

INTIMIDATION, CONSENT AND THE ROLE OF HOLISTIC JUDGMENTS IN AUSTRALIAN RAPE LAW

JONATHAN CROWE* AND LARA SVEINSSON†

This article examines the circumstances in which intimidation will vitiate consent to sex under Australian rape law. It begins by summarising the legislative provisions in the various Australian jurisdictions, before surveying recent appellate case law. Existing cases can usefully be grouped into a number of categories based on the kinds of intimidation involved. There is, however, almost always some degree of overlap between the various different forms of intimidation and other factors relevant to determining consent. The article concludes by examining the reasoning process utilised by the courts in these kinds of cases. It is argued that judges rely heavily on a holistic assessment of the facts of each case to determine whether consent is legally effective. This has important consequences for how statutory definitions of rape are interpreted and applied.

CONTENTS

I Introduction	136
II Legislative Frameworks	137
III Relevant Case Law.....	139
A Physical Intimidation.....	140
B Verbal Intimidation.....	143
C Intimidation By Authority	145
D Intimidating Environments.....	147
IV A Holistic Assessment?.....	148
V Interpretive Principles	151
VI Conclusion	153

I INTRODUCTION

The crime of rape (or the equivalent offence) is defined throughout Australia essentially as sexual intercourse without free and voluntary consent.¹ The various Australian states and territories have all adopted legislative provisions designed to clarify the circumstances in which consent to sex is taken not to be freely and voluntarily given. These provisions all recognise that at least some forms of

* Professor of Law, Bond University.

† BA/LLB Candidate, Bond University.

¹ *Crimes Act 1900* (NSW) ss 611, 61HA; *Crimes Act 1958* (Vic) ss 34C, 38; *Criminal Code 1899* (Qld) ss 348(1), 349; *Criminal Code 1902* (WA) ss 319(2), 325; *Criminal Law Consolidation Act 1935* (SA) ss 46(2), 48; *Criminal Code Act 1924* (Tas) ss 2A, 185; *Criminal Code Act 1983* (NT) s 192; *Crimes Act 1900* (ACT) ss 54, 67(1).

intimidation or threats will vitiate consent for legal purposes. This issue is dealt with slightly differently in each jurisdiction, but there is significant overlap between the provisions and some recurring themes can be identified in the case law.

The incidence of appellate case law on intimidation and consent in rape law differs widely between jurisdictions. There are a number of recent Queensland cases, but relatively few in New South Wales and Victoria. The situation is complicated by the fact that there is typically a combination of factors that operate at any one time to vitiate consent to sexual activity, such as physical violence, threats or incapacity due to alcohol or drugs. The present article focuses on intimidation, not because it operates in isolation, but because in some cases it is a crucial factor in determining consent.² It also provides an instructive case study through which to examine the approach of courts to interpreting rape provisions more broadly.

The article begins by summarising the legislative provisions in the various Australian states and territories, before surveying recent appellate case law. Existing cases can usefully be grouped into a number of categories based on the different forms of intimidation involved. The article concludes by examining the reasoning process utilised by the courts in these kinds of cases. It is argued that judges rely heavily on a holistic assessment of the facts of each case to determine whether consent is freely and voluntarily given. This has important consequences for how statutory definitions of rape are interpreted and applied.

II LEGISLATIVE FRAMEWORKS

All Australian jurisdictions have enacted legislation defining the scope and meaning of consent as it relates to rape law. Common to all of these is the requirement that consent be either ‘freely and voluntarily given’ or, in the cases of Victoria, the Northern Territory and Tasmania, that it equates to ‘free’ or ‘free and voluntary’ agreement.³ Similarly, each jurisdiction then provides a non-exhaustive list of circumstances in which consent is not deemed to be free and voluntary. Included among each of these is consent obtained by way of threats or

² For a similar analysis focusing on fraud, see Jonathan Crowe, ‘Fraud and Consent in Australian Rape Law’ (2014) 38 *Criminal Law Journal* 236.

³ *Crimes Act 1900* (NSW) s 61HA; *Crimes Act 1958* (Vic) s 34C; *Criminal Code 1899* (Qld) s 348(1); *Criminal Code 1902* (WA) s 319(2); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code Act 1924* (Tas) s 2A(1); *Criminal Code Act 1983* (NT) s 192. The Australian Capital Territory provision does not expressly use these terms, but otherwise defines consent similarly to other jurisdictions: *Crimes Act 1900* (ACT) s 67(1).

intimidation. However, the exact scope of these provisions differs significantly between jurisdictions.

The broadest provisions on the role of intimidation and threats in vitiating consent to sex are those found in New South Wales, Queensland and Western Australia. These provisions effectively cover intimidation or threats of any kind. The New South Wales legislation provides that a person does not freely and voluntarily consent to sex where the consent is induced by ‘threats of force or terror’,⁴ but the provision now also goes on to state that lack of consent may also be established by ‘intimidatory or coercive conduct’ or other threats not involving force.⁵ The Queensland and Western Australian provisions, meanwhile, simply make a general reference to threats and intimidation as vitiating consent for these purposes.⁶

The equivalent provisions in other jurisdictions are restricted to threats of certain specified kinds, rather than intimidation and threats generally. The narrowest sections are those found in Victoria and the Northern Territory, which only recognise threats of force or harm as overriding consent.⁷ The three other jurisdictions (South Australia, Tasmania and the Australian Capital Territory) fall somewhere in between, recognising some combination of intimidation by status or position,⁸ threats of force or harm,⁹ and threats to degrade, humiliate, disgrace or harass.¹⁰ The wording of the various state and territory provisions dealing with intimidation and consent to sex can therefore be summarised as follows:

	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
Intimidation of any kind	X		X	X				
Intimidation by status or position						X ¹¹		X
Threats of any kind	X		X	X		X		
Threats of	X	X			X		X	X

⁴ *Crimes Act 1900* (NSW) s 61HA(4)(c).

⁵ *Crimes Act 1900* (NSW) s 61HA(6)(b).

⁶ *Criminal Code 1899* (Qld) s 348(2)(b); *Criminal Code 1902* (WA) s 319(2)(a).

⁷ *Crimes Act 1958* (Vic) s 34C(2)(b); *Criminal Code Act 1983* (NT) s 192(2)(a).

⁸ *Criminal Code Act 1924* (Tas) s 2A(2)(e); *Crimes Act 1900* (ACT) s 67(1)(h).

⁹ *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i); *Crimes Act 1900* (ACT) s 67(1)(b).

¹⁰ *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(ii); *Crimes Act 1900* (ACT) s 67(1)(d).

¹¹ The Tasmanian provision refers to being ‘overborne by the nature or position of another person’: *Criminal Code Act 1924* (Tas) s 2A(2)(e).

force or harm								
Threats to degrade, humiliate, disgrace or harass					X			X

It is important to bear in mind that the lists of vitiating factors in all states and territories are non-exhaustive. This raises the prospect that courts may consider forms of intimidation not explicitly mentioned in the provisions. The variations in wording nonetheless seem to be reflected in the breadth of case law arising in the different jurisdictions. The Queensland provisions have been widely applied, resulting in a range of cases dealing with intimidation. Other jurisdictions, such as Victoria, have seen a very limited number of cases before the appellate courts. The courts in some jurisdictions have expressly alluded to differences in wording as a factor in their approaches. For example, the New South Wales Court of Appeal in *R v Aiken*¹² declined to follow the reasoning in the Queensland case of *R v PS Shaw*¹³ due to the more expansive wording of the Queensland provision at the time.

III RELEVANT CASE LAW

The Australian appellate case law dealing with intimidation and threats in rape law is somewhat limited, but a range of examples can be identified. The cases can usefully be grouped into four categories. This section begins by looking at cases involving physical intimidation, before considering cases dealing with verbal intimidation or threats. It turns next to cases involving intimidation by status or position, then finally examines cases where intimidation was established based on the physical environment. Cases of the former two kinds would be captured by the legislative provisions in all Australian jurisdictions. However, cases of the third kind would seem to fall outside the strict wording of provisions in Victoria, South Australia and the Northern Territory, while cases of the fourth kind appear only to be captured by the broad wording in New South Wales, Queensland and Western Australia.

¹² *R v Aiken* (2005) 63 NSWLR 719, [20]. The difference has now been removed through amendments to the New South Wales provision. See *Crimes Act 1900* (NSW) s 61HA(6)(b).

¹³ [1995] 2 Qd R 97.

One question that therefore arises is whether courts should be willing to recognise forms of intimidation capable of vitiating consent that fall outside the strict wording of the provisions. This question has arisen in a series of cases discussed later in this article and has given rise to differences of opinion among the judges.¹⁴ We noted above that the lists of vitiating factors in all Australian jurisdictions are non-exhaustive; this potentially allows the courts to rely on the overarching standard that consent must be freely and voluntarily given. Furthermore, as we argue later in the article, the courts can and do properly rely on a holistic assessment of the facts of each case to determine whether consent is legally effective.

A Physical Intimidation

A consistent theme in the various Australian legislative provisions is the separate references to force, threats and intimidation as circumstances capable of overcoming consent. Nonetheless, these issues are often treated cumulatively: that is, past or present use of physical force may strengthen the court's conclusion that consent was vitiated by threats or intimidation. Similarly, physical intimidation, combined with threats, an intimidating environment or a history of controlling behaviour, may combine to create the overall conclusion that consent was legally ineffective. This holistic approach to the facts of the case, discussed in more detail later in this article, is characteristic of the case law in this area.

An example is provided by the Queensland case of *R v IA Shaw*.¹⁵ The appellant in that case was a guest in the complainant's family home. He had been drinking heavily, so the complainant agreed to drive him home. He directed her to drive to a remote and unfamiliar bushland area, where he had sex with her. The coercive circumstances of the case were constituted by threats of violence by the appellant against the complainant, along with the appellant's ongoing intimidation of the complainant with a knife and the intimidating circumstances constituted by the remoteness of the location and the appellant's physical strength and appearance.¹⁶ The court took a holistic view of these factors to find that it was clearly open to the jury to conclude that the complainant's consent was secured by intimidation.

¹⁴ See, for example, *Michael v Western Australia* (2008) A Crim R 348; *R v Pryor* [2001] QCA 341; *R v Winchester* [2011] QCA 374.

¹⁵ [1996] 1 Qd R 641.

¹⁶ [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).

The more recent Queensland case of *R v CV* indicates a similar form of reasoning.¹⁷ The appellant in that case was the complainant's brother in law, who had intercourse with her on three separate occasions in his home. The complainant stated in evidence that she had not felt able to resist his advances due to his physical size, intimidating behaviour and repeated threats of consequences if she did not 'keep her fucking mouth shut'.¹⁸ It was argued on appeal that none of these circumstances, taken alone, could override the complainant's consent. However, the Court of Appeal rejected that argument, ruling that the cumulative conduct of the appellant was sufficient to vitiate the complainant's consent and finding it unnecessary to consider whether each factor could have that result individually.¹⁹

Cases from other Australian jurisdictions raise similar issues. The Victorian case of *R v Rajakaruna*, for example, concerned a man convicted of multiple rapes against sex workers in St Kilda.²⁰ One of the counts occurred when he said he would pay for sex, but failed to do so. However, the counts also involved physical intimidation and threats of violence. The Court of Appeal upheld the convictions, finding there was sufficient evidence to show that the intimidation and threats induced the sex workers to provide services without charge. Similarly, in the South Australian case of *R v Moss*,²¹ the complainant sex worker had originally consented to sexual acts for which she had been paid, but refused repeatedly to have sex without a condom. The appellant then became aggressive, threatening her verbally and with a gun. The Court of Appeal took a holistic view of the appellant's behaviour, finding that the complainant's response established a lack of consent in the circumstances.²²

A series of recent Queensland decisions illustrate that a context of force, threats and intimidating conduct may override consent even if the conduct occurs over an extended period. The appellant and complainant in *R v Everton*,²³ for example, had begun a sexual relationship after meeting at the caravan park in which they both lived. After a number of weeks, the appellant's behaviour towards the complainant became abusive and threatening; he regularly called her a 'witch', controlled her behaviour and finally forced her to leave her son at a police station.²⁴ The conduct intensified when the two began travelling together,

¹⁷ [2004] QCA 411.

¹⁸ [2004] QCA 411, [13] (Jones J).

¹⁹ [2004] QCA 411, [40] (Jones J).

²⁰ [2004] VSCA 114.

²¹ [2011] SASFC 93.

²² [2011] SASFC 93, [39] (Doyle CJ).

²³ [2016] QCA 99.

²⁴ [2016] QCA 99, [4]-[9] (Fraser JA).

with the appellant regularly becoming violent and not allowing the complainant to leave.

The Queensland Court of Appeal noted that the complainant's lack of resistance to sexual encounters that occurred over this period of intensifying behaviour stemmed from fear of both further physical force and other harm to herself and her son.²⁵ The evidence of significant physical violence by the appellant allowed the court to more easily conclude that the complainant had not willingly consented. The Court reiterated, however, that even where individual sexual acts did not directly follow specific acts of violence, it was reasonable for the jury to conclude that 'at all times after the [initial] assault [...] the complainant must have been terrified' and that this terror alone was sufficient to establish that consent was not genuine.²⁶ The court also cited the appellant's 'domination over the complainant' alongside his use of force as a legitimate factor for consideration by the jury.²⁷

The mode of analysis adopted in *Everton* makes sense in cases where threats or intimidating behaviour escalate at a later time into actual violence. This question commonly arises in cases where the appellant and complainant have an ongoing intimate or family relationship, perhaps with a long history of abusive or controlling behaviour. A situation of this kind arose in *R v Motlop*,²⁸ where the appellant and the complainant were in a de facto relationship. The appellant threatened the complainant that he 'could kill [her] right now and no one would even know that you're gone' and threatened her with a knife on multiple occasions early in one evening.²⁹ The Court of Appeal emphasised that the number of hours intervening between this behaviour and the later sexual intercourse did not preclude a finding by the jury that the complainant had been intimidated into giving consent.³⁰

A more extended pattern of abuse was considered in *R v Parsons*.³¹ The appellant in that case was charged with several counts of rape against his stepdaughter. The complainant stated in evidence that she had not offered resistance to these acts due to the fear created by a history of ongoing violence and threats against herself and her family, which the court found had 'intimidated [her] into silence'.³² This ongoing history involved previous acts of violent rape

²⁵ [2016] QCA 99, [49] (Fraser JA).

²⁶ [2016] QCA 99, [46] (Fraser JA).

²⁷ [2016] QCA 99, [50] (Fraser JA).

²⁸ [2013] QCA 301.

²⁹ [2013] QCA 301, [11]-[12] (Boddice J).

³⁰ [2013] QCA 301, [42] (Boddice J).

³¹ [2000] QCA 136.

³² [2000] QCA 136, [13].

by the appellant, as well as physical intimidation with knives and a gun. The court did, however, find that a lack of temporal connection between intimidating conduct and sexual intercourse could provide a basis for a defence of mistake of fact, since the appellant could reasonably think the complainant was consenting.³³ The appeal in *Parsons* was therefore upheld on the basis that mistake of fact should have been left to the jury.³⁴

R v C provides an example of a case where physical intimidation was held to exist in the absence of any verbal threats of violence.³⁵ The complainant in that case was a wheelchair-bound female who was assaulted by a taxi driver in her apartment. The complainant verbally expressed her lack of consent to the initial sexual contact, but thereafter remained silent. The Court of Appeal accepted that the expression of lack of consent to the initial act was sufficient to establish lack of consent to all the subsequent acts.³⁶ The complainant's later silence was found to reflect physical intimidation by the able-bodied, male taxi driver, coupled with the belief that he would not leave her home until the assault was completed.³⁷

B Verbal Intimidation

Many of the cases discussed above involved a combination of verbal threats and physical intimidation. We have seen that the courts have been willing to consider these factors in a holistic manner. Cases where physical or verbal intimidation occurs in isolation are less common, although *R v C* is an example of a case involving physical intimidation without verbal threats. An example of a case involving verbal intimidation without overt physical intimidation or threats of violence is *R v PS Shaw*.³⁸ The complainant in that case was the appellant's sister-in-law. She had been staying with her sister and the appellant at their home in Innisfail. The appellant had sexually molested the complainant on a number of previous occasions. He then threatened that he would not let her return to her home in Melbourne unless she agreed to be videotaped having sex with him.

The court found that it was reasonably open to the jury at trial to conclude that any consent the complainant gave was not freely and voluntarily given, as it was induced by the complainant's isolation at the appellant's house and her fear of being unable to return home. McPherson JA emphasised that the phrase 'threats

³³ *Criminal Code 1899* (Qld) s 24.

³⁴ For strong criticism of this decision, see Jonathan Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23(1) *Bond Law Review* 21, 34-5.

³⁵ [2005] QCA 306.

³⁶ [2005] QCA 306 [19] (McMurdo P).

³⁷ [2005] QCA 306 [19] (McMurdo P), [47] (Jerrard JA).

³⁸ [1995] 2 Qd R 97.

or intimidation' in s 348(2) of the Queensland *Criminal Code* could be interpreted broadly to account for such factors as the environment in which an incident occurred. The court also stressed that the language of the section did not require an objective determination that a person 'of average fortitude, maturity or determination' would have felt sufficiently intimidated or threatened by the appellant's conduct for consent to be vitiated. Rather, the question is whether the conduct subjectively induced the complainant's consent in the case at hand.³⁹

The verbal threat in *PS Shaw*, although highly significant, did not occur in isolation. Rather, it occurred against a backdrop of previous sexual assaults and was reinforced by the physical and social isolation of the environment. The case therefore illustrates the importance of holistic assessments of the factual circumstances. A further illustration of this point is provided by the case of *Michael v Western Australia*.⁴⁰ The appellant in that case separately told two female sex workers that he was a police officer, threatening that he would 'make trouble for them' if they refused his sexual demands. The intimidation caused by the appellant's apparent position of authority, coupled with the direct verbal threats, induced the complainants to reduce or waive their fees and allow behaviour (such as kissing or licking their face and breasts) they would not normally tolerate from clients.⁴¹

The Court of Appeal in *Michael* held by a two judge majority that fraudulent representations accompanied by verbal threats could vitiate consent to sex under Western Australian law. Steytler and Miller JJ both found that the deception of the accused was instrumental to facilitating the threats which induced the victims' consent. The complainants only acquiesced to sexual intercourse on the terms they did because they thought the appellant was a police officer. Steytler J took the view that the deception did not itself induce consent, other than by enabling the resulting threats or intimidation.⁴² Miller J, by contrast, thought that it was impossible to separate the deception from the threats or intimidation and the facts must be viewed as a whole.⁴³ Heenan AJA dissented, finding that the kind of deception perpetrated in this case did not fall within the Western Australian provision.⁴⁴ We will discuss this difference of opinion in further detail later in this article.

³⁹ [1995] 2 Qd R 97, 115 (McPherson JA).

⁴⁰ [2008] WASCA 66.

⁴¹ [2008] WASCA 66, [80] (Steytler J).

⁴² [2008] WASCA 66, [80]–[82] (Steytler J).

⁴³ [2008] WASCA 66, [190] (Miller JA).

⁴⁴ [2008] WASCA 66, [376].

A related fact scenario arose in the New South Wales case of *R v Aiken*.⁴⁵ The complainant in that case was induced to perform sexual acts on the accused due to her mistaken belief that he was an undercover security guard who had witnessed her shoplifting. An issue arose in the case as to whether this kind of deception was covered by the statutory definition. The Court of Appeal found that ‘non-violent threats’ of the kind made by the appellant did not fall within the list of coercive factors in the New South Wales legislation; the appellant’s conviction was therefore overturned.⁴⁶ This issue has now been addressed by statutory amendments that significantly widened the scope of the New South Wales provision.⁴⁷

C Intimidation by Authority

A further category of cases involves circumstances where the complainant was intimidated into consenting to sexual acts by the accused’s position of authority. The cases of *Michael* and *Aiken* discussed above could both plausibly be placed into this category, although the claims to authority in those cases were false and the courts’ reasoning focused more on the subsequent threats than the deceptive claims that preceded them. Criminal statutes in some jurisdictions, such as the Australian Capital Territory,⁴⁸ distinguish abuse of a position of authority as a specific circumstance in which consent may be overridden. Others jurisdictions, such as Western Australia, make no explicit reference to authority as a factor that can vitiate consent to sex.⁴⁹ However, the Court of Appeal in *Stubbley v Western Australia* held that Western Australian law can accommodate this possibility.⁵⁰

The appellant in that case was a psychiatrist who had intercourse with a number of patients in his office over a period of years. Two of these patients were the complainants. The appellant contended that all the sexual acts had been consensual. However, the patients testified to having been intimidated by his position of power and authority, angry temperament, control over the clinical environment or, in some cases, direct verbal threats. The Court of Appeal appeared to accept that intimidation by authority could legitimately be considered as a factor in rendering consent not free and voluntary.⁵¹ The judges also held that while a person who is angry may intimidate another person, the significant factor

⁴⁵ (2005) 63 NSWLR 719.

⁴⁶ (2005) 63 NSWLR 719, [33] (Studdert J).

⁴⁷ *Crimes Act 1900* (NSW) s 61HA(6)(b).

⁴⁸ *Crimes Act 1900* (ACT) s 67(1)(h).

⁴⁹ *Criminal Code 1902* (WA) s 319.

⁵⁰ [2010] WASCA 36.

⁵¹ [2010] WASCA 36, [357] (Buss JA).

in respect to consent to sexual acts is not merely that anger is expressed, but that it is conveyed ‘in a context which induces some action (or inaction) by the person intimidated’.⁵²

It is now well established that fraudulent representations as to the medical nature of a sexual act can render consent not freely given.⁵³ There has, however, been relatively little consideration, beyond the comments in *Stubley*, of those circumstances where the position, control and behaviour of a practitioner may constitute a form of intimidation. A further case of this kind is *R v Wilson*,⁵⁴ where the appellant committed a large number of sexual assaults on clients in the course of his practice as a naturopath. The evidence given by the complainants suggested that their failure to take further steps to avoid the acts was due to the appellant’s status as a medical professional, rather than any positive belief about the medical benefits of the procedure. A similar point could be made about cases such as *R v Mobilio* (where the appellant conducted intravaginal ultrasounds while falsely claiming them to have a medical purpose)⁵⁵ and *R v BAS* (where sexual molestation was falsely represented as physical therapy).⁵⁶ The central issue in the latter cases was the fraudulent claims by the appellants, but it could equally be said that consent was induced by intimidation resulting from their authority, social standing and claimed expertise.⁵⁷

Cases involving sexual assault by sports coaches could also be placed into this category. The Australian Capital Territory case of *R v King*,⁵⁸ for example, concerned a fifty-five year old cricket coach charged with twenty-five counts of sexual assault against minors aged between ten and sixteen. The accused, who spent significant time coaching the complainants in private, was stated to have prominence in the community and was responsible for the complainants’ selection into various teams.⁵⁹ Complainants stated in evidence that they ‘found his persuasive manner and size was intimidating’.⁶⁰ Reference was made to the intimidating nature of the appellant’s ability to influence the complainant’s selection prospects. The case therefore involved intimidation arising from a combination of social standing, physical presence, influence and authority. These

⁵² [2010] WASCA 36, [131] (Pullin JA). The appellant’s conviction was later overturned by the High Court due to the role played by evidence of uncharged assaults on patients other than the complainants: *Stubley v Western Australia* (2011) 242 CLR 374.

⁵³ See, for example, *R v Flattery* (1877) 2 QBD 410; *R v Williams* [1922] All ER 433.

⁵⁴ [2011] VSCA 328.

⁵⁵ [1991] VR 339.

⁵⁶ [2005] QCA 97. See also *R v Hatchard* [1999] SASC 111.

⁵⁷ For further discussion, see Crowe, above n 2, 240-1.

⁵⁸ [2013] ACTCA 23.

⁵⁹ [2013] ACTCA 23, [32].

⁶⁰ [2013] ACTCA 23, [33].

factors were sufficient to vitiate the complainants' consent to the sexual acts, even in the absence of overt threats or violence.

D Intimidating Environments

The previous sections have discussed a number of cases where the intimidation or threats that induced the complainant's consent were compounded or strengthened by an intimidating or isolated physical environment. The case of *IA Shaw*, where the complainant was directed to drive to a remote and isolated bushland area, provides an example. Cases such as *CV, PS Shaw* and *Stubley* also made reference to the accused's ability to control the physical environment of his home (*CV* and *PS Shaw*) or office (*Stubley*). The physical setting of the assaults in these cases formed part of a holistic assessment by the courts by of whether, all things considered, the complainant's consent was not freely and voluntarily given.

A further case where physical location played a critical role was the Queensland decision of *R v R*.⁶¹ The fifteen year old complainant in that case had gone into an unfamiliar pool hall to ask directions. The complainant stated that the comparative size of the appellant had caused her to feel intimidated and threatened. The unfamiliar environment of the pool hall (which was perceived as being controlled by the appellant) also reinforced the perception that she had no choice but to allow the sexual acts.⁶² The appellant alleged that the acts had been consensual, but the court found that it was open for the jury to conclude that such an environment would be sufficiently intimidating to render any consent legally ineffective.

The sexual offences in *R v Ibbs*⁶³ occurred after the complainant had moved into the home of the appellant and his wife as a tenant at short notice. The complainant received unwanted sexual advances from the appellant on multiple occasions, before giving grudging consent to the effect of 'let's get it over with'.⁶⁴ However, the complainant then withdrew her consent by words and actions during the act. The appellant was convicted on the basis that the complainant's initial consent had been effectively withdrawn, but the trial judge commented on the appellant's abuse of the position of power which he occupied over the complainant, noting that intimidation need not involve overt force or threats of violence.⁶⁵ The appellant's position of power in this case was constituted

⁶¹ [2001] QCA 121.

⁶² [2001] QCA 121, [40] (Douglas J).

⁶³ Unreported, WACCA, 16 July 1987, discussed in *Ibbs v The Queen* (1987) 163 CLR 447 (appeal against sentence upheld by the High Court).

⁶⁴ (1987) 163 CLR 447, 449.

⁶⁵ (1987) 163 CLR 447, 450.

substantially by his control over the complainant's place of residence and physical environment.

A similar finding was made by the Queensland Court of Appeal in *R v Kovacs*.⁶⁶ The appellant in *Kovacs* ran a takeaway shop in Weipa with his wife, a Philippine national. The appellant and his wife had arranged for the complainant, also a Philippine national, to travel to Weipa to live with them and work in the shop. As soon as the complainant arrived, the appellant began to sexually molest her; this continued over several months. The complainant was in Australia illegally, knew little English and had no independent means of support. It seems clear that the appellant systematically abused her dependence on him, which included (but was not limited to) his control over her physical location.⁶⁷ The Court of Appeal recognised the complainant's physical isolation as a factor to be considered within a broader holistic assessment of the circumstances which facilitated the abuse.⁶⁸

IV A HOLISTIC ASSESSMENT?

A consistent theme in the cases discussed above is the use by the courts of a holistic assessment of the various coercive circumstances that may render consent to sex legally ineffective. This holistic assessment may take account of various forms of intimidation, including physical intimidation, verbal threats, positions of authority and physical environments. It may also place intimidation alongside other coercive factors, such as physical violence or a history of controlling behaviour. This approach makes it challenging to disentangle various kinds of intimidation as they appear in the case law, although in some cases specific features of the factual scenario seem to have carried particular weight in the court's reasoning.

The use of these kinds of holistic assessments in judicial reasoning is by no means confined to rape cases. There is reason to think that holistic judgments of the facts and law relevant to a case are widespread in judicial decisions.⁶⁹ There is now a substantial body of research, exemplified by the work of Amos Tversky,

⁶⁶ [2007] QCA 143.

⁶⁷ The facts in this case seem to form part of a wider pattern of predatory behaviour on the part of the appellant. See the unrelated case of *R v Kovacs* [2007] QCA 441.

⁶⁸ The appellant's conviction was ultimately overturned on the ground that the defence of mistake of fact under s 24 of the *Criminal Code 1899* (Qld) should have been left to the jury. For strong criticism of this aspect of the case, see Crowe, above n 34, 35-6.

⁶⁹ Compare Jonathan Crowe, 'The Role of Snap Judgments in Constitutional Deliberation: A Dialectical Equilibrium Model' in Graeme Orr and Ron Levy (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2017); Jonathan Crowe, 'Pre-Reflective Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011).

Jonathan Haidt and Daniel Kahneman,⁷⁰ suggesting that holistic judgments play a central role in practical decision-making. This research draws on dual process models of cognition, which distinguish two different kinds of thought processes. The first (often called System 1) involves fast, intuitive snap judgments, while the second (System 2) involves controlled, reflective deliberation.⁷¹

A series of experiments conducted by Haidt and his collaborators demonstrates that System 1 processes are central to ethical judgments.⁷² People typically react to ethical dilemmas by first forming snap judgments and then rationalising or modifying these judgments through further reflection. The resulting picture of ethical reasoning differs considerably from the traditional idea of a reflective, considered process. People do not usually respond to an ethical dilemma in a purely reflective way by weighing up the different options. Rather, they use System 1 thinking to form a holistic judgment about the case at hand. These snap judgments are not arbitrary, but are generally based on rough rules of thumb or heuristics that enable us to deal with complex situations in a cognitively efficient way. The soundness of the judgments will then depend on the reliability of the heuristics involved.⁷³

System 1 thinking, then, is typically the first component of a decision-making process. It is not necessarily the end of the process, since decision-makers will often employ System 2 thinking to reflect upon and perhaps modify their conclusions. However, even in such cases, decision-makers nonetheless begin their reflective reasoning with a preconceived sense of the relevant factors and, in many cases, at least a presumptive outcome. The decision-making process can then be understood as involving a dialectical movement between holistic snap judgments and reflective considerations, where the outcome reflects a kind of balance or equilibrium between these factors.⁷⁴ The outcome of this process may

⁷⁰ See, for example, Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' in Dirk Wendt and Charles Vlek (eds), *Utility, Probability and Human Decision Making* (Springer, 1975); Jonathan Haidt, 'The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108 *Psychological Review* 814; Jonathan Haidt, "'Dialogue Between My Head and My Heart': Affective Influences on Moral Judgment' (2002) 13 *Psychological Inquiry* 54; Jonathan Haidt, 'The New Synthesis in Moral Psychology' (2007) 316 *Science* 998; Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

⁷¹ See, for example, John A Bargh and Tanya L Chartrand, 'The Unbearable Automaticity of Being' (1999) 35 *American Psychologist* 462; Shelly Chaiken and Yaakov Trope, *Dual Process Theories in Social Psychology* (Guilford, 1999).

⁷² Haidt, 'The Emotional Dog and Its Rational Tail', above n 70; Haidt, "'Dialogue Between My Head and My Heart'", above n 70; Haidt, 'The New Synthesis in Moral Psychology', above n 70; Jonathan Haidt, Silvia Helena Koller and Maria G Dias, 'Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?' (1993) 65 *Journal of Personality and Social Psychology* 613.

⁷³ Compare Cass Sunstein, 'Moral Heuristics' (2005) 28 *Behavioral and Brain Sciences* 531.

⁷⁴ Compare Crowe, 'The Role of Snap Judgments', above n 69.

evolve over time as the decision-maker considers new information and perspectives.

The body of research discussed above helps us to make sense of judicial reasoning in rape cases. It seems likely that judges in such cases will begin their reasoning by making a holistic assessment of the relevant coercive factors, guided at least partly by System 1 thinking. These judgments will not be devoid of legal content; rather, they are likely to involve an overall evaluation based on the judges' understanding of both the facts of the case and the applicable law. The judges will then typically reflect upon this initial assessment and apply the relevant legal categories in a more considered way. However, the overall outcome in the case will still be influenced by the initial snap judgment. It is therefore likely to depend on a range of interlocking and mutually reinforcing considerations.

The role of holistic judgments in judicial decision-making might seem to raise worries about the transparency or consistency of this form of reasoning. However, these concerns should not be overstated. Appellate court judges are highly trained legal specialists and the heuristics they use to form holistic judgments will reflect their legal training and experience in the courtroom. Their judgments are therefore likely to track the legal rules at both a rule-based and principled level. There is empirical literature to suggest that the use of holistic judgments is indicative of high levels of skill among trained experts in a range of fields, including professional athletes,⁷⁵ chess players,⁷⁶ dancers,⁷⁷ surgeons⁷⁸ and writers.⁷⁹ Furthermore, if such judgments do play a role in judicial decisions—as the preceding discussion suggests—transparency favours being open about this mode of reasoning.⁸⁰

⁷⁵ Susan A Jackson et al, 'Relationships between Flow, Self-Concept, Psychological Skills and Performance' (2001) 13 *Journal of Applied Sport Psychology* 129.

⁷⁶ Jerad H Moxley et al, 'The Role of Intuition and Deliberative Thinking in Experts' Superior Tactical Decision-Making' (2012) 124 *Cognition* 72.

⁷⁷ Kate M Hefferon and Stewart Ollis, "'Just Clicks": An Interpretive Phenomenological Analysis of Professional Dancers' Experience of Flow' (2006) 7 *Research in Dance Education* 141.

⁷⁸ David Alderson, 'Developing Expertise in Surgery' (2010) 32 *Medical Teacher* 830.

⁷⁹ Susan K Perry, *Writing in Flow* (Writer's Digest, 1999).

⁸⁰ Compare Jonathan Crowe, 'The Role of Contextual Meaning in Judicial Interpretation' (2013) 41 *Federal Law Review* 417, 437-8.

V INTERPRETIVE PRINCIPLES

The role of holistic judgments in rape law also helps to make sense of some debates that have arisen about the interpretation of the statutory provisions in various jurisdictions. A series of recent cases in this area have raised issues about whether the legislative definitions of rape should be read in a restrictive or purposive fashion. The decision of the Queensland Court of Appeal in *Pryor*, for example, concerned a burglar who broke into a house and assaulted a woman who was sleeping there.⁸¹ The woman initially mistook the burglar for her usual sexual partner, who was also asleep in the house at the time. Section 347 of the Queensland *Criminal Code*, as it then was, provided that sexual intercourse would amount to rape where consent was induced through any of a list of coercive factors, including ‘by means of false or fraudulent representations as to the nature of the act, or, in the case of a married female, by personating her husband.’⁸² However, the victim in *Pryor* was not married, but mistook the burglar for a person described as her ‘sole sexual partner’.⁸³

A majority of the Court of Appeal, comprising Williams JA and Dutney J, ruled that the burglar’s conviction could nonetheless be upheld. Their Honours considered that, even if the facts of *Pryor* fell outside the strict wording of the section in relation to impersonation, the conviction could still be sustained based on the more general standard that the victim’s consent was not freely and voluntarily given. Byrne J dissented and would have overturned the conviction. The majority and minority judges effectively differed on whether the list of coercive factors in s 347, the precursor to the current s 348(2), should be regarded as exhausting the grounds on which consent to sex may be considered legally ineffective.⁸⁴

A related issue arose in the more recent Queensland Court of Appeal case of *R v Winchester*.⁸⁵ The case concerned sexual activities between the accused and a girl who had volunteered at his horse stables since she was twelve years old. The victim gave evidence at trial that she submitted to sexual acts with the accused on multiple occasions because he had promised to give her a racehorse, which in fact he did not own. The accused was convicted of multiple counts of rape and indecent treatment of a child under sixteen, as well as one

⁸¹ [2001] QCA 341.

⁸² *Criminal Code 1899* (Qld) s 347 (prior to 27 October 2000).

⁸³ *Pryor* [2001] QCA 341, [2] (Williams JA).

⁸⁴ The Queensland Parliament introduced amendments in 2000 aimed at overcoming this difficulty. Section 348(2)(f) now refers to ‘a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.’

⁸⁵ [2011] QCA 374.

count of maintaining a sexual relationship with a child. The Court of Appeal treated the promises to the girl as a type of fraud not covered by the reference in s 348(2) of the *Criminal Code* (the successor to the former s 347) to fraud involving the ‘nature or purpose of the act’.

Nonetheless, Muir and Fryberg JJ were prepared to consider the fraudulent promises as relevant to the broader issue of whether consent was ‘freely and voluntarily given’ within s 348(1). Their Honours took the view that a holistic assessment must be made of the victim’s life history and circumstances in considering whether consent obtained after a promise or offer should be considered free and voluntary.⁸⁶ This may involve consideration of the victim’s maturity, intellectual ability, emotional state and relationship history with the accused. Fryberg J remarked that where a woman is systematically controlled by her partner this might influence whether fraudulent representations rendered consent not freely and voluntarily given.⁸⁷ The power dynamics between the parties are therefore part of the wider context to be considered. Chesterman J, by contrast, took the narrow view that fraud can only vitiate consent to sexual activity if it falls within the technical wording of s 348(2).⁸⁸ His Honour was unprepared to rely on the overarching standard that consent must be ‘freely and voluntarily given’.⁸⁹

A similar division of opinion can be perceived in the Western Australian Court of Appeal decision in *Michael*,⁹⁰ discussed earlier in this article. The majority judges in *Michael*, as we saw previously, took a holistic view of the case by regarding the appellant’s deception and threats as relevant to the broader issue of whether consent was free and voluntary within the meaning of the Western Australian *Criminal Code*. The dissenting judge, Heenan AJA, took a more formalistic view. His Honour held that the reference to ‘deceit, or any fraudulent means’ in s 319(2)(a) of the *Code* should only extend to fraud concerning the nature or purpose of the act, the identity of the accused or their legal status as a spouse.⁹¹ He would have allowed the appeal on the basis that the jury was not properly directed by the trial judge to separate out the deception of the accused from the threats or intimidation.

⁸⁶ [2011] QCA 374, [85]-[86] (Muir J), [135]-[136] (Fryberg J).

⁸⁷ [2011] QCA 374, [135].

⁸⁸ [2011] QCA 374, [101].

⁸⁹ The Court of Appeal ultimately upheld the appeal on the basis that the trial judge’s direction to the jury had been inadequate.

⁹⁰ [2008] WASCA 66.

⁹¹ [2008] WASCA 66, [376] (Heenan AJA). For criticism, see Crowe, above n 2, 246.

The differences of opinion in *Pryor*, *Winchester* and *Michael* all follow a similar pattern.⁹² In each of these cases, a two judge majority took a holistic view of the case to find that legally effective consent was not present, despite some technical challenges posed by the wording of the legislative provisions. The third dissenting judge in each case took a more formalistic view, finding that the conviction could only be sustained if it fit strictly within the enumerated legal categories, precluding a finding that consent was not freely and voluntarily given. We have suggested in the earlier sections of this article that the holistic approach adopted by the majority judges in these decisions is more consistent with the general approach of the Australian courts to intimidation and related coercive factors in rape cases.

Holistic judgments play a central role in determining whether consent to sex is legally effective. The complex and interlocking factors that often arise in such cases make such a holistic outlook both necessary and desirable. Furthermore, as discussed above, judgments of this kind are far from arbitrary. They reflect the heuristics that judges have developed over time in applying the relevant legal categories. Experienced criminal court judges are well placed to make overall assessments of whether consent to sex is legally effective.⁹³ These judgments should, of course, be guided by the coercive factors enumerated in legislation, but these lists are worded non-exhaustively in all Australian jurisdictions. They should not be applied in such a way as to frustrate the overarching legal requirement that sexual activity must only take place with the free and voluntary consent of all parties.

VI CONCLUSION

This article has considered the role of intimidation and threats in vitiating consent to sex for the purposes of Australian rape law. We began the article with an overview of the relevant statutory provisions throughout Australia, noting the minor differences in wording between jurisdictions. We then surveyed the appellate case law, noting that the cases can be grouped into four overlapping categories: physical intimidation, verbal intimidation or threats, intimidation by authority and intimidation based on the physical environment. We further noted a

⁹² For further discussion, see Crowe, above n 2, 243-5.

⁹³ There is certainly a risk that the content of holistic judgments may be influenced by the judges' social and cultural outlook, although a similar concern applies to more reflective forms of reasoning. The role played by snap judgments is one reason why it is important to promote gender and cultural diversity among the judiciary. Compare Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 *Journal of Law and Society* 219; Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 185-6.

tendency by the courts in all these cases to take a holistic approach to the factual circumstances, viewing various forms of intimidation and other coercive factors as part of an overall assessment as to whether consent is freely and voluntarily given.

The final parts of the article examined this reasoning process in more detail. We argued that there is empirical evidence from other fields to support the view that judges rely on holistic assessments in deciding rape cases. This kind of reasoning is far from arbitrary; indeed, it makes sense as a way of analysing the complex and overlapping factors often present in rape trials. The role of holistic assessments in such cases favours a purposive approach to the applicable legislative provisions that emphasises the overall question of whether consent is freely and voluntarily given,⁹⁴ rather than a formalistic emphasis on the lists of coercive factors found in the various statutory provisions. This is consistent with the approaches of the majority judges in recent cases such as *Pryor*, *Winchester* and *Michael*.

⁹⁴ Compare Crowe, above n 2, 246-7.