THREE PROBLEMS WITH SEXUAL ASSAULT LAW*

(*with possible solutions)

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1. The *Actus Reus* Problem

2. The *Mens Rea* Problem

3. The Credibility Problem

1. THE *ACTUS REUS* PROBLEM

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Sexual assault's *actus reus* problem was laid bare by the spirited disagreement between the majority and the minority in the recent case of *Kirkpatrick* 2022 SCC 33. A did not use a condom after C explicitly told him she would not have sex without it. C said she believed he used one, only realized afterwards he did not.

Does A's failure to use a condom, despite C's conditioning sex on its use, amount to sexual assault? If so, why?

TWO PATHWAYS TO CONVICTION

There are two explanations as to why the situation in *Kirkpatrick* amounts to non-consent:

One is based on the definition of consent in 273.1 as **voluntary** agreement to the sexual activity in question. On this view, where C places a condition on her agreement to sexual activity and that condition is not met, she does not consent. This was the view taken by the majority of the SCC in *Kirkpatrick**:***

"…under our law of consent, all persons are able to decide to consent or not based on whatever grounds are personally meaningful to them. Under s. 273.1, the law has no interest in why a person gave or withheld consent as their thoughts, motivations and desires are private." (at para. 70 per Martin J.)

The second approach follows the reasoning of the majority in *Hutchinson* (2014), a case in which A poked holes in condoms, leading to an unwanted pregnancy for his former partner.

In that case, the majority (following *Cuerrier* and *Mabior*) treated the situation as a fraud that vitiated consent, because it put C at significant risk of serious bodily harm (pregnancy). Voluntariness applies only to the essential features of the sexual activity, not collateral features like birth control. This approach was applied by the minority in *Kirkpatrick.*

A DISTINCTION WITH A DIFFERENCE

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The chosen pathway did not affect the result in *Kirkpatrick* because of the risk of pregnancy.

It would make a difference to the result in cases where C is unable to become pregnant and there is no risk of STI transmission. (e.g. 2 men or an older woman) It could also make a difference where A openly refuses to use a condom.

A policy choice between the risk of overcriminalization (pathway 1) and the risk of disregarding individual autonomy by judging the reasons for refusal (pathway 2)

DOES THE LAW CARE WHY WE SAY YES OR NO?

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In the 1983 reforms to the *Code, s*. 265(3) sets out 4 circumstances in which a submission or lack of resistance is not consent:

- Force
- Threats
- Fraud
- Exercise of authority

Does this mean other circumstances of submission can equal consent?

1992 REFORMS

Consent is defined in s. 273.1 as "**voluntary** agreement to engage in the sexual activity in question." Non-consent still not defined, but a list of situations in which "no consent is obtained" are listed in 273.1(2):

- Incapacity
- Consent discontinued
- Consent by a third party
- Abusing a position of trust, power or authority, etc.

1983 provisions remain unamended.

CASE LAW DEFINITIONS

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R v Ewanchuk (1999): SCC defines non-consent as the "complainant, in her own mind, did not want the touching to take place." Not about an observable lack of voluntary agreement but rather a subjective state of mind. Consent cannot be implied from the relationship or the circumstances.

G.F. (2021): describes the factors in 265(3) as "vitiating" consent, while those in 273.1(2) (except subs.(c)) mean no consent was ever present .

WHY DOES THIS MATTER?

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- There can be a difference between “agreeing” to sexual activity (granting permission) and “wanting” sexual activity (subjectively desiring it). People can agree to things they don’t want.

- Why you agree or disagree can be legally relevant.

- *G.F.* ‘s expansion of the idea of “vitiated consent” is at odds with *Kirkpatrick’s* robust definition of “voluntariness.”

POSSIBLE SOLUTIONS

Amend the *Code* to create one coherent set of provisions, with a definition of consent and non-consent, and a list of examples of involuntariness.

Recognize that people can set any conditions they want on their willingness to engage in sex, and when someone else knowingly disregards those conditions and proceeds, this is a sexual assault.

Reserve the concept of “vitiated” consent for, e.g. imbalances of power short of incapacity; infliction of bodily harm.

DO ANY OF THESE = A LACK OF CONSENT? (Y/N)

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A. C agrees to have sex with A because she is afraid A will beat her up if she does not.

B. C agrees to have sex with A, her husband, because he has told her that he will leave her and kick her out of the house if she does not.

C. C agrees to have sex with A on the basis of his assurance that he is single and has never been married. A is married with 3 kids.

D. C agrees to have sex with A in order to get a role in his movie.

2. THE *MENS REA* PROBLEM

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Sexual assault's *mens rea* problem was brought to the surface by the Supreme Court of Canada's decision in *R v. Morrison* 2019 SCC 15.

Morrison was charged with "internet luring" after a police sting operation. The person that Morrison was chatting with online was an undercover police officer posing as a 14 year old. The Crown said Morrison believed he was speaking with a 14 year old girl; Morrison said he believed he was "role-playing" with an adult.

Trial judge had a reasonable doubt that Morrison believed he was speaking with a child, but convicted because he failed to take reasonable steps to ascertain age.

WHAT DID THE SUPREME COURT DECIDE?

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The SCC said this was an error. Burden was on the Crown to affirmatively prove *mens rea* (Morrison's belief in age) BARD apart from any question of reasonable steps.

Also said in *obiter* this reasoning would apply to other offences, like sexual interference. Some courts have followed this for other offences against children, and sexual assault generally:

- *Carbone* 2020 ONCA 394; *HW* 2022 ONCA 15

Others have limited it to luring/police stings:

- *Angel* 2019 BCCA 449; *Jerace* 2021 BCCA 94

WHY IS THIS SUCH A PROBLEM?

Especially in cases of online communication, proving actual knowledge or willful blindness is not easy (recklessness is not enough for the sting offence).

The real problem is that it reads the reasonable steps provision out of existence.

If the Crown proves that A believed or knew he was communicating with a child, then A will be guilty. If the Crown fails to prove this, A is acquitted.
So how do we ever get to reasonable steps?

The same thing would be true for knowing or being reckless as to the fact that you are having sex with a child, or that an adult C has not communicated consent, if the reasoning is extended.
This was not the intention of Parliament in including the reasonable steps requirement for all of these offences.

IS THERE A SOLUTION?

Go back to first principles, set out in *Pappajohn* (1980): Mistake, although a denial of *mens rea*, is not properly before the court in every sexual assault case – better seen as a defence that needs an air of reality.

Mens rea flows from the *actus reus* – if C did not communicate consent, or is underage, can conclude A knows that, in the absence of A disputing that knowledge.

Air of reality must exist for both the belief and the reasonable steps: *Barton* (2019).

Limit *Morrison* to the sting context where no child involved.

A, 41, IS CHARGED WITH SEXUAL INTERFERENCE OF C, 13. A SHOULD BE CONVICTED IF:

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A. A was aware of a risk that C was under 16 but proceeded anyway.
B. A suspected that C was under 16, but chose not to inquire.
C. A failed to take all reasonable steps to confirm that C was old enough to legally consent
D. A or B is sufficient.
E. Any of the above are sufficient.

3. THE CREDIBILITY PROBLEM

Trial Judges have been repeatedly warned by appeal courts to avoid reasoning that is tainted by discredited myths and stereotypes about sexual assault.

Myths and stereotypes were reflected in:
substantive law of rape (resistance requirement; marital rape exemption)
rules of evidence (recent complaint; corroboration)
prejudicial reasoning (“asking for it” by dress, drinking, etc.)

CONSENT AND CREDIBILITY

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R v. Ewanchuk (1999):

While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. […] The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence *including any ambiguous conduct.* The question at this stage is purely one of credibility, and *whether the totality of the complainant's conduct is consistent with her claim of non-consent*.

WHAT WORDS AND ACTS ARE INCONSISTENT WITH NON-CONSENT?

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How can judges use reason and common sense to draw inferences and make findings when this may be tainted by stereotypical thinking?

You can check lists of judicially recognized stereotypes, but beyond this it gets more challenging

Can you take judicial notice of how trauma may impact recall, behaviour, communication, etc?

EVIDENCE, NOT GENERALIZATIONS

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Findings of fact need to be based in the evidence – common sense isn't free floating, and it isn't based on generalizations about what must have happened based on who is before the court, but rather what the trier of fact finds did happen based on the evidence they accept.

The trier of fact needs to be asking what assumptions form the basis of a common sense inference.

This does not fully solve the problem of what inferences can safely be drawn from the facts.

DRAWING PERMISSIBLE INFERENCES

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Ewanchuk was a case in which A did not testify. Only had C's evidence. If you accept her account of her state of mind, it meets the definition of a sexual assault – she did not want to engage in the sexual activity.

Should not be rejecting her evidence on the basis of an absence of expected resistance or objection – consent is voluntary agreement, not a lack of resistance or objection. *What did she actually do or say that indicates voluntary agreement to engage in the sexual activity in question?*

CAN YOU RELY ON THE FOLLOWING TO CONTRADICT A CLAIM OF NON-CONSENT?

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1. C was wearing new, matching underwear when she went to meet A.
2. C went up to A's hotel room even though she claimed she felt uneasy and did not want to.
3. C didn't try to leave the room when A got up to find a condom.
4. C didn't call for help even though other people were in the adjoining room.
5. C went to her friend's birthday party after the alleged sexual assault.

WHAT ABOUT THE FOLLOWING?

6. A texted C to come on over for a “quick hookup” and C arrived at A’s home an hour later.
7. C took off her clothes and asked A to lock the door to the adjoining room.
8. C found a condom and put it on A.
9. C responded to A’s text the next morning saying he had a great time with “OK, thx” and a photo of herself in pyjamas drinking coffee in bed.

FURTHER READING

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Grant, Isabel and Janine Benedet. “The Meaning of Capacity and Consent in Sexual Assault: *R v. G.F.* (2022) 70 *Criminal Law Quarterly* 78-112.

Grant, Isabel and Janine Benedet. “Unreasonable Steps: Trying to Make Sense of *R v Morrison*” (2019) 67 *Criminal Law Quarterly* 14-33.

Dufraimont, Lisa. “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44 Queen's LJ 316-354.

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