the a broad interpretation to the nature and quality of consent is less likely to resonate with the courts because it would involve overruling centuries of established precedent. While Justice Ellen France in *KSB* considered that the position was not settled in New Zealand, I respectfully disagree. All of the cases referred to by the court in that case do indeed reflect the narrow overseas position, because they all find that the nature and quality of the act was changed when the complainant's discovered that the touching was not for the purpose of medical treatment. This is indeed consistent with *R v Clarence* where the Court considered that sexual activity procured under the guise of medical treatment was fraudulent because they committed an act of a totally different character.[210]

[209] Amanda Clough "Conditional consent and purposeful deception" (2018) 82(2) SAGE 178 at 182.
[210] Above n 120 at 156.

It is thus likely settled that nature and quality is to be interpreted narrowly in New Zealand, in accordance with *R v Clarence*. Therefore, for any court to find that the absence of a condom changes the nature and quality of the sexual activity agreed to, they will have to overrule centuries worth of established authority. This would likely only occur if the case is heard before a progressive, realist judge who would be willing to make a decision based on morality, rather than established precedent.

Indeed, in a case of nearly identical facts, Justice Randerson was unwilling to give an expansive definition to subsection 7, stating that such changes were a matter for Parliament.[211] Therefore, as it cannot be guaranteed that the case will be heard before a progressive judge, it would be undesirable to rely on subsection 7 to criminalise stealthing. A conditional consent standard, in comparison, does not face such difficulties. While a conditional consent standard has not been adopted by New Zealand courts, there is also no authority which suggests that a conditional consent standard cannot be employed.

Furthermore, it is questioned whether *Cuerrier* translates to New Zealand law as easily as was suggested in *KSB*. As we have seen above, Canadian courts have traditionally employed an affirmative consent standard, which emphasises that individuals are entitled to decide how they are touched. Section 128A(1) provides that a person does not consent to sexual activity just because they do not protest or offer physical resistance.[212] While it may be assumed from this provision that New Zealand also has an affirmative consent standard, the Court in *Christian v R* confirms that this is not the case.[213]

In this case the Court held that subsection 1 does not require positive evidence of consent, as in Canada, rather, what is required is 'something more' than mere passivity, although the Court does not clarify what that something more is.[214] This dissertation does not seek to clarify whether or not an affirmative consent standard should be adopted in New Zealand, rather it suggests that it may have only been appropriate to broaden the guise of nature and purpose in Canada because of its affirmative consent standard. As this was not engaged with by the Court in *KSB*, it is arguable that due to a lack of an affirmative consent standard in New Zealand it

[211] *CLM v ACC* [2006] 3 NZLR 127 at [82].
[212] Above n 5.
[213] *Christian v R* [2018] 1 NZLR 315.
[214] At [33].

would not be reasonable to broaden the nature and quality of the sexual activity in order to encompass stealthing.

This dissertation therefore suggests that the most convincing argument for criminalising stealthing is one which relies upon a conditional consent standard. Such a standard has the benefit of recognising that stealthing is an offence because of the violation of the complainant's consent, rather than the increased risk of harm. This is consistent with the analysis of why stealthing should be criminalised in Part One. Part One does not suggest that stealthing should be criminalised because the absence of the condom increases the risks to the complainant, rather Part One suggests that stealthing should be criminalised because it is a violation of the complainant's dignity and autonomy.

When a women is stealthed she is told that she is not equal to her sexual partner; rather she is shown that he is superior to her, and he has the right to decide how she is touched. Jean Hampton suggests that it is this imbalance in value, wherein one person asserts themselves as being of elevated value, which justifies criminal intervention. The conditional consent standard, by enabling an individual to place conditions on their consent gives individuals the power to decide how the sexual activity is carried out. It ensures that the sexual activity is carried out in a manner which respects that individuals dignity and autonomy and ensures that no one party has more power over the other. It is therefore proposed that a conditional consent standard should be employed to criminalise stealthing because it recognises that sexual assault is a crime not because it is violent, but because it is violating.

Conclusion

How then should stealthing be criminalised? We have seen that stealthing should be criminalised as rape because rape should not be confined to violent dark alley way situations. Rape is a crime of violation, not of violence – it is any instance of unwanted penetration. The issue then became whether stealthing was indeed nonconsensual penetration; whether the removal or the absence of the condom, contrary to the complainant's request that a condom be worn, vitiated the complainant's consent to the sexual activity.

As we have seen, stealthing may be criminalised in New Zealand either because the absence of the condom changes the nature of the sexual activity, or because it breaches the conditions

on the complainant's consent. This dissertation argues that stealthing will be most effectively criminalised through the use of a conditional consent standard, because a conditional consent standard is most likely to resonate with the courts, as it does not involve overruling centuries worth of established precedent. Further, a conditional consent standard is consistent with the analysis in Part One because it confirms that stealthing should be criminalised as a violation of women's dignity, by failing to respect how she decides to engage in sexual activity. In comparison, the nature and quality standard would criminalise stealthing because of the increased risk of harm to the complainant. It therefore would suggest that stealthing should be criminalised because it is violent and harmful.

Final Thoughts

The purpose of this dissertation was to advocate for the criminalisation of stealthing in New Zealand. In this dissertation it is argued that stealthing should be criminalised because it is an act of male dominance through which women's value is diminished, and men's value is strengthened. If stealthing was not to be criminalised it would allow men to control whether a condom is worn – thus solidifying their hegemonic position. Stealthing degrades women's dignity and autonomy by directing that they have no right to decide how the sexual activity they have agreed to is to be carried out.

This dissertation argues that stealthing is rape because it vitiates the complainant's consent. This dissertation recommends adopting a conditional consent standard to criminalise stealthing – by which it is mean that the removal or the failure to wear a condom, breaches the condition the complainant placed on their consent. This is the most satisfactory means of criminalising stealthing because it confirms that stealthing is a violation through which women's dignity and sexual autonomy is degraded. A conditional consent standard enables women to direct how the sexual activity is to be carried out, while working within New Zealand's legislative framework.

Such a conclusion vindicates the lived experiences of women like Katharine, who feel like they have been violated, but have been unable to prove it. It would confirm that they were raped, not sort-of raped. Criminalising stealthing will enable such women to achieve justice by confirming that they have indeed been violated. This will likely result in a high prosecution rate, as more women would feel confident reporting the offending to the police, given the confirmation that they were raped. Such a conclusion would also help women who have been stealthed to recover and come to terms with the harm they have endured, by validating their lived experience.

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