

MISTAKE OF FACT: THE LEGACY OF *PAPPAJOHAN V. THE QUEEN*

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The Supreme Court of Canada decision in Pappajohn v. The Queen acknowledged, in relation to a charge of rape, the defence of "honest belief in consent", and it endorsed the subjective approach to mens rea by holding that an honest belief need not be reasonable. However, the case also dealt with the evidential question of when the trial judge should have placed the "defence" before the jury. Although the crime of rape has been abolished, the fundamental issues raised by the case still remain. This article re-examines the judgments rendered in Pappajohn, and the cases which have been decided subsequently, to determine how the evidential question has been resolved. It suggests that the test applied and explained in Pappajohn to determine when the defence should be left to the jury is being so rigidly applied that we are losing sight of the principles governing the relationship between mens rea and mistake of fact—principles which were also explained and approved in Pappajohn. Finally, in light of these "principles" and the functional division between judge and jury, the article suggests that we re-examine the evidentiary question of when the defence should be left to the trier of fact.

La Cour suprême du Canada dans son jugement de l'affaire Pappajohn c. La Reine a reconnu le bien-fondé, pour ce qui est de l'accusation de viol, de la plaidoirie de "croyance sincère qu'il y a eu consentement" et a sanctionné la façon subjective d'interpréter mens rea en décidant qu'une croyance sincère n'a pas besoin d'être raisonnable. Il s'agissait aussi cependant dans cette affaire d'une question de preuve, soit la question de savoir quand le juge doit présenter au jury cette plaidoirie. Quoique le crime de viol ait été aboli, les questions fondamentales soulevées par l'affaire sont toujours valables. L'auteur de l'article examine à nouveau les jugements de l'affaire Pappajohn et des affaires jugées depuis afin de voir comment la question de preuve a été résolue. Il avance que le critère appliqué et expliqué dans le jugement de l'affaire Pappajohn et qui permet de décider quand cette plaidoirie doit être présentée au jury est appliqué de façon tellement stricte qu'on en perd de vue les principes de base des rapports entre mens rea et erreur de fait—principes qui eux aussi ont été expliqués et approuvés dans l'affaire Pappajohn. En conclusion, à la lumière de ces principes et de la division qui existe entre les fonctions du juge et du jury, l'auteur suggère qu'il est temps de réexaminer la question de savoir quand cette plaidoirie doit être présentée au jury des faits.

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Introduction

In May of 1980, the Supreme Court of Canada rendered its decision in the celebrated case of *Pappajohn v. The Queen*.¹ George Pappajohn, a Vancouver businessman, had been charged with the rape of the woman he had engaged to sell his Vancouver home. He was tried before a judge and jury and convicted. The British Columbia Court of Appeal upheld the conviction. His appeal to the Supreme Court of Canada was dismissed.

On August 4, 1976, the accused and the complainant had met for lunch to discuss the sale of his property. Their luncheon meeting extended well into the afternoon with each party consuming a fair amount of alcohol. They left the restaurant around 4:00 p.m. to view the house the accused had listed for sale. The accused drove the complainant in her car, stopping along the way to visit one of his friends. By the time they arrived at his house, it was close to 5:00 p.m.

At the trial, the testimony of the complainant and accused was, up to this point, consistent and corroborative of each other. However, their recollections of the events which followed were markedly in contrast. The victim testified that immediately upon entering the house the accused pushed her down the hall and into a bedroom, where he removed her clothes and repeatedly raped her. In the last hour of her ordeal, she was bound and gagged but managed to escape. In stark contrast was the testimony of the accused. As McIntyre J. put it, "[h]e spoke of an amorous interlude involving no more than a bit of coy objection on her part and several acts of sexual intercourse with her consent".² The accused acknowledged that he had bound the complainant's wrists and had tied a bow-tie around her neck but that he had done so as symbolic bondage in order to stimulate sexual climax. He did indicate, however, that at this point the complainant's behaviour changed. She became hysterical and began to cry. He left the room to get a cigarette and when he returned, she had gone.

Whatever had transpired at the accused's residence, the evidence was clear that at approximately 7:30 p.m., the complainant, still naked, arrived at the door of a nearby house. The priest who lived there testified that the woman appeared to be in fear and under emotional stress. She had a man's bow-tie around her neck and her hands were bound tightly behind her back.

The foregoing summary is a very simplified version of the facts. The detailed summaries found in the judgments of the Supreme Court indicate

¹ [1980] 2 S.C.R. 120, (1980), 111 D.L.R. (3d) 1, [1980] 4 W.W.R. 387, affirming *R. v. Pappajohn*, [1979] 1 W.W.R. 562, (1978), 45 C.C.C. (2d) 67, (1978), 5 C.R. (3d) 193 (B.C.C.A.).

² *Ibid.*, at pp. 124 (S.C.R.), 28 (D.L.R.), 417 (W.W.R.).

that, while there was a major conflict between the accused and the complainant in their recall of the events of the evening, there was also a number of areas of common agreement bound up within each version of the facts. For example, although both agreed that the accused had removed the complainant's clothes and hung her blouse in the closet, the complainant testified that he had done so against her protests whereas the accused testified that the complainant assisted him in the removal of her clothes. Such was the nature of their testimony. Any areas of consensus were surrounded by contrasting perceptions as to the purpose of their respective actions. Thus, although not totally contradictory, their testimony appeared to be, as McIntyre J. stated, "diametrically opposed" on the vital issue of consent.³

At the trial, the learned judge instructed the jury that its job was essentially to choose between the two versions of the facts and decide whether there was or was not consent. Despite the strenuous arguments of defence counsel, he declined to instruct the jury to consider whether the accused had mistakenly believed the complainant had consented because he was of the opinion that there was not "in the evidence any sufficient basis of fact to leave the defence of mistake of fact to this jury".⁴

The accused appealed to the British Columbia Court of Appeal. Farris C.J.B.C. and Craig J.A. agreed with the trial judge that the only issue emerging from the evidence was a simple one of consent or no consent. Lambert J.A., in dissent, argued that the defence assertion of mistaken belief in consent should have been left to the jury, but with the direction that an honest mistaken belief must be reasonably held.

An appeal was taken to the Supreme Court of Canada on the ground that the plea of mistake of fact should have been left to the jury. However, due to the nature of the dissent in the court below and the fact that the Crown had argued that the *mens rea* for rape did not extend to the issue of consent, the court could not restrict its judgment to the evidentiary question alone and found it necessary to consider some of the fundamental issues surrounding *mens rea* and mistake of fact.

The majority of the court (McIntyre, Pigeon, Beetz and Chouinard JJ.) held that the trial judge was correct in not instructing the jury on the defence of mistaken belief in consent. Dickson J. in dissent, Estey J. concurring, would have allowed the appeal on the basis that the trial judge erred in not instructing the jury on the possibility of a mistaken belief in consent in the "pre-bondage" phase of the encounter.

³ *Ibid.*, at pp. 132 (S.C.R.), 34 (D.L.R.), 423 (W.W.R.).

⁴ *Ibid.*, quoted in the judgment of McIntyre J., at pp. 126 (S.C.R.), 29 (D.L.R.), 418 (W.W.R.).

On the substantive issues of *mens rea* and mistake of fact, however, the judgment of Dickson J. carried the majority. At the conclusion of his judgment, McIntyre J. referred to the dissenting judgment and remarked:⁵

... while it is apparent that I am unable to accept his [Dickson J.'s] view on the evidentiary question, I am in agreement with that part of his judgment dealing with the availability as a defence to a charge of rape in Canada of what is generally termed the defence of mistake of fact.

In the result, six out of the seven judges held that the defence of honest belief in consent was available to a defendant charged with rape and that no principle of law required the mistake to be based on reasonable grounds. Martland J., in a separate majority judgment, suggested that the question of whether a defendant needed reasonable grounds for a mistaken belief remained unsettled but, as it was not an issue before the court, it fell to be decided in a later case.

On its face, the *Pappajohn* decision appeared to be a defendant's judgment. Although the court upheld the conviction of the accused it gave express recognition to the plea of honest belief in consent, however unreasonable, as a possible defence to a charge of rape. This latter aspect of the decision raised the ire of many groups across the country who questioned the capacity of the rape provisions to protect the victims and punish the offenders. It was argued that *Pappajohn* would do nothing to aid the enforcement of rape laws but was, on the contrary, tantamount to an invitation to would-be-rapists.

Without commenting on the validity of these claims, it is fair to say that, despite all appearances resulting from the court's treatment of the substantive issues, the crux of the matter is that the court constructed a considerable threshold with respect to having the defence of mistaken belief in consent placed before the jury. More specifically, the concluding comments of the majority judgment appeared to place a heavy evidential burden on an accused and his counsel. Subsequent judicial interpretation has only served to maintain this threshold.

It must be remembered that, in the main, the Supreme Court was concerned with an evidential question: whether the evidence was sufficient to justify charging the jury on mistake of fact. For this reason alone one would expect that lower courts would not be too rigid in their application of the *Pappajohn* decision, but rather, would consider the statements of McIntyre J. in light of the factual circumstances in which they were made. Recent Court of Appeal decisions would indicate, however, that a rigid application of the McIntyre dictum is an approach that is prevalent among some judges.

The purpose of this article is, therefore, to briefly re-examine, in the context of the charge of rape, the fundamental principles of *mens rea* and

⁵ *Ibid.*, at pp. 134 (S.C.R.), 35 (D.L.R.), 425 (W.W.R.).

mistake of fact, to examine how these concepts interrelate, and finally, in light of these principles, to address the central question of when the defence of mistaken belief in consent should be left to the consideration of the trier of fact. Although the examination proceeds in the context of the now abolished offence of rape,⁶ the principles set forth concern a defence which hitherto has been applicable to many offences and will continue, it is submitted, undiminished in the context of the new sexual assault provisions of the Criminal Code.⁷

I. *Mens rea*

Section 143 of the Criminal Code (now repealed) defined the offence of rape as follows:

143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,

(a) without her consent, or

(b) with her consent if the consent

(i) is extorted by threats or fear of bodily harm,

(ii) is obtained by personating her husband, or

(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

There are two views on the relationship between paragraphs (a) and (b). The predominant view is that they did not define different offences with different physical and mental elements, but that paragraph (b) was intended only to codify the common law principle⁸ that a woman who *submitted* to sexual intercourse under threats or fraud was not consenting within the meaning of the definition of the crime. Certainly, Canadian courts have taken the view that a *submission* resulting from threats falls into the category of "non consensual intercourse".⁹ In this context paragraph (b) was seen, not as a separate charging section, but rather as an interpretative provision which served to underline the requirement that a woman's consent must be a true, genuine and voluntary consent. Dickson J. in *Pappajohn* apparently acceded to this "global" approach to section 143. He pointed out that "for all practical purposes" the statutory defini-

⁶ Criminal Law Amendment Act, S.C. 1980-81-82-83, c.125, s.6. Analysis of the rape offence is a necessary aspect of the paper because the judicial consideration of the issues discussed herein was given in rape cases.

⁷ R.S.C. 1970, c.C-34, as amended, ss.246.1 to 246.8 inclusive. For a detailed discussion of the elements of the sexual assault provisions, see Christine Boyle, *Sexual Assault* (1984). As Boyle notes mistaken belief in consent will continue to be a predominant line of defence.

⁸ *R. v. Day* (1841), 9 Car & P. 722, 173 E.R. 1026.

⁹ E.g., *R. v. Firkins* (1977), 80 D.L.R. (3d) 63, 37 C.C.C. (2d) 227, 39 C.R.N.S. 178 (B.C.C.A.); *R. v. Hindle*, [1978] 2 W.W.R. 712, (1978), 39 C.C.C. (2d) 529 (B.C.C.A.); *R. v. Martin* (1980), 53 C.C.C. (2d) 425 (Ont. C.A.).

tion essentially codified the common law position.¹⁰ In the Manitoba Court of Appeal in *R. v. Sansregret*¹¹ Philp J.A., in a dissenting judgment, strongly adhered to Dickson J.'s opinion. However, Huband J.A., in a concurring majority judgment, took the second of the two views on the relation between the paragraphs.¹² He thought that they encompassed distinct and separate physical and mental elements and, on appeal, that view was endorsed by McIntyre J. in the Supreme Court of Canada.¹³

The former of these two judicial approaches to section 143(b) is now reflected in the definition of consent in the new assault provisions of the Criminal Code, in that the definition excludes "submissions" obtained by the application of force, or threats or fear of the application of force, fraud, or the exercise of authority.¹⁴

With that qualification in mind, one can proceed to examine the elements of the offence of rape.¹⁵ It is readily apparent that the Crown must prove, as part of the *actus reus*, that the accused (i) had sexual intercourse, (ii) with a female who was not his wife, (iii) without her genuine consent. In addition, the Crown must prove that the accused had the requisite mental element or *mens rea* for the offence. On this point, both Crown and defence were in agreement in *Pappajohn*. Rape was clearly a "*mens rea* offence",¹⁶ but in defining the precise nature of the *mens rea*, the parties differed. In examining this question, Dickson J. began with an analysis of the basic principles of criminal liability and in doing so, elaborated on the groundwork he had laid in his dissenting judgment in *Leary v. The Queen*.¹⁷

¹⁰ *Supra*, footnote 1, at pp. 140 (S.C.R.), 8 (D.L.R.), 395 (W.W.R.).

¹¹ [1984] 1 W.W.R. 720, at pp. 739-740, (1983), 10 C.C.C. (3d) 164, at pp. 182-183, 37 C.R. (3d) 45, at pp. 65-66 (Man. C.A.).

¹² *Ibid.*, at pp. 728 (W.W.R.), 172 (C.C.C.), 54 (C.R.).

¹³ [1985] 3 W.W.R. 701, at p. 710 (S.C.C.).

¹⁴ Criminal Code, s.244(3). The section states:

For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of:

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

¹⁵ In light of the new sexual assault provisions of the Criminal Code, (ss. 246.1-246.8), the comments with respect to the required proof apply only to prosecutions under the former s.143. The transitional provision of the Amending Act (cited in footnote 7 above) is s.33. It provides that offences committed prior to January 4, 1983 will be dealt with under the former rape provisions.

¹⁶ *The Queen v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, (1978), 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353.

¹⁷ [1978] 1 S.C.R. 29, (1977), 74 D.L.R. (3d) 103, [1977] 2 W.W.R. 628.

The issue in *Leary* was whether drunkenness could afford a defence to a charge of rape. The majority held that it would not because rape was a crime of "general" rather than "specific" intent. Dickson J. (Laskin C.J.C. and Spence J. concurring), was of the opinion that the distinction made by the majority was an artificial one. The issue before the court called for "consideration of basic criminal law principles of *mens rea*" ¹⁸ In *Pappajohn*, Dickson J. similarly remarked that "[i]n the main, the Court is here concerned with issues of *mens rea* and mistake of fact". ¹⁹

In both of these cases Dickson J. built his analysis on a foundation constructed from the fundamental principles of criminal liability. In *Pappajohn* he reviewed a number of authorities in an attempt to distill some of these principles. With respect to *mens rea*, he drew the following conclusions. He indicated, first of all, that a presumption existed making *mens rea* an essential ingredient in every statutory offence unless Parliament indicated otherwise by express language or by necessary implication. Secondly, the *mens rea* element applied to all elements of the *actus reus*. Thirdly, the precise nature of the *mens rea* required would vary with the definition of the crime. It could be expressly spelled out or it could be implied. Finally, the Crown was required to prove the existence of the *mens rea* in addition to proving the *actus reus*, although this could be established by inference from the nature of the act committed. This latter proposition may appear to be trite law but Dickson J. wanted to emphasize the necessity for proof. As he stated in *Leary*:²⁰

It will not do simply to say that because the accused committed the physical act and the woman did not consent, he must be taken to have intended to have intercourse without consent.

In *Leary*, Dickson J. eloquently discussed the significance of the *mens rea* requirement in our criminal law:²¹

The notion that a court should not find a person guilty of an offence against the criminal law unless he has a blameworthy state of mind is common to all civilized penal systems. It is founded upon respect for the person and for the freedom of the human will. A person is accountable for what he wills. When, in the exercise of the power of choice, a member of society chooses to engage in harmful or otherwise undesirable conduct proscribed by the criminal law, he must accept the sanctions which that law has provided for the purpose of discouraging such conduct. Justice demands no less. But to be criminal, the wrongdoing must have been consciously committed. To subject the offender to punishment, a mental element as well as a physical element is an essential concomitant of the crime.

In *Pappajohn* the question remained: what was the *mens rea* for rape? The Crown had argued that the mental element for rape was simply

¹⁸ *Ibid.*, at pp. 32 (S.C.R.), 114 (D.L.R.), 640 (W.W.R.).

¹⁹ *Supra*, footnote 1, at pp. 138 (S.C.R.), 6 (D.L.R.), 393 (W.W.R.).

²⁰ *Supra*, footnote 17, at pp. 35 (S.C.R.), 116 (D.L.R.), 642-643 (W.W.R.).

²¹ *Ibid.*, at pp. 34 (S.C.R.), 116 (D.L.R.), 642 (W.W.R.).

knowledge of, or recklessness as to, the act of intercourse. All members of the court rejected this contention. The essence of the crime of rape was the commission, by an accused, of the act of intercourse with a woman who was not his wife *where the woman's consent or genuine consent had been withheld*. As this latter aspect was an essential part of the *actus reus*, the *mens rea* of rape extended to this circumstance as well. *The accused had to be aware of the non-consent*. In defining the *mens rea* for rape, Dickson J. quoted the definition from in his dissent in *Leary*:²²

... the Crown must prove, beyond reasonable doubt, intercourse without consent, together with (a) an intention to force intercourse notwithstanding absence of consent, or (b) a realization that the conduct may lead to non-consensual intercourse and a recklessness or indifference to that consequence ensuing.

This definition, which accords with the position adopted by four Law Lords in *Director of Public Prosecutions v. Morgan*,²³ is, it is submitted, applicable, *mutatis mutandis*, to a charge of sexual assault where the Crown relies on the definition of assault in section 244(1)(a) of the Code.

II. *The Nature of the Mistake of Fact Defence*

The defence of mistake of fact is often misunderstood. Stated simply, it is a positive formulation of the defence of "no *mens rea*". As pointed out above, it is a fundamental principle of our criminal law, that in the absence of contrary language or implication, an accused cannot be convicted of a crime unless it is proven that he had the necessary *mens rea* or guilty mind. Therefore, an accused who acted under a mistake which effectively negated the *mens rea* must be acquitted. Defined, mistake of fact occurs for the purpose of the criminal law, where an accused holds a positive belief in a fact or state of facts which is untrue, but in furtherance of the mistaken belief commits the *actus reus* of an offence. The accused's ignorance of fact will be a defence if it results in an absence of the *mens rea* which is required by the definition of the offence charged.²⁴

It will be seen then, that mistake of fact is not a "defence" in the same sense that provocation, self-defence, duress, and necessity are defences. These latter defences *justify* or *excuse*, either partially or totally, what would otherwise be criminal conduct.²⁵ A mistake of fact which negates

²² *Supra*, footnote 1, at pp. 144 (S.C.R.), 11 (D.L.R.), 399 (W.W.R.).

²³ [1976] A.C. 182, [1975] 2 All E.R. 347 (H.L.), per Lord Cross at pp. 203 (A.C.), 352 (All E.R.), per Lord Hailsham at pp. 209 (A.C.), 357 (All E.R.), per Lord Simon at pp. 218 (A.C.), 365 (All E.R.), per Lord Edmund-Davies at pp. 225 (A.C.), 371 (All E.R.).

²⁴ R. Cross, P.A. Jones, *Introduction to Criminal Law* (9th ed., 1980) p. 57, para. 4.13.

²⁵ See however, the discussion in Cross and Jones, *ibid.*; and see also p. 373, para. 18.1 with respect to duress and necessity. For a discussion of the distinction between

the *mens rea* renders the committed act innocent and thus there never arises any question of exonerating criminal conduct. These points were alluded to by Dickson J. in *Pappajohn*:²⁶

Mistake is a defence, then, where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. *Mistake is a defence though, in the sense that it is raised as an issue by an accused.* The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.

An accused may thus be acquitted, notwithstanding proof of the commission of the prohibited act, because the Crown failed to prove the mental element of the crime. When a mistake of fact defence is raised, the trier of fact is provided with a *reason why* the accused lacked the necessary *mens rea*. An example of this, as discussed by Cross and Jones,²⁷ is where an accused charged with murder argues that he should not be convicted, because he did not intend to kill the victim. The trier of fact might be hard pressed to accept this story unless the accused also provided a reason why he did not intend to kill, such as "I thought the gun was unloaded" or, put in the negative, "I was unaware that the gun was loaded". If the trier of fact had a reasonable doubt as to whether the accused knew the gun was loaded then the accused would have to be acquitted of murder.

In a charge of rape (and now sexual assault), a mistake of fact defence will almost always be framed as a plea of "honest belief in consent". Where a fact or circumstance is not known or misapprehended by the accused leading to a mistaken but honest belief in the consent of the woman, his act is not culpable.²⁸ Assuming no one would be mistaken

justification and excuses, see the decision of the Supreme Court of Canada in *Perka v. The Queen*, [1984] 2 S.C.R. 232, [1984] 6 W.W.R. 289, (1984), 14 C.C.C. (3d) 385, 42 C.R. (3d) 113; annotation by Don Stuart (1984), 42 C.R. (3d) 115. See also D. Stuart, Canadian Criminal Law (1982), p. 376. In *Perka* the court was divided in its analysis of justification and excuse. Dickson C.J.C. labels the mistake of fact defence as an excusing defence; see pp. 246-247 (S.C.R.), 302-303 (W.W.R.), 396-397 (C.C.C.), 128-129 (C.R.). Wilson J. in her concurring judgment placed mistake of fact in the justification category. Furthermore, they did not appear to agree on what the justification category represented. Wilson J. suggests it comprises defences which negate an element of the offence whereas Dickson C.J.C. suggests it comprises situations that "challenge the wrongfulness of an action which technically constitutes a crime", situations where we consider technical crimes "*rightful*"; see pp. 246 (S.C.R.), 302 (W.W.R.), 396 (C.C.C.), 128 (C.R.).

²⁶ *Supra*, footnote 1, at pp. 148 (S.C.R.), 14 (D.L.R.), 402 (W.W.R.). (Emphasis added). As noted in footnote 25, *supra*, Dickson C.J.C. appears to contradict this in *Perka*.

²⁷ Cross and Jones, *op. cit.*, footnote 24, pp. 58-59.

²⁸ *Pappajohn v. The Queen*, *supra*, footnote 1.

as to the act of intercourse or that the person was a woman, the only other mistake that would have negated the *mens rea* in a charge of rape would have been a mistaken belief by the accused that the victim was his wife.²⁹

Dickson J., relying on the article, *Ignorance and Mistake in the Criminal Law*,³⁰ summarized the rationale for the defence of mistake of fact:³¹

Culpability rests upon commission of the offence with knowledge of the facts and circumstances comprising the crime. If according to an accused's belief concerning the facts, his act is criminal, then he intended the offence and can be punished. If, on the other hand, *his act would be innocent*, according to facts as he believed them to be, he does not have the criminal mind and ought not to be punished for this act.

The above quotation also serves to emphasize that not all mistakes will constitute a defence. A mistake, if it is to lead to an acquittal, cannot result in the accused possessing the *mens rea* for another offence.³² If the mistake causes the accused to have the *mens rea* for a lesser offence than the one charged then the mistake will only result in acquittal if the *mens rea* which he possesses is for an offence of a totally different character.³³ That being said, the conceptual problems surrounding the issue of "materiality of the mistake" need not be discussed here as they simply do not arise with a plea of honest belief in consent.³⁴

III. *An Honest and Reasonable Belief*

The argument over whether a mistaken belief had to be based on reasonable grounds has been the subject of debate for many years. This issue was squarely addressed by the House of Lords in *Morgan*, and the Supreme Court of Canada in *Pappajohn*. In both cases it was held that, as a matter of law, an honest but yet unreasonable mistake as to consent should result in an acquittal if the trier of fact believed or had a reasonable doubt as to whether the accused in fact entertained the belief. The crux of the dispute here centered on the question of whether *mens rea* should be determined on a subjective basis or on an objective standard. In answering the questions as they did, both the House of Lords and the Supreme Court endorsed the subjective approach to *mens rea*.

²⁹ In light of the definition of "assault" in s. 244 of the Criminal Code, proof that the victim was not the accused's wife is not necessary in a charge of sexual assault. By virtue of s.246.8 a husband or wife may now be charged with the sexual assault of his/her spouse.

³⁰ E.R. Keedy (1908), 22 Harv. Law Rev. 75, at p. 82.

³¹ *Pappajohn v. The Queen*, *supra*, footnote 1, at pp. 148 (S.C.R.), 14 (D.L.R.), 402 (W.W.R.) (Emphasis added).

³² *R. v. Ladue* (1965), 51 W.W.R. 175, [1965] 4 C.C.C. 264, (1965), 45 C.R. 287 (Y.T.C.A.); *The Queen v. Kundeus*, [1976] 2 S.C.R. 272, (1975), 61 D.L.R. (3d) 145, [1976] 1 W.W.R. 8.

³³ *R. v. Couture* (1976), 33 C.C.C. (2d) 74 (Ont. C.A.).

³⁴ See however, Laskin C.J.C., dissenting in *Kundeus*, *supra*, footnote 32, and Stuart, *op. cit.*, footnote 25, pp. 254-260.

In *Pappajohn*, Dickson J. found support for this position in both authority and principle. With respect to principle, he stated that in *mens rea* offences the trier of fact had to be concerned with the mind of the accused. By requiring an honest belief in consent to be based on reasonable grounds the court would be importing a standard external to the accused, *i.e.*, was it reasonable for the accused to make this mistake? On such a test, the possibility existed that an accused could be convicted of the serious crime of rape for not living up to the standard of the reasonable man, notwithstanding that he actually had an innocent mind.³⁵

With respect to the authorities, Dickson J. faced a much easier situation than that which confronted the House of Lords in *Morgan*. In *Pappajohn*, Dickson J. was merely confirming what had clearly been the predominant approach to this question as far as Canadian courts were concerned.³⁶ In addition, Dickson J.'s position was obviously strengthened by the fact that the House of Lords had clearly endorsed the subjective approach only four years earlier in *Morgan*.

In the words of Don Stuart, both the House of Lords and the Supreme Court viewed the debate on this point as somewhat of a "tempest in a teapot".³⁷ That is, in both *Morgan* and *Pappajohn*, the point was stressed that the existence or non-existence of reasonable grounds for a belief is relevant and powerful evidence to be weighed by the trier of fact in determining whether the belief was in fact honestly held. For this reason, Dickson J. pointed out that while the question was conceptually important to the orderly development of the criminal law, it was unimportant in the realm of practicality because it would be a rare day when a jury would be satisfied as to the existence of an unreasonable belief.³⁸ However, by not requiring the existence of reasonable grounds for a belief *as a matter of law* the courts would leave open the possibility for a jury to so find.

With respect to the requirement that the mistaken belief be "honestly" held, it is useful to refer to the remarks of Lord Fraser in *Morgan*, where he stated:³⁹

³⁵ *Supra*, footnote 1, at pp. 150 (S.C.R.), 16 (D.L.R.), 404 (W.W.R.).

³⁶ *R. v. Rees*, [1956] S.C.R. 640, (1956), 4 D.L.R. (2d) 406, 115 C.C.C. 1; *R. v. Beaver*, [1957] S.C.R. 531, (1957), 118 C.C.C. 129, 26 C.R. 193; *R. v. Davidson* (1971), 3 C.C.C. (2d) 509 (B.C.C.A.); *R. v. Vlecko* (1972), 10 C.C.C. (2d) 139 (Ont. H.C.); *R. v. Kundeus*, *supra*, footnote 32, per Laskin C.J.C.; *R. v. Couture*, *supra*, footnote 32; *R. v. Chow*, [1978] 3 W.W.R. 767, (1978), 41 C.C.C. (2d) 143 (Sask. C.A.).

³⁷ Stuart, *op. cit.*, footnote 25, p. 241.

³⁸ *Supra*, footnote 1, pp. 155-156 (S.C.R.), 20 (D.L.R.), 408-409 (W.W.R.). Such a rare day apparently occurred with the trial judge in *R. v. Sansregret* (1983), 34 C.R. (3d) 162 (Man. C.C.), rev'd in the Manitoba Court of Appeal, *supra*, footnote 11, the reversal upheld in the Supreme Court of Canada, *supra*, footnote 13.

³⁹ *Supra*, footnote 23, at pp. 236-237 (A.C.), 381 (All E.R.).

Strictly speaking, I do not think that a belief, if held at all, can be held otherwise than honestly, but I read that last phrase as a warning to the jury to consider carefully whether the evidence of the defendant's belief was honest.

In a similar vein Lord Simon remarked:⁴⁰

To say that he must show that he believed it "honestly" is tautologous but useful as emphasising a distinction.

Before turning to the question of when the defence is available to an accused, it is appropriate to refer briefly to some of the criticisms leveled at the courts for acknowledging the "honest unreasonable belief" defence. Both *Morgan* and *Pappajohn* touched off an emotional debate over the susceptibility of women to rapists who could now advance "a cock and bull story" of honest belief in consent and thus be acquitted. W.J. Braithwaite, in an article reviewing the Supreme Court's performance in the field of criminal law during the 1979-80 term,⁴¹ criticized Dickson J.'s analysis as being somewhat self-serving. He acknowledges that "doctrinally" the judgment is unassailable,⁴² but that in doctrinally applying the subjective *mens rea* approach to rape it avoided dealing with the central question of whether policy considerations necessitated departure from basic doctrine.⁴³ Toni Pickard takes the matter further. She argues that the acceptance of the honest, but yet unreasonable, belief in consent as a sufficient answer to rape countenances "the doing of a major harm that could have been avoided at no appreciable cost".⁴⁴

Without attempting a detailed analysis of the arguments in favour of an objective standard of *mens rea*, three brief comments might be made in answer to the above. First of all, with due respect for those holding a contrary opinion, Dickson J. fully addressed the policy considerations in his judgment.⁴⁵ Second, many of the criticisms levied at the judgment from a policy perspective appear to be unwarranted. This is exhibited somewhat by the fact that in both *Morgan* and *Pappajohn* the accused rapists were convicted. Third, implicit in many of the criticisms levied against the *Pappajohn* decision is a belief that the criminal law should have a lower standard of proof in a rape or sexual assault case in order that "guilty" people will be convicted. It suggests that an accused who is acquitted where the

⁴⁰ *Ibid.*, at pp. 218 (A.C.), 365 (All E.R.).

⁴¹ Developments in Criminal Law and Procedure: The 1979-80 Term (1981), 2 Sup. Ct. L. Rev. 177.

⁴² *Ibid.*, at p. 184.

⁴³ *Ibid.*

⁴⁴ Toni Pickard, Culpable Mistakes and Rape (1980), 30 U.T.L.J. 75, at p. 77. For a strong attack on Pickard's thesis see Stuart, *op. cit.*, footnote 25, pp. 245-247.

⁴⁵ *Pappajohn v. The Queen*, *supra*, footnote 1, at pp. 154-155 (S.C.R.), 19 (D.L.R.), 407-408 (W.W.R.).

defence of honest belief is raised is getting off on a technicality. An eloquent answer to such a criticism can be found in the comments of Rupert Cross where he was responding to the charge that the *Morgan* decision was unduly legalistic:⁴⁶

As to the charge of legalism, one reason why the maximum punishment for rape is life imprisonment is that the common man considers rapists to be very wicked people. Some one who believes, albeit without reasonable cause, that the woman is consenting may well be stupid and insensitive, but he is not wicked in the sense that the rapist is wicked. If there is a real need for it, let us have a new statutory offence of having sexual intercourse being negligent as to the woman's consent but let us also consider carefully what the maximum punishment should be, and above all let us not call the crime "rape". The offence would differ from rape to the same extent as involuntary manslaughter differs from murder.

Despite the persuasive arguments advanced by authors such as Pickard and Christine Boyle⁴⁷ in favour of a more objective approach to *mens rea*, the relevance of reasonable grounds for a mistaken belief in consent will likely not be reconsidered even in the context of the new sexual assault provisions.⁴⁸ Some measure of support for this can be found in section 244(4) which appears to have given statutory recognition to this aspect of the *Pappajohn* decision. This sub-section states:

Where an accused alleges that he believed that the complainant consented to the conduct that is the subject matter of the charge, a judge, *if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence*, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.^{48a}

As the emphasized portion indicates, however, a trial judge, before charging a jury on the defence of honest belief in consent, must first be

⁴⁶ Rupert Cross, Centenary Reflections on Prince's Case (1975), 91 L.Q.R. 540, at p. 552.

⁴⁷ Boyle, *op. cit.*, footnote 8, pp. 76-88.

⁴⁸ Likewise, the apparent move toward an objective standard of recklessness by the House of Lords in *R. v. Caldwell*, [1982] A.C. 341, [1981] 1 All E.R. 961, will probably fail to gain acceptance in Canada. This is due in part to the express approval of the subjective approach to *mens rea* in *Pappajohn* but also because in *Caldwell* the House of Lords was defining "reckless" in the context of the Criminal Damage Act, 1971, which was held to have revised the law of recklessness. This is not to suggest, however, that objective *mens rea* is dead. However, what we are more likely to see is a subtle shift toward objective standards of *mens rea* under the guise of employing a subjective approach. It is submitted that such occurred in *Caldwell* and it appears to be the effect of the recent Supreme Court of Canada decision in *Sansregret*, *supra*, footnote 13.

^{48a} It is certainly possible that s.244(4) could be interpreted as overruling *Pappajohn* by requiring the existence of reasonable grounds as a matter of law before credence could be given to an alleged mistaken belief. However, it is submitted that the subsection was intended only as a procedural direction to the trial judge and the direction, related as it is to the judge's charge, is consistent with the substantive law as settled in *Pappajohn*.

satisfied that the required evidentiary threshold has been met. In explaining this threshold, lower courts will undoubtedly continue to rely on *Pappajohn* as the principal authority on the issue of when the defence can be put to the jury.

IV. *The Availability of the Defence*

A. *The Rationale Behind Pappajohn*

In *Pappajohn*, the defendant's appeal was successful on the substantive questions, but his conviction was upheld because the majority was of the opinion that it was unrealistic in the circumstances to expect the trial judge to leave the defence of honest belief in consent to the jury. Yet, as Don Stuart has remarked, it is difficult to conceive how the evidence "did not surmount the low hurdle required to leave the matter to the jury, where matters of fact properly reside".⁴⁹

The principal test applied by McIntyre J. in determining the evidentiary question was whether there could be found in the record some evidence which would convey a sense of reality in the submission.⁵⁰ McIntyre J. held that the trial judge directed himself correctly in law in that he had applied the correct test. He then went on to deal with the question of whether the trial judge was correct in determining that the evidence was insufficient. According to McIntyre J., in order to convey the sense of reality required, it was necessary that there be some evidence which, if believed, would support the existence of a mistaken but honest belief that the complainant was consenting to the admitted acts of intercourse.⁵¹

After reviewing the evidence of the accused and the victim, McIntyre J. concluded:⁵²

It will be seen at once that there is a fundamental conflict between the two stories. Her version excludes consent and any possible mistaken belief in consent. His version speaks of actual consent and no suggestion of mistaken belief could arise. To find support for the defence asserted by the appellant, the other evidence must be considered.

He then considered the other circumstantial evidence such as the absence of physical injury to the complainant, the absence of damage to the clothing, the finding by the police of her necklace and keys in the living room and her underclothes folded at the foot of the bed. He noted that these facts were corroborative of the accused's testimony, but he con-

⁴⁹ Stuart, *op. cit.*, footnote 25, p. 238.

⁵⁰ Following Fauteux J., in *Kelsey v. The Queen*, [1953] 1 S.C.R. 220 at p. 226, (1953), 105 C.C.C. 97. at p. 102, 16 C.R. 119 at p. 125.

⁵¹ *Pappajohn v. The Queen*, *supra*, footnote 1, at pp. 127 (S.C.R.), 30 (D.L.R.), 419 (W.W.R.).

⁵² *Ibid.*, at pp. 130 (S.C.R.), 32-33 (D.L.R.), 422 (W.W.R.).

cluded that this evidence was only cogent to the issue of actual consent and that these facts could not "by themselves" advance a suggestion of mistaken belief. The stories were "diametrically opposed" on the vital issue of consent and thus the only realistic issue which could arise on the evidence concerned the presence or absence of consent.⁵³

Dickson J. disagreed with the majority's assessment of the evidence, especially the view that an acceptance of the evidence of the accused automatically led to a finding of consent. It was Dickson J.'s opinion that in accepting the appellant's evidence the jury could still find that the complainant was *non consenting* because of the "token resistance" which the appellant allegedly understood as play-acting. In other words, the jury could have accepted almost all of the accused's testimony except his opinion that she had consented. By finding the token resistance to be non-consent, the Crown would have proved the *actus reus*. However, the jury would still have had to consider whether the appellant was aware of, or reckless as to her non-consent, and thus his plea of mistake would be very relevant. Dickson J. went on to suggest that on all of the evidence taken together, there existed a sufficient evidentiary foundation to place the defence of mistake of fact before the jury.⁵⁴

On Dickson J.'s viewpoint of the evidence, the majority was making an incorrect assumption with respect to how the accused's evidence could be interpreted. However, the reasoning of the majority, as expressed by McIntyre J., was also based on another crucial assumption. It is implicit in the majority decision that the jury would either totally accept one story or totally reject it. If this was a correct reading of what the jury would do then one can readily understand why the majority could not see any purpose in putting the alternative defence of mistake to the jury. Assuming, as was suggested, that the two stories were totally incompatible then, if the jury believed the accused's story *in toto*, he would be acquitted on the basis that there was no *actus reus* (i.e., consent was present). If the jury totally believed the complainant, then not only would the *actus reus* have been proven but moreover the jury would have already branded the accused as a liar. Therefore, it becomes unrealistic to suggest that they would nonetheless hold that he had an *honest belief* in consent.⁵⁵

The above reasoning appears logical, given the premise. The question remains, however, whether it is correct to assume that a jury will accept one story in its totality and reject the other completely? It would seem not. Where there are conflicting versions of facts, the trier of fact

⁵³ *Ibid.*, at pp. 132-133 (S.C.R.), 34 (D.L.R.), 423-424 (W.W.R.).

⁵⁴ *Ibid.*, at pp. 163-164 (S.C.R.), 25-26 (D.L.R.), 414-415 (W.W.R.).

⁵⁵ Even this justification for the majority decision in *Pappajohn* becomes suspect in light of the assessment of the evidence made by the trial judge in *R. v. Sansregret* (1983), 34 C.R. (3d) 162, where, notwithstanding that she concluded that the accused had lied about parts of his testimony, she found an honest mistake of fact.

must "find" what happened. It is well accepted that in doing so, the trier of fact is not bound to deal with one party's evidence as a whole but may accept some of it and reject that which is unacceptable. Lambert J.A., of the British Columbia Court of Appeal, reiterated this point in *R. v. Trotter*.⁵⁶

Trotter involved an accused's appeals against his convictions on one count of rape and two counts of indecent assault. The evidence indicated that the accused had picked up two sixteen year old girls who were hitchhiking in the Port Coquitlam area of British Columbia. The girls accompanied the accused to go pick up some auto parts in a town seven miles away. Various stops were made while in town but after driving for some three hours the appellant proceeded down a dirt road off the highway, stopped the car, and engaged the two girls in various sexual activities including intercourse. The evidence of the complainants was that they submitted without physical resistance because the accused had forced them to get undressed by threatening them with a paring knife. The accused denied the threats and said the girls appeared to be willing. The trial judge charged the jury on the defence of consent, and alternatively, honest belief in consent but he indicated that the belief had to be based on reasonable grounds. The accused appealed his convictions on the ground that the jury was misdirected on the defence of honest belief. The Crown's central argument was that the defence need not have been put to the jury in any event.

MacDonald J.A. (Hinkson J.A. concurring) acceded to the Crown's argument and dismissed the appeal. Lambert J.A. dissented on the ground that the trial judge was correct in leaving the defence of honest belief to the jury but that he erred in instructing them on the requirements of the defence. In support of his opinion, Lambert J.A. reviewed the evidence and concluded that a number of options had been open to the jury. It could have believed, more or less in its entirety, either the evidence of the complainants or the evidence of the accused. However, he then went on to state:⁵⁷

Finally, of course the jury could, in my opinion, have reached a conclusion that was not in total conformity with all the evidence of the complainants, or either of them, or with the evidence of the accused.

Arguably, the same could have been said of the options open to the jury in *Pappajohn*.

The question of whether a jury will accept, in its totality, one witness's account of the facts over another contrasting version, was raised before the House of Lords in *Director of Public Prosecutions v. Morgan*.⁵⁸

⁵⁶ (1981), 28 B.C.L.R. 117, 58 C.C.C. (2d) 289, 21 C.R. (3d) 330 (B.C.C.A.).

⁵⁷ *Ibid.*, at pp. 134 (B.C.L.R.), 297 (C.C.C.), 338 (C.R.).

⁵⁸ *Supra*, footnote 23.

The facts of the case, being somewhat bizarre, warrant brief comment. The defendant Morgan was a senior non commissioned officer in the Air Force. On the night in question, he invited the other three defendants, all junior members of the force, to return to his house and have sex with his wife. The three younger men did not know Mrs. Morgan and were at first reluctant to accept the invitation. They finally accepted after Morgan had spoken of his wife's sexual aberrations and provided them with contraceptives. The three younger men also claimed that Morgan told them that his wife was "kinky", that she would pretend to resist but that they need not take it seriously. Morgan specifically denied this latter claim.

In any event, the four proceeded to Morgan's house. Mrs. Morgan testified that she was awakened by the men and dragged into another room and placed on a bed. She stated that each defendant had intercourse with her in turn and that she protested throughout by yelling and screaming. Her physical resistance was restricted because she was continuously held down on the bed, arms and legs apart, while the assault took place.

The three younger defendants each gave statements to the police which essentially corroborated Mrs. Morgan's version of the forcible rape. However, they later repudiated their statements in the witness box claiming that the police had put the words in their mouths. In their testimony, they indicated that Mrs. Morgan initially resisted but that she soon became an active participant in a variety of sexual activities with all four men and that throughout she manifested her co-operation and enjoyment.

The defendants argued that Mrs. Morgan consented to the sexual activities and alternatively that they honestly believed she consented. The trial judge placed both defences before the jury. Morgan was convicted of aiding and abetting the rape by the other three. His three co-defendants were all convicted of rape and aiding and abetting rape. Their appeals were dismissed by the Court of Appeal and they appealed to the House of Lords.

As was the case in *Trottier*, the alleged error was that the jury was misdirected on the honest belief defence because that judge had instructed them to employ an objective standard in assessing whether the belief was held. The appeal in *Morgan* was therefore on a narrow question of law: whether an honest belief in consent had to be based on reasonable grounds. The crucial question which faced the Supreme Court of Canada (should the trial judge have charged the jury on mistake of fact?) was never in issue before the House of Lords. Despite this, both Lord Hailsham and Lord Cross dealt with the issue, suggesting that, in the circumstances, it was unnecessary for the judge to have left the defence of mistaken belief to the jury. Lord Cross stated his opinion on this as follows:⁵⁹

⁵⁹ *Ibid.*, at pp. 204 (A.C.), 353 (All E.R.).

So, as the judge made clear at the outset of his summing up, the only real issue in the case was whether what took place in the Morgan's house that night was a multiple rape or a sexual orgy. The jury obviously considered that the appellants' evidence as to the part played by Mrs. Morgan was a pack of lies and one must assume that any other jury would take the same view as to the relative credibility of the parties. That any jury which thought that the grounds for a belief in consent put forward by the defendants, which if truly held would have been eminently reasonable, were in fact never entertained by them at all, should in the same breath hold that they may have had an honest belief in consent based on different and unreasonable grounds is inconceivable.

Lord Hailsham put it even more strongly. In fact, in reading his judgment, it becomes readily apparent that his reasoning provided the genesis for the opinions expressed in the majority judgment in *Pappajohn*. Lord Hailsham took the same view of the evidence in *Morgan* as McIntyre J. did in *Pappajohn* — the stories of the victim and the defendants were "wholly incompatible".⁶⁰ In answer to the submissions of the defence that the jury need not accept one story *in toto* but could accept portions of the testimony of both sides, he replied:⁶¹

In spite of the valiant attempts of counsel to suggest some way in which the stories could be taken apart in sections and give rise in some way to a situation which might conceivably have been acceptable to a reasonable jury in which, while the victim was found not to have consented, the appellants, or any of them could conceivably either reasonably or unreasonably have thought she did consent, *I am utterly unable to see any conceivable half-way house. The very material which could have introduced doubt into matter of consent goes equally to belief and vice versa.* [sic]

To Lord Hailsham's mind, the task that faced the trial judge was simple:⁶²

. . . it would have been quite sufficient for the judge, . . . to tell the jury that they must really choose between the two versions, the one of a violent and unmistakable rape of a singularly unpleasant kind, and the other of active co-operation in a sexual orgy, . . .

As indicated in the introduction to this article, although there was a fundamental conflict in *Pappajohn* on the issue of consent, the two stories were not totally incompatible. As Dickson J. noted in his summary of the evidence, even the recollections of the accused and the complainant of events inside the accused's house contained areas of common agreement. There was very little, if any, agreement in *Morgan*. There, three of the defendants had given statements to the police which essentially confirmed the testimony of Mrs. Morgan. However, these statements were later repudiated by their evidence in the witness box which was totally and unmistakably opposed to Mrs. Morgan's evidence. Given all the circumstances, Lord Hailsham's conclusion that there was no "half-way house" for the jury was probably justified but one questions whether such an assumption should have been made in *Pappajohn*.

⁶⁰ *Ibid.*, at pp. 207 (A.C.), 355 (All E.R.).

⁶¹ *Ibid.* (Emphasis added).

⁶² *Ibid.*

In pondering the relevance of the *Morgan* reasoning another factor might be considered. That concerns the speculation as to the jury's findings at trial and the apparent reliance upon it by Lord Hailsham and Lord Cross.

Appellate courts, by their nature, are afforded a view of the proceedings not available to the trial judge. A trial judge charging the jury cannot solicit one finding from the jury and then decide whether to charge them on other defences. Lord Hailsham referred to this when, after suggesting the defence of mistake was not open, he stated: "But, presumably because, at that stage, the jury's view of the matter had not been sought, the matter was left open to them, . . .".⁶³ The House of Lords, on the other hand, had before them one jury finding from which it could be inferred whose version of the facts was believed. Moreover, the jury in *Morgan* had also considered the mistake of fact defence (albeit on an objective standard) and rejected it as well. The jury's apparent rejection of the accused's evidence on the issue of consent was clearly influential to the two Law Lords. Lord Cross stated:⁶⁴

The jury obviously considered that the appellants' evidence as to the part played by Mrs. Morgan was a pack of lies and one must assume that any other jury would take the same view as to the relative credibility of the parties.

Lord Hailsham noted;⁶⁵

. . . if, as I think plain, the jury accepted Mrs. Morgan's statement *in substance* there was no possibility whatever of any of the appellants holding any belief whatever, reasonable or otherwise, in their victim's consent to what was being done.

In view of this "hindsight" one can understand that it would be easier for Lord Cross and Lord Hailsham to conclude that, in light of the incompatible stories, it was unnecessary to have charged the jury on the defence of mistaken belief.

It is submitted that the words of Humphreys J. in *R. v. Roberts*,⁶⁶ are applicable in considering this issue: "The Court. . . cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them". It is understandable that the majority in *Pappajohn* may have been influenced, at least unconsciously, by the jury's apparent rejection of the accused's evidence on the issue of consent. Yet, McIntyre J. warned that an appellate court must consider the situation as it presented itself to the trial judge at the time: "Speculation as to what the jury did, or would have done after being charged, is not relevant here".⁶⁷ This admonition rings hollowly however, given the apparent reliance by McIn-

⁶³ *Ibid.*, at pp. 207 (A.C.), 356 (All E.R.).

⁶⁴ *Ibid.*, at pp. 204 (A.C.), 353 (All E.R.).

⁶⁵ *Ibid.*, at pp. 206 (A.C.), 354 (All E.R.). (Emphasis added).

⁶⁶ (1942), 28 Cr. App. R. 102, at p. 110.

⁶⁷ *Supra*, footnote 1, at pp. 131 (S.C.R.), 33 (D.L.R.), 423 (W.W.R.).

tyre J. on the *Morgan* reasoning where such speculation was clearly involved.

B. *Implications of Pappajohn*

The foregoing discussion has attempted to suggest why the evidence in *Pappajohn* was deemed insufficient to support the honest belief defence. However, whatever the rationale, the effect of the decision is that it sets a high threshold for defence counsel to cross. If the evidence in *Pappajohn* was not sufficient, what evidence will be? McIntyre J. offered some insight into this question when, at the conclusion of his judgment, he stated:⁶⁸

It would seem to me that if it is considered necessary in this case to charge the jury on the defence of mistake of fact, it would be necessary to do so in all cases where the complainant denies consent and an accused asserts it. To require the putting of the alternative defence of mistaken belief in consent, there must be, in my opinion, some evidence beyond the mere assertion of belief in consent by counsel for the appellant. *This evidence must appear from or be supported by sources other than the appellant in order to give it any air of reality . . .* Where the complainant says rape and the accused says consent, and where on the whole of the evidence, including that of the complainant, the accused, and the surrounding circumstances, there is a clear issue on this point, and where as here the accused makes no assertion of a belief in consent as opposed to an actual consent, it is unrealistic in the absence of some other circumstance or circumstances, such as are found in the *Plummer and Brown* and *Morgan* cases, to consider the judge bound to put the mistake of fact defence.

In these remarks, McIntyre J. made a number of interesting observations. First of all, he suggests that an accused has to specifically assert that he believed the woman consented as opposed to simply asserting that she consented. But surely if an accused asserts actual consent, then he must be asserting a belief in consent (assuming he is not lying). Lambert J.A., of the British Columbia Court of Appeal, alluded to this when he stated in *Trottier* that, to his mind, there was no principle of law requiring an assertion by the accused of a belief in consent as opposed to actual consent.⁶⁹

The second interesting comment of McIntyre J. is his suggestion that where there are conflicting stories as to what transpired, making a clear issue on the fact of consent, then in the absence of "other circumstances" the alternative defence need not be put. This suggestion which appears to be rooted in the reasoning of Lord Hailsham in *Morgan*, could conveniently be labelled the "two conflicting stories" theory. Interpreted literally, this "theory" comes very close to suggesting that the "defences" of consent and honest belief in consent are mutually exclusive. Of course, they are not. The defence of consent, if accepted, operates to negate the

⁶⁸ *Ibid.*, at pp. 133-134 (S.C.R.), 34-35 (D.L.R.), 424 (W.W.R.) (Emphasis added).

⁶⁹ *Supra*, footnote 56, at pp. 134 (B.C.L.R.), 297 (C.C.R.), 339 (C.R.).

actus reus while the defence of honest belief operates to negate the *mens rea*. As such, there is no reason in law why the defences cannot both be placed before the trier of fact. McIntyre J.'s theory, if interpreted as distilling a general principle, could effectively blur this distinction.

A second problem with McIntyre J.'s remarks about conflicting testimony is that it places an accused rapist in a "no win" situation: If the accused does not testify, there will be "no assertion of belief in consent"; if he does testify, there will likely be conflicting stories as to what transpired and again the defence would be unavailable.

The third and perhaps most significant aspect of McIntyre J.'s comments are the statements suggesting that in order for the defence of honest belief to go to the jury there must be evidence beyond mere assertions of belief in consent by counsel and this evidence "must appear from or be supported by sources other than the appellant in order to give it any air of reality". This statement suggests that the testimony of the accused in itself would not be sufficient to create the necessary evidential foundation. If this view is correct, it places a heavy evidential burden on the defence. It is submitted that such an interpretation does not find support in either authority or principle.

Harkening back to the celebrated case of *Woolmington v. Director of Public Prosecutions*.⁷⁰ and the of quoted passages from Viscount Sankey's judgment, one finds the fundamental ground rules with respect to the burden of proof:⁷¹

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt . . . If, at the end of and on the whole of the case, there is a reasonable doubt, *created by the evidence given by either the prosecution or the prisoner* . . . the prosecution has not made out the case and the prisoner is entitled to an acquittal . . . When evidence [of the elements of the offence] has been given (this is a question for the jury) *the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part . . . was either unintentional or provoked*. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, *even if his explanation be not accepted*, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

Lord Fraser touched on these principles in *Morgan*, when he stated:⁷²

If the effect of the evidence as a whole is that the defendant believed, or may have believed, that the woman was consenting then the Crown has not discharged the onus of proving commission of the offence as fully defined . . .

⁷⁰ [1935] A.C. 462 (H.L.).

⁷¹ *Ibid.*, at pp. 481-482. (Emphasis added).

⁷² *Supra*, footnote 23, at pp. 237 (A.C.), 382 (All E.R.). Lord Hailsham made the same point when he quoted from the judgment of Lord Goddard C.J. in *Rex v. Steane*, [1947] K.B. 997, at p. 1004; see pp. 213 (A.C.), 360 (All E.R.).

As suggested by Lambert J.A. in his dissenting judgment in *Trottier*, and reiterated in his recent dissent in *R. v. Bulmer et al.*,⁷³ it was surely not the intention of McIntyre J. in *Pappajohn* to enunciate a proposition of law stipulating what particular features must appear in the evidence before the defence should be put to the jury, especially a proposition that would fly in the face of such weighty authorities. In the words of Lambert J.A., "[a]ll that is required in law is some evidence that gives a sense of reality to the defence".⁷⁴

One must be reminded that when all else is said and done the issue the trier of fact must be concerned with is the presence or absence of *mens rea*. The burden of proof here is always on the Crown.⁷⁵ For this reason, perhaps the test that governs whether "excusing" defences should be placed before the jury is not entirely applicable when one is dealing with a defence which negates an essential element of the offence. A small measure of support for this can be found in the comments of Lord Hailsham in *Morgan*:⁷⁶

Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a "defence" of honest belief or mistake, or of a defence of honest and reasonable belief or mistake. *Either the prosecution proves that the accused had the requisite intent, or it does not.* In the former case it succeeds, and in the latter it fails.

As the above quotation clearly suggests, the fact that the issue of honest belief in consent is a matter raised as a "defence" does not alter the fundamental rules of the burden of proof. Thus, when one strips away the non-essential terms such as "mistake of fact" or "honest belief in consent", the crucial question that remains is whether the Crown has proved beyond a reasonable doubt that the accused had the requisite *mens rea* of the offence charged. An examination of recent Court of Appeal decisions would indicate however, that this essential principle can be effectively nullified as judges attempt to grapple with the *Pappajohn* dictum on when the "defence" of mistake need be considered by the trier of fact.

*R. v. Sansregret*⁷⁷ involved a Crown appeal against the acquittal of the accused on a charge that he did have sexual intercourse with the complainant, who was not his wife, whose consent he had extorted by

⁷³ (1983), 10 C.C.C. (3d) 256 (B.C.C.A.).

⁷⁴ *R. v. Trottier*, *supra*, footnote 56, at pp. 133 (B.C.L.R.), 296 (C.C.R.), 337 (C.R.).

⁷⁵ See *R. v. Deol* (1981), 23 C.R. (3d) 324 (Alta. C.A.), per Laycraft J.A., at p. 331.

⁷⁶ *Supra*, footnote 23, at pp. 214 (A.C.), 361 (All E.R.). (Emphasis added).

⁷⁷ *Supra*, footnote 11.

threats and fear of bodily harm. The facts which led to the charge were, as Philp J.A. remarked, "indeed bizarre".⁷⁸ The accused had been living with the complainant in her home for a little more than a year. Their relationship over this time was very turbulent and the trial judge noted that the two had little in common. In September of 1982 the complainant broke off the relationship and requested the accused to move out. A few weeks later, but three weeks prior to the night in question, the accused broke into the complainant's residence by picking the lock on one door and breaking the window on the next. Armed with a pointed file, he threatened the complainant and insisted that they resume their relationship. The complainant testified that the accused was in a violent rage. In an attempt to pacify him, she held out hopes for a future reconciliation. The couple engaged in sexual intercourse and the next morning parted amicably. The complainant reported the incident to police but she did not proceed with the charges. The evidence indicated that although the accused was aware she had reported the incident, he was apparently unaware she had complained of rape.⁷⁹

Out of fear, the complainant spent the next two weeks at her mother's, but moved back to her apartment on October 7. On October 15, at approximately 4:30 a.m., the accused once again forcibly entered the complainant's residence. The accused was clearly in a violent rage, and as Philp J.A. summarized, he proceeded to virtually terrorize the complainant.⁸⁰

He proceeded through the kitchen, where he armed himself with a butcher knife, to the complainant's bedroom. She was trying to dial 911 and he grabbed the telephone, pulled the cord out of the jack and threw the telephone into the living room. He was violent and threatened the complainant with the butcher knife. He said he would kill her. He hit her in the mouth with a closed fist. He jabbed the knife into walls and into a kitchen cupboard. He forced her to take off her nightgown. He tied her hands behind her back. He took money and her keys from her purse. He made her stand at the rear screen door and whistle (so that she could not escape from him) while he went outside to repair the window through which he had gained entry.

Still armed with the knife he took her back in the bedroom. They talked at length. He was still hostile and threatening. She was trying to calm him down. She was in fear of her life.

The complainant, still naked, attempted to engage the accused in conversation. She began to pretend that everything would be fine and as she had done three weeks earlier, she tried to pacify the accused by holding out hopes for a reconciliation. She indicated to him that she had not been seeing other men and that she still cared a great deal about him.

⁷⁸ *Ibid.*, at pp. 734 (W.W.R.), 177 (C.C.C.), 59 (C.R.).

⁷⁹ This critical finding of the trial judge was subsequently overruled by the Supreme Court of Canada which held that the accused was aware that a rape complaint was made; *supra*, footnote 13, at pp. 712-713.

⁸⁰ *Supra.*, footnote 11 at pp. 735 (W.W.R.), 178 (C.C.C.), 60-61 (C.R.).

As they talked, the accused proceeded to calm down. He suggested lovemaking to the complainant and although she did not expressly assent, she did not attempt to dissuade him. Accordingly, the accused removed his clothes and got into bed with the complainant. The two engaged in sexual intercourse without any outward resistance from the complainant. When she resisted a second act of intercourse, the accused did not persist.

By this time, the complainant had to get ready for work. They left the house together in her car and she dropped the accused at his father's. Before parting they talked for a short while, made a date to meet later that day, kissed and left. The complainant immediately proceeded to contact the police. At their insistence, she continued with the arrangements to meet Mr. Sansregret later that evening. When he arrived at the appointed time and place, he was arrested by the police after a brief chase. He was charged with breaking and entering with intent to commit an indictable offence, possession of a weapon, robbery, unlawful confinement and rape.

In assessing the evidence at trial, the learned judge made several crucial findings with respect to the rape charge. Although the testimony of the two parties had been similar, it differed dramatically in several areas and in those areas the trial judge accepted the evidence of the complainant. The judge found that the complainant's apparent consent to intercourse was not genuine and that she had merely submitted out of fear. The trial judge also found that there was a "nexus" between the threats of the accused, the fear of the complainant and the sexual intercourse. However, the judge concluded that this "nexus" was only apparent in the mind of the complainant. It was the judge's opinion, *and she so found*, that the accused honestly believed that the complainant was genuinely consenting to the sexual acts. Accordingly, on the basis of *Pappajohn*, she acquitted the accused of rape. He was convicted of breaking and entering with intent to commit an indictable offence and unlawful confinement. The Crown appealed the acquittal on the rape charge and in a two-to-one decision, the Manitoba Court of Appeal reversed the decision and convicted the accused.

It was clear from the reasoning of the learned trial judge that while she was convinced the accused had been guilty of many offences as a result of his rampage, he was not guilty of rape as defined in the Code and explained in *Pappajohn*. Her finding of an honest belief in consent was based on a combination of factors.

First of all, the evidence of the complainant readily supplied the basic evidentiary foundation. In her attempt to calm the accused, the complainant became friendly and indicated that they might get back together. The accused was obviously relieved; he suggested sex and was obliged. The foundation for the honest belief was clearly present on this evidence.

This foundation was then strengthened by the trial judge's finding that the actions of the accused in breaking into her apartment, forcing her to strip and tying her hands, were not preliminaries to an intended rape but were related solely to the accused's purpose in confining the complainant. The trial judge had concluded that upon finding the complainant on the phone, the accused became preoccupied in covering up the evidence of his break-in and in preventing her escape. The learned trial judge noted:⁸¹

What better way to confine her than to take her car keys, her house keys, and her money, to strip her naked, to bind her hands and to force her to stand by the back door and whistle so he could hear where she was. I find that the accused forced the complainant to strip and tied her hands, not by way of preliminaries to an intended rape, but by way of confining the complainant.

In the opinion of the trial judge, the accused's purpose in confining the complainant was to convince her that they should resume their relationship and in the accused's mind, by the time they went to bed, he had clearly succeeded.

Still, even on these findings, the conclusion that the accused could have honestly believed that the complainant's consent was genuine seemed highly unreasonable to the trial judge. What appeared to clinch the matter for the defence was a crucial part of the complainant's own evidence. In cross-examination she readily admitted that knowing the accused as she did, it was her opinion that he probably did believe they were reconciled by the time they went to bed. The trial judge accordingly concluded that the accused had entertained a mistaken, albeit totally unreasonable belief that the complainant was genuinely consenting to the sexual acts.

The Court of Appeal, in substituting a verdict of guilty on the rape charge, was clearly divided in its reasons. Matas and Huband J.J.A., while differing in their approach, were both of the opinion that the trial judge had erred and that the necessary *mens rea* was present on the evidence. Philp J.A., in dissent, held, that on the findings of fact made by the trial judge, the *Pappajohn* decision had been correctly applied and therefore he would have sustained the acquittal of the accused.

Although not without its problems, the judgment of Huband J.A. is by far the more convincing of the two majority decisions. Huband J.A. concluded that a conviction should have been entered because the accused had clearly been reckless as to the impact of his threats.⁸² While it is not clear whether this was an argument advanced by the Crown on the appeal, it is certainly plausible that the trial judge did not consider the issue of

⁸¹ *R. v. Sansregret*, *supra*, footnote 38, at p. 166.

⁸² *R. v. Sansregret*, *supra*, footnote 11, at pp. 731 (W.W.R.), 175 (C.C.C.), 57 (C.R.).

recklessness as it relates to the offence of rape.⁸³ However, Huband J.A. did not purport to justify his decision on this ground. Rather, he did so on the basis that the trial judge asked herself the wrong question in considering mistake of fact. According to Huband J.A., when the charge is that the accused committed consensual intercourse by extorting the consent through threats or fear of bodily harm, then the question is not whether the accused held an honest belief in consent but rather whether the accused honestly believed that his threats did not induce the consent.

It is respectfully submitted that this is a distinction without a difference. The essential question which faced the trial judge on the plea of mistake was whether, after all of the events which preceded the sexual intercourse, the accused could have honestly believed that the consent given by the complainant was a true and genuine consent. The learned trial judge considered this question and concluded that the accused did hold this mistaken belief. As such, it is questionable whether Huband J.A. could impose his finding of recklessness and thus reverse the decision of the trial judge.

Be that as it may, it is the decision of Matas J.A. which raises the most serious questions regarding the availability of the mistake of fact defence. After reviewing the *Pappajohn* decision, the evidence and the findings made by the trial judge, Matas J.A. went on to discuss McIntyre J.'s comments regarding when the defence should be left to a jury. He then proceeded to reach a rather startling conclusion:⁸⁴

In the case at bar, it was Mr. Sansregret's conduct which terrorized the complainant and brought about her conciliatory response. It would be the ultimate in irony if the complainant's successful pretence that she consented, out of a legitimate fear for her life, could be relied on by the accused as a basis for a defence of honest but mistaken belief in consent. To paraphrase the words of McIntyre J., in *Pappajohn*, the notion of the availability of the defence in these circumstances has an air of unreality. *In my respectful opinion, it is not open to Mr. Sansregret to terrorize his victim, to follow up the terror with sexual intercourse, and to end up innocently claiming he had an honest belief in his victim's consent. I have concluded that the defence of mistake of fact does not arise in this case.*

In essence, Matas J.A. held that, as a matter of law, it was not open for the trial judge to make the finding of fact that the accused had entertained an honest but mistaken belief in consent. This is a remarkable proposition.

The appeal in *Sansregret* had been based on a question of law: "whether the defence of mistake of fact is available in circumstances where the accused's honest belief in consent is founded upon conduct and

⁸³ A greater examination of the element of recklessness by a trial judge may well be a way to mitigate what appears to many to be the unacceptable results of adopting the subjective approach in *Pappajohn*.

⁸⁴ *R. v. Sansregret*, *supra*, footnote 11, at pp. 727 (W.W.R.), 171-172 (C.C.C.), 53 (C.R.). (Emphasis added).

circumstances flowing directly from his own criminal acts".⁸⁵ The answer to this question must surely be yes. If the trier of fact finds that an accused held an honest belief in consent or an honest belief that the consent was genuine, then assuming the issue of recklessness has been canvassed, it is irrelevant upon what conduct the belief is founded. While these considerations are relevant in deciding whether the mistaken belief was actually held, once this decision is made in the accused's favour, he must be acquitted because the Crown has failed to prove the *mens rea* of the offence. However, notwithstanding that the trial judge had considered the accused's conduct, Matas J.A. held that she was precluded from making the finding which she did. It is submitted that the effect of this judgment is to turn what is ostensibly a question for the trier of fact into a question of law.

The accused appealed to the Supreme Court of Canada⁸⁶ where the conviction entered by the Manitoba Court of Appeal was upheld. However, the Supreme Court decision cannot be taken as a clear endorsement of either of the two majority judgments. The court appeared to accept the trial judge's finding that the accused had entertained an honest albeit unreasonable belief in consent, but, despite that, held that the trial judge's "finding" that the accused had been "wilfully blind to the obvious"⁸⁷ precluded the operation of the mistake of fact defence. The court ruled the trial judge should have applied the doctrine of wilful blindness. By doing so the accused was presumed to have knowledge⁸⁸ that the consent of the complainant had been induced by threats.⁸⁹ Although the Supreme Court decision does not deal directly with the evidential issue canvassed in this paper, it is, in effect, another step toward rendering the "honest belief" defence a purely theoretical exercise.

⁸⁵ *Ibid.*, at pp. 732 (W.W.R.), 175 (C.C.C.), 57-58 (C.R.).

⁸⁶ *Supra*, footnote 13.

⁸⁷ It is submitted that the Supreme Court had to draw a long bow to conclude that these words, used by the trial judge to exhibit the unreasonableness of the accused's belief, amounted to a finding of "wilful blindness". The trial judge likely never intended to use the words in the technical legal sense attributed to them by the common law.

⁸⁸ On this point, the judgment is very similar to the English Court of Appeal decision in *R. v. Parker*, [1977] 1 W.L.R. 600, [1977] 2 All E.R. 37, where the court presumed recklessness as a consequence of wilful blindness. *Parker* was subsequently overruled by the House of Lords in *Caldwell*, *supra*, footnote 48.

⁸⁹ The conclusion that the accused had been wilfully blind is suspect. The authorities relied on by McIntyre J. suggest that the doctrine of wilful blindness can be properly applied where an accused has had his suspicions aroused as to the existence of specific facts but then deliberately refrains from making further inquiries, thus wilfully depriving himself of full knowledge of the facts. In *Sansregret*, the trial judge's findings all pointed to the conclusion that the accused had never even suspected that the complainant was not genuinely consenting. In addition, the facts in *Sansregret* were all disclosed but, as the trial judge found, the accused had simply misinterpreted them. More importantly, it is submitted the finding of an honest belief in consent excluded a finding of wilful blindness because the two are mutually exclusive findings.

Shortly after the Court of Appeal decision in *Sansregret*, the judgment in *R. v. Bulmer et. al.*⁹⁰ was handed down in British Columbia. In *Bulmer*, the British Columbia Court of Appeal was once again faced with the task of considering the mistake of fact defence in the context of rape. The facts of the case can be briefly stated. On the night in question, the three accused had proceeded to a Vancouver hotel where the accused Bulmer resided. Shortly thereafter, the accused Laybourn left to go pick up a prostitute. He proceeded downtown and picked up the complainant. They discussed various activities she might perform and the price she would charge. They then returned to the hotel room. The complainant testified that she had wanted to go to her own hotel but that Laybourn had persuaded her to go to his.

When they entered the hotel room, the complainant immediately objected to the presence of Bulmer and Illingworth. Both the complainant and Laybourn asked them to leave and they obliged. Laybourn then paid the complainant eighty dollars as the price they had previously agreed upon. Within minutes however, both Bulmer and Illingworth had returned to the room. According to the complainant, Bulmer told her to return Laybourn's money and then told her she would have to perform for free. She testified that she returned the money and asked to leave. At this point, a discussion ensued about the price she would charge. A witness, who had been in the adjoining hotel room, testified that the complainant's voice sounded as if she was whining and pleading. He said the complainant asked for sixty dollars from each but that a male voice indicated they would each pay twenty dollars.

Over the next twenty minutes or so the complainant performed oral sex and had sexual intercourse with both Laybourn and Illingworth. The accused Bulmer laid on top of the complainant but was too drunk to have intercourse with her. At this point, the police arrived and the prostitute complained of rape. Laybourn and Illingworth were charged with rape and indecent assault. Bulmer was charged with attempted rape and indecent assault.

At the trial, only Laybourn and Illingworth gave evidence. Both denied that they had threatened the complainant. In an apparent response to the complainant's testimony that she had performed the sexual acts out of fear, both Laybourn and Illingworth testified that nothing they had said or done could have been construed as threats. All of the accused agreed that there had been sexual activities between themselves and the complainant but they all asserted that she had consented. Counsel for the accused Laybourn offered the alternative position that Laybourn had mistakenly believed that the complainant was consenting.

The trial judge instructed the jury on the issue of consent and on the mistake of fact defence and he did so with respect to all of the accused.

⁹⁰ *Supra*, footnote 73.

Laybourn and Illingworth were convicted of both rape and indecent assault. Bulmer was convicted of indecent assault but acquitted of attempted rape.

The three accused appealed their convictions, *inter alia*, on the ground that the trial judge had confused the jury in his redirection on the honest belief defence by leaving them with the impression that the defence had to adduce evidence showing a reasonable basis upon which the belief could rest. The Crown argued that the trial judge need not have addressed the jury on mistake of fact, and alternatively, that he had not misdirected them in any event. All of the appeals were dismissed.

As was the case with the Manitoba Court of Appeal in *Sansregret*, the British Columbia Court of Appeal was divided in its analysis of the issues. Taggart J.A. held that the trial judge was correct in leaving the mistake of fact defence to the jury but he dismissed the appeals on the ground the jury had been adequately instructed. Lambert J.A. agreed with Taggart J.A.'s conclusion that the trial judge was correct in leaving the honest belief defence to the jury but he dissented from the result on the ground that the jury was left with the impression that the defence depended upon the belief being honest and reasonable. Craig J.A. concurred with Taggart J.A. that the appeal should be dismissed, but he did so on the ground that the trial judge need not have addressed the jury on the mistake of fact defence at all. In his reasons for judgment, it is readily apparent that Craig J.A.'s decision was based on the "two conflicting stories" theory which, as discussed earlier in this article, found its genesis in *Morgan* and was adopted in *Pappajohn*.

In his short judgment, Craig J.A. began by indicating that cases where mistake of fact was available as a defence were exceedingly rare and that the case before the court did not fall into that category. The issue was simply "consent or no consent".⁹¹ Craig J.A. went on to point out that the complainant had testified emphatically that she had not consented while Laybourn and Illingworth testified emphatically that she had. As such, he concluded one could not find a basis for the defence of mistake of fact in any of their evidence. He then went on to state:⁹²

Is there other evidence of circumstances which would give this defence an air of reality that would require the trial judge to put it to the jury? I do not think there is any such evidence. The complainant says that she did not consent. Two of the appellants say that she did consent. As McIntyre J. pointed out in *Pappajohn v. The Queen* "in this situation the only realistic issue which can arise is the simple issue of consent or no consent".

It is submitted that the judgment of Craig J.A. is another example of how rigid adherence to the *Pappajohn* dictum inevitably results in the conclusion that the jury need only be concerned with the issue of the *actus reus*,

⁹¹ *Ibid.*, at p. 272

⁹² *Ibid.*

notwithstanding that the evidence is far from conclusive on the issue of *mens rea*.

Perhaps the best example of the high evidential threshold now required is the recent decision of the Ontario Court of Appeal in *R. v. Guthrie*.⁹³ In *Guthrie*, the principal issue on the accused's appeal from his conviction for rape was whether the trial judge had erred in refusing to instruct the jury with respect to the accused's claim that he had honestly believed the complainant was consenting. The Court of Appeal upheld the conviction, ruling the dictum of McIntyre J. in *Pappajohn* was directly applicable. The evidence simply did not convey the "sense of reality" required to warrant instructing the jury on the defence of mistake of fact. The Court reached this conclusion despite acknowledging that numerous aspects of the evidence related to the defence. Some of these aspects of evidence were:

- (a) The complainant's willingness to go to the accused's apartment at 4:00 a.m. even though he was a stranger.
- (b) The complainant's decision to spend the night on the accused's couch.
- (c) The evidence of a joint discussion of sexual experiences involving bondage and the complainant's purported statement that it sounded like fun and that she would like to try it some time.
- (d) The complainant's decision to remove her dress and put on one of the accused's shirts shortly after this discussion.
- (e) The complainant's response to the accused placing a straight razor at her neck by stating "S & M eh?".
- (f) The lack of evidence of a struggle or attempt to escape and the absence of verbal resistance by the complainant.
- (g) The accused's testimony that he believed the complainant was consenting.

In his reasons for judgment, Morden J.A. (Martin and Blair J.J.A. concurring), made it clear that his decision on whether the defence was available was based on the conflict between the testimony of the complainant and the accused. He placed emphasis on the fact that the complainant asserted "no consent" while the accused asserted "consent". He concluded his analysis by quoting McIntyre J.'s statement in *Pappajohn*: "in this situation, the only realistic issue which can arise is the simple issue of consent or no consent".⁹⁴

The approach taken by the Ontario Court of Appeal on the evidentiary question mirrored the approach taken by Matas J.A., in *Sansregret* and

⁹³ Unreported, April 29, 1985.

⁹⁴ *Ibid.*, at p. 18.

Craig J.A. in *Bulmer et al.* However, Morden J.A. went on to deal with the related argument by the accused that the trial judge had failed to give any instruction at all on the issue of *mens rea*. Morden J.A. answered this contention by stating:⁹⁵

Since the only possible issue which could arise with respect to the requisite state of mind related to whether or not the appellant had an honest but mistaken belief in consent and since this issue did not realistically arise on the evidence, there was, in my view, no substantial wrong or miscarriage of justice resulting from the trial judge's nondirection in this regard.

It is submitted the above quotation clearly illustrates that the high evidential burden cast on the defendant by *Pappajohn* will in practice result in no instruction on the *mens rea* issue. Therefore, in deciding the evidential question (which is now almost certainly going to be resolved against the accused) the trial judge will have virtually taken the *mens rea* issue from the jury.

Conclusion

It is readily apparent that the mystique which has been built up around the defence of mistake of fact can cause one to temporarily lose sight of the fundamental principle of *mens rea* and the rules governing its proof.

It is well accepted that *mens rea* is an issue for the jury. As such, surely defence counsel should be entitled to ask a trial judge to instruct the jury, *inter alia*, that the Crown must prove that the accused was aware the complainant was not consenting or was reckless as to whether the complainant was consenting or not and that this element must be proved beyond a reasonable doubt. Furthermore, this instruction should be proper even if the plea of mistake is not advanced.⁹⁶ However, if such a plea is advanced an instruction along the following lines could be given:

You must be satisfied that the accused was aware that the complainant was not consenting, *such that, if you find the accused had an honest belief in consent, or if you have a reasonable doubt as to the existence of that belief*; the accused must be acquitted.

What evidence must be adduced so that the jury should be charged in that way? Common sense would suggest that only the barest evidentiary foundation should be required to place the *mens rea* issue before the jury in this fashion. Although mistake is an issue which the defence must raise,⁹⁷

⁹⁵ *Ibid.*, at p. 19.

⁹⁶ See however, the *obiter* remarks of Pigeon J. in *Peda v. The Queen*, [1969] S.C.R. 905, at p. 921, (1969), 6 D.L.R. (3d) 177, at p. 191, [1969] 4 C.C.C. 245, at p. 260, where he stated that it is only in exceptional circumstances that a jury needs instruction on the issue of *mens rea*.

⁹⁷ *Pappajohn v. The Queen*, *supra*, footnote 1, at pp. 148 (S.C.R.), 14 (D.L.R.), 402 (W.W.R.), per Dickson J., quoted in the text at footnote 26, *supra*; *Director of Public Prosecutions v. Morgan*, *supra*, footnote 23, at pp. 214 (A.C.), 361 (All E.R.), per Lord Hailsham.

the authorities are clear that it can be raised by the defence simply pointing to certain aspects of the prosecution's case. It is submitted that the correct statement of the principle governing this question is to be found in this excerpt from Cross and Jones:⁹⁸

Where the prosecution has to prove a subjective mental element, the accused does not bear the burden of adducing evidence with regard to his lack of it because the issue of *mens rea* must be left to the jury as it is part of the prosecutor's case. *In most cases the accused will adduce evidence of ignorance but its sufficiency is no concern of the judge at a trial with a jury.*

There may be well be cases where the evidence is such that the plea of mistake is unrealistic,⁹⁹ but the trial judge must be careful in making this decision so that the issue of *mens rea* is not taken from the trier of fact. This very point was stressed by Lambert J.A. in *Bulmer* where he indicated that the difficult task the trial judge faces in deciding what to leave to the jury is not aided by the impositions of arbitrary rules. He went on to state:¹⁰⁰

Where there is a foundation in the evidence, the defence should be put, without wondering whether the facts of the case make that case exceedingly rare and without wondering about the number of other cases where the defence might or might not be available.

One must reiterate that the two issues of *mens rea* and mistake of fact are intertwined.¹⁰¹ If a trial judge in a rape or sexual assault case refuses to charge the jury on the defence of honest belief in consent, how is the *mens rea* issue to be treated? Is it to be ignored? Clearly, it should not. That being so, if a judge does instruct the jury in pure *mens rea* language, surely it would not confuse the jurors to explain the *mens rea* by including instruction on the honest belief defence where the evidence raises this possibility.

Ultimately, there is a certain irony in all of this. The very principles which were so carefully delineated by Dickson ed J. in *Pappajohn* and accepted by the majority of the court as governing the issues of *mens rea* and mistake of fact are being inadvertently sidestepped by the courts in an attempt to adhere to the "ratio" of the *Pappajohn* decision.

⁹⁸ *Op. cit.*, footnote 24, p. 58. (Emphasis added).

⁹⁹ See generally, *R. v. Deol*, *supra*, footnote 75.

¹⁰⁰ *Supra*, footnote 73, at p. 275.

¹⁰¹ See generally, *R. v. Mazza* (1975), 24 C.C.C. (2d) 508 (Ont. C.A.), *aff'd* on appeal [1978] 2 S.C.R. 907, (1978), 84 D.L.R. (3d) 400, 40 C.C.C. (2d) 134. In the Supreme Court Laskin C.J.C. refers to the *mens rea* issue by interchanging words expressing absence of guilty mind with words expressing a positive mistaken belief; see pp. 911-912 (S.C.R.), 403-404 (D.L.R.), 137-138 (C.C.C.).