2. The Diminishing Significance of Sexual Intercourse

Damn it, when you get married, you kind of expect you're going to get a little sex.¹

Introduction

Traditionally, sexual intercourse was considered central to the legal definition of marriage. A marriage could be annulled and legally revoked if it had not been consummated. The law also made it clear that upon marriage a husband had unlimited sexual access to his wife. Neither of these principles are true any longer. This chapter documents the shift in the narrative of the relationship between marriage and sex from one of duty and procreation, to one of mutuality and pleasure, and in doing so examines the process in order to determine what role, if any, romantic love plays in this narrative.

The legal connection between sex² and marriage in law is not explicitly stated. The association of sex with immorality and licentiousness make it an uneasy topic for marriage and law. Courts are careful to avoid language that casts sex as a duty and could be interpreted as reducing wives to prostitutes. However it would not be accurate, or even desirable, to separate sex from marriage. Some old laws of marriage accept that sex is part of marriage, but dance around questions of consent, obligation and rights. Others, such as the marital immunity against rape, are unequivocal about both its centrality and the husband’s right to demand it.³ Modern laws have overturned these principles. The 1991 case of \textit{R v L},⁴ asserted that a husband could be found guilty of raping his wife, and established that the crime of rape could exist in marriage, that men could not demand, and women did not have to submit to sex just because they were married. The revolutionary nature of the case cannot be overstated; it redefined the relationship between sex and marriage and helped to recreate the meaning

² There is often slippage in the meaning of the word sex. This is especially so between the meaning of the word when used to indicate sexual activity and the word used to identify sexual identification. Where there is likely to be confusion, I refer to sexual identity and sexual activity in order to distinguish between the two. Otherwise, I follow the conventions of using the word to mean the two different things according to the context as is the case in everyday Australian English.
³ \textit{R v Clarence} (1888) QB 23.
of marriage. Some ten years later, the centrality of sex in marriage was further eroded with the case of *Re Kevin* which went on to assert that sex (sexual capacity and sexual intercourse) is not the central, defining characteristic of marriage.

Quite a shift has occurred between the old laws and the new laws, but what is the role of love within this new narrative? This chapter will demonstrate that love has come to be considered more important in the discourse of sex and marriage, albeit in a small way. *R v L* changed the perception that sex was an inevitable part of marriage, and instead linked sex with marriage only in the context of a mutually consensual and loving environment. *Re Kevin* also severed marriage from sex altogether and left a silence about the meaning of marriage which, I argue, can be filled with love. Despite the insinuation of love into sex and marriage, and despite the association of love with liberty and progress (as discussed in chapter one), sex and sexual access remain a delicate issue, and this is especially true in marriage.

### The Old Discourse of Sex and Marriage

The extent to which law once saw sex as part of marriage requires a discussion of several different common law principles and legislation.

**Consortium vitæ**

According to Thornton, ‘there is no precise legal definition of consortium and its elusive nature has permitted the judiciary to place its own gloss on the concept from time to time’. In so far as we can define it, *Crabtree v Crabtree (No 2)* claims that consortium is a raft of things, including sexual intercourse, which together unite a husband and wife. Consortium is defined as a partnership or association that involves a sharing of the good and the bad of the two lives involved: ‘In its fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse — all those elements which when combined, justify the old common law dictum that a man and his wife are one person.’ In the *Marriage of Todd (No 2)*, the Court itemised the elements that make up consortium as ‘dwelling under the same roof, sexual intercourse, mutual society and protection, [and] recognition of the existence of the marriage

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5 Prior to the 1980s, this action was only recognised in common law as belonging to a husband. For a discussion of this see M Thornton, ‘Loss of Consortium: Inequality Before the Law’ (1984) 10 *The Sydney Law Review*; A Risely, ‘Sex, Housework and the Law’ (1980–81) 7 *Adelaide Law Review* 421–456. Since then, reform has taken place. The action has been abolished in New South Wales, Tasmania and Western Australia. South Australia has kept the action but allows wives to pursue the action equally with husbands.


7 *Crabtree v Crabtree* (No 2) [1964] ALR 820.

by both spouses in public and private relationships’. The Court stated that these elements need not all be present in every marriage. While sexual intercourse is listed as an element of consortium in both Crabtree v Crabtree and in the Marriage of Todd (No 2), most of the cases involving loss of consortium tend to focus on loss of services in relation to domestic work. However, there has also been some discussion on loss of sexual capacity. It is on this issue that I will focus my discussion.

In Kealley v Jones Justice Samuels described sexual intercourse as a comfort of the most material kind (for the husband) but avoided the issue of value by saying that you cannot put a replacement/monetary value on something which is as unique as a wife’s society. As Thornton puts it, the discomfort shown by Samuels J is understandable, as placing a monetary value on sexual services would ‘ineluctably lead to the idea of the wife as a prostitute’. In Birch v Taubmans Ltd, the Court distinguished between losses that were of a temporal nature and recoverable, and those losses that were of a spiritual nature which were not recoverable. Sexual intercourse was considered to be of a temporal nature. This classification was possible, however, because the Court discussed sexual intercourse in terms of loss of opportunity to have children rather than loss of sexual pleasure. In the end, the principle is carefully outlined. The judges said:

We are of the opinion that where, as in this case, the opportunity … [to procreate] has been taken away absolutely, such a deprivation transcends matters which might well be said to be within the terms of the limitation above referred to and is a loss which is temporal rather than spiritual.

Subsequent cases, however, have acknowledged that the loss can also be of sexual pleasure. In Meadows and Meadows v Maloney, Judge Walters was guided by the High Court’s acceptance of the principle as outlined in Birmingham Southern Railway Co v Lintner where CJ McClellan accepted that loss of ‘the society of a wife’ and ‘marital companionship’ can be different from mere services, and thus can be recoverable. This principle is contained in the statement below by CJ McClellan.

The husband, also, of course, has a legal right to the society of the wife, involving all the amenities and conjugal incidents of the relation.

9 In the Marriage of Todd (No 2) (1976) 1 Fam LR 11,188 (Watson J).
10 In the Marriage of Todd (No 2) (1976) 1 Fam LR 11,188 (Watson J).
13 Birch v Taubmans Ltd [1956] 57 SR (NSW) 93.
This right of society may be invaded by an act which while leaving to the husband the presence of the wife, yet incapacitates her for the marital companionship and fellowship, and such incapacity may be the deprivation of her society differing in degree only from total deprivation by her death. For such impairment, so to say, of the wife’s society, of his right of consortium, such deprivation of the aid and comfort which the wife’s society, as a thing different from mere services, is supposed to involve, he is entitled to recover.\(^\text{16}\)

This right to recover for loss of sexual pleasure within an action for loss of consortium was also recognised in *Hasaganic v Minister for Education*.\(^\text{17}\) In this case, the parties were older, already had three children, and there was no question of further procreation. The Court accepted that the husband could claim for loss of services of his wife in relation to housework and to also claim for loss of ability to have sexual intercourse.

Justice Bright in *Fisher v Smithson*\(^\text{18}\) welcomed the widening of the concept away from services and towards companionship and affection, claiming that this was more in keeping with the changing marriage relationship:

> [T]he cases seem to me to demonstrate a broadening of the approach, a greater emphasis on loss of companionship and affection, a somewhat reduced emphasis on loss of ‘services’. If the law is as I hope, moving in this direction, it is merely reflecting, in my view, changing attitudes towards the matrimonial relationship.\(^\text{19}\)

From this small sample of cases we can say that sexual intercourse is considered to be a part of the *consortium vitae*, but that a wife’s ‘society’ is considered unique and is therefore difficult to place a value upon. In so far as courts have placed a value upon it, that value has been restricted to seeing sexual intercourse as an opportunity to procreate. There is some small evidence from the cases of *Hasaganic v Minister for Education* and *Fisher v Smithson* that this view is shifting, with courts showing a willingness to see sex as not only valuable for procreation but for fulfilling other emotional functions.

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\(^{17}\) *Hasaganic v Minister for Education* [1973] 5 SARS 554.


\(^{19}\) *Fisher v Smithson* [1977] 17 SASR 227 (Bright J).
Conjugal Rights

Another perspective on the historical picture of the law’s view on the relationship between marriage and sex can be gleaned by looking at the old action of conjugal rights.

Section 60 of the Matrimonial Causes Act 1959 (Cth) enabled a party to the marriage to petition the court for a restitution of conjugal rights. In order to succeed, a petitioner had to show, among other things, that the respondent’s refusal is without just cause and excuse, and that the petitioner sincerely desires conjugal rights. Some legal dictionaries include sexual activity as an aspect of conjugal rights, but it is important to note that the term remains largely undefined in either legislation or case law.

Cases show that sexual intercourse is an irrelevant factor in deciding whether one spouse has refused to render conjugal rights. In Fielding v Fielding, Salmond J categorically asserted that refusal to have sex is not a ground which can be used to petition the court for a restitution of conjugal rights, that action being about co-habitation and not sexual relations. He stated the principle as follows:

[T]he jurisdiction in restitution of conjugal rights is an old ecclesiastical jurisdiction, and is by the law that was in force in the Ecclesiastical Courts. Conjugal rights in those courts meant the right of co-habitation and nothing more, and that is what it still means.

Similarly, in Tew v Tew and Orme v Orme, the Court dismissed a petition for restitution of conjugal rights where the applicants relied upon their spouse’s refusal to have sexual intercourse.

Other cases, however, have taken an opposite view. Synge v Synge was a case where the wife agreed to live with her husband only on the condition that there was no sexual intercourse between them. The husband, on the other hand, agreed to live with her only on the condition that there was. The Court found that refusal to have sexual intercourse is not actionable, but a partner to the marriage is entitled to leave it if the other does not consent to sexual relations. Sir Francis Jeune P said that the law could not condone a situation in which the husband is ‘bound continually to expose himself to such mortification and

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20 Webster’s New World Law Dictionary defines conjugal rights as ‘the mutual rights and privileges between two individuals that arise from the state of being married. These include, among other things, affection, companionship, co-habitation, joint property rights, and sexual gratification.’ (Wiley Publishing, Hoboken New Jersey 2010).
21 Fielding v Fielding (1921) NZLR 1069.
22 Fielding v Fielding (1921) NZLR 1071 (Salmond J).
23 Tew v Tew (1921) NZLR 1071.
24 Orme v Orme (1824) 2 Add 382.
25 Synge v Synge [1900–03] All ER Rep 452.
misery as is necessarily involved’ in such a marriage.\footnote{Synge v Synge [1900–03] All ER Rep 461.} He went on to say that sex was an inevitable part of co-habitation. For Sir Francis Jeune P the two could not be distinguished:

The objects of married life are as expressed in the marriage service and are not the less true because they are utterances of a more plain spoken age than the present, and, while human nature remains what it is, I think a husband has a right to decline to submit to a groundless demand of his wife that he should live with her as a husband in name only. Neither party to a marriage can, I think insist on cohabitation unless she or he is willing to perform a marital duty inseparable from it.\footnote{Synge v Synge [1900–03] All ER Rep 461.}

A similar view was held by Justice Hill in \textit{Wily v Wily},\footnote{Wily v Wily (1918) P1.} who, clearly referring to sex, rejected the view that just because you live in the same house you have performed your duty to your spouse. Both \textit{Wily} and \textit{Synge}, interestingly, refer to sex as a marital duty.

In \textit{Bartlett v Bartlett}\footnote{Bartlett v Bartlett (1933) 50 CLR 3.} Justice Evatt specifically considered whether sex was integrated in an action for restitution of conjugal rights and found that there was authority to support both sides of the question. He concluded that the question of sexual intercourse or ‘mutual society’ cannot be said to be irrelevant to the question of conjugal rights:

\[\text{[I]n the marriage service the woman promises ‘to obey him, and serve him, love honour, and keep him in sickness and in health’. The man’s promise is to ‘love her comfort her, honour, and keep her in sickness and in health’. Revision or elision of some of the promises has been attempted, and with or without authority, been made. But the prayer book’s third stated purpose for which marriage was ordained — ‘mutual society, help and comfort’, is of the essence of the marriage relationship.}\footnote{Bartlett v Bartlett (1933) 50 CLR 23 (Evatt J).}]

Bartlett thus stands for the proposition that sex is a part of marriage; it is not necessarily the most important part, but it is without doubt a part of it. Justice Evatt goes on to extend this relationship and, like Justice Brennan in \textit{R v L}, as we will see, threw love into the mix. In deciding the case before him, he concluded that the relationship could not be saved: conjugality, including sexual relations, cannot be restored. He stated, ‘it is difficult to see how, upon
the assumption that all love and affection have disappeared this fundamental purpose can be carried out’.

For Evatt J, then, it is not only marriage and sex that are connected but marriage, sex and love.

Matrimonial Causes Act (1959)

This Act mirrored the position that English law does not seek to enforce matrimonial sexual intercourse, and that the refusal to engage in sexual intercourse by either husband or wife does not amount to a matrimonial offence. However, sex remains an important subtext to the relationship of marriage in the Act in a number of ways. For example, section 21 states that a marriage may be voidable if one or both parties are incapable of consummating the marriage. Furthermore, ‘wilfully and persistently’ refusing to consummate the marriage was a ground for divorce under section 28(c), and refusal to engage in sex could also be taken as evidence of desertion and thereby give rise to desertion as a ground for divorce under section 28(b).

In the above discussion we have seen all of the ways that sex was ‘supported’ as a legal part of marriage. The common law in relation to consortium vitae and conjugal rights saw sex as an important part of marriage, but stopped short of imposing it as a duty or even elevating it above any other element of marriage. In the context of cases seeking damages for loss of consortium vitae we have also seen a shift in seeing loss of sexual capacity as a loss measurable only in the context of inability to procreate to a widening of the concept to at least allow the possibility of counting loss of sexual pleasure. This is in keeping with the shift that has occurred whereby sex in marriage has come to be seen as being more about pleasure than duty. According to Honore, the old law points to three requirements of the law in relation to sex and marriage: that a husband and a wife have a duty to consummate the marriage; that they develop and maintain a mutually tolerable sexual relationship; and that they are faithful to each other. But the old laws, in fact, go much further than that and assert that sex is an exclusive right of the parties to the marriage, in particular that it is the exclusive right of the husband. This position can be argued by looking at laws in relation to criminal conversation and adultery, which give parties to a marriage a legal right to sue for compensation or for divorce if sex occurs with a third party outside of the marriage. The fact that both of these rights were either exclusively available to men (criminal conversation) and much more readily available to husbands than

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31 Bartlett v Bartlett (1933) 50 CLR 23 (Evatt J).
33 There are no cases that have explicitly recognised this, but there are cases that welcome the widening of the concept.
35 Honore, Sex and Law 17–34.
Looking for Love in the Legal Discourse of Marriage

to wives (divorce double standard), supports the argument that exclusive sex was a right a husband could demand of his wife. But nothing asserts a husband’s right to have sex with his wife more than the immunity that he enjoyed against marital rape. In this context, a picture emerges of sex being not only inseparable from marriage, but also being a right that a husband enjoyed over his wife. This casts marriage as oppressive and exploitative, a picture that justifies the feminist critiques of both sex and marriage.

Rape in Marriage

In *History of the Pleas of the Crown* (1736), Sir Matthew Hale stated that a husband cannot be guilty of ‘a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband which she cannot retract’. This was asserted for hundreds of years as the common law of Britain and its colonies. Subsequently, both the legitimacy and the legality of this statement have been questioned. Barton, however, argues that what Hale wrote appears to have been a reflection of established belief at the time, traceable to the thirteenth century.

The idea that a man could not be guilty of raping his wife is founded upon three possible theories. The first is that which emerges from Mathew Hale’s statement, that is, that upon marriage a wife has given her consent to sexual relations. This is known as the implied consent theory. Immunity can, however, also be justified under the unity of person theory which views marriage as a unity of two people, or, more precisely, an incorporation of a woman’s entity into that of her husband. In this conception of marriage, a woman ceased to be an independent legal entity during marriage and the question of consent therefore becomes irrelevant. As noted earlier, this is the view that was voiced by Blackstone about marriage in general. The third theory is the property theory: upon marriage a woman becomes the property of her husband of which he can ‘make appropriate use’.

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37 C Glasman has argued that the marital rape immunity never had any grounding in common law. ‘Women Judge the Courts’ (1991) 141 *New Law Journal* 395. Brennan J in *R v L* also said it was never part of the common law. The High Court of Australia had cause to visit this question in *PGA v The Queen* (2012) 245 CLR 355. In this case, rather controversially, the majority (5:2) held that even if the marital immunity had at some time existed it had ceased to do so by 1935 at the latest as a result of state legislation. For a discussion of the implications of this case see W Larcombe and M Heath, ‘Case Note Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*’ (2012) 34 *Sydney Law Review* 785–807.
40 See chapter one.
41 Adamo, ‘The Injustice of the Marital Rape Exemption’ 560.
The marital rape exemption has over time been justified on the ground that rape in marriage would be difficult to prove, could be misused by a vengeful wife, and could lead to ‘unrest and discord’ in a marriage.\textsuperscript{42} It has also been argued that it would constitute an intrusion into the privacy of marriage.\textsuperscript{43} Regardless of its origins and legitimacy, the view became law and was reiterated in academic texts\textsuperscript{44} and in law cases for over 200 years. It was not until the last half of the twentieth century that this legal principle came to be seen as insupportable.\textsuperscript{45} While many countries have now removed the immunity,\textsuperscript{46} too many still have not and, as we will see, in the following discussion, this removal was not without its opponents.\textsuperscript{47}

\textit{R v Clarence}

So entrenched was the view that a husband could not be guilty of raping his wife that even when sex resulted in serious harm, the Court was not willing to disturb the immunity. \textit{R v Clarence}\textsuperscript{48} has been quoted over time as giving authority for marital rape immunity. In \textit{R v Clarence}, the husband had contracted venereal disease and was aware of his condition, but did not tell his wife, with whom he continued to have sexual intercourse. She subsequently contracted the disease and her husband was charged with rape and assault. The wife argued that she was raped because she had not consented to having sex with a man who was infected. The majority of judges did not agree. While Barton argues that, between them, the judges expressed every possible logical opinion, a number of them relied on the principle that a husband cannot be guilty of raping his wife, pure and simple.\textsuperscript{49}

\begin{thebibliography}{99}
\bibitem{42} Adamo, ‘The Injustice of the Marital Rape Exemption’ 561.
\bibitem{44} For example, see P Brett and L Waller, \textit{Criminal Law: Text and Cases} fourth edition, (Butterworths Sydney 1977) 93–94, where the authors argue that the immunity to marital rape should be extended to people living in any intimate relationship and not just marriage. This view is not repeated in subsequent editions.
\bibitem{45} T Fus, ‘Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches’ (2006) 39 \textit{Vanderbilt Journal of Transnational Law} 481–517. According to Anderson, as late as the mid-twentieth century there was no country that viewed a husband as forcing his wife to have sex with him as a crime. Anderson, ‘Lawful Wife, Unlawful Sex’.
\bibitem{46} According to \textit{MarriageAbout.com}, marital rape is considered a criminal offence in many countries, including Argentina, Australia, Austria, Barbados, Belize, Bulgaria, Canada, Croatia, Cyprus, Denmark, Ecuador, England, the Fiji Islands, Finland, France, Georgia, Germany, Honduras, Hong Kong, Ireland, Israel, Macedonia, Mexico, Namibia, Nepal, The Netherlands, New Zealand, Norway, The Philippines, Poland, South Africa, Spain, Sri Lanka, Sweden, Taiwan, Trinidad/Tobago, the United States, Uzbekistan, and Zimbabwe. (Country Reports on Human Rights Practices released by the US State Department, Bureau of Democracy, Human Rights and Labor, were used to determine countries’ legal status of marital rape.) http://marriage.about.com/cs/maritalrape//maritalrape2.htm accessed 29/06/10.
\bibitem{47} J Mertus, ‘Human Rights of Women in Central and Eastern Europe’ (1998) 6 \textit{American University Journal of Gender & Law} 369–484 listed Albania, Bulgaria, Croatia, Czech Republic, Hungary, Kosovo, Poland, Romania, Russia, Serbia and Ukraine as still providing some immunity for husbands.
\bibitem{48} \textit{R v Clarence} (1888) QB 23.
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Pollock B, relying on Hale’s dictum, stood firm on the assertion that the marriage contract means that the wife has no ‘right or power’ to refuse sex, and that the fact of venereal disease was irrelevant:

[T]he husband’s connection with his wife is not only lawful, but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent.\(^{50}\)

Similarly, A L Smith relied on the features of the marriage, and argued that the wife consents to sex at the time of marriage. This consent is not confined to when the husband is sound in body. Smith affirmed the principle that consent to sex stands throughout marriage, and affirmed the existence of the immunity in all circumstances:

[U]ntil the consent given at marriage be revoked, how can it be said that the husband in exercising his marital right has assaulted his wife? In the present case at the time the incriminated act was committed, the consent given at marriage stood unrevoked. Then how is it assault? … In my judgment in this case, the consent given at marriage still existing and unrevoked, the prisoner has not assaulted his wife.\(^{51}\)

Even those judges who thought Mr Clarence was guilty of rape did not wish to disrupt the marital immunity. They simply argued that his suffering a communicable disease created an exception to the rule. Sex was a marital privilege, but with some exceptions.\(^{52}\) This view continued. Over the years, before \(R \text{ v } L\), courts showed a general unwillingness to water down the marital exemption. Cases show that the presumption that a man cannot be guilty of raping his wife could be displaced by a separation order,\(^{53}\) a separation agreement,\(^{54}\) or a \textit{decree nisi}.

\(^{55}\) Until very recently, and even in extreme circumstances, cases show that courts were more willing to develop exceptions to the rule rather than to eliminate the rule altogether. For example, in \(R \text{ v } McMinn\)\(^{56}\) the husband broke into his wife’s home and physically and sexually abused her in the presence of their small child. Even then, Starke J did not question the existence of the

\(^{50}\) \textit{R v Clarence} (1888) QB 63–64 (Pollock B).

\(^{51}\) \textit{R v Clarence} (1888) QB 37 (Smith AL).

\(^{52}\) \textit{R v Clarence} (1888) QB 51 (Hawkins J).

\(^{53}\) \textit{R v Clarke} [1949] 2 All ER 448.

\(^{54}\) \textit{R v Miller} [1954] 2 QB 282.

\(^{55}\) \textit{R v O’Brien} [1974] 2 All ER 663.

\(^{56}\) \textit{R v McMinn} [1982] VR 53.
rule but instead focussed on the fact that there was a Family Law Court order existing at the time which restrained her husband from molesting her, thus constituting a revocation of consent to sex by the wife.

The Changing Discourse of Sex and Marriage

As previously discussed, the legal discourse of marriage in Australia has been significantly altered by the passing of the FLA. In relation to sexual intercourse, this piece of legislation is silent. Some of the ways that sex was present in the Matrimonial Causes Act (adultery, refusal to consummate a marriage) were removed. The single ground of ‘irretrievable break down’ evidenced by a 12-month separation removes questions about the nature of the parties’ involvement with each other, sexual or otherwise. Furthermore, the discourse of sex in marriage has been significantly altered in Australian common law. This can be illustrated by two leading cases. *R v L* overturned centuries of common law that had protected husbands against the crime of raping their wives. Ten years later, the case of *Re Kevin* recognised a transsexual marriage and along the way asserted that sex (sexual identity as well as sexual intercourse) was no longer a central defining characteristic of marriage.

*R v L* and the Removal of the Marital Immunity for Rape

In 1991, *R v R* the UK Court of Appeal said the rule that protected husbands against a conviction of raping their wives was ‘anachronistic and offensive’. In *R v L* in the same year, the High Court of Australia said that the notion ‘was out of keeping with the view society now takes of the relationship between the parties to a marriage’. It is important to note here that, by then, every State legislature had passed laws which removed the distinction between married and unmarried women in relation to intimate partner rape.

Amazingly, given the length of time the rule had operated and the tenacity with which the courts had enforced it, Justice Brennan questioned the legal validity of the principle altogether. He claimed that there was little evidence for it in either the law of marriage or any other doctrine of common law:

Hale’s and Hume’s reason for the common law rule that a husband could not be guilty as a principal in the first degree of raping his wife was

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extremely dubious … Hale’s reason for the rule is not supported by the law of marriage. Nor is that reason supported by any other doctrine of common law.\(^\text{59}\)

This question was revived decades later in the 2012 case of \textit{PGA v The Queen}\(^\text{60}\) in which the majority of the High Court decided that, even if the rule ever existed, it no longer did so by the middle of the twentieth century. Nevertheless, the idea was certainly entrenched enough that even in the 1990s some were not only defending it but calling for its retention. In a two-part article in the \textit{New Law Journal},\(^\text{61}\) Professor Glanville Williams argued that if a husband did force his wife to have sex with him, this was not rape but rather a sign that the relationship was broken. Williams argued that rape is too serious an offence to apply to the relationship that exists within marriage:

We are speaking of a biological activity, strongly baited by nature, which is regularly and pleasurably performed on a consensual basis by mankind … Occasionally some husband continues to exercise what he regards as his when his wife refused him … What is wrong with his demand is not so much the act requested but his timing, or the manner of his demand. The fearsome stigma of rape is too great a punishment for husbands who use their strength in these circumstances.\(^\text{62}\)

A report by UK Criminal Law Revision Committee in 1984 into marital rape took a similar view, arguing that marital rape was more of a problem for social workers than for the criminal law.\(^\text{63}\)

In \textit{R v L}, Justice Brennan argued that the law of marriage is to be found in the ecclesiastical courts rather than the common law courts. He claims that a review of those relevant cases shows that connubial rights are an essential part of marriage but ‘do not exhaust, the legal incidents of marriage’.\(^\text{64}\) Furthermore, he adds that the law has always been that sexual intercourse must be performed


\(^{60}\) \textit{PGA v The Queen} (2012) 245 CLR 355.


\(^{62}\) Williams, ‘The Problem of Domestic Rape: Part I’ 206. It is important to note that Professor Williams has argued in other writings that, when it comes to rape, men need the law’s protection more than women. In his \textit{Textbook of Criminal Law}, he talks of consent as a ‘hazy concept’. He says that women are prone to changing their minds, ‘enjoy fantasies of being raped’ and therefore welcome a ‘masterful advance while putting up a token of resistance’. He goes on to say that girls often lie in relation to sexual consent out of shame or guilt or ‘for obscure psychological reasons’. G Williams, \textit{Textbook of Criminal Law} second edition (Stevens and Sons, London 1983) 238. These views are by no means unique. Naffine has shown their predominance in a number of criminal law textbooks. N Naffine ‘Windows on the Legal Mind: Evocation of Rape in Legal Writings’ (1991–1992) \textit{Melbourne University Law Review} 744–751.


\(^{64}\) \textit{R v L} (1991) 174 CLR 392 (Brennan J).
voluntarily.\textsuperscript{65} Justice Brennan says that the ecclesiastical approach can be found in Sir William Scott’s judgement in \textit{Forster v Forster}\textsuperscript{66} which stated that ‘the duty of matrimonial intercourse cannot be compelled by this court though matrimonial cohabitation may’\textsuperscript{67}. However, he went on to say that it is not a ‘matter perfectly light’ if a spouse has withdrawn themselves ‘from the discharge of duties that belong to the very institution of marriage’,\textsuperscript{68} thus creating some confusion.

Despite this, Justice Brennan argues that to admit that sexual intercourse is part of marriage is not the same thing as asserting that a man can never be guilty of raping his wife. A wife, he argues, is not upon marriage relegated to the status of sexual chattel. To accept Hale’s principle would relegate a married woman to the rank of concubine and reduce her to a mere object of desire and sexual gratification:

Far from relegating a wife to the position of a sexual chattel, the status of wife created by marriage confers on a wife a right … to live with her husband, to have him listen and talk to her, to be cherished, to be entertained at bed and board and treated with respect. These are not rights that can be enforced by decree but they are rights attached to the status of husband and wife.\textsuperscript{69}

He goes on to say that ‘marriage is an institution which casts upon a husband an obligation to respect a wife’s personal integrity and dignity; it does not give the husband a power to violate her personal integrity and destroy her dignity’.\textsuperscript{70}

For Justice Brennan, while sex is part of marriage, it is not the only part of it. Moreover, to say that it is part of marriage does not mean that a spouse must engage in sex at all times. There is a sense in which there is an obligation upon a spouse not to persistently and wilfully refuse sexual intercourse, but this is to acknowledge that consent is necessary for sex during marriage and not evidence for the view that a general consent is granted upon marriage:

The ecclesiastical courts never embraced the notion of a general consent to sexual intercourse given once and for all on marriage by either spouse. The doctrine of ecclesiastical courts was quite different, namely, that each spouse has a mutual right to sexual intercourse provided the right is exercised reasonably, subject to the health of the spouses and the

\textsuperscript{65} \textit{R v L} (1991) 174 CLR 392 [Brennan J].
\textsuperscript{66} \textit{Forster v Forster} (1790) 161 ER 505 (Sir William Scott).
\textsuperscript{67} \textit{Forster v Forster} (1790) 161 ER 508 (Sir William Scott).
\textsuperscript{68} \textit{Forster v Forster} (1790) 161 ER 508 (Sir William Scott).
\textsuperscript{69} \textit{R v L} (1991) 174 CLR 396 [Brennan J].
\textsuperscript{70} \textit{R v L} (1991) 174 CLR 396 [Brennan J].
exigencies of family life. It is a right to be exercised by consent. It is a right the exercise of which is intended to foster and maintain connubial love, not to be the occasion of abuse and degradation.\(^{71}\)

Sex in marriage is therefore subject to many factors, consent foremost among them. Brennan’s opinion, quoted above, is extremely important because it acknowledges that there is a connection between sex and marriage, but it goes further and asserts that both are also connected to love.

**In the Shadow of \(R v L\)**

The decision in \(R v L\) cannot, however, be taken as evidence that the connection between marriage and sex, and as sex being the right of a husband, has been completely severed in legal discourse. Both in England and in Australia, courts have shown a tendency to treat ‘relationship rape’ as a less serious offence than rape involving strangers. In England, for example, Warner shows that courts have developed a principle that a pre-existing sexual relationship between the rapist and his victim should operate as a mitigating factor.\(^ {72}\) Mustill LJ in the leading case of *Berry* stated that rape of a former sexual partner makes it a less serious offence. He justified this principle on the ground that the ‘violation’ and ‘defilement’ are less of a feature in such cases. He argues that relationship rape cases show that ‘in some instances the violation of the person and the defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship’.\(^ {73}\)

This view exists also in Australia. For example, in *R v Spencer*, the Court said ‘[g]enerally I would expect that if the parties were cohabitating at the time of the rape, this would go in mitigation of sentence, recognising the very special relationship between husband and wife’.\(^ {74}\) The special relationship between husband and wife would require, it seems, a lower level of consent to sexual intercourse than in other relationships. And then there was the now infamous ‘rougher than usual handling’ case, in which Judge Bollen sitting on the case of *R v Johns* in which a husband was tried for six counts of rape, said:

There is of course, nothing wrong with a husband faced with his wife’s initial refusal to engage in intercourse in attempting in an acceptable

\(^{71}\) *R v L* (1991) 174 CLR 396 (Brennan J).


\(^{73}\) *Berry* 1988 10 Cr App R (S) 15.

\(^{74}\) *R v Spencer* Queensland Court of Criminal Appeal CA no 80 unreported 1991.
way to persuade her to change her mind and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree.75

There also exist other situations where courts have displayed attitudes towards the meaning of consensual sex that sound alarm bells. Take, for example, cases of mistaken identity which appear to suggest not only that sex is an implied part of any intimate relationship but also that it requires a much lower level of negotiation and consent than sex in other situations.

In the case *R v George Allan Pryor*,76 the victim thought she was having sex with her partner but found instead that a stranger had broken into her apartment, led her out of bed and had sex with her in the corridor. The victim realised her mistake when she reached up to touch his face and realised that the features were not those of her partner. She argued that it was rape as she had only consented to having sex on the mistaken belief that she was having sex with her partner. The man was charged with rape but appealed on the ground that she had consented. The Court reviewed a number of old authorities with similar facts, notably *R v Jackson*77 and *R v Saunders*.78 In both cases, the wife was asleep and submitted to advances made by a man that each woman believed to be her husband. In both cases, the Court held that it could not be rape as the women had consented to the act of sexual penetration. While in *R v Allan Pryor* the appeal against rape was not successful, one of the judges did adhere to the authorities above, claiming that rape rests upon the essential enquiry of whether there has been consent as to the nature and character of the act of sexual intercourse.79

This view is evidence of the assumed ease with which sex is assumed in marriage and marriage-like relationships. Consent, in these cases, did not need any words. In fact it seems that consciousness itself was not required for consent to occur. To accept this state of affairs one must view marriage as a relationship where sex occurs often and with little or no negotiation needed between the partners. The low threshold of consent that the law requires for such cases is questionable, even if it can be argued that it is merely reflecting social attitudes when it does so.80


77 *R v Jackson* [1822] 8 Car & P 266.

78 *R v Saunders* [1838] 8 Car & P 266.

79 See Byrne J in *R v George Allen Pryor*.

80 Empirical studies suggest that a woman who has been forced to have sex with a partner might not see herself as a victim of rape with recourse to legal remedies. See N Naffine, ‘Windows on the Legal Mind’
The above discussion makes one careful about how to characterise the law’s position in relation to sex in marriage and other intimate relationships. Some of the old common law principles (consortium vitae and conjugal rights) danced around the issue, while others (rape immunity) were brutally clear that it was to be considered as a duty by the wife to have sex with her husband. While Re L was a definite statement against this principle, some surrounding principles involving sex and relationships (lesser thresholds of consent cases), makes one cautious. The case of Re Kevin, however, adds some much needed clarity to the relationship between marriage and sex.

The Case of Re Kevin

The case of Re Kevin saw sexual identity, sexual intercourse and procreation rejected as the central defining characteristics of modern marriage.

Kevin was born a female. At birth her gonads, genitalia and chromosomes were identified as female, but as far back as she could remember she felt herself to be male. Since 1994, she dressed and presented herself as male in all situations. In 1995 she began hormone treatment, in 1997 she underwent breast removal surgery, and in 1998 she underwent sex reassignment surgery, involving a total hysterectomy and a bilateral oophorectomy. In 1996 Kevin met her partner Jennifer. Jennifer fully supported Kevin’s transition from female to male. In August 1999 Kevin and Jennifer married and in November 1999 Jennifer, who had become pregnant on an assisted fertility program, had a child. In 2003, during the appeal, Jennifer was pregnant with their second child. Kevin’s gender identity history was revealed to all official parties involved in the marriage and the conception of their child. Kevin applied to the Family Court in 2001 to have the marriage between himself and Jennifer validated. The Attorney General intervened in the proceedings arguing that the marriage could not be valid because it was not a marriage between a man and a woman.

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741; ‘Possession’; Feminism and Criminology (Polity Press, Cambridge 1997). Patricia Eastal, in an empirical study, also found that some married women do not see their husbands wanting to have sex against their will as rape. See Eastal, ‘Marital Rape Conflicting Constructions of Reality’. Barton and Painter report that a survey conducted in the early 1990s in England, Wales and Scotland designed by the Middlesex Centre for Criminology showed that one in seven women thought it was their duty to have sex with their husbands even when they did not feel like it. C Barton & K Painter, ‘Rights and Wrongs of Marital Sex’ (1991) 141 New Law Journal 394. One can certainly find evidence of this view in the press. For example, in March 2009, prominent Australian sex therapist Bettina Arndt urged women to say yes more often as a key to keeping marriages/relationships alive. In an article entitled ‘Women Need to Say Yes to Sex’, Bettina Arndt advises women to ‘just do it’. Apparently suggesting that women need not be bothered about desire when considering sex, she says: ‘Once the canoe is in the water, everyone starts happily paddling. For couples to experience regular, pleasurable sex and sustain loving relationships women must get over that ideological roadblock of assumptions about desire and “just do it”. The results will be both men and women will enjoy more, better sex.’ Canberra Times 2/03/09 http://www.canberratimes.com.au/news/opinion/editorial/general/women-need-to-say-yes-to-sex/1447294.aspx#.
and a woman. The Family Court ruled that for the purposes of the Marriage Act Kevin was a male and his marriage to Jennifer was therefore valid. This decision was affirmed on appeal in 2003 before a Full Court of the Family Law Court.

Neither Kevin nor the Court argued against the idea that marriage must be between a man and woman. For Kevin, the point to prove was not that love and marriage could exist among same-sex couples, but rather that he was a man. The same-sex marriage issue was not considered in any way relevant to this case. Parliamentary debates on the 2004 amendment to the Marriage Act, however, showed that some MPs did read the decision as a threat to the ‘traditional’ definition of marriage as being between a man and a woman, and feared that the Court’s liberal reading of marriage for the purpose of recognising transgender marriage might be read as a sign for a possible liberal attitude toward same-sex marriage.81

The argument for the Court in this case was whether Kevin was a man, but along the way much was said about the meaning of marriage in modern Australia. While the focus was on sex as sexual identity, the arguments led to discussion on the centrality of procreation and sexual intercourse in marriage.

The Legal Arguments and the Decision

The Attorney General in Re Kevin82 argued the following propositions in relation to the meaning of marriage:

• That marriage was to be given the meaning embodied in the Marriage Act of 1961 which implied that marriage was a union for life between a man and a woman.
• The meaning of marriage was to be given the meaning it held in 1961 when the Act was passed, and not, according to current cultural and social factors.
• That marriage was understood to embody Judeo-Christian teachings and, as such, was closely tied with the procreation and care of children.

Assent to all of these propositions would therefore rule out the recognition of the relationship between Kevin and Jennifer as well as the future recognition of ‘other’ relationships such as same-sex marriages.

The Full Court of the Family Law Court rejected all of the above arguments. In relation to the Marriage Act being a code for the meaning of marriage (as well as

81 Liberal Party Senator, Guy Barnett said that ‘the issue of marriage has been raised in Australia recently in a number of ways, including in the Family Court case of Kevin and Jennifer. The Full Court said that the words “marriage” and “man” in the Marriage Act have a contemporary everyday meaning. Are we going to allow the longstanding definition of marriage to be interpreted out of the context in which it was written?’ Commonwealth, Parliamentary Debates Senate June 17 2004 (Guy Barnett) http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2014889 accessed 15/05/2008.
82 Re Kevin (Validity of Marriage of Transsexual) (No2) [2003] Fam CA 94.
‘man’ and ‘woman’) the Court said that it could not be so. Given that the terms had not been defined in the Act, the Court claimed therefore that it had a duty to interpret these terms in relation to ‘contemporary’, ‘normal’ and ‘everyday’ meanings. Furthermore, the Court did not see any use in the argument that marriage is a concept whose meaning is fixed in time:

We think it plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot in our view, be correctly said to be one that is ever frozen in time … There is no historical justification to support Mr Burnmester’s contention that the meaning of marriage should be understood by reference to a particular point in time in the past such as 1961. To the contrary, it lends support to the arguments … that the meaning of the term should be given its contemporary meaning in the context of the Marriage Act.

This argument is further strengthened by an examination of the Court’s approach to the interpretation of the constitutional marriage power. The Full Court examined the different approaches taken by the High Court in the interpretation of the marriage power and found that while there were conservative approaches expressed by Brennan J in Fisher v Fisher83 and R v L,84 there were also more liberal approaches such as the view of McHugh J in Re Wakin; exparte McNally where, quite coincidentally, McHugh J uses the very example of same-sex marriage to argue for an expansive approach to the constitutional interpretation of the marriage power:

in 1901 ‘marriage’ was seen as meaning a voluntary union of life between one man and one woman to the exclusion of all others. If that level of abstraction was now accepted, it would deny the parliament of the Commonwealth power to legislate for same sex marriages, although arguably marriage now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.85

The Full Court accepted that the constitutional power of marriage should be given a broader interpretation:

[I]t seems to us that we should not in this case adopt the narrow interpretation of marriage … it seems to be inconsistent with the approach of the High Court to the interpretation of other heads of Commonwealth power to place marriage in a special category, frozen

85 McHugh in Re Wakin; exparte McNally (1999) 198 CLR 511, Re Kevin no 2 para 96.
in time to 1901. We therefore approach the matter on the basis that it is
within the power of parliament to regulate marriages in Australia that
are outside the monogamistic Christian tradition.86

In the above statement, we see not only approval for a broad legal interpretation
of what constitutes marriage but also a rejection of the idea that marriage is to
be considered primarily as a Christian institution. The Court said that, while
there has been an undoubted relationship between Christianity and marriage,
the relationship in contemporary law is such that we cannot see marriage only
in a religious context. The Court points out that it is the role of the State rather
than the Church that is paramount in the legal regulation of marriage. One
can get married without the church, for example, but not without the state.
Furthermore, it is accepted as legitimate that the state regulates marriage in
ways that have over the years redefined the institution. As discussed elsewhere,
the status of women in marriage has been radically altered by legal reforms
such as the recognition of women’s economic capacity and their human rights
against violence and rape. The state has similarly altered the idea of marriage as
a life-long relationship by facilitating divorce, and has removed the privileged
position of marriage by legitimating de facto relationships and children born
out of wedlock.

The Court also considered and rejected the idea that procreation was the
underpinning of modern marriage. In the first of the Re Kevin87 cases the trial
judge accepted that there is a general sense in which marriage is connected to
the generation of children, but he was prepared to accept the different ways
that one could do this in a modern society. He was prepared to accept, for
example, that the generation of children was not limited to the traditional
model of biological parents conceiving and giving birth without the assistance
of reproductive technologies, adoption and surrogacy agreements. In fact,
Jennifer and Kevin were testimony to this fact, as they were bringing up
children. Justice Chisholm stated:

Given that marriage is a social and legal institution which includes
people who are infertile or by reason of illness or otherwise are unable to
engage in genital penetrative intercourse, it seems to me odd, rather than
self evident, to treat capacity for genital intercourse as ‘the essential’
role of a woman (or man) in marriage.88

In Re Kevin No 2 the Full Court said:

We accept as did the trial Judge, that marriage has a particular status.
Like the trial Judge, we reject the argument that one of the principal

86 Re Kevin (Validity of Marriage of Transsexual) (No 2) [2203] Fam CA 94 para 99–100.
87 Re Kevin (Validity of Marriage of Transsexual) [2001] Fam CA 1074.
88 Re Kevin (Validity of Marriage of Transsexual) [2001] Fam CA 1074 para 95.
purposes of marriage is procreation. Many people procreate outside of marriage and many people who are married neither procreate, nor contemplate doing so. A significant number of married persons cannot procreate either at the time of marriage or subsequently — an obvious example being a post-menopausal woman. Similarly, it is inappropriate and incorrect to suggest that consummation is in any way a requirement to the creation of a valid marriage.89

In its argument, the Family Court also considered the English decision of Corbett v Corbett90 where a marriage between a male to female transsexual and a male did not receive legal validation. Whilst the Corbett case was finally overwritten by legislation in the UK in 2004,91 at the time of the Re Kevin decision it was still the authoritative case in the UK concerning transsexual marriage and the Attorney General in Re Kevin had been adamant that it should be followed here in Australia.92

Justice Ormrod in the Corbett case said that sex is determined at birth according to genitalia, gonads and chromosomes. The construction of an artificial vagina through surgery and the growth of breasts as a result of hormone treatment could not alter one’s ‘true sex’. For Ormrod J, marriage must be dependent upon one’s ‘true sex’ because it is only then that the true function of marriage, procreation, can be realised. In this way Justice Ormond is not only centralising sexual identity in marriage but also heterosexual sexual intercourse, because it alone can lead to conception and birth. It is worth quoting his reasoning at length to show precisely how he arrives at this position:

[S]ex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has of course, many other characteristics, for which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two people of opposite sex … since marriage is essentially a relationship between a man and a woman, the validity of the marriage in this case depends, in my judgement, on whether the respondent is or

89 Re Kevin (Validity of Marriage of Transsexual) (No 2) [2203] Fam CA 94 para 153.
90 Corbett v Corbett (otherwise Ashley) [1970] 2 All ER 33.
91 The Corbett case received affirmation in Belling v Belling [2001] EWCA Civ 1140, however, both cases were subsequently overridden by the passing of the Gender Recognition Act UK 2004, which was passed as a response to the decision by the European Court of Human Rights in Christine Goodwin and I v United Kingdom (28957/1995).
92 Its status in Australian law had up to that point been equivocal. Andrew Neville Sharp has described the Corbett decision as an undercurrent in Australian law. ‘The Transsexual Marriage: Law’s Contradictory Desires’ (1997) 7 Australasian Gay and Lesbian Law Journal 4.
is not a woman … the question then becomes what is meant by ‘woman’ in the context of a marriage, for I am not concerned to determine the ‘legal sex’ of the respondent at large. Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgement, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is capable of performing the essential role of woman in marriage.93

Justice Ormond here not only argues that one’s sex is determined permanently at birth, but also that marriage relies upon the heterosexual sex act for its legitimacy, as that act alone has the potential to lead to procreation. The Court thus spent a considerable period of time establishing whether the couple had had sex, and what the nature of the sexual act had been between them. The Court was concerned to establish not only whether penetration had occurred but also whether there had been orgasm. But the Family Court was not convinced by the reasoning in Corbett.

**Sex and Marriage and Love**

In both the first and the second Re Kevin cases, the Family Court rejected Corbett and its essentialising of sexual identity and the capacity for sexual intercourse and procreation. In fact, Justice Chisholm was critical of Justice Ormrod’s approach in the case, saying that in his opinion it presents a ‘remarkable focus on the mechanics of genital sexual activity’.94 He goes on to question the approach more specifically and asks:

‘[W]hat is the essential role of a woman in marriage’? Does it require a capacity for sexual activities? If so, precisely which activities? Is a woman who is unable to have genital intercourse because of illness or disability unable to perform her ‘essential role’? Further, why should it be assumed that ‘the essential role of a woman’ in marriage is concerned merely with matters of sex and biological sexual constitution?

He quotes with approval Gordon Samuels’s criticism of Justice Ormrod’s approach:

[T]here is no reason to suppose that she could not provide the companionship and support which one spouse ordinarily renders to the other. She could not conceive and bear children. But it is not the law that marriage is not consummated unless children are procreated.

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93 Ormond J in Corbett v Corbett (otherwise Ashley) [1970] 2 All ER 33.
94 Re Kevin (Validity of Marriage of Transsexual) [2001] Fam CA 1074 para 94.
or that procreation of children is the principal end of marriage. Hence the female spouse’s ability or willingness to produce children is not a necessary incident of a valid marriage.95

Samuels’ reasoning was similarly quoted with approval by the Full Court in the second Re Kevin case, where the Court said that it represented the modern approach to marriage.96

In rejecting Corbett, the Family Court in Re Kevin argued that procreation and sex are only aspects of marriage and are not necessarily the defining characteristics of the relationship. The Court claimed that there has been a considerable shift in the community away from ‘purely sexual aspects of marriage in the direction of defining it in terms of companionship’.97 This is evident in the FLA reforms discussed earlier.

The Full Court also draws upon the R v L decision by the High Court and quotes with approval Mason CJ Deane and Toohey JJ’s position which similarly disengages marriage from sex:

[W]hatever the scope of the power of the parliament to make laws with respect to marriage, it is apparent that the Commonwealth Act does not attempt comprehensively to regulate the rights and obligations to consent to sexual intercourse by a party to a marriage. Refusal to consummate a marriage is no longer a ground for dissolution. In one of the early decisions on the Commonwealth Act, the Family Court accepted that sexual intercourse between the parties to a marriage may have ceased without the marriage having broken down irretrievably.98

Re Kevin therefore represents a significant statement by an Australian court in relation to the significance of sexual activity and its (dis)connection to marriage. But what does it say about love?

Re Kevin is an important case for the legal recognition of love in marriage, not because of its assertions but because of its silences. The case told us that marriage does not have to be about procreation and it does not have to be about having sex. It told us that marriage can have multiple meanings. The Court acknowledged that marriage varies according to age (menopausal women unable to procreate, for example), and to disposition (not wishing to procreate, for example). In all of these ways, the Court removed traditional meanings of marriage and left a silence around its meaning, a silence which, given the strength of the love rhetoric that exists in other discourses of marriage, can be readily implied here.

96 Re Kevin (Validity of Marriage of Transsexual) (No 2) [2203] Fam CA 94 78128.
97 Re Kevin (Validity of Marriage of Transsexual) (No 2) [2203] Fam CA 94 para 38.
98 Mason et al R v L quoted in Re Kevin (Validity of Marriage of Transsexual) (No 2) [2203] Fam CA 94 para 294.
Conclusion

There has been a shift in the law in relation to sex and marriage. Old legal principles clearly asserted that sex is an essential part of marriage. In describing sex, judges have used phrases such as ‘the society of the wife’99 or, more inclusively, ‘mutual society’.100 However, when it comes to describing the importance of sex in marriage judges have said that it is a ‘marital duty inseparable from it’,101 ‘the essence of the marriage relationship’,102 and a ‘duty that belongs to the very institution of marriage’.103 In one instance, a Court described a situation where there was no sexual intercourse as a relationship in which a husband would be ‘a husband in name only’.104 These decisions imply that sexual intercourse not only defines marriage but also the very identity of ‘husband’. When we take these views alongside the marital rape immunity, the only reading of the old law that makes sense is that a husband had an unlimited right to have sex with his wife. The law enforced the power of men and the subordination of women, and sex was simply one expression of that reality.105

But these principles have been beaten back by more recent cases. The decision of R v L unequivocally removed the right of a husband to have sex at his pleasure and Re Kevin asserted that neither sex (identity and intercourse), nor procreation form the essential part of modern Australian marriage. To some extent, these cases reflect the changes that have occurred in society to the institution of sex. As discussed in the introduction, sex has come to be seen as a legitimate activity engaged in for pleasure. It is disconnected from marriage and from procreation, and forms its own distinct narrative.106 But where is the love? So far I have argued that there is both a distinction and a connection between love and sex and, in turn, marriage. The relationship between love and sex has undergone various permutations. In Ancient Greece, sex could be an expression of love, but love was primarily seen as the attainment of knowledge and goodness. In contrast, Christianity saw sex as largely negative, barely tolerated even in marriage and then only for procreation. Courtly love and romantic love legitimated sexual pleasure per se, a project that (despite its problems) reached its fruition with the sexual revolution of the 1960s. The link between marriage and procreation inevitably makes sex an essential part of marriage. This connection is still

99 Birmingham Southern Railway Co v Lintner (1904) 141 ALA 420.
100 Bartlett v Bartlett (1933) 50 CLR 23.
102 Bartlett v Bartlett (1933) 50 CLR 23.
103 Forster v Forster (1790) 1 Hag Con 144.
104 Synge v Synge [1900–03] All ER Rep 461.
105 See Kathryn MacKinnon, discussed earlier.
106 It can also be argued that, as a result of the sexual revolution and the gay liberation movements, sex has become disconnected from gender and sexuality.
Looking for Love in the Legal Discourse of Marriage

strong but, as we have seen in legal judgements considered in this chapter, mutual sexual pleasure, rather than the mere act of copulation has come, over time, to be seen as an essential feature of a successful marriage. Sex has been transformed from a duty of marriage undergone for the sake of procreation and as a service of the wife to the husband, to something which is negotiated and consensual, at the heart of which lies, to use Justice Brennan's words, ‘connubial love’. These cases are not enough to assert that sex is no longer a part of marriage, but rather that it alone cannot be so central. Sex can be linked to procreation, to consent, to personal satisfaction, but Justice Brennan also links it to love, and this is important for the central argument of the book.

Love is reflected in the new discourse of sex and marriage in a number of explicit and implicit ways. Above we saw that love is explicitly mentioned in the two cases of *R v L* and *Bartlett v Bartlett*. These cases reflect the romantic discourse that sex is an expression of love; as love is a mutual feeling so too must sex be mutual and consensual and pleasurable. It can be argued that love also emerges implicitly in the *Re Kevin* case. By rejecting some traditional meanings of marriage this case left a silence about the meaning of marriage. Given the strength of the rhetoric of romantic love in the popular discourse of marriage documented earlier in the book, it is a legitimate conclusion that *Re Kevin* left open the idea that marriage is about love more than anything else.

The introduction of love to both marriage and sex would suggest that a liberating and more equal relationship between men and women is now the model of marriage before us. However, more legal evidence is needed before we can say that sex in marriage has become imbued with the ideology of love and is seen as an expression of love, delivering mutual satisfaction, negotiated under equal conditions. The two cases of *R v L* and *Re Kevin* discussed in this chapter certainly come close to asserting this to be the case. Their history and context, however, make one cautious. Before jumping to this conclusion one must also remember the feminist critique of love and the oppressive reading of love that emerges from it. We need to be cognisant of the fact that the removal of sex and insertion of love in the legal discourse of marriage might not necessarily have the desired effect, it may simply be a new form of oppression.

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107 This is especially the case in the same-sex marriage debates.
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