Sense and Caution. A Comparative Perspective on Sweden's Negligent Rape Law

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A. Introduction

As this volume shows, many jurisdictions have broadened the scope of criminal sexual violence through the introduction of consent-based models. At the same time, measures have been taken with regard to the subjective elements of criminal liability in response to a common defence in rape cases: namely, that the defendant lacked knowledge of the other person's lack of consent. While some jurisdictions have introduced limitations to the defence of mistaken belief in consent – for example, the 'reasonable steps' provision in Canada – other countries, like Sweden, have introduced negligence as a sufficient fault element for rape liability. In this chapter, I examine the recently established negligent rape law in Sweden as one instance of a trend: a move in sex crimes law towards introducing a duty of diligence for persons who initiate sexual acts. I use a rape case from a Swedish Court of Appeal to illustrate fault elements across jurisdictions and to discuss some implications of the criminal law operating with a diligence standard.

B. Background

The reform of Swedish rape law – from a coercion-based definition of rape to a definition based on voluntariness – was complemented by a broadening of the mens rea requirement criminalising grossly negligent behaviour in sexual situations. The reform was preceded by almost twenty years of activism and discussion in the press and in parliament. Gabriella Nilsson has shown that the discursive field in which the process took shape consisted of news reports and debate about a number of high-profile Swedish group rape cases.[1] In the course of this discursive process, the notion of

1 *Gabriella Nilsson*, 'Towards voluntariness in Swedish rape law: Hyper-medialised group rape cases and the shift in the legal discourse', in: Marie Bruvik Heinskou,

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negligence was gradually introduced as part of a critique of court cases in which defendants were acquitted due to lack of intent. Voices in the media debate stressed that accountability should be put where it belongs, meaning that men should be responsible for making sure that the other person wants to have sex before performing a sexual act. The following quote from a daily newspaper op-ed in 2003 captures this criticism of the criminal justice system:

> Swedish legislation has an implied prerequisite: women are basically available for sexual intercourse – unless otherwise specified. On the other hand, men are not being held responsible for finding out whether women consent to intercourse. And if a woman finds herself in a helpless state, it is sufficient for the men to be too dumb to realise that for them to walk completely free.[2]

While changes concerning the actus reus of rape were gradually implemented, there was more hesitation about revising the fault element required for rape.[3] In 2010, a governmental inquiry stated that there was no need to criminalize rape committed through negligence.[4] Almost ten years later and after another governmental inquiry reached the opposite conclusion, the Government found reasons for criminalising negligent rape.[5] One of these reasons was that sexual abuse is a serious crime and that the harm caused to the victim is independent of whether the act is committed intentionally or through negligence. It was further stated that there is just as much reason to use society's resources to prosecute negligent sexual crimes as intentional ones. Another argument put forward was: "A law based on voluntary participation is founded on the premise that anyone who intends to have sexual intercourse with someone else must ensure that the will to have such intercourse is mutual. Therein lies a requirement for caution."[6] Finally, the Government was inspired by the

May-Len Skilbrei and Kari Stefansen (eds), Rape in the Nordic Countries. Community and Change (2019).

2 *Nilsson* (note 1), 109.

3 Before non-voluntariness was introduced, reforms of the actus reus of rape had taken place in 2005 and in 2013; Prop. 2004/05:45 En ny sexualbrottslagstiftning, Prop. 2012/13:111 En skärpt sexualbrottslagstiftning.

4 SOU 2010:71 Sexualbrottslagstiftningen – utvärdering och reformförslag, 218.

5 SOU 2016:60 Ett starkare skydd för den sexuella integriteten; Prop. 2017/18:177 En ny sexualbrottslagstiftning byggd på frivillighet, 23.

6 Prop. 2017/18:177 (note 5), 23 (author's translation).

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sexual offence laws of England and Scotland, which were said to have "a kind of negligence liability".[7]

C. Rape law and a duty of diligence in a comparative perspective

For the following brief comparative overview, I will use as an example a case that the Prosecutor-General appealed to the Swedish Supreme Court.[8] The defendant (A) was charged with rape. Both the District Court and the Court of Appeal found that the complainant (B) was asleep and did not participate voluntarily when the defendant inserted his fingers into her vagina. The District Court found A responsible for intentional rape, while the Court of Appeal acquitted A on the ground that neither intent nor negligence could be proven. The established facts, based on the defendant's description of the course of events, were, in summary, as follows. A and B were friends, had never been in a romantic relationship, and had no intention to have sex. On the night in question, B, feeling sad, had sought support from A. B was tired when she came to A's house at night and fell asleep fully dressed in A's bed. A also fell asleep but later woke up again. B was then in the same position that she had been in before, on her side facing away from A. A moved nearer to B and lay close to her back. B took his hand and brought it to her chest. They played with each other's hands. Neither of them said anything. A begun to touch B's breasts and then her genitals. At that point B rolled over on her back, and A inserted his fingers into her vagina. He had his fingers in her vagina for a few minutes. B woke up and left the apartment.

This is the type of case that presumably will become more common in courts in the wake of the move to a rape law based on non-voluntariness. In the absence of violence, threat, or other means of coercion, it may be difficult to derive intent from the defendant's physical actions. Evidence for the subjective element is mainly found in the details as told by the complainant and the defendant. In cases like these, defendants often claim that they did not know or could not possibly understand that the other party did not want to participate in sex. One way to hold A liable is to

7 Prop. 2017/18:177 (note 5), 23: "ett slags oaktsamhetsansvar" (author's translation).

8 Hovrätten för Västra Sverige, judgement 2020–11–17 in case no. B 2279–20, Prosecutor-General petition for appeal 2020–12–15 (AMR-8753–20), Supreme Court decision 2021–05–05 in case no B 6632–20. A review permit was not granted by the Supreme Court. I used the prosecutor's appeal documents to describe the facts of the case.

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say: even if A did not know, he should have taken sensible precautions and ensured B's consent before initiating the sexual act. To repeat the words of the journalist quoted above, A should not escape blameworthiness because he was "too dumb to realise" that B did not consent. This requires measures to reduce the mens rea standard. The purpose of the following brief overview is to show that while differences exist across jurisdictions, we can still discern a general trend towards criminal law discourse prescribing a duty of diligence in sexual situations.

The most serious fault elements are usually described as direct and indirect intent.[9] In applying the Swedish law to the example above, intent means that A must have been aware of, have known, or have been practically certain that B did not consent. In our example, the prosecutor could not prove that A knew that B was not consenting. We could also say that A raised the defence that he honestly believed that B was consenting.

Many civil law jurisdictions do not restrict mens rea requirements to direct or indirect intent, which means that A could be liable for intentional rape if he was aware of the risk that B did not consent. The lowest fault element in civil law systems such as Germany, Austria, and Switzerland is described as conditional intent/dolus eventualis (or reckless/indifference intent, the terminology used in Sweden).[10] This includes a two-step assessment: first, awareness of the risk for a circumstance to occur (a cognitive element), and second, acceptance of the risk (a volitional element). In our example, this means that for liability for intentional reckless rape in Sweden, it must be established that A was aware of the risk that B did not consent, and that this knowledge did not stop A from proceeding, or, in other words, that A accepted the realisation of the risk that B was not participating voluntarily.[11]

The concept of recklessness used in common law jurisdictions is similar to dolus eventualis, but recklessness there constitutes a separate type of fault and is generally not understood as the lowest degree of intent.[12] In the U.S. Model Penal Code, recklessness in relation to sexual offences

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9 *Jeroen Blomsma* and *David Roef*, 'Forms and Aspects of Mens Rea', in: Johannes Keiler and David Roef (eds), Comparative Concepts of Criminal Law (2016), 129–132.

10 *Bloemsma* and *Roef* (note 9), 132–139; see also the chapters on Germany, Austria, and Switzerland in this volume.

11 NJA 2004 s. 176.

12 *Blomsma* and *Roef* (note 9), 139; *Dennis Martinsson* and *Ebba Lekvall*, 'The Mens Rea Element of Intent in the Context of International Criminal Trials in Sweden', Scandinavian Studies in Law 2020, vol. 66, 107.

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means that a person must be aware of the substantial risk that the victim is not a willing party and proceed anyway.[13]

With regard to negligence, civil law systems usually distinguish between advertent (or conscious) and inadvertent (or unconscious) negligence.[14] Advertent negligence means that A foresees a possibility of B not consenting, but wrongfully relies on the idea that B consents. A is indifferent only to the risk, not to its realization. The lowest threshold of intent (conditional or reckless intent) and advertent negligence both require that A appreciates that there is a risk that B is not participating voluntarily. The distinction between the two appears in the second step – was A indifferent as to whether the complainant does not participate voluntarily? If yes, reckless intent is established. If no, A cannot be held liable for intentional rape, because A was indifferent to the risk, but not to its realization. A can be punishable only if negligent rape has been criminalized.

The fault elements described – whether in conditional intent, recklessness or advertent negligence – all require that A subjectively (from his standpoint) either was aware of B's lack of consent or had realized the risk that there was a lack of consent. To repeat again the journalist's words: "It is sufficient for the men to be too dumb to realise that for them to walk completely free." This criticism seems to call for (at least partly) objectivizing the assessment of the guilty mind. In common law systems, this has been achieved through the limitation of exculpation to instances of a *reasonable* mistake or through a requirement to affirmatively establish non-consent. In civil law systems, "inadvertent negligence" has been criminalized. Common to both solutions is the fact that A's behaviour is assessed not only subjectively but also from the point of view of an objective observer.

When negligent rape – which includes inadvertent negligence – was implemented in Sweden, the scope of criminal liability was extended considerably, because the new law made it possible to convict those who were truly ignorant. Inadvertent negligence is usually described as a two-step assessment: A *should* have been aware of this risk and *could* have done something to become aware of it. To be a bit more specific, to establish liability for inadvertent negligent rape according to Swedish law, first we must find out whether A breached a duty of care, whether A was careless.[15] This means considering what could be expected of a sensible and diligent

13 See the chapter on the United States in this volume.
14 *Blomsma* and *Roef* (note 9), 146.
15 NJA 2019 s. 668 para. 28.

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person, with regard to the concrete circumstances and the context. Next it must be established that A could have met the required standard of care. A could have done something – like asking B – to determine whether B consented or not. Further, Swedish law prescribes that the degree of carelessness must be gross, 'clearly reprehensible'.[16]

This terminology of advertent and inadvertent negligence does not match with common law, where negligence refers only to inadvertent negligence.[17] However, the effect of criminalizing inadvertent negligence is similar to the effect of other lesser requirements for mens rea. A Canadian sexual assault law reform in 1992 involved a limitation of the defence of mistaken belief: the accused must have taken 'reasonable steps' to ensure consent, and there can be no such defence if the mistaken belief arises through 'recklessness' or 'willful blindness'.[18] The test of reasonable belief in the English Sexual Offences Act 2003 includes a two-step assessment.[19] First, did A subjectively believe that B consented? Second, did A (objectively) *reasonably* believe that B consented? This second step seems in effect to be somewhat similar to asking, under the inadvertent negligence assessment, whether A deviated from a standard of care. As described in the chapter on Australia, in some jurisdictions a defendant cannot rely on a defence of honest and reasonable mistake of fact unless it is established that he took reasonable steps to ascertain whether the complainant was consenting.[20] The chapter on the U.S. notes that jurisdictions regularly employ a negligence standard, requiring that people's conclusions about whether there was consent were reasonable.[21]

At the risk of over-simplifying, even if the terminology and criminal legal classifications differ, all legal constructions such as 'inadvertent negligence', 'reasonable belief' or 'reasonable steps' direct the focus toward the defendant's actions, and not only introduce a standard of diligence in sexual situations but also produce a sensible and careful subject in legal discourse.

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16 'Klart klandervärd', Prop. 2017/18:177 p. 8. See also Supreme Court decision 2022–04–07 in case number B 779–21.

17 *Blomsma* and *Roef* (note 9), 146.

18 *Lise Gotell*, 'Canadian sexual assault law: neoliberalism and the erosion of feminist-inspired law reforms', in: Vanessa Munro and Clare McGlynn (eds), Rethinking rape law: international and comparative perspectives (2010), 212.

19 Rape and Sexual Offences – Chapter 6: Consent, https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent, (accessed January 23, 2022). See also the chapter on England and Wales in this volume.

20 See the chapter on Australia in this volume.

21 See the chapter on the U.S. in this volume.

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D. Concluding discussion

If the aim of past and ongoing reforms of sexual offences is to provide an increased protection for the individual's – especially women's – sexual integrity and autonomy, then changes to the fault element seem as important as amendments of the actus reus elements. In the example I have used, the actus reus definition of non-voluntary participation means that B, objectively, was raped. B had not in any way expressed consent and was also asleep when A inserted his finger into her vagina. Her bodily and sexual integrity was violated. If the message that criminal law sends about the protection of sexual integrity is to extend beyond a merely symbolic function, it seems insufficient to rely on A's subjective perception that he thought B consented. An objective standard, a duty of diligence for the person who initiates sexual acts, moves the focus from what B should have done in order not to be raped (not falling asleep in A's bed?) to what A should have done before he inserted his finger into her vagina in order to avoid violating her bodily and sexual integrity. Taking into consideration the context of this case, it can be argued that a diligent person in this situation should have realized that B was not voluntarily participating in the sexual act. A could have taken control measures, or in common law language, reasonable steps to ascertain that B consented. Therefore, A can be blamed for doing nothing to determine whether B was participating voluntarily although that he should have done something to make sure that she did. What is at stake is whether the subject that sexual offence laws intend to protect is perceived as available, and, especially, the female body as subject only to her autonomous determination.[22]

That said, a broadening of the fault element required for criminal liability does not come without problems. One concern that has been expressed concerning 'reasonable belief' is that jurors have difficulties in making this assessment, so that the intended objectivization slides into a subjectivized assessment.[23] In the Swedish context, where there are no jurors, a review by the Swedish National Council for Crime Prevention of court cases after

22 *Ulrika Andersson*, 'The unbounded body of the law of rape: the intrusive criterion of non-consent', in: Kevät Nousiainen et al. (eds), Responsible selves: women in the Nordic legal culture (2001), 333.

23 *Clare McGlynn*, 'Feminist activism and rape law reform in England and Wales: a Sisyphean struggle?', in: Clare McGlynn and Vanessa Munro (eds), Rethinking rape law: international and comparative perspectives (2010), 144; *Sharon Cowan*, 'All change or business as usual? Reforming the law of rape in Scotland', ibid., 165.

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the 2018 reform concluded that the mens rea assessment became more difficult after the introduction of non-voluntary participation and negligent rape.[24] There seems to be, in court practice, an ambiguity in the language of the lowest threshold of intent and negligence. Another study of court judgments found that 'it appears arbitrary [as to] when the judge finds that gross negligence is attained' and 'the practice of proving gross negligent behavior appears difficult.'[25] This arbitrariness is problematic from the point of view of legal certainty, and it poses the broader, important question: what should be the required standard of care in sexual situations? Further, criteria for the assessment need to be worked out that take into account the significance of the protection of sexual integrity but prevent the punishment of conduct that lies within the limits of a reasonable degree of carelessness. There certainly is a need for future comparative studies in this field.

24 Brottsförebyggande rådet Rapport 2020:6 Den nya samtyckeslagen i praktiken, 53–55.

25 *Lisa Wallin et al.*, 'Capricious credibility – legal assessments of voluntariness in Swedish negligent rape judgements', 22 Nordic Journal of Criminology 3, 11 (2021).

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