

THE ISSUE OF CONSENT IN THE CRIME OF SEXUAL ASSAULT

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The consent of the complainant is often the only disputed issue in a trial of an accused charged with the crime of sexual assault. Consent or its absence distinguishes normal pleasurable behaviour from a serious crime. Because consent is a question of mixed fact and law, judges are required to instruct juries on the meaning of consent. This is a difficult task since the definition for a legally recognized consent reflects policy considerations and social values. This article examines the common law, and the old and new statutory provisions governing the matter of the consent of the complainant for the crime of sexual assault.

Le consentement de la plaignante est souvent la seule question en litige quand un inculpé est accusé du délit d'agression sexuelle. C'est le consentement ou l'absence de consentement qui permet de distinguer entre un acte agréable normal et un délit grave. Les faits et le droit étant tous deux en cause quand on décide s'il y a eu consentement, les juges doivent donner aux jurés des directives sur le sens à donner au mot consentement. C'est là une tâche difficile car la définition en droit du mot consentement reflète des principes généraux et des valeurs sociales. Dans cet article, l'auteur examine la 'common law' et les dispositions passées et présentes de la loi en matière de consentement de la plaignante en cas d'agression sexuelle.

Introduction

The offence of "sexual assault" was created in 1983 by the passage of section 246.1 of the Criminal Code.¹ This section was part of a package of legislative amendments which have significantly altered the substantive and procedural law relating to offences of a sexual nature.² The

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¹ An Act to amend the Criminal Code, S.C. 1980-81-82, c. 125, s. 19.

² See D. Watt, *The New Offences Against the Person* (1984), pp. 3-6, for a discussion of the scope of the legislative amendments contained in An Act to amend the Criminal Code, *supra*, footnote 1, Bill C-127. Recently, the Supreme Court of Canada commented on the scope of the new offence: "[T]he definition of the term "sexual assault" and the reach of the offence it describes is not necessarily limited to the scope of its predecessors. . . . While it is clear that the concept of a sexual assault differs from that of the former indecent assault, it is nevertheless equally clear that the terms overlap in many respects and sexual assault will in many cases involve the same sort of conduct. . . [as] an indecent assault."; McIntyre J. in *The Queen v. Chase*, [1987] 2 S.C.R. 293, at p. 301, (1987), 45 D.L.R. (4th) 98, at p. 104, 59 C.R. (3d) 193, at p. 199.

amendments included provisions relating to the vitiation of the complainant's consent (section 244(3)), the codification of the "defence" of mistaken belief in consent (section 244(4)), and the negation of the defence of consent if the complainant was under fourteen years of age (with an exception for an accused less than three years older than the complainant) (section 246.1 (2)). On January 1, 1988, An Act to amend the Criminal Code and the Canada Evidence Act³ (herein Bill C-15) was proclaimed in force. Bill C-15 repealed section 246.1 (2)⁴ and replaced it with several interrelated provisions concerning the consent of immature persons to sexual activity.⁵

In this article, I will focus on the consent of the complainant under section 246.1. I will first examine the concept of consent as it was understood at common law and under the repealed provisions of the Code. I will then analyze the scope of the above amendments and the effect they may have on the legal concept of consent for the purposes of the offence of sexual assault.

I. *Consent: The Actus Reus or External Circumstances of Sexual Assault*⁶

A. *General Principles*

Section 246.1 creates the offence of sexual assault, states the nature of the prohibited conduct and establishes the maximum penalty for its contravention. Section 246.1 states:

Every one who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for ten years; or
- (b) an offence punishable on summary conviction.

A striking feature of the new legislation is its lack of definition of the term "sexual assault". Recently, the Supreme Court of Canada has defined it: "Sexual assault is an assault within one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated."⁷ By virtue of section 244(2) of the Criminal Code, the alternative ways of committing an assault found in section 244(1) form part of the definition of the term sexual assault.⁸ Although section

³ S.C. 1987, c. 24.

⁴ *Ibid.*, s. 10.

⁵ For example, *ibid.*, ss. 139(1) to (5); s. 154(b).

⁶ "[T]he *actus reus* includes all the elements in the definition of the crime except the accused's mental element. . .": J.C. Smith and B. Hogan, *Criminal Law* (6th ed., 1988), p. 33.

⁷ *The Queen v. Chase*, *supra*, footnote 2, at pp. 302 (S.C.R.), 104 (D.L.R.), 199 (C.R.).

⁸ *Ibid.*, at pp. 297 (S.C.R.), 101 (D.L.R.), 196 (C.R.); also see *The Queen v. Robertson*, [1987] 1 S.C.R. 918, at p. 929, (1987), 39 D.L.R. (4th) 321, at p. 328, 58 C.R. (3d) 28, at p. 36.

244(1) sets out three alternative descriptions of assaultive behaviour, lack of consent is only an element under sub-section (1)(a).

Section 244(1)(a) provides:

A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly:

Under section 244(1)(a), the prohibited conduct is the non-consensual application of force⁹ to another person. The force may be applied directly or indirectly, and an accused may use an animate¹⁰ or an inanimate object¹¹ to effect his purpose. Therefore, the prohibited conduct for the offence of sexual assault is the non-consensual direct or indirect application of force to another person in circumstances of sexuality.¹²

Under section 244(1)(a), the absence of consent to the application of force is an element of the *actus reus*. Therefore, the Crown must prove the existence of a negative state of mind (that is, the complainant's non-consent to the application of force).¹³ On the other hand, defence counsel will try to establish a positive state of mind (that is, consent),¹⁴

An Act to amend the Criminal Code, *supra*, footnote 1, s. 244(2) states:

This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third part or causing bodily harm and aggravated sexual assault.

⁹ See *Fagan v. Commissioner of Metropolitan Police*, [1969] 1 Q.B. 439, [1968] 3 All E.R. 442, [1968] 3 W.L.R. 1120 (Q.B.D.); *R. v. Miller*, [1983] 2 A.C. 161, [1983] 1 All E.R. 978, [1983] 2 W.L.R. 539 (H.L.). On one interpretation of the facts, there is authority that an assault may be committed by an omission, but see comments on *Fagan* by D. Stuart, *Canadian Criminal Law* (2nd ed., 1987), pp. 72 *et seq.* It is difficult to envision the commission of a sexual assault only by an omission and thus I will not elaborate on this question (but see *R. v. Speck*, [1977] 2 All E.R. 859 (C.C.A.) where the court held that the accused's inactivity constituted an invitation to a child). Section 141 of the Criminal Code creates a separate offence when a person who, for a sexual purpose, counsels or incites a person under the age of fourteen to touch sexually the body of any person (S.C. 1987, c. 24).

¹⁰ *E.g.*, D. instructs his attack dog to bite V.

¹¹ *E.g.*, a motor vehicle (*R. v. Corrier* (1972), 7 C.C.C. (2d) 461, 19 C.R.N.S. 308, 4 N.B.R. (2d) 775 (N.B.C.A.)), or liquid (*R. v. Chapin* (1909), 22 Cox C.C. 10 (C.C.C.)).

¹² It is beyond the scope of this paper to analyze the term "sexual assault". Recently, the Supreme Court of Canada set out the test for determining this term: "The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: 'Viewed in the light of all circumstances, is the sexual or carnal context of the assault visible to a reasonable observer'"; *The Queen v. Chase*, *supra*, footnote 2, at pp. 302 (S.C.R.), 104 (D.L.R.), 199 (C.R.). In *Chase*, the court also set out the relevant factors to be considered in applying this test.

¹³ See *R. v. Donovan*, [1934] 2 K.B. 498, at p. 504 (C.C.A.), as cited in Stuart, *op. cit.*, footnote 9, p. 470. The accused's knowledge of, and belief in, consent are discussed below.

¹⁴ A person may communicate his consent to the application of force orally (*e.g.*, a person who agrees to settle his differences with another by fighting), in writing (*e.g.*, a

or will attempt to adduce sufficient evidence to raise a reasonable doubt about the lack of consent. The evidential and persuasive (legal) burden of proof as to lack of consent remains with the Crown throughout the trial¹⁵ although, as a practical matter, there may be a tactical shifting of the evidential burden of proof once the complainant testifies that there was no consent. Recently, the Supreme Court of Canada has ruled that the accused has the evidential burden in relation to the "defence" of mistake of fact as to the consent of the complainant.¹⁶

A problem may occur when a complainant consents to a certain kind or amount of sexual activity but alleges that the accused's conduct went beyond the scope of the consent. In many diverse situations the courts refused to infer that the complainant consented to the use or degree of the force applied.¹⁷ Thus a kick to the head in a schoolboy fight,¹⁸ a beating in a domestic dispute,¹⁹ and a malicious, unprovoked or overly violent attack in professional hockey²⁰ were all held to be assaults because the application of force (to the knowledge of the accused) went beyond the scope of the consent. Although the question (was the accused's conduct during the sexual activity within the ambit of the complainant's consent) will turn upon the particular facts of each case, I suggest that the nature and degree of force used, the possibility of serious injury to the victim, and the circumstances surrounding the giving of the consent are relevant factors for making this determination.

Criminal conduct is often distinguished from non-criminal conduct by the presence or absence of consent as an element of the offence. Also on the grounds of policy, the Criminal Code does not allow a person to

patient who signs a medical consent form), or by conduct (e.g., an athlete who engages in a contact sport). Although consent to engage in sexual activity may be communicated in any one of these three ways, it will be normally communicated orally or be implied by reason of past or present conduct.

¹⁵ Stuart, *op. cit.*, footnote 9, pp. 470-471.

¹⁶ *The Queen v. Chase*, *supra*, footnote 2.

¹⁷ When a person engages in a contact sport, she does not expressly set out the boundaries of her consent with respect to the nature and/or degree of physical contact. For example, a player in a non-contact hockey league may impliedly consent to being hooked from behind, but a vicious cross-check is outside the scope of the implied consent. Although the latter conduct may be penalized in professional sports, such contact may fall within the ambit of consent. Speaking generally, whether a person impliedly consents to the application of force must be determined after a review of all the surrounding circumstances. See *R. v. MacTavish* (1972), 8 C.C.C. (2d) 206, 20 C.R.N.S. 235, 4 N.B.R. (2d) 876 (N.B.C.A.); *R. v. Abraham* (1974), 30 C.C.C. (2d) 332 (Que. C.A.); *R. v. Day* (1841), 9 C. & P. 722, 173 E.R. 1026 (Assizes). See also Stuart, *op. cit.*, footnote 9, pp. 476-477.

¹⁸ See *R. v. MacTavish*, *ibid.*

¹⁹ See *R. v. Abraham*, *supra*, footnote 17.

²⁰ See *R. v. Maki*, [1970] 3 O.R. 70, (1970), 1 C.C.C. (2d) 333, 10 C.R.N.S. 268 (Prov. Ct.); *R. v. St. Croix* (1979), 47 C.C.C. (2d) 122 (Ont. Co. Ct.).

consent to death and excludes the defence of consent in a charge of consensual homicide.²¹ Similarly, it is a crime to aid and abet suicide.²² There is also authority, based on public policy,²³ that a person cannot consent to the infliction of grievous bodily harm.²⁴ However, for the

²¹ Section 14 of the Criminal Code, R.S.C. 1970, c. 34, states:

No person is entitled to consent to have death inflicted upon him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted upon the person by whom consent is given.

²² Section 224 of the Criminal Code, *ibid.*, states:

Everyone who:

(a) counsels a person to commit suicide, or

(b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

See also G. Hughes, *Two Views on Consent in Criminal Law* (1963), 28 M.L.R. 233, at pp. 240-241.

²³ "Everyone has a right to consent to the infliction upon himself of force not involving bodily harm."; Stephen's Digest of Criminal Law (9th ed., by L.F. Sturge, 1950), p. 258 (art. 312)). See also A.W. Mewett and M. Manning, *Criminal Law* (2nd ed., 1985), p. 566, and Smith and Hogan, *op. cit.*, footnote 6, pp. 358 *et seq.* Both at common law and under the Criminal Code, the victim's consent is not an element of some offences because of the seriousness of the resulting harm (*e.g.*, murder (s. 212) and criminal negligence (ss. 203 and 204)).

²⁴ Canadian and English law may differ in their positions on consent to bodily harm for the crime of assault. The English position was recently restated in the *Attorney-General's Reference (No. 6 of 1980)*, [1981] Q.B. 715, [1981] 2 All E.R. 1057, [1981] 3 W.L.R. 125 (C.A.). It was held that where two persons fight, intending to cause or causing actual bodily harm, it is not a defence to a charge of assault that the other consented to the fight. The reason given for this position was that it was not in the public interest that people should try to cause bodily harm to each other for no good reason. It should be noted that the case prompting the reference concerned a fistfight in which the injuries were minimal—a bloody nose and bruises.

On the other hand, the Canadian Criminal Code does allow a person to consent to the application of force but the severity of the resulting bodily harm or the means used may vitiate consent in some cases. The boundaries in this area are nebulous. For instance, in *R. v. Setrum* (1976), 32 C.C.C. (2d) 109 (Sask. C.A.), the court overturned the decision of the trial judge who had applied the law as established by English authorities. It was held that since, under s. 244 of the Criminal Code, lack of consent was an essential element of assault, a blow struck in a fight will not constitute an assault within the meaning of s. 244 unless the Crown proves that the blow was inflicted without the victim's consent (even when the blow results in death). The case of *R. v. Barron* (1985), 48 C.R. (3d) 334, 12 O.A.C. 335, 23 C.C.C. (3d) 544 (Ont. C.A.), involved two teenage classmates who were in the habit of good natured jostling. D. gave V. a slight push at the top of the stairs while carrying out a prank. V. lost his balance, fell down the stairs and died from head injuries. Because the push was within the scope of implied consent, D. was found not guilty of manslaughter by an unlawful act (that is, assault) (*ibid.*, at page 337). But the situation in *Barron* can be contrasted with one involving a fight with knives: "One cannot consent to be stabbed. The public policy of the law intervenes to nullify the apparent consent of each of the combatants" (*R. v. Carriere* (1987), 56 C.R. (3d) 257, at p. 269 (Alta. C.A.)). However, the same court held that a

purposes of assault, the Criminal Code does not distinguish between the kinds of application of force to which a person may consent.²⁵ It is an open question whether the judiciary will rule, on grounds of public policy, that certain physically dangerous, degrading or psychologically abusive sexual conduct is beyond the scope of consent.²⁶

A legally effective consent must be timely. Professor Williams writes:²⁷

[C]onsent must be given before or at the time of the act. Subsequent condonation or ratification of the act by the victim does not deprive it of its criminal character.

Consent must exist throughout the sexual activity.²⁸ However, if consent is withdrawn during the sexual activity, the withdrawal of consent should be clearly signalled to the other party or else that party may have grounds to claim an honest belief in consent.

B. *Vitiating of Consent: Section 244(3)*

(1) *Introduction*

Section 244(3) of the Criminal Code specifies four instances in which consent is vitiated, notwithstanding the victim "submits or does

person can consent to bodily harm caused by kicking, *R. v. Bergner* (1987), 36 C.C.C. (3d) 25. Recently, in *R. v. Jobidon* (1987), 59 C.R. (3d) 203 (Ont. H.C.), Campbell J. reluctantly held that consent was a defence to a charge of manslaughter where vicious blows were exchanged (see also D.H. Doherty and D. Stuart, *Jobidon: Consensual Combat and the Crime of Manslaughter—Two Views*, *ibid.*, at p. 216; Stuart, *op. cit.*, footnote 9, pp. 469-472). The Ontario Court of Appeal in *R. v. Jobidon*, unreported November 22, 1988, reversed the acquittal. The court held that consent as used in s. 244 of the Criminal Code is subject to the same limitations as are expressed in the *Attorney General's Reference (No. 6 of 1980)*, *supra*. Simply put, consent for the purposes of s. 244 ". . . is limited and extends only to the application of force where bodily harm is neither caused or intended"; per Zuber J.A., *ibid.* The present state of the law in Canada is confusing and conflicting.

²⁵ Section 244(2) states: "This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party, or causing bodily harm and aggravated sexual assault."

²⁶ See Stuart, *op. cit.*, footnote 9, p. 472, n. 17, and see G. Hughes, *Consent in Sexual Offences* (1962), 25 M.L.R. 67, at pp. 682-685.

²⁷ G. Williams, *Criminal Law: The General Part* (2nd ed., 1961), p. 609. "It may well be that a woman in the earlier stages will resist a man's attempt to have connection with her; but if she changes her mind and subsequently permits that which she had hitherto resisted, the consent so given being a real consent, the prisoner is not then to be convicted of rape."; Hewart L.C.J., in *R. v. Salman* (1924), 18 Cr. App. Rep. 50, at p. 52. Although this statement is accurate with respect to the former crime of rape which was defined solely by penetration, I submit that in the "earlier stages" a sexual assault is committed if there was no consent at or during the application of force.

²⁸ ". . . it is no excuse that she was first taken with her own consent, if she were afterwards forced against her will"; Russell on Crime (12th ed., by J.W.C. Turner, 1964), p. 711. In *Kaitamaki v. The Queen*, [1985] A.C. 147, at pp. 151-152, [1984] 3 W.L.R. 137, at p. 139 (P.C.), Lord Scarman held that "[s]exual intercourse is a continuing offence which only ends in withdrawal". See also *Fagan*, *supra*, footnote 9, where the majority held that there was a continuing assault.

not resist". Lack of consent is an element of assault under section 244(1)(a), but it is not an element under the alternative descriptions of assaultive behaviour such as threats or begging.²⁹ Thus the provisions of section 244(3) apply only to the definition of assault set out in section 244(1)(a).³⁰ Section 244(3) provides:³¹

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.

The scope and language of section 244(3) raise fundamental issues about the element of lack of consent for the crime of sexual assault. This part of the article will examine the following issues: (1) the vitiating circumstances for sexual offences under the common law and previous statutory offences, such as rape and indecent assault; (2) the legal effect of section 244(3); (3) the meaning of the terms "consent", "submit" and "does not resist"; (4) the test (subjective or objective) to determine the existence of a listed circumstance; (5) the requirement for causation; (6) the scope of the vitiating circumstances listed in section 244(3) and at common law for the crime of sexual assault; and (7) the scope of the new provisions negating the consent of a person under fourteen years of age.

(2) *Historical Background*

Section 244(3) does not introduce a new concept to the law of sexual offences. Since the middle of the nineteenth century, courts have recognized that a complainant's consent may be vitiated and a lack of resistance or submission explained by intimidation,³² fraud,³³ or a partic-

²⁹ The alternative descriptions are s. 244(1)(b) (threats) and s. 244(1)(c) (accosting or begging while carrying a weapon).

³⁰ However, the existence of a circumstance listed in section 244(3) may also be relevant to other issues. For example, the vitiating circumstance of a threat of force found in s. 244(3)(b) also constitutes assaultive behaviour under section 244(1)(b).

³¹ An Act to amend the Criminal Code, *supra*, footnote 1.

³² See *R. v. Day*, *supra*, footnote 17; *R. v. Rudland* (1865), 4 F. & F. 495, 176 E.R. 661 (Assizes); *R. v. Hallett* (1841), 9 C. & P. 748, 173 E.R. 1036 (Assizes).

³³ See *R. v. Case* (1850), 1 Den. 580, 169 E.R. 381 (C.C.R.); *R. v. Flattery* (1877), 2 Q.B.D. 410, 13 Cox C.C. 388 (C.C.R.).

ular vulnerability.³⁴ In the modern murder case of *R. v. Stanley*,³⁵ five intruders entered the accused's residence to assault him. The intruders blocked all avenues of escape and, in the ensuing struggle, the accused Stanley fatally stabbed an intruder. The accused appealed his murder conviction on the ground that he was acting in self-defence. The Crown argued that the intruders did not commit an assault, contrary to section 244 of the Code, because the accused Stanley consented to a fight. Branca J.A. stated:³⁶

To suggest that Stanley [the accused] in the attendant circumstances had consented to an assault, when he faced five invaders who had virtually broken into his home with all of the related signs of violence is not only absurd but is an untenable situation. . . There can be no consent at law, unless it is a free and voluntary one and I add that where a consent is extracted by threats and violence it does not and cannot amount to a consent in law at all.

McIntyre J.A. said:³⁷

. . . any consent given by Stanley must have been a genuine consent freely given expressing an acceptance of battle with an appreciation of its risks and with, in his view, freedom to make an alternative choice if he desired. A consent forced upon him by the presence of his adversaries and not freely made would amount only to a submission, an acceptance of what may have seemed to be inevitable.

Some of the circumstances listed in section 244(3) can be traced to the common law³⁸ and repealed Criminal Code definitions of assault, rape, and indecent assault³⁹ and, perhaps, to their judicial interpretation.

³⁴ See *R. v. Nichol* (1807), Russ. & Ry. 130, 168 E.R. 720 (C.C.R.).

³⁵ (1977), 36 C.C.C. (2d) 216, [1977] 4 W.W.R. 578 (B.C.C.A.).

³⁶ *Ibid.*, at pp. 233 (C.C.C.), 598 (W.W.R.).

³⁷ *Ibid.*, at pp. 234 (C.C.C.), 600 (W.W.R.). Although McIntyre J.'s comments were in reference to self-defence and the defence of property, they are relevant to the issue of consent for the crime of assault.

³⁸ See the cases cited, *supra*, footnotes 32, 33, 34.

³⁹ *Assault*

244. A person commits an assault when

- (a) without the consent of another person or *with consent*, where it is obtained by fraud, he applies force intentionally to the person of the other, directly or indirectly;
- (b) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person and begs (R.S.C. 1970, c. C-34, s. 244; 1974-75-76, c. 93, s. 21).

Rape

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*

Although both the former statutory provisions and section 244(3) address the issue of a complainant's consent being vitiated by intimidation or fraud, the wording of section 244(3) is different from its legislative predecessors. The repealed Criminal Code provisions⁴⁰ stated that there was "consent" to the sexual activity even if it was a product of a vitiating circumstance, but that such a "consent" was legally ineffectual.⁴¹ In contrast, section 244(3) stipulates that "no consent" is obtained if the complainant "submits" or "does not resist" as a result of a listed circumstance. The difference in the wording of the two sections reflects both the philosophical debate on the meaning of the word "consent" and a change in the public's attitude towards sexual offences. However, it remains an open question whether the change in wording has any effect on the meaning of consent for the purposes of section 244(1)(a).

Section 244(3) appears, at first glance, to be broader than its legislative predecessor. For example, unlike the repealed legislation,⁴² section 244(3) expressly includes threats or fear of the application of force⁴³ and the exercise of authority as vitiating circumstances. Also, "fraud" is listed in section 244(3) as a vitiating factor without any qualifications

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- (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. (S.C. 1953-54, c. 51, s. 135).

Indecent Assault on female

149. (1) Everyone who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person *with the consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.* (R.S.C. 1970, c. C-34, s. 149; 1972, c. 13, s. 70). (Emphasis added).

⁴⁰ *Ibid.*

⁴¹ Perhaps the wording of the former section can be traced, in part, to the following common law definition of rape: "Rape is the act of having carnal knowledge of a woman forcibly and against her will, i.e. without her consent"; Stephen's Commentaries of the Laws of England, vol. IV (21st ed. by Warmington), p. 65. Smith and Hogan, *op. cit.*, footnote 6, p. 408, say: ". . . courts and writers continued up to 1976 to cite the traditional seventeenth century definition of rape as having intercourse without consent 'by force, fear or fraud'." This obsolete definition of rape required the use or threats of force whereas the modern concept of rape is consent. In *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 140, (1980), 111 D.L.R. (3d) 1, at p. 11, 14 C.R. (3d) 243, at p. 253, Dickson J. stated: "For all practical purposes the Criminal Code merely codifies the common law."

⁴² *Supra*, footnote 39.

⁴³ The former definition of rape required that the threats or fear relate to bodily harm; *ibid.*

whereas the repealed definitions of rape and indecent assault stated that only false and fraudulent representations *as to the nature and quality of the act*⁴⁴ vitiated consent. However, it must be remembered that, under the common law, there was authority that fear,⁴⁵ fraud,⁴⁶ and the exercise of authority⁴⁷ could vitiate the consent of a complainant. Thus, it would appear that section 244(3) is partially a codification of common law principles and partially a reflection of former statutory provisions.

(3) *The legal relevance of section 244(3)*

The provisions of section 244(3) will now be examined to determine their effect on the meaning of consent with respect to the offence of sexual assault. The unusual wording of the introductory part of the section creates fundamental problems of interpretation. Do the words "no consent is obtained where the complainant submits or does not resist by reason of [a listed circumstance]" mean that evidence of a listed circumstance is relevant to the issue of the complainant's consent?⁴⁸ For instance, a threat of force directed to the complainant is admissible evidence on the issue of consent. I suggest that this construction is too narrow. Do the words mean that the occurrence of a listed circumstance that subjectively caused V. to submit or not resist conclusively prove lack of consent?⁴⁹ For example, a fraudulent promise to marry which causes V. to submit vitiates consent. I suggest that this interpretation is too broad.

In my view, section 244(3) means:

- (1) a listed circumstance may vitiate any consent V. gives to the sexual contact; and
- (2) a listed circumstance may prevent V. from communicating her lack of consent to the sexual contact.

Thus, if V. consents to sexual activity but does so by reason of a particular *subset* of those circumstances listed in section 244(3) (for example, fraudulent personation of V.'s spouse), there is no consent for the purposes of section 244(1)(a). Similarly, if V. engages in sexual activity but submits or does not resist only because of a *subset* of those circumstances then, notwithstanding the apparent *manifestation* of consent (passive acquiescence), there is no consent in law.

⁴⁴ *Ibid.*

⁴⁵ See *R. v. Cardo* (1888), 17 O.R. 11 (Ont. C.A.).

⁴⁶ See *R. v. Flattery*, *supra*, footnote 33.

⁴⁷ See *R. v. Nicol*, *supra*, footnote 34.

⁴⁸ See Watt, *op. cit.*, footnote 2, p. 217. This is correct as far as it goes but the section certainly has a broader meaning.

⁴⁹ Compare s. 244(3), *supra*, footnote 1, and s. 139, *supra*, footnote 3. Unlike s. 244(3), the latter provision states that on proof of a particular circumstance (*viz.* age), the consent of the complainant (a minor under twelve) is either legally inoperative or immaterial; that is, on proof of the basic fact (age) the law conclusively presumes that there is a lack of consent.

(4) *The meaning of the terms "consent" and "submission"*

The introductory part of section 244(3) provides that "no consent is obtained where the complainant *submits* . . . by reason of [force, intimidation, fraud or the exercise of authority]". This raises the issue whether there is a difference between consensual and submissive conduct. In the mid-nineteenth century case of *R. v. Day*,⁵⁰ Coleridge J. formulated the oft quoted "test" to distinguish between consent and submission: "[E]very consent involves a submission; but it by no means follows, that a mere submission involves consent."⁵¹ This "test" has been used by several Canadian courts⁵² and was recently adopted by the English Court of Appeal.⁵³ Smith and Hogan⁵⁴ criticize the reasoning of Coleridge J. in *Day*:

The dictum of Coleridge J. in *Day* . . . seems, on reflection, to be the wrong way around. A woman who joyously embraces her reluctant lover undoubtedly consents to the intercourse which follows but it would seem inappropriate to put it mildly, to say that she "submits" to that which she ardently desires and provokes. On the other hand, a woman who gives in to threats does in fact consent, however reluctantly.

Professor Williams⁵⁵ agreed with this criticism of *Day*:

[B]oth parts of this statement [in *Day*] are wrong. A consent eagerly given between equal partners does not involve a submission (which implies giving in to a dominant will), and a mere submission does involve consent if there are no vitiating factors. Many a wife (or cohabitee) has submitted to the attentions of a man with

⁵⁰ *Supra*, footnote 17.

⁵¹ *Ibid.*, at pp. 724 (C. & P.), 1027 (E.R.).

⁵² See *R. v. Cardo*, *supra*, footnote 45; *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.), (leave to appeal to S.C.C. refused, 37 C.C.C. (2nd) 227n); *R. v. Stinson*, [1934] 21 D.L.R. 544, [1934] 1 W.W.R. 593, (1934), 61 C.C.C. 227 (B.C.C.A.).

⁵³ See *R. v. Olugboja* (1981), 73 Cr. App. Rep. 344, [1981] 3 All E.R. 443 (C.A.) (leave to appeal to the House of Lords refused, *ibid.*, at pp. 351 (Cr. App. Rep.), 449 (All E.R.)). The Court of Appeal cited with approval part of the jury direction of Coleridge J. in *R. v. Day*, *supra*, footnote 17, at pp. 724 (C. & P.), 1027 (E.R.). The complete text of Coleridge J.'s summing-up is:

There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description [rape], was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the prosecutrix was voluntary on her part, or the result of fear, under the circumstances in which she was placed.

⁵⁴ *Op. cit.*, footnote 6, p. 434.

⁵⁵ See G. Williams, *Textbook of Criminal Law* (2nd ed., 1983), p. 554, n.6. Professor Williams agrees with Professor J.C. Smith's criticism as set out in "Note to *Olugboja*", [1981] Crim. L.R. 717. This criticism is repeated in Smith and Hogan, *ibid.*

whom she is bored, because for one reason or another she does not care to reject them; and in so doing she consents to the contact.

In my view these criticisms clearly demonstrate the fallibility of the judicial "test" formulated in *Day*.

Several Canadian judges have stated that there is a difference between consent and submission. For example, in a case concerning the former offence of rape, Coyne J.A. said:⁵⁶

There is no consent, of course, where submission is extorted by threats of fear of bodily harm, and it is a complete misuse and contradiction of language to employ the word "consent" in such a case. . .

But does this judicial reasoning help us to distinguish between consent and submission?⁵⁷ Consent is difficult to define.⁵⁸ Although adjectives such as "real", "genuine", "legal", "true" or "voluntary" are useful in a summing-up to a jury, they do not define consent. Consent is best described by examining the factors which negate its existence. For instance, a consent is not "genuine" or "legal" if obtained by threats of violence. The lack of a suitable legal definition for consent is not solved by using the phrase "submits because of [a listed circumstance]" as an antonym. Professor Williams states:⁵⁹

It is a purely verbal question whether. . . [we say the complainant] consents under compulsion or. . . she does not truly consent but simply gives *submission, acquiescence or complaisance*. However one expresses it, there is not effective consent in law.

Leaving aside the semantic and philosophic debate, I question the practical utility of section 244(3). It seems to me that defining

⁵⁶ *R. v. Brothers* (1952), 103 C.C.C. 108, at p. 109, 60 Man. R. 182, at p. 183 (Man. C.A.). See also reasoning by McIntyre J. in *Stanley, supra*, footnote 35.

⁵⁷ The English cases are susceptible to the same criticism. For example, in *R. v. Wallaston* (1872), 12 Cox. C.C. 180, at p. 182 (C.C.A.), an indecent assault case, Kelly C.B. stated: "Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent." The court does not elaborate as to what constitutes the difference. See also *R. v. Flattery, supra*, footnote 33, where the terms are used without an adequate definition.

⁵⁸ This is the view of Williams, *op. cit.*, footnote 55, p. 550, with which I agree. Mewett and Manning, *op. cit.*, footnote 23, p. 597, are of the opinion that consent means motive. I disagree with their analysis. Motive, like consent, is difficult to define (see *R. v. Steane*, [1947] 1 K.B. 997, [1947] 1 All E.R. 813, (1947), 32 Cr. App. Rep. 61 (C.C.A.) and *Paquette v. R.*, [1977] 2 S.C.R. 189, (1976), 70 D.L.R. (3d) 129, 30 C.C.C. (2d) 417), and, thus, equating consent with motive will not assist us in defining consent. Also, a person may have several contradictory motives for the same conduct. For example, a person may not wish to engage in sexual activity but does so to preserve the relationship. Under such circumstances, I suggest that the complainant consents although his motive is to preserve the relationship. A similar problem exists with using the terms "voluntary" and "duress" to distinguish between consent and submission; see Williams, *ibid.*, p. 624, n. 1 and the text, *infra*, p. 129).

⁵⁹ *Ibid.*, pp. 551-552.

“non-consent” by using terms such as “submits because of [a listed circumstance]” does nothing to help us differentiate between consensual and non-consensual conduct. The term “submit” adds no more clarity to the issue than the original term “consent”. In an obvious case, for example where physical violence is involved, the particular words chosen by the trial judge to instruct the jury on the difference between consensual conduct and unwilling submission will have little effect on the outcome of its deliberations. However, I suggest that in a difficult case, where it is unclear whether the complainant actually consented (albeit reluctantly) as opposed to submitting only because of a listed circumstance, a learned discussion of “consent” and “submit” may confuse rather than assist. Smith and Hogan say:⁶⁰

It is doubtful if the bounds of the crime of rape can be satisfactorily drawn by a distinction between consent and submission. It is so vague that, as the above cases suggest, both judges and juries may have quite different ideas as to its application.

I suggest that this comment applies equally to the offence of sexual assault. Although section 244(3) introduces the concept of submission into the legislation on sexual assault, the provision still does not help us, in a border-line case, to ascertain whether or not the complainant consented to the sexual activity. However, for the purposes of this article, I will subsequently use the word “submit” to mean non-consent or, at least, to mean a consent which is negated by reason of a vitiating circumstance.

(5) *The meaning of the term “does not resist”*

Section 244(3) provides that “. . . no consent is obtained where the complainant submits or *does not resist* by reason of the application of force. . .”. However, the term “does not resist” is not necessarily synonymous with the word “submit”. Assume, for example, that V. is sexually molested while asleep.⁶¹ In this illustration, although V. does not resist (but not by reason of any of the listed circumstances), we cannot say that V. submitted because the word implies a conscious awareness of the force being applied. The term “does not resist [because of a listed circumstance]” is also not always a synonym of non-consent. For example, if two consenting adults willingly engage in sexual activity involving bondage,⁶² the passive person cannot resist (“does not resist”) because he is bound (“application of force”). Yet, in this hypothetical, it is inaccurate to say that the passive person does not consent to the

⁶⁰ *Op. cit.*, footnote 6, p. 434.

⁶¹ See *R. v. Mayers* (1872), 12 Cox. C.C. 311 (Cir.).

⁶² See *Pappajohn v. The Queen*, *supra*, footnote 41, for an instance of alleged consensual sexual bondage, and T. Sharpe, *Blott on the Landscape* (1975), for a fictional account.

sexual activity because force is being applied: in fact, he is a willing participant.⁶³

The common law offence of rape was defined as "carnal knowledge with a woman with force and violence and against her will".⁶⁴ There were divergent views on whether or not resistance was an element of this crime. Some judges instructed juries that "they must, also, be satisfied that there was evidence of 'some resistance on the part of the woman to show that she was really not a consenting party'".⁶⁵ Other authorities disagreed. In *R. v. Camplin*,⁶⁶ Denman L.C.J. correctly said:

It is put as if resistance was essential to rape: but that is not so, although proof of resistance may be strong evidence in the case.

Similarly, resistance by the complainant is not an element of sexual assault. I suggest that the presence or absence of resistance and its cause (if any) is relevant only as evidence on the issue of consent or the accused's belief in consent. The equation of the term "does not resist [because of a listed circumstance]" with "no consent" in section 244(3) may create problems. The section may be incorrectly taken to imply that if there is no resistance and no listed circumstance then, without more, there is consent. The wording may also give rise, once again, to the expectation that a true victim will always resist, or to the erroneous notion that resistance is an element of the offence which must be established in order to convict for sexual assault.⁶⁷

⁶³ See Stuart, *op. cit.*, footnote 9, p. 472, note 27 for authorities that persons consent to sado-masochistic infliction of violence on themselves.

⁶⁴ See text, *supra*, at footnote 41; also see *R. v. Olugboja*, *supra*, footnote 53, at pp. 349 (Cr. App. Rep.), 447 (All E.R.). According to K.L. Koh, Consent and Responsibility in Sexual Offences, [1968] Crim. L.R. 81, at p. 89, there were two judicial views on this definition. One was a narrow interpretation—that rape was sexual intercourse with a woman "against her will" and not "without her consent". As such, a manifestation of an opposing will had to be shown by resistance brought about by force or violence. The broad interpretation of rape (after 1841) was first stated in *R. v. Camplin* (1845), 1 Den. 89, 169 E.R. 163, 1 Cox C.C. 220 (C.C.R.). Tindal C.J. and Parke B. were of the view that rape was ravishing a woman "where she did not consent", and not ravishing her "against her will". Although first defined by the common law, rape has been prohibited by statute since 1275 (3 Edw. 1, c. 13). Rape was first defined in the U.K. in the Sexual Offences (Amendment Act, 1976), s. 1(1).

⁶⁵ *R. v. Fick* (1866), 16 U.C.C.P. 379, at p. 384; see also *R. v. Wright* (1866), 4 F. & F. 967, 176 E.R. 869 (Assizes), and defence counsel's argument in *R. v. Dee* (1884), 15 Cox C.C. 579, at pp. 580-583 (Ir. C.C.R.).

⁶⁶ *Supra*, footnote 64, at pp. 91 (Den.), 164 (E.R.). The words of Denman C.J. were differently reported in 1 Cox C.C., *supra*, footnote 64, at p. 221: "The word 'resistance' has been introduced, as though it were necessary to constitute rape; but that is not so, however strong it may be as evidence."

⁶⁷ The Criminal Law Revision Committee, Sexual Offences, 15th Report (1984), Cmnd. 9213, resisted pressure from women's groups to redefine rape as sexual intercourse against a woman's will "because it appeared to excuse those who had sexual intercourse when [the victim was] drunk or incapable. These cases are met by a formula

(6) *An objective or a subjective test to determine the existence of a vitiating circumstance*

The question arises whether the existence of a circumstance listed in section 233(4) should be ascertained by a subjective or an objective test. Using a subjective test, consent would be vitiated when a complainant submitted because of a belief (whether mistaken or reasonable) in the existence of one of the listed circumstances. For example, if D. touched V.'s hand with a request that they engage in sexual activity and V. submitted solely by reason of the touching, then, using a subjective test, there would be "no consent" for the purposes of section 244(1)(a). On the other hand, with a combined subjective/objective test, a situation would also have to meet objective criteria in order to constitute a vitiating circumstance. In the above illustration, because the external pressure was slight, objectively non-coercive, and similar to conduct which normally precedes consensual sexual activity, this kind of application of force would not be a vitiating circumstance. In many cases, for example, where the sexual assault is accompanied by violence, the two tests will produce the same result.

There are several arguments favouring a subjective construction for section 244(3). First, because section 244(3) provides a statutory method for determining the existence of consent for section 244(1)(a), and since consent is a state of mind, any test designed to determine the existence of a purely subjective matter should also be subjective. Secondly, when Parliament intended an objective standard to be applied in section 244 it clearly showed that by explicit language. For instance, the complainant's fear under section 244(1)(b) must be based on reasonable grounds. Absent the requirement that the complainant's apprehension of force must be based upon reasonable grounds, one could argue that Parliament intended a subjective test for section 244(3).

Thirdly, a subjective interpretation can also be justified on policy grounds. It can be argued that section 244(3) was designed to protect complainants from specified external pressures and to deter persons from exerting those types of pressures.⁶⁸ Thus, if the law requires a vitiating circumstance to meet objective standards, it falls short of protecting those persons most in need of protection and it implicitly acknowledges that there is an acceptable level or kind of external pressure. A subjective test would best protect the vulnerable and deter the aggressive.

which turns on the absence of consent. To return to a test which asked whether the intercourse was against the woman's will would narrow the definition of rape". (*Ibid.*, p. 11).

⁶⁸ C. Boyle, *Sexual Assault* (1984), p. 60, states: "The message of the criminal law would be: refrain from behavior which you know will put pressure on another person to fulfill your will instead of his or her own."

On the other hand, there are arguments supporting an objective construction for section 244(3). Although section 244(3) specifies categories of circumstances which are capable of vitiating consent, the courts must decide the kinds and/ or degree of pressures within these categories which are sufficient to negate consent. This guidance must be given by rules of law.⁶⁹ For instance, section 244(3)(d) says that "the exercise of authority" may vitiate consent but does not differentiate between the various ways a person may exercise authority. Assume, for example, that a woman, the dominant person in a relationship, threatens her common law spouse with separation unless he engages in sexual activity and that the male person reluctantly consents by reason of this pressure. I suggest that this kind of exercise of authority should not be a vitiating circumstance under section 244(3)(d). If the test used to ascertain consent is solely subjective, then Parliament has effectively created at least two new offences, *viz.*, sexual assault by reason of perceived threats or perceived exercise of authority. I do not think Parliament intended to alter the law governing sexual conduct to this extent.

Parliament often incorporates objective criteria as an element of an offence in order to distinguish criminal from non-criminal activity. An attempted or threatened battery contrary to section 244(1)(b)⁷⁰ requires reasonable grounds for the complainant's belief that the accused had the present ability to carry out his threat of force. A threat of force is also a vitiating circumstance in section 244(3)(b). By parity of reasoning, for a threat to be a vitiating circumstance under section 244(3)(b), it should meet the same objective standard incorporated in the definition of assault. In other words, it is submitted that the threat must be *objectively* coercive in order to vitiate consent. However, the general characteristics of the complainant (such as maturity) may be incorporated as part of the objective test.

Concerning the argument that the legislation should be interpreted in such a way as to protect the vulnerable and deter the aggressive, I suggest that the criminal law should not recognize physical contact or external pressure as being capable of vitiating consent for the crime of sexual assault unless it is objectively coercive. If deterrence of conduct which falls below this criminal standard of conduct is considered a desirable social goal, Human Rights legislation,⁷¹ collective bargaining or judge-made tort law, rather than the criminal law, would be a more effective, efficient and appropriate way to deter such conduct. My view, that the test should be a combined subjective/objective one, will be exam-

⁶⁹ Williams, *op. cit.*, footnote 55, pp. 551, 555.

⁷⁰ By definition, an assault includes an attempted battery: "A person commits an assault when. . . (b) he attempts or threatens. . . to apply force to another person."

⁷¹ See s. 6 of the Ontario Human Rights Code, 1981, S.O. 1981, c. 53.

ined in more detail below when I evaluate the scope of each of the circumstances listed in section 233(4).

(7) *Causation*

The opening words of section 244(3), which state that “no consent is *obtained* where the complainant submits or does not resist *by reason of* [a vitiating circumstance]”, raise the issue of causation. In order for a circumstance listed in section 244(3) to be a cause of the consequence (that is, the complainant’s submission or lack of resistance), it must be both a factual and an imputable (legal) cause.

Factual causation is the equivalent of “but-for” causation. As Professor Williams⁷² explains:

For a factor to be a but-for cause, one must be able to say that but-for the occurrence of the antecedent factor the event would *not* have happened.

Thus, “but-for” the occurrence of a listed circumstance (outside the *de minimis* range),⁷³ the complainant would not have submitted or would have resisted. A listed circumstance, viewed objectively, may appear to be the cause of the submission or lack of resistance; however, it may not be the *factual* cause, which must be determined subjectively. For example, if D. threatens V. with physical violence but V. submits by reason of affection, then D.’s threat is not a factual cause of the submission.

When the answer to the “but-for” test is affirmative, the listed circumstance must then be shown to be the imputable (legal) cause of the consequence. The test for imputable causation is that the consequence must be reasonably foreseeable⁷⁴ (ought to have known) and not too remote; the consequence must be “within the risk that would be apprehended by a reasonable person”.⁷⁵

Imputable causation is ascertained by applying objective criteria. Factors such as: the nature or degree of the intimidation; the nature and type of fraud; the manner of the exercise of authority; the reasonableness of the complainant’s reaction to the external pressure; the relation-

⁷² *Op. cit.*, footnote 55, p. 379.

⁷³ See *Smithers v. The Queen*, [1978] 1 S.C.R. 506, (1977), 75 D.L.R. (3d) 321, 34 C.C.C. (2d) 427.

⁷⁴ Williams, *op. cit.*, footnote 55, pp. 381-401, sets out various principles governing causation, but most can be gathered under his “reasonable foresight principle” (pp. 388-390). I am not aware of any Canadian appellate court that has clearly adopted the views of Williams in relation to imputable causation.

⁷⁵ The English case of *R. v. Roberts* (1971), 56 Cr. App. Rep. 95 (C.A.) is a good illustration of the application of the principle of imputable causation. “D was driving a girl home from a party and pestered her with advances, held her coat and told her he had beaten up girls who had refused him. She jumped out of the car and suffered injury”; Williams, *op. cit.*, footnote 55, p. 388. In these circumstances, D. caused the injury because he ought to have foreseen that V. might try to escape and suffer injury in her attempt to flee.

ship between the complainant and the third party (for example, stranger, spouse) if the force is directed to a person other than the complainant; the accused's knowledge of the complainant's sensitivity to intimidation and other external pressures (for example, age or intellectual capacity); and, perhaps, the complainant's alternative course of conduct will all be relevant to the issue of imputable causation. For instance, assume that V., the victim of a sexual assault by X. the year before, misconstrues an objectively harmless comment by D. as a threat of violence. Also assume that D. is unaware of the previous experience. Because V. perceives D.'s comment as a threat, V. does not resist D.'s advances and submits to sexual activity. In this illustration, D.'s words are a *factual* cause of V.'s submission and lack of resistance, but the words are not an *imputable* cause because the consequences (unwilling submission and lack of resistance) were not reasonably foreseeable.⁷⁶ In my view, the words "obtained. . . by reason of" in section 244(3) incorporate the requirement of causation.⁷⁷ Therefore, the vitiating circumstance must be the factual as well as the imputable cause of the consequence.⁷⁸

⁷⁶ However, if courts apply the thin-skulled plaintiff exception, then D.'s conduct would be an imputable cause of V.'s submission; see *R. v. Blauie*, [1975] 3 All E.R. 446, [1975] 1 W.L.R. 1411, 61 Cr. App. Rep. 271 (C.A.), followed in *Smithers v. The Queen*, *supra*, footnote 73. Query: should the law distinguish between conduct which has no social utility (assault) and conduct which has social utility and is part of normal every day life (sexual relationships)? If yes, then should the doctrine in *Blauie* apply only to the former type of conduct?

⁷⁷ The courts could reject the orthodox rules of causation and hold that the vitiating circumstance need only precede or occur during the submission or period of lack of resistance. This approach was formulated by several Supreme Court judges as the test for determining whether evidence was obtained in contravention of section 24(2) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982 (Canada Act, 1982 (U.K.), 1982, c. 11): Le Dain J. (McIntyre concurring) in *The Queen v. Therens*, [1985] 1 S.C.R. 613, at p. 648, (1985), 45 C.R. (3d) 97, at p. 129, 18 C.C.C. (3d) 481, at p. 509; see also the reasons of Lamer J., *ibid.*, at pp. 623 (S.C.R.), 109 (C.R.), 490 (C.C.C.). Under Le Dain J.'s interpretation, it is unclear whether the vitiating factor need be a factual cause of the consequence: also, there is no requirement that the consequence be reasonably foreseeable. Presumably, applying this test, consent is determined subjectively and the reasonableness or foreseeability of the result is relevant solely to the complainant's credibility. I suggest that this constitutional test is extremely vague and I question its value as a substitute for the established rules of causation for determining the scope of section 244(3).

⁷⁸ When an accused intentionally or recklessly commits the *actus reus* of sexual assault, an examination of the issue of causation will, practically speaking, be redundant: it would be most difficult to argue that if a person intends or is aware of the possibility of a consequence it is not foreseeable. Several matters are sometimes confused with the issue of causation. For instance, the reasonableness or proportionality of the complainant's reaction to the vitiating circumstance may be relevant both to the complainant's credibility and the accused's belief in the existence of consent. Although the evidential foundation for these matters may also form an evidential basis for the issue of imputable causation, I submit that the issues are distinct. See Williams, *op. cit.*, footnote 55, p. 389. See Mewett and Manning, *op. cit.*, footnote 23, p. 564, for an alternative approach.

I will now examine the scope of the individual statutory circumstances found in section 244(3).

C. The Scope of the Vitiating Circumstances (Section 244(3))

(1) Section 244(3)(a): application of force

Section 244(3) states:

. . . 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.

The former statutory offences of rape and indecent assault⁷⁹ did not specify that the application of force⁸⁰ was a vitiating circumstance. However, the judiciary recognized that force could vitiate consent⁸¹ or prevent the complainant from signifying a refusal to engage in sexual activity.⁸² It may be reasonably argued that section 244(3)(a) is a codification of these common law principles.

The application of force to a third party may also vitiate the complainant's consent to sexual activity under section 244(3)(a).⁸³ However, the section remains silent on such issues as the requisite degree of force and the nature of the relationship between the recipient of the force and the complainant. Literally interpreted, the mere touching⁸⁴ of a stranger

⁷⁹ *Supra*, footnote 39.

⁸⁰ The application of force is an element of assault under section 244(1)(a) as well as being a vitiating circumstance under section 244(3)(a). The question arises whether these forces are the same or distinct. Boyle, *op. cit.*, footnote 68, p. 64, says that "there are two forces, the 'assault' force and the 'consent' force". Query: are there two assaults? Watt, *op. cit.*, footnote 2, p. 218, n. 17, says that "V's consent to the [sexual] assault was obtained by conduct which itself amounts to an assault". In many instances—for example where an assailant physically restrains or overpowers the victim to effect his purpose—there is one continuous assault. However, in other instances, there are two separate applications of force and two distinct assaults. If, for example, V. submits to sexual intercourse because D. strikes V.'s child, the assault upon the child is distinct from the sexual assault upon the victim.

⁸¹ See *R. v. Brothers*, *supra*, footnote 56.

⁸² See *R. v. Hallett*, *supra*, footnote 32. "If there was non-resistance on her part, but that non-resistance proceeded merely from being overpowered by actual force, or from not being able from want of strength to resist any longer, or that from the number of prisoners she considered resistance dangerous and absolutely useless the full charge is made out, and you ought to convict the prisoners of the capital offence"; Coleridge J., in summing-up to the jury, *ibid.*, at pp. 751 (C. & P.), 1038 (E.R.).

⁸³ I am unaware of a reported case recognizing force to a third party as a vitiating factor at common law. However, there is no reason in principle why such force would not be capable of vitiating consent, apart from an express statutory provision.

⁸⁴ Assault and battery were distinct crimes at common law but, by common usage and by statute, the term "assault" is used for both crimes. "An assault is any act by which D, intentionally or recklessly, causes P to apprehend immediate and unlawful personal violence. A battery is any act by which D, intentionally or recklessly, inflicts unlawful personal violence upon P"; Smith and Hogan, *op. cit.*, footnote 6, p. 351.

could negate consent. I suggest that the degree of force, the relative strength, age, and sex of the complainant and the third party, and the relationship between the complainant and the assaulted third party (such as parent/child or spouse) are relevant factors in determining whether an application of force to a third person could vitiate consent. Judges, as a matter of law, must determine whether a particular application of force is capable of vitiating consent. Juries will then determine whether the application of force occurred, whether it meets this legal standard and if it negated the victim's consent.

(2) *Section 244(3)(b): threats or fear of the application of force*

Section 244(3)(b) provides:

... no consent is obtained where the complainant submits or does not resist by reason of

...

(b) threats or fear of the application of force to the complainant or to a person other than the complainant.

Section 244(3)(b) can be compared with the former Criminal Code definition of rape:

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

...

(b) with her consent if the consent

(i) is extorted by threats or fear of bodily harm.⁸⁵

Several appellate courts interpreted this vitiating circumstance very narrowly. For example, in *R. v. Bursey*,⁸⁶ the Ontario Court of Appeal

Touching is sufficient to be an assault under s. 244(1)(a): "It is, of course, trite law that the force applied may be of very slight degree, in fact, may be mere touching"; Spence J., dissenting, in *Bolduc v. The Queen*, [1967] S.C.R. 677, at p. 683, (1967), 63 D.L.R. (2d) 82, at p. 87, 60 W.W.R. 665, at p. 669. See also *R. v. Burden*, [1982] 1 W.W.R. 193, (1981), 25 C.R. (3d) 283, 64 C.C.C. (2d) 68 (B.C.C.A.). Touching a person in sexual circumstances constitutes a sexual assault: *Chase, supra*, footnote 2. Parliament recently created the new offences of sexual interference and invitation to sexual touching (ss 140 and 141 of the Criminal Code, enacted by An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3).

⁸⁵ *Supra*, footnote 39. There was no equivalent provision for indecent assault (*ibid.*). Extortion means "to wrest from a reluctant person by force, violence, torture, or intimidation. . . or to extract forcibly"; *The Shorter Oxford English Dictionary* (3rd ed., 1984), p. 711.

⁸⁶ (1957), 26 C.R. 167, 118 C.C.C. 219 (Ont.C.A.). See also the decision of the British Columbia Court of Appeal in *R. v. Jones*, [1935] 2 W.W.R. 270, (1934), 63 C.C.C. 341. In overturning a rape conviction, the majority commented on the requirements of the vitiating circumstance of fear. "It is not enough for a woman to say 'I was afraid of serious bodily harm and therefore consented,' she must prove in evidence that she had a dire reason to be afraid, and that she took every possible precaution to avoid the outrage"; at pp. 271 (W.W.R.), 341 (C.C.C.). The dissenting opinion of Martin J.A. that there was sufficient evidence of non-consent for the jury's consideration is, with respect, the preferable view.

overturned a jury conviction for rape. The complainant, an inexperienced eighteen year old, testified that she engaged in sexual activity with the accused because she feared he would attack her and leave her in a ditch. The occurrence took place in an isolated area where neither escape nor resistance was viable. Laidlaw J.A. stated:⁸⁷

First, there is no evidence of any struggle resulting in the tearing of any of the complainant's clothing; there is no evidence of any bruise or bodily injury of any kind to the complainant; there is a minimum of evidence touching the question of threats or fear of bodily harm exerted by the appellant to extort the consent of the complainant.

It is clear that the wording of the former rape provision (which required proof of extortion as well as threats or fear of bodily harm) and the narrow interpretation given to the vitiating circumstance by the judiciary justifies the broader language used in section 244(3)(b). Unlike its forerunner, section 244(3)(b) does not include the requirement of extortion nor does it require the complainant to fear bodily harm—the mere apprehension of force (in other words, a common assault) may vitiate consent. If the facts in *Burse*⁸⁸ recur, I suggest that under the present legislation an appellate court would not overturn a jury conviction as there would be some evidence of threats of force capable of vitiating consent.

Although courts have long recognized that threats or fear of force may vitiate consent⁸⁹ and affect the complainant's resistance, an issue arises concerning the type of threat or degree of fear that will meet the requirements of section 244(b). In the mid-nineteenth century case of *R. v. Day*,⁹⁰ the accused attempted to rape a ten year old girl who was walking up a dark lane on her way home. The accused committed the offence without violence and the victim did not resist. Coleridge J., in summing up the case to the jury, stated:⁹¹

It would be too much to say, that an adult submitting to an outrage of this description, was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law.

⁸⁷ *R. v. Bursey, ibid.*, at pp. 173 (C.R.), 224 (C.C.C.).

⁸⁸ *Ibid.*

⁸⁹ See *R. v. Cardo, supra*, footnote 45.

⁹⁰ *Supra*, footnote 17.

⁹¹ *Ibid.*, at pp. 724 (C. & P.), 1027 (E.R.). But see *R. v. Rudland, supra*, footnote 32, where the accused threw the complainant on the bed and accomplished his purpose. Crompton J. did not approve of the jury's verdict because the complainant did not resist as she ought to have done. See also *R. v. Wright, supra*, footnote 65. In these latter cases, the judges may have erroneously required resistance as an element of rape (see text, *supra*, at p. 107). See also the recent case of *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, (1985), 17 D.L.R. (4th) 577, 18 C.C.C. (3d) 223, where the complainant did not resist because of the apprehension of force.

In *R. v. Hallett*,⁹² several people were charged with the rape of a prostitute outside a brothel. Coleridge J. instructed the jury:⁹³

If there was non-resistance on her part, but that non-resistance proceeded merely from being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of the prisoners she considered resistance dangerous and absolutely useless, the full charge is made out, and you ought to convict the prisoners of the capital offence. . .

Although the existence of consent was a question of fact, Coleridge J. correctly instructed both these juries, as a matter of law, on the kinds of threats or apprehension which were capable of vitiating consent by forcing submission⁹⁴ or overcoming resistance.⁹⁵ These instructions may be contrasted with the trial judge's summing-up in the modern case of *R. v. Olugboja*⁹⁶ in which no force was used or expressly threatened. The complainant testified that, although she did not consent, she engaged in sexual intercourse by reason of fear. However, she was not asked about the nature or source of her fear. The trial judge instructed the jury on consent and submission as follows:⁹⁷

Sometimes a woman gives in and submits out of fear, or constraint, or duress. . . Was it circumstances in which she was consenting, or was it circumstances in which there was constraint operating on her mind, fear or constraint, so that she was doing it without consent.

Subject to a minor qualification concerning the use of the word "constraint", the English Court of Appeal approved this summing-up.⁹⁸ The court stated:⁹⁹

[T]he dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.

The decision in *Olugboja*¹⁰⁰ has been criticized¹⁰¹ and applauded.¹⁰² Although the facts support the reasonable inferences that the complainant feared the application of force and that she believed resistance would be useless, the trial judge failed to instruct the jury adequately as to the

⁹² *Supra*, footnote 32.

⁹³ *Ibid.*, at pp. 751 (C. & P.), 1038 (E.R.).

⁹⁴ *R. v. Day*, *supra*, footnote 17.

⁹⁵ *R. v. Hallett*, *supra*, footnote 32.

⁹⁶ *Supra*, footnote 53.

⁹⁷ *Ibid.*, at pp. 347 (Cr. App. Rep.), 445 (All E.R.).

⁹⁸ "We think it would have been better not to use the word 'constraint' in explaining the offence, but whenever he used it the judge linked it with the word 'fear', so that in the context the word seems to us to be unexceptional"; *ibid.*, at pp. 351 (Cr. App. Rep.), 449 (All E.R.).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

types of threat or the kinds of fear which may negate consent in law. Surely there is a need for uniformity concerning the kinds of fear or threats which are capable of vitiating consent. Unlike the vague approach of the English Court of Appeal in *Olugboja*,¹⁰³ section 244(3) requires that the threat or fear relate to an application of force. But is it sufficient for a judge simply to read the section to a jury without any guidance? I submit that the courts, as a matter of law, must assist juries by instructing them about the kinds of force, or its apprehension, which are capable of vitiating consent. Leaving it in the hands of a jury without guidance is unsatisfactory.¹⁰⁴ Depending on the evidence, a judge may instruct the jury that a particular fear of force, for example, an irrational or speculative one, is not a vitiating circumstance. Or, if unknown to D., V. submits by reason of, or fear of, reasonable parental discipline for breaking curfew, V.'s apprehension of force is not a vitiating circumstance under section 244(3)(b).

Section 244(3)(b), unlike its legislative predecessor, expressly provides that a threat of force to a person other than the complainant may vitiate consent.¹⁰⁵ Because the nature and degree of force and the relationship between the person threatened and the complainant may vary greatly, the extremely broad language of section 244(3)(b) is understandable. However, in a case by case approach, the courts should articulate the kind of force and the nature of the special relationship (for example, parent, guardian, spouse, teacher) which is capable of overpowering the complainant's will. Assume V. is duped into attending a "biker's picnic,"¹⁰⁶ and one of the participants demands that V. engage in sexual activity. If this demand is accompanied by a non-specific threat of force to V.'s child who is present, I submit that V.'s apprehension of force may viti-

¹⁰¹ See Smith, *loc. cit.*, footnote 55; Williams, *op. cit.*, footnote 55, pp. 551-558. See also *R. v. Guerrero* (1988), 64 C.R. (3d) 65 (Ont. C.A.).

¹⁰² See Boyle, *op. cit.*, footnote 68, pp. 60, 65.

¹⁰³ *Supra*, footnote 53.

¹⁰⁴ See Williams, *op. cit.*, footnote 55, p. 554.

¹⁰⁵ The question arises whether a threat by a third party, directed either at the complainant or at another person, is capable of vitiating consent. At common law, a threat by a third party was capable of vitiating consent. See *R. v. Plummer and Brown* (1975), 24 C.C.C. (2d) 497, 31 C.R.N.S. 220 (Ont. C.A.). Section 244(3)(b) is silent on this issue but there is no reason in law or policy why this common law rule would not also apply to the crime of sexual assault. But see *R. v. Guerrero, supra*, footnote 101, where the Ontario Court of Appeal held that: ". . . under the provisions of s. 244(3) of the Criminal Code, the vitiation of consent, if it occurs, must occur by reason of one of the enumerated sorts of behaviour". With regard to the former crimes of rape and indecent assault, I am unaware of any case holding that a threat of force to a third party could vitiate consent but, on principle, I think such a threat should be a vitiating circumstance; see Williams, *op. cit.*, footnote 55, p. 552.

¹⁰⁶ See *R. v. Salajko*, [1970] 1 O.R. (2d) 842, (1969), 9 C.R.N.S. 145, [1970] 1 C.C.C. 352 (Ont. C.A.) for an example of this grotesque ritual.

ate consent. On the other hand, I suggest that a threat to punch a distant relative in the nose at some unspecified future time and place would not normally be a vitiating circumstance for the purpose of section 244(3)(b).¹⁰⁷

Lastly, the issue arises whether section 244(3)(b) excludes other types of threats, or fear of things other than force, from being vitiating circumstances. In the bizarre case of *R. v. Bird*,¹⁰⁸ the accused duped a woman into believing that he had photographs of her husband engaging in indecent acts with other persons. The accused threatened to circulate the photographs unless she agreed to engage in sexual activity with him. The complainant complied with the blackmailer's demand. Because section 244(3)(b) applies only where there is a threat or fear of physical force, it could reasonably be argued that threats such as the one made by the blackmailer in *Bird* are not capable of vitiating consent to sexual assault.¹⁰⁹

(3) *Section 244(3)(c): fraud*

Section 244(3)(c) provides:

. . . no consent is obtained where the complainant submits or does not resist by reason of

. . .

(c) fraud.

Section 244(3) lists fraud as a vitiating circumstance without qualification. Surely not every fraud which subjectively causes a complainant to engage in sexual activity is capable of vitiating consent in law, especially if such fraud does not contravene a statutory law or tort duty. If the contrary were correct, it would produce some remarkable results. Let us take two examples. Assume two adults meet in a "singles" bar and they lie to each other about their financial attributes. If they subsequently willingly engage in sexual activity by reason of their mutual deceits, are both persons guilty of sexual assault? Or, if a person gives counterfeit money to a prostitute and engages in sexual activity, can a fraud of this nature constitute a vitiating circumstance?¹¹⁰

¹⁰⁷ But see Watt, *op. cit.*, footnote 2, p. 218.

¹⁰⁸ [1970] 3 C.C.C. 340, (1969), 9 C.R.N.S. 1, 71 W.W.R. 256 (B.C.C.A.). Bird was convicted of obtaining sexual intercourse by extortion, an offence found under the "Property" part of the Criminal Code. The argument that the subject matter of the extortion must relate to property was rejected by the court; *ibid.*, at pp. 354 (C.C.C.), 17 (C.R.N.S.), 272 (W.W.R.).

¹⁰⁹ Of course, one could argue that the accused's fraud vitiated consent; see text, *infra*, at pp.125-126. Recently, the Ontario Court of Appeal in *R. v. Guerrero, supra*, footnote 101, held that a threat to expose photographs taken of the complainant in the nude was not a vitiating circumstance.

¹¹⁰ This example was used by Willes J. in *Clarence*, (1888), 22 Q.B.D. 23, 37 W.R. 166, 16 Cox C.C. 511 (C.C.R.). Recently, in *R. v. Petrozzi* (1987), 58 C.R. (3d) 320, the British Columbia Court of Appeal held that a fraud of this nature did not vitiate consent.

The judiciary has, historically, held divergent views on whether a type or kind of fraud or a misrepresentation vitiated the complainant's consent for the former crimes of rape or indecent assault. Most of these frauds or misrepresentations fell into four general classifications: (1) personation of the husband; (2) misrepresentation of medical treatment; (3) communication of a venereal disease; and (4) bigamy. I will examine the common and statutory law, and related jurisprudence concerning these kinds of deceptions to determine whether they constitute the vitiating circumstance of fraud for the offence of sexual assault.

(i) *Personification of the husband*

In the typical personification case, the accused fraudulently induces a woman to believe that she is engaging in sexual activity with her husband. English authorities held that carnal knowledge of a married woman under these circumstances did not constitute rape.¹¹¹ The English judges reasoned that there was a difference between "compelling a woman against her will, when the abhorrence which would naturally arise in her mind was called into action, and beguiling her into consent and co-operation".¹¹² Because there was an absence of consent by the complainant, some judges surprisingly held that the accused was guilty of the included offence of assault.¹¹³ Surely, in these circumstances, the effect of the fraud on consent would be the same for rape and assault.

The Irish Court of Crown Cases Reserved refused to follow the English authorities. In *R. v. Dee*,¹¹⁴ the court held that sexual intercourse with a married woman who mistakenly believed that the accused was her husband constituted rape. May C.J. reasoned that a lawful marital act and adultery were wholly different in their moral nature¹¹⁵ and that a consent to one did not encompass consent to the other. In the

¹¹¹ See *R. v. Jackson* (1822), Russ & Ry. 487, 168 E.R. 911 (C.C.R.); *R. v. Saunders* (1838), 8 C. & P. 265, 173 E.R. 488 (Assizes); *R. v. Williams* (1838), 8 C. & P. 286, 173 E.R. 497 (Assizes); *R. v. Clarke* (1854), 1 Dears C.C. 397, 169 E.R. 779 (C.C.A.); *R. v. Barrow* (1868), L.R. 1 C.C.R. 156, 11 Cox C.C. 191 (C.C.A.). These authorities were questioned in *R. v. Flattery*, *supra*, footnote 33.

¹¹² *R. v. Jackson*, *ibid.*, at pp. 487 (Russ. & Ry.), 911 (E.R.). This reasoning was even inconsistent with the outmoded definition of rape which prohibited carnal knowledge by "force, fear or fraud".

¹¹³ See *R. v. Saunders*, *supra*, footnote 111; *R. v. Williams*, *supra*, footnote 111. This was questioned in *R. v. Dee*, *supra*, footnote 65 and *R. v. Case*, *supra*, footnote 33. This patent contradiction may result from the erroneous judicial interpretation that, for the crime of rape, there must be resistance whereas, for an assault, there is no requirement for resistance. But see M. Hancock, Fallacy of the Transplanted Category (1959), 37 Can. Bar Rev. 535, at pp. 543 *et seq.* One explanation for this apparent dichotomy is that rape, unlike assault, was a capital offence and personation was not considered heinous enough to deserve the death penalty.

¹¹⁴ *Supra*, footnote 65.

¹¹⁵ *Ibid.*, at p. 587.

same case, O'Brien J. included deception in a list of the various circumstances¹¹⁶ which he felt were capable of vitiating consent.

In 1885, the United Kingdom Parliament settled the judicial controversy by declaring that a man who induces a married woman to have sexual intercourse by personating her husband commits rape.¹¹⁷ This provision was later incorporated into the (now repealed) Canadian Criminal Code¹¹⁸ definition of rape ("... with consent if the consent is obtained by personating her husband"), but was repealed by the Criminal Law Amendment Act.¹¹⁹

I suggest that spousal personation should continue to vitiate consent to sexual activity. However, there is no longer any justification, on the grounds of policy or morality, for differentiating between spousal personation and the personation of any other individual. I think that personation of any individual should constitute the vitiating circumstance of fraud for the purposes of section 244(3).

(ii) *Medical treatment*

Situations involving "medical treatment" constitute the second category of "fraudulent induced consent" cases.¹²⁰ In *R. v. Case*,¹²¹ the accused doctor, under the pretext of medical treatment, had sexual intercourse with the fourteen year old complainant. The complainant did not resist. Wilde C.J. stated:¹²²

It is said that as she made no resistance she must be viewed as a consenting party. That is a fallacy. . . The prisoner disarmed her by fraud. She acquiesced under a misrepresentation that what he was doing was with a view to a cure and that only; whereas it was done solely to gratify the passion of the prisoner. . . She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will.

¹¹⁶ "Whether the act of consent be the result of overpowering force, or of fear, or of incapacity, or of natural condition, or of deception, it is still want of consent, and the consent must be, not consent to the act, but to the act of the particular person. . ."; *ibid.*, at p. 598.

¹¹⁷ Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, s. 4: "Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."

¹¹⁸ *Supra*, footnote 39. For the origins of the section see s. 266 of the 1892 Criminal Code, 55-56 Vict., c. 29. It is interesting that J.F. Stephen, *Digest of the Criminal Law* (3rd ed., 1883), p. 158, expressed the view that "where consent is obtained by fraud the act does not amount to rape".

¹¹⁹ *Supra*, footnote 1.

¹²⁰ The principle, that a fraud concerning "medical treatment" vitiated consent, applied to medical and non-medical persons alike. In *R. v. Flattery*, *supra*, footnote 33, the accused, a "quack", gave medical and surgical advice for money from a market stall. See also *Rosinski's Case* (1824), 1 Lew. 11, 168 E.R. 941 (Assizes).

¹²¹ *Supra*, footnote 33.

¹²² *Ibid.*, at pp. 582 (Den.), 382 (E.R.).

In the same case, Platt B. stated:¹²³

Her non-resistance was caused by the prisoner's fraud; he is therefore criminally liable. But even treating it as consent, she consents to one thing, he does another.

The repealed Criminal Code definitions of rape and indecent assault stated that consent was vitiated ". . . by false and fraudulent representations as to the nature and quality of the act".¹²⁴ In *R. v. Harms*,¹²⁵ a masseur known as "Doctor Harms" treated a twenty year old woman for menstrual problems. Under the guise of treatment, he placed contraceptive pills in her womb and had sexual intercourse with her. The complainant knew that the so-called treatment involved sexual intercourse and that the pills were supposed to prevent pregnancy. The Saskatchewan Court of Appeal held that Harms' deceit related to the nature and quality of the act:¹²⁶

. . . the complainant's knowledge of the nature and quality of the prisoner's act is not necessarily to be determined by a mere consideration of her understanding of the intimate incidents preceding it, or by its usually natural consequences but by the purpose which rendered her submissive to it and by the effect that she was moved by the prisoner to believe would result therefrom.

In its reasoning, the court held that if the nature and quality of the act was *subjectively* pathological (that is, medical) and not carnal (that is, sexual), this would vitiate consent.¹²⁷

I suggest that the reasoning of the court concerning the effect of the accused's deceit is wrong. Because the twenty year old complainant knew that a sexual act was part of the "medical treatment" (and so was not deceived as to the nature or character of the physical act), she, in fact, consented to the sexual activity. The deceit related to a collateral matter, the *medical benefit* of the sexual act. Surely a complainant's subjective belief in the medical benefit of sexual activity, in which she knowingly and willingly partakes, cannot vitiate consent even if it was the accused who induced such a belief. Put differently, does the accused's deceit convert apparent consensual contact into non-consensual sexual intercourse? I suggest that the accused's conduct is more accurately described as obtaining sex by deceit. In my view, Parliament did not intend to

¹²³ *Ibid.*, at pp. 583 (Den.), 382 (E.R.).

¹²⁴ *Supra*, footnote 39. In contrast, the repealed definition of assault provided that fraud (which was neither defined nor qualified) vitiated consent (*ibid.*).

¹²⁵ (1943), 81 C.C.C. 4, [1944] 1 W.W.R. 12, [1944] 2 D.L.R. 61 (Sask. C.A.).

¹²⁶ *Ibid.*, at pp. 8-9 (C.C.C.), 16 (W.W.R.), 65 (D.L.R.). In *Papadimitropoulos v. The Queen* (1958), 98 C.L.R. 249, at p. 260, the Australian High Court quoted with approval the editorial note, *ibid.*, at p. 5 (C.C.C.), which accompanied *Harms*: ". . . the complainant appreciated the nature of the act but submitted because she thought it was a necessary part of medical treatment. Is there not in such circumstances a real consent?"

¹²⁷ *Ibid.*, at pp. 9 (C.C.C.), 17 (W.W.R.), 66 (D.L.R.).

create new offence(s) when it enacted section 244(3). Rather, section 244 expands the type and kinds of circumstances that may vitiate consent.

In *R. v. Maurantonio*,¹²⁸ the Ontario Court of Appeal formulated a different test for determining whether the accused made fraudulent representations as to the "nature and quality of the act". The accused had "medically" examined female patients although he lacked any professional qualification. There was no evidence of any fondling, lewdness, sexual advances or attempts to examine parts of the body other than those requiring treatment. However, he used a photo enlarging machine which he passed off as an X-ray machine and a needle was administered to the buttocks of one patient and to the back of another. In several instances, the accused's wife or the complainant's spouse or relative was present during the examinations. Hartt J. distinguished between a fraud where "the deception causes a misunderstanding as to the nature of the act itself" and a fraud where "the deceit relates not to the thing done but merely to some collateral matter".¹²⁹ In the former ("fraud in the *factum*"), consent is vitiated whereas in the latter ("fraud in the inducement") the consent is effective.¹³⁰ Hartt J. held that, because the "nature and quality of the act" included the physical contact in the surrounding circumstances, the accused's fraudulent representations that he was providing medical care vitiated the complainant's consent to the physical acts of touching.¹³¹

While agreeing with Hartt J. concerning the categories of fraud, Laskin J.A. characterized the accused's conduct and its effect differently. He reasoned that because the patients were "fully aware of what was done to them, accepted what was done as medical treatment, and the accused did not delude them into accepting something other than what they expected or sought" the patients were not deceived as to the nature and quality of the act.¹³² Quoting from a judgment of the High Court of Australia, Laskin J.A. said that ". . . once the consent is comprehending and actual, the inducing causes cannot destroy its reality".¹³³

¹²⁸ [1968] 1 O.R. 145, (1967), 2 C.R.N.S. 375, 65 D.L.R. (2d) 674 (Ont. C.A.).

¹²⁹ *Ibid.*, at pp. 152 (O.R.), 377 (C.R.N.S.), 682 (D.L.R.). (Hartt J. was sitting as an *ad hoc* member of the Court of Appeal.)

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, at pp. 153 (O.R.), 377 (C.R.N.S.), 682 (D.L.R.).

¹³² *Ibid.*, at pp. 150 (O.R.), 383 (C.R.N.S.), 679 (D.L.R.).

¹³³ *Ibid.*, at pp. 150 (O.R.), 383-384 (C.R.N.S.), 679 (D.L.R.), quoting from *Papadimitropoulos v. The Queen*, *supra*, footnote 126, at p. 261. In *R. v. Maurantonio*, *supra*, footnote 128, at pp. 147 (O.R.), 380 (C.R.N.S.), 676 (D.L.R.), Laskin J.A. was of the view that the accused could have been convicted of an *assault* because fraud (without qualification) vitiated consent. Since s. 244(3) now lists fraud (without qualification) as a vitiating circumstance, Laskin J. presumably would find Maurantonio guilty today of *sexual assault*.

I suggest that the patients in *R. v. Maurantonio*¹³⁴ consented to exclusively medical treatment but received non-medical treatment. Because the accused's deceit induced a mistaken belief as to the quality or character of the physical act, this type of conduct would constitute fraud for the purpose of section 244(3)(c).

The question arises as to the kinds of medical treatment frauds that are capable of vitiating the complainant's consent. I suggest that if an accused deceives a complainant as to the nature or character of the physical act by inducing a belief that it is a medical treatment, the complainant's consent to the sexual activity is vitiated. For instance, if an accused induces a child to believe she is being medically examined but it is in reality a sexual touching, the fraud vitiates the complainant's consent. On the other hand, if the complainant knows that she is engaging in a sexual act and she knowingly allows the physical contact, a deceit with respect to the medical benefits¹³⁵ or morality¹³⁶ of the sexual act should not be regarded as a vitiating circumstance.

(iii) *Venereal disease*

In Canada, communicating a venereal disease was an offence under the 1892 and subsequent Criminal Codes¹³⁷ until its repeal by the 1985 Criminal Law Amendment Act.¹³⁸ Prior to the leading case of *R. v. Clarence*,¹³⁹ the courts held that failure to disclose a venereal disease to one's sexual partner was a deceit which vitiated consent.¹⁴⁰ In *Clarence*,¹⁴¹ the accused had intercourse with his wife even though he was aware that he had gonorrhoea. The accused's spouse became infected with the disease. The court found that the complainant would not have engaged in sexual intercourse with her spouse if she had been aware of his condition. However, Stephen J., in dissent, expressed the orthodox view:¹⁴²

The only cases in which fraud indisputably vitiates consent. . . are cases of fraud as to the nature of the act done. As to fraud as to the identity of the person by whom it is done, the law is not quite clear.

¹³⁴ *Ibid.*

¹³⁵ See Williams, *op. cit.*, footnote 55, pp. 561 *et seq.*, but see Stuart, *op. cit.*, footnote 9, p. 47, who doubts whether the medical treatment frauds can be reconciled.

¹³⁶ See J.A. Scutt, *Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and its Moral Implications* (1976), 18 *Crim. Law Q.* 312 for a different view on this issue.

¹³⁷ The former s. 253 of the Criminal Code, R.S.C. 1970, states: "Everyone who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction."

¹³⁸ S.C. 1985, c. 19, s. 42.

¹³⁹ *Supra*, footnote 110.

¹⁴⁰ See *R. v. Bennett* (1866), 4 F. & F. 1105, 176 E.R. 925 (Assizes); *R. v. Sinclair* (1867), 13 Cox C.C. 28 (C.C.C.).

¹⁴¹ *Supra*, footnote 110.

¹⁴² *Ibid.*, at pp. 43 (Q.B.D.), 171 (W.R.), 527 (Cox C.C.).

Recently the question has arisen whether the old authorities will be followed in cases involving the transmission of AIDS. There are three different analyses of consent (or the lack of it) in the situation where D., who knows he has AIDS, has sex with V. but does not inform V. of this fact. These analyses can be spread along a spectrum of responsibility. The first analysis puts the onus on V. to inform himself of the risks and accept responsibility for any unwanted consequences of sexual activity. V. gave his consent to the physical contact with full knowledge of the nature and character of the act (as opposed to its consequences). The condition of D.'s health, like his wealth or marital status, is a collateral matter: deceit as to any one of these attributes is merely deceit as an inducing cause, not deceit concerning the act itself. This analysis concludes that fraud as to infection with a sexually transmitted disease is not sufficient to vitiate consent.

At the other end of the spectrum is an analysis that puts the onus on D. to inform any prospective partner of the risks inherent in sexual activity with him, thereby making any resulting consent an *informed* consent.¹⁴³ The problem arises when V. has *not* been informed of the risk and therefore gives an uninformed consent. The transmission of the disease is analyzed as a risk which does not fall within the ambit of consent to sex *per se*. The "quality" of the act has been misrepresented: V. consents to safe sex but partakes unwittingly in life-threatening sex. Therefore, if D. induces V. to have sex with him by fraudulently presenting himself or the sexual act as healthy, V.'s consent to the act as a whole is vitiated. An analogy to this situation would be V. consenting to an immunization shot and, instead, being purposefully injected with cancerous cells—the consent to the application of force (the injection) has obviously been vitiated by the fraud.¹⁴⁴

In the middle of the spectrum stands the split-consent analysis¹⁴⁵ which divides the responsibility between V. and D. The position taken here is that V. consented to the *sexual* act but not to the transmission of a disease. There was consent only to the sexual contact but no consent with respect to the application of force involved resulting from the trans-

¹⁴³ This analysis is based on the interpretation of "consent" as an informed consent "freely given in appreciation of all the risks"; Watt, *op. cit.*, footnote 2, p. 216. See also Stuart, *op. cit.*, footnote 9, p. 477.

¹⁴⁴ One could argue, in the alternative, that D. had gone beyond the scope of the consent by transmitting a disease to V. while engaging in a sexual act, the latter being the only thing to which V. had consented.

¹⁴⁵ See also Koh, *loc. cit.*, footnote 64, at p. 153: "For, what is really objected to is not the intercourse but the contact with the virus. Hence, it may be argued that there is consent for the purpose of rape but not consent for the purpose of assault. The communication of the disease may be regarded as different from the act of sexual assault for the purpose of consent."

mission of the disease. Therefore, there was an assault under section 244 (or, with AIDS, probably an aggravated assault under section 245.2) but not a sexual assault under section 246.1.

All three analyses contain conceptual and analytical problems which cannot be addressed in this article. However, given the rapid development of events with respect to AIDS, it is certain that very shortly the courts will be weighing their merits in public.

(iv) *Bigamy and fraudulent marriage ceremonies*

The question arises whether deceit concerning the validity of a marriage ceremony or a person's marital status is capable of vitiating consent. In the leading case of *Papadimitropoulos v. The Queen*,¹⁴⁶ a woman consented to sexual intercourse under the fraudulently induced belief that she was married to the accused. The High Court of Australia carefully examined the English, Australian and Canadian¹⁴⁷ jurisprudence concerning the relationship between fraud and consent in the offence of rape. The court stated that it is not rape if there is actual consent to the "nature and character of the act".¹⁴⁸ The court held that the "identity of the man and the character of the physical act that is done or proposed. . . [are] part of the nature and character of the act",¹⁴⁹ but when the conduct has been induced only by fraud or immorality, the consent is still legally valid. The court stated:¹⁵⁰

To return to the central point; rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.

¹⁴⁶ *Supra*, footnote 126.

¹⁴⁷ The Australian High Court seemed to approve of *State of California v. Skinner* (1924), 33 B.C.L.R. 555 (B.C. Co. Ct.) and *R. v. Arnold*, [1947] O.R. 147, [1947] 2 D.L.R. 438 (Ont. C.A.), but questioned *R. v. Harms*, *supra*, footnote 125. In fact, the court, at p. 259, favourably quoted the critical editorial note in *R. v. Harms*, *ibid.*, at p. 5 (C.C.C.); at that time, the editors of the Canadian Criminal Cases included Dean Cecil Wright and Mr. Justice Martin of the Ontario Court of Appeal. In *Skinner*, California attempted to extradite a Canadian on the ground that he had induced the complainant's consent to co-habitation by going through a feigned marriage ceremony. The extradition judge analyzed the former Criminal Code definition of rape and, relying on *Clarence*, *supra*, footnote 139, for the proposition that not every fraud will vitiate consent, held, at pp. 558-559, that the complainant's knowledge of the physical act precluded the accused's conviction for rape. Because taking part in a feigned marriage ceremony was not expressly included as a vitiating circumstance in the definition of rape, the judge reasoned that Parliament did not intend to make a deceit of this nature a vitiating circumstance for rape.

¹⁴⁸ *Supra*, footnote 126, at p. 260.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, at p. 261.

A deceit about the legality of the marriage ceremony or the accused's marital status should not render the accused liable for the crime of sexual assault. The complainant is not mistaken about the nature of the physical act or the identity of her sexual partner; the mistake is only with respect to a collateral matter. The underlying justification for the prohibition of bigamy is distinct from those for crimes of violence. By enacting section 244(3)(c) I do not think that Parliament intended to label a bigamist as a rapist. Neither type of fraud should be recognized as a vitiating circumstance for the purposes of section 244(3)(c).

(v) *Miscellaneous kinds of frauds*

There are several reported cases of fraud which do not fall within the above categories. For instance, in *R. v. March and Bronstern*,¹⁵¹ the accused March dispensed medicine and practised as a surgeon. A pregnant woman went to March's residence and gave birth to a child. For some unknown reason, March led the mother to believe that her child would be taken to an institution for nursing. Instead, the child was put in a bag which in turn was placed near a footpath where it was later discovered, unharmed. Tindal C.J. ruled that "[t]he mother gave that consent [to custody of the child] on the false pretext that the child was to be taken to some institution; and as that pretext was false, it was really no consent [to the assault on the child]".¹⁵² I submit that the accused's deceit was both an inducing cause and related to the essence of the consent. This case demonstrates the difficulty of characterizing fraud as falling into one category or another.

There are several modern cases worthy of comment. In *R. v. Arnold*,¹⁵³ the Ontario Court of Appeal refused to recognize an offer of employment as a vitiating circumstance for the crime of rape. Although this conduct might constitute "sexual solicitation by a person in a position to confer a benefit", contrary to section 6(3) of the Ontario Human Rights Code, 1981,¹⁵⁴ it would not constitute a vitiating circumstance for the purpose of section 244(3)(c). Although the fraudulent offer of employment was an inducing cause, I suggest that the complainant's consent was not vitiated because she was aware of the nature and character of the physical activity.

In the bizarre case of *R. v. Bird*¹⁵⁵ fraud (concerning the possession of obscene photographs) together with a threat of blackmail were used to induce the complainant to engage in sexual activity. It could be argued

¹⁵¹ (1844), 1 Car. & K. 496, 174 E.R. 909 (Assizes).

¹⁵² *Ibid.*, at pp. 499 (Car. & K.), 911 (E.R.).

¹⁵³ [1947] O.R. 147, [1947] 2 D.L.R. 438, (1947), 3 C.R. 31 (Ont. C.A.).

¹⁵⁴ *Supra*, footnote 71.

¹⁵⁵ *Supra*, footnote 108. The facts are set out in more detail, *supra*, p. 117.

that a fraud of this nature which is exacerbated by coercion (blackmail) is sufficient to vitiate consent. This case can be compared with *Bolduc v. The Queen*¹⁵⁶ in which a medical doctor examined a patient in the presence of a lay person who was passed off to the patient as a medical intern. The lay person did not touch the patient. The majority of the Supreme Court of Canada held that the fraud was not with respect to the physical examination but, instead, related to the medical qualifications of the lay person. The court was of the view that if the lay person had done anything overt, alone or in concert with the medical practitioner, it would have been an assault. The court, following the reasoning in *Papadimitropoulos v. The Queen*,¹⁵⁷ held that consent to the physical examination was real and comprehending and that the fraud was not with respect to the nature and quality of the act.¹⁵⁸ I suggest that the above fraud related to a collateral matter and that although this type of activity may be the subject of professional misconduct proceedings or a violation of a right to privacy, as a matter of criminal law, such a deceit does not constitute fraud for the purpose of section 244(3)(c).

(vi) *Conclusion*

Historically, the courts have recognized that some frauds vitiated consent while other frauds did not. In *Clarence*,¹⁵⁹ *Papadimitropoulos*,¹⁶⁰ *Arnold*¹⁶¹ and *Bolduc*,¹⁶² deceptions concerning the health of the sexual partner, the validity of the marriage ceremony, an offer of employment, and the medical status of a voyeur did not vitiate consent. However, in *Dee*,¹⁶³ *Flattery*¹⁶⁴ and *Maurantonio*,¹⁶⁵ spousal personation and medical treatment frauds vitiated consent.

Often, as in the above cases, the distinguishing factor is whether the deceit is classified as "fraud in the inducement" or as "fraud in the nature and character of the act".¹⁶⁶ In many instances, it is easy to characterize fraud as falling into one category or the other. Frauds—for example, concerning one's ancestry, age, social status, education, material possessions or intention to marry—which induce a person to engage

¹⁵⁶ *Supra*, footnote 84.

¹⁵⁷ *Supra*, footnote 126.

¹⁵⁸ See *Bolduc v. The Queen*, *supra*, footnote 84, at pp. 681 (S.C.R.), 85 (D.L.R.), 667 (W.W.R.).

¹⁵⁹ *Supra*, footnote 139

¹⁶⁰ *Supra*, footnote 126.

¹⁶¹ *Supra*, footnote 147.

¹⁶² *Supra*, footnote 84.

¹⁶³ *Supra*, footnote 65.

¹⁶⁴ *Supra*, footnote 33.

¹⁶⁵ *Supra*, footnote 128.

¹⁶⁶ I am indebted to the author of the editorial note accompanying *Harms. supra*, footnote 125, at p. 4 (C.C.C.), for this argument.

in sexual activity are "frauds in the inducement". In these examples, the complainant is not deceived about the identity of her partner (apart from his attributes) or mistaken as to the nature and character of the physical act. However, in other instances such as the medical treatment frauds, the distinction will be a fine one. And, occasionally, as was pointed out above,¹⁶⁷ it may be difficult to characterize the deceit as falling within one classification or another.

In a case by case approach the courts must give guidance to juries by segregating those frauds which are capable of vitiating consent from those which do not have that effect. I suggest that the common law and former statutory requirement that the deceit relate to the nature and character (quality) of the physical act is a useful, albeit not exhaustive, analytical tool for making this legal distinction. As a matter of policy,¹⁶⁸ or by the application of particular criteria, courts must distinguish between those kinds of frauds which are capable of vitiating consent and those which do not have this effect in law.

(4) *Section 244(d): Exercise of Authority*

Section 244(3)(d) provides:

. . . no consent is obtained where the complainant submits or does not resist by reason of

. . .

(d) the exercise of authority.

The words "exercise" and "authority" are vague and dictionary definitions lack guidance as to the meaning of the subsection. Because this statutory circumstance does not have a forerunner in Canadian or English legislation I look to the common law for guidance on the meaning of the term "the exercise of authority". In the early nineteenth century case of *R. v. Nichol*,¹⁶⁹ a thirteen year old female complainant was a student in a school run by the accused. The complainant testified that on several occasions the accused sexually touched her against her will. The trial judge's summing-up included comments about the complainant's age and the accused's responsibility for, and authority over, the complainant. The trial judge also told the jury that the complainant's fear and awe of the prisoner might check her resistance. The trial judge directed the jury

¹⁶⁷ *R. v. March and Bronstern*, *supra*, footnote 151.

¹⁶⁸ In *R. v. Petrozzi*, *supra*, footnote 110, at p. 333, Craig J.A. said: "I fail to appreciate why, as a matter of policy, we should restrict fraud insofar as it relates to consent in common assault and sexual assault cases to a case involving the nature and quality of the act or to a case involving the identity of the offender". Curiously Craig J.A. then concluded that Parliament so intended: "Parliament, therefore, must determine whether fraud in sexual offences should be expanded to include any fraud which has a causal connection with consent or to what extent, if any, it should be expanded"; *ibid.*, at p. 334.

¹⁶⁹ *Supra*, footnote 34; see also *R. v. McGavaran* (1852), 6 Cox C.C. 64 (Assizes) where a schoolmaster indecently assaulted a thirteen year old girl.

that if "the acts were against her will, though she had not resisted to the utmost" the accused was liable for attempted rape and assault.¹⁷⁰ In my view, the summing-up in *Nichol* implicitly recognized that the exercise of authority could vitiate consent.¹⁷¹

The effect of the exercise of authority on consent to sexual touching was also analyzed in the civil case of *Latter v. Braddell*,¹⁷² where a mistress requested that a doctor examine her maid for pregnancy. Over the maid's protestations and crying, the doctor ordered the housemaid to remove her clothing, and palpated her breasts and stomach before declaring her not pregnant. At the trial the complainant testified that she had not consented. The trial judge held that there was no evidence of lack of consent and dismissed the case against the mistress; a jury acquitted the doctor. On appeal (to the Common Pleas Divisional Court), Lopes J. held that there should be a new trial because there was no consent in law. He reasoned:¹⁷³

A submission to what is done, obtained through a belief that she is bound to obey her master and mistress; or a consent obtained through a fear of evil consequences to arise to herself, induced by her master's or mistress's words or conduct, is not sufficient. In neither case would the consent be voluntarily given: it would be a consent in one sense, but a consent to which the will was not a party. . . I cannot adopt the view that the plaintiff consented because she yielded without her will having been overpowered by force or fear of violence.

On the other hand, Lindley J. (who was also the trial judge) held that there was consent because there was no evidence of force or violence, and the complainant had the option of complying with the order of her mistress or leaving her employment. He stated:¹⁷⁴

. . . there was no evidence of want of consent as distinguished from reluctant obedience or submission to her mistress's orders, and that in the absence of all evidence of coercion, as distinguished from an order which the plaintiff could comply with or not as she chose, the action cannot be maintained.

The court of appeal unanimously upheld Lindley J.'s judgment.¹⁷⁵ I submit that the question of consent in this case centered on two issues:

¹⁷⁰ *Ibid.*, at pp. 131 (Russ & Ry.), 720 (E.R.). The case was reserved and the common assault conviction was upheld.

¹⁷¹ This case can be contrasted with assaults upon thirteen year olds by an accused who "was not in authority or control" (e.g. *R. v. Johnson* (1865), 10 Cox C.C. 114 (C.C.A.)). In these cases, the courts often reluctantly acquitted D. because V. consented. I suggest the distinguishing circumstance is the accused's "authority and control" over the victim (see argument by Crown counsel in *R. v. McGavaran*, *supra*, footnote 169).

¹⁷² (1880), 50 L.J.Q.B. 166 (C.P. Div.). Because the new offence of sexual touching seems to require a specific intent (s. 140 "every person who, for a sexual purpose touches. . .", *supra*, footnote 3), the doctor's conduct in *Latter v. Braddell* would not be contrary to s. 140 of the Code.

¹⁷³ *Ibid.*, at p. 168.

¹⁷⁴ *Ibid.*, at p. 169.

¹⁷⁵ *Latter v. Braddell* (1881), 50 L.J.Q.B. 448 (C.A.).

(1) whether a threat involving something other than physical force could vitiate consent; and (2) whether the surrounding circumstances could be characterized as sufficiently coercive to vitiate consent. The first issue is a question of law whereas the second is a matter of mixed fact and law. In modern times if a mistress required an "au pair girl" to undergo a similar examination I suggest that the analysis of Lopes J. is the correct one.

In the modern case of *R. v. McCoy*,¹⁷⁶ the complainant, an air hostess, failed to adjust and secure her safety belt during the landing of an aircraft. The appropriate discipline for breaching this company regulation was dismissal or grounding with loss of flight pay. Following discussion with the accused (her superior at work), the air hostess agreed to caning as a substitute for the normal economic penalties. The accused administered six strokes with a cane on her buttocks which were covered by a slip and knickers. Because the blows were likely or intended to cause bodily harm, the court held that the complainant could not consent in law to bodily harm.¹⁷⁷ In *obiter*, Thomas A.C.J. also said:¹⁷⁸

. . . the complainant's consent was not real in that she did not give it freely or voluntarily. . . Under duress she reluctantly acquiesced in the infliction on her of a form of punishment which was repugnant. She merely submitted. . . Now submission, according to the authorities is totally different from consent.

Voluntariness is not a satisfactory concept with which to analyze consent unless one understands voluntary in the legal sense. Professor Williams states:¹⁷⁹

There is no positive test of the voluntariness of consent, only a negative test. Consent is voluntary when it is not given as the result of certain pressures. . . voluntary has no meaning except as the negation of certain factors.

Legal terms such as "voluntary" or "duress"¹⁸⁰ do not assist in determining the existence of consent. Like consent, they are best defined by reference to the presence or absence of particular vitiating circumstances. It would have been preferable if the court in *R. v. McCoy*¹⁸¹ had set out the types of exercise of authority which were capable of vitiating consent or, at least, given the criteria for differentiating between them.

¹⁷⁶ [1953] 2 S.A. 4 (S.R.).

¹⁷⁷ The court followed the English authority of *R. v. Donovan*, *supra*, footnote 13, for this principle: see text of footnote 24, *supra*.

¹⁷⁸ *Supra*, footnote 176, at pp. 10-12.

¹⁷⁹ *Op. cit.*, footnote 55, p. 555.

¹⁸⁰ Williams, *ibid.*, states that this argument also applies to duress.

¹⁸¹ *Supra*, footnote 176.

Although the complainant in *McCoy*¹⁸² was subject to an economic penalty, she knowingly accepted the degrading alternative. I would suggest that the use of a legitimate economic sanction such as this to obtain a complainant's consent would not be a vitiating circumstance under section 244(3)(d). If the alternative penalty for breaching the company rules was not sexual but instead required the complainant to work overtime at her regular wage, could one argue that she did not consent to this arrangement?¹⁸³

Although the exercise of authority is capable of vitiating consent, I suggest that the judiciary must place limits on the scope of this statutory provision. If a foreman in a factory propositions one of the line workers and the worker agrees because he is afraid of losing his job (even though there have been no verbal threats to this effect), has the foreman exercised his authority? Does this vitiate the worker's consent to the sexual activity? The answer to these questions depends where one draws the line between consensual and non-consensual conduct for the purposes of criminal law. I would suggest that in this illustration V.'s consent is not vitiated and that something more is required in order for it to be a vitiating circumstance under section 244(3)(d).

In a case by case approach, the courts must give guidance, as a matter of law, about the kinds of exercise of authority which are capable of vitiating consent. I suggest that factors such as the maturity¹⁸⁴ and vulnerability of the complainant, knowledge of the probable effect of the external pressure, and the existence of a fiduciary or dependent relationship will be relevant for determining whether the particular exercise of authority would have this legal effect.¹⁸⁵ The courts must keep in mind that there is a difference between the crime of sexual assault and the offensive conduct of sexual harassment. I suggest that sexual harassment in the workplace, for example, is more effectively and appropri-

¹⁸² *Ibid.*

¹⁸³ It is for this reason that legislation like s. 3 of the Ontario Employment Standards Act, R.S.O. 1970, c. 137, provides that a contracting-out of minimum standards in the workplace is null and void.

¹⁸⁴ Recently Parliament created the new offences of sexual interference (s. 140) and sexual exploitation (s. 146) of a complainant who is under fourteen, and between fourteen and eighteen respectively; An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3.

¹⁸⁵ This approach was used by Hall C.C.J. in *R. v. (C.E.)S.* (1988), 63 C.R. (3d) 194 (N.S. Co. Ct.), when he assessed the effect of the factors of age, relationship, the nature and type of pressure and the surrounding circumstances to hold that the "exercise of authority" by the accused vitiated the complainant's consent. See also s. 139(2)(c) for an example of precise legislation dealing with the combined effect of age and dependency (*ibid.*).

ately dealt with by legislation such as the Ontario Human Rights Code¹⁸⁶ than by the criminal law.

D. Other Vitiating Circumstances: Common Law and Legislation

(1) Introduction

Historically, courts have recognized that sleep,¹⁸⁷ intoxication,¹⁸⁸ immaturity,¹⁸⁹ and the lack of intellectual capacity¹⁹⁰ were capable of vitiating consent. The underlying justifications for recognizing these circumstances as being capable of vitiating consent to sexual conduct were twofold: (1) to protect persons who were particularly vulnerable; and (2) to protect complainants who were not sufficiently conscious (sleep or intoxication), intelligent (mental capacity) or mature (age) to make a meaningful choice. This reasoning continues to be valid even in today's moral climate of sexual freedom.

The preliminary issue is whether a complainant's consent to sexual activity may be vitiated by a circumstance which is not listed in section 244(3). Because other Criminal Code provisions set out circumstances which negate consent to sexual activity, it cannot be argued reasonably that Parliament intended section 244(3) to be exhaustive.¹⁹¹ Common sense also favours the recognition of other vitiating circumstances. For example, if V. is unconscious by reason of illness or medical sedation and D. sexually molests V., would anyone suggest that V. consented? In my view, there are additional vitiating circumstances to those listed in section 244(3). I will now examine three common law categories of vitiating circumstances to determine whether they are capable of vitiating the consent of the complainant for the crime of sexual assault.

¹⁸⁶ *Supra*, footnote 71. See s. 6 which prohibits sexual harassment in accommodation and workplaces. The remedies (s. 50) include mandatory orders concerning future practises and mandatory compensation including an award for damages for mental anguish. These powers are broader than those a judge would have in criminal and, perhaps, civil court.

¹⁸⁷ See *R. v. Mayers* (1872), 12 Cox. C.C. 311 (Assizes).

¹⁸⁸ See *R. v. Camplin*, *supra*, footnote 66.

¹⁸⁹ See *R. v. Howard*, [1966] 1 W.L.R. 13, (1965), 50 Cr. App. Rep. 56 (C.A.); *R. v. Lock* (1872), 21 W.R. 144, 12 Cox C.C. (C.C.R.). *Contra: R. v. Martin* (1839), 9 C. & P. 213, 173 E.R. 807 (Assizes); *R. v. Read* (1849), 3 Cox C.C. 266 (C.C.R.).

¹⁹⁰ See *R. v. Connolly* (1867), 26 U.C.Q.B. 317; *R. v. Ryan* (1846), 2 Cox C.C. 115 (C.C.C.); *R. v. Walebek* (1913), 21 C.C.C. 130 (Sask. C.A.); *R. v. Barratt* (1873), 2 L.R.C.C. 81 (C.C.R.); *R. v. Fletcher* (1859), 8 Cox C.C. 131 (C.C.R.); *R. v. Fletcher* (1866), L.R. 1 C.C.R. 39, 10 Cox C.C. 248 (C.C.R.); *R. v. Pressy* (1867), 10 Cox C.C. 635 (C.C.R.).

¹⁹¹ *E.g.* s. 139, *supra*, footnote 3. However, it could be argued that Parliament included all the various vitiating circumstances in the Code. In *R. v. Guerrero*, *supra*, footnote 101, the Ontario Court of Appeal recently held that s. 244(3) is exhaustive with respect to the vitiation of consent.

(2) *Consciousness*

Sleep¹⁹² and intoxication¹⁹³ vitiated consent at common law. The judges reasoned that a complainant who was asleep was not capable of consenting¹⁹⁴ and that a complainant who was in a state of intoxication was deprived of the ability to make a meaningful choice¹⁹⁵ or to signify refusal.¹⁹⁶ Let us take a modern example. Assume D. drops several tablets of L.S.D. into V.'s soda water and V. drinks the concoction and becomes incapacitated. If D. then touches V. in circumstances of sexuality, there is no consent for the purposes of section 246.1.¹⁹⁷ However, if a person merely gives in to his passions or exercises poor judgment due to the effects of drugs or alcohol, his consent is not vitiated.

If there is a continuing relationship and prior sexual conduct (for example, such as lovers) consent to sexual activity may be implied, notwithstanding the complainant is asleep or is drunk. But if the passive person, upon awakening or becoming aware, signifies non-consent to the partner, the aggressive partner must desist.

(3) *Mental Impairment*

At common law, mental impairment could be a vitiating circumstance.¹⁹⁸ The judges determined, as a matter of law, whether there was sufficient evidence of mental impairment for a jury to find reasonably that the complainant was incapable of consenting to the sexual conduct.¹⁹⁹ As a

¹⁹² See *R. v. Mayers*, *supra*, footnote 187 (rape and attempted rape); *R. v. Young* (1878), 14 Cox C.C. 114 (C.C.A.) (rape).

¹⁹³ See *R. v. Camplin*, *supra*, footnote 64 (rape); see also *R. v. Lang* (1975), 62 Cr. App. Rep. 50, [1976] Crim. L.R. 65 (C.A.) (rape). "It would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it liable to be indicted. If so, every drunken woman returning from the market, and happening to fall down on the road side, may be ravished at the will of the passers by"; Campbell C.J. in *R. v. Fletcher* (1859), *supra*, footnote 190, at p. 134).

¹⁹⁴ ". . . but if she was asleep, she is incapable of consent, and therefore it would be rape"; Lush J., during counsel's argument, in *R. v. Mayers*, *supra*, footnote 187, at p. 312.

¹⁹⁵ "The evidence. . . of her mind being so influenced by drink that she lacked the understanding of her situation necessary to enable her to make a choice. . ."; Scarman L.J. in *R. v. Lang*, *supra*, footnote 193, at p. 52 (Cr. App. Rep.), 66 (Crim. L.R.).

¹⁹⁶ ". . . she was deprived of the power of continuing to express such want of consent"; Patteson J. in *R. v. Camplin*, *supra*, footnote 64, at p. 222 (Cox C.C.).

¹⁹⁷ The effect of the ingestion of a drug is the same as alcohol for the defence of drunkenness; *R. v. Curtis* (1972), 8 C.C.C. (2d) 240, 9 C.R.N.S. 11 (Ont. C.A.); *R. v. Lipman* (1969), 53 Cr. App. Rep. 600, [1970] 1 Q.B. 152, [1969] 3 All E.R. 410 (C.A.). By parity of reasoning, alcohol and drugs have the same effect on vitiating consent.

¹⁹⁸ See cases, *supra*, footnote 190.

¹⁹⁹ See *R. v. Pressy*, *supra*, footnote 190, at p. 637; *R. v. Barratt*, *ibid.*, at p. 83; *R. v. Walebek*, *ibid.*, at p. 133.

question of fact, the jury determined whether the complainant lacked such capacity by reason of the mental impairment.²⁰⁰ In 1886, the Canadian Parliament recognized the need to protect the mentally impaired and enacted the offence of carnal knowledge of a "female idiot or imbecile in circumstances not amounting to rape".²⁰¹ This crime was a Criminal Code Offence²⁰² from 1892 until its repeal by the new sexual offences legislation.²⁰³ The former section 148 provided:²⁰⁴

Every male person who, under circumstances that do not amount to rape, has sexual intercourse with a female person

(a) who is not his wife

(b) who is and he knows or has good reason to believe is feeble-minded, insane, or is an idiot or imbecile

is guilty of an indictable offence and is liable to imprisonment for five years.

There are many philosophical and legal issues concerning the consensual sexual activity of the mentally impaired. The Canadian Law Reform Commission states that "persons with a mental handicap should have the same rights to sexual expression as other members of society".²⁰⁵ It was also the Commission's opinion that the former section 148 was superfluous because, if V. was incapable of giving a valid consent, the sexual act would be a *de facto* sexual assault.²⁰⁶ However, the Commission's view is dependent upon the courts restrictively interpreting consent when the complainant is mentally impaired. On the other hand, Watt states that "[t]he effect of the repeal, it is submitted, is to leave unpunished those who engage in consensual sexual intercourse with members of the class articulated in former section 148 unless V., somewhat fortuitously, falls within another protected class with whom sexual intercourse continues to be an offence".²⁰⁷ It should also be pointed out that mental impairment falling short of incapacity may be relevant in determining the effect of other potential vitiating circumstances, like fraud or the exercise of authority. As a hypothetical, say V. is a mentally handicapped person who has sex with D. because he has told her that the act

²⁰⁰ See *Pressy, Barratt, and Walebek, ibid.*

²⁰¹ An Act to punish seduction, and like offences, and to make further provisions for the Protection of Woman and Girls (1886), 1 S.C. 49 Vict., c. 52, s. 1(2).

²⁰² S. 189, 1892 Criminal Code, S.C. 55-56 Vict., c. 32. This offence is the same as s. 5, Criminal Law Amendment Act, 1885 (U.K.), 48 & 49 Vict., c. 69.

²⁰³ *Supra*, footnote 1, s. 8.

²⁰⁴ R.S.C. 1970, c. 34.

²⁰⁵ Law Reform Commission of Canada, Working Paper 22, Sexual Offences (1978), p. 28.

²⁰⁶ *Ibid.*, p. 29.

²⁰⁷ *Op. cit.*, footnote 2, p. 93. For example, persons under fourteen form a protected class of persons (s. 139 of the Criminal Code; An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3).

is an operation which will make her able to fly. Ordinarily this suggestion would be so fantastic that a jury would not believe that the fraud had induced the consent but, because of V.'s mental handicap, the fraud does have this effect. However, unless the objective test is tempered by importing subjective characteristics of V.'s mental impairment, this fraud may not be a vitiating circumstance for the purposes of section 244(3)(c).

I suggest that the Commission's view (which seemingly persuaded Parliament)²⁰⁸ may not adequately protect the mentally handicapped from sexual exploitation. If it was thought that the former provision was too broad, surely Parliament could enact a law which allows the mentally impaired sexual freedom but yet protects them from exploitation. At a minimum, legislation like section 128 of the Mental Health Act (U.K.),²⁰⁹ which prohibits an officer, manager or employee of a hospital or mental nursing home from engaging in sexual intercourse with a patient, would have been a responsible starting point. It is inconsistent to recognize incapacity by reason of immaturity but not to recognize incapacity due to mental illness when the effect on informed consent is the same in both situations; both complainants are equally in need of protection from exploitation. Recently, Parliament enacted section 154(3)(b)(ii) which states:²¹⁰

(b) a person shall be deemed not to consent to an act [of anal intercourse]. . . if the court is satisfied beyond a reasonable doubt that that person could not have consented to that by reason of mental disability.

Absent such express language in section 233(4), a mentally handicapped person may not be sufficiently protected from sexual exploitation.²¹¹

(4) *Maturity*

Whether a child of tender years is capable of consenting to sexual activity is an old question. In An Act to take away clergy from offenders in rape or burglary,²¹² the United Kingdom Parliament declared the age of consent for sexual intercourse as follows:²¹³

And for the plain declaration of law, be it enacted, that if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as a felon without allowance of clergy.

²⁰⁸ The provision which had made it an offence to have sexual intercourse with a feeble-minded person was repealed when Parliament overhauled the "sexual offences" sections of the Criminal Code; An Act to Amend the Criminal Code, *supra*, footnote 1, s. 8.

²⁰⁹ Mental Health Act, 1959 (U.K.), 7 & 8 Eliz. 2, c. 72. Perhaps this situation may fall under the "exercise of authority" provision.

²¹⁰ S.C. 1987, c. 24.

²¹¹ When legislation sets out a list of exceptions, often a legitimate matter is inadvertently omitted.

²¹² (1576), 18 Eliz. 7, s. 1.

²¹³ *Ibid.*, s. 4.

Therefore, the consent of a child under ten years of age to an act of sexual intercourse was immaterial for the crime of rape.²¹⁴

In the middle part of the nineteenth century, English and Irish courts²¹⁵ continued to hold that immature children were capable of consenting to other kinds of sexual activity. In those cases where it was held that the immature child did not consent, additional vitiating circumstances were normally present.²¹⁶ This distinction still prevails in the United Kingdom. In the recent English case of *R. v. Howard*,²¹⁷ the trial judge instructed the jury, as a matter of law, that a child of six could not consent to sexual intercourse which would otherwise amount to rape. The Court of Appeal held that this was a misdirection because "[although] the law has provided that such consent affords no defence to a man on a charge of carnal knowledge of a girl under sixteen. . . there is no such provision as to the crime of rape".²¹⁸ However, the Court of Appeal refused to order a new trial because, in any case, the test for consent for a girl under sixteen would be whether she had sufficient understanding and knowledge to decide whether to consent and "it would be idle for

²¹⁴ The authorities disagreed whether the age of consent for sexual intercourse was ten or twelve years of age. "It was a question before 18 El.7 whether a Rape could be committed on a child of the age of six or seven years but by that statute, 'whosoever shall unlawfully and carnally know and abuse any woman child under the age of ten years, shall suffer as a felon without clergy. Upon an Indictment for this offence, it is no way material whether such child consented, or were forced; yet, it must be proved, that the offender entered into her body.'" ; Hawkins, *Pleas for the Crown* (1716), c. 11, 108. On the other hand Hale put the age of consent at twelve years of age because the age of consent to marry is twelve years "and consequently her consent is not material in rape, if she be under twelve years old, thou above ten years old. . . but is she be above the age of twelve years, and consenting at the time of the fact committed, it is not felony"; Hale, *Pleas of the Crown* (1736), Vol. 1, p. 731.

²¹⁵ See *R. v. Martin*, *supra*, footnote 189 (victim of assault between ten and eleven years old); *R. v. Banks* (1838), 8 C. & P. 574, 173 E.R. 624 (Assizes) (victim of assault nine years old); *R. v. Cockburn* (1849), 3 Cox C.C. 543 (Assizes) (victim of attempted rape under the age of five); *R. v. Johnson* (1865), 10 Cox C.C. 114 (C.A.) (victim of indecent assault between ten and eleven years old); *R. v. Mehegan* (1856), 7 Cox C.C. 145 (Irish Ct. of Crim. App.) (assault complainant between ten and eleven years old). A quote from *Cockburn*, *ibid.*, at p. 543, exemplifies the attitude taken by the judiciary at that time with respect to the consent of young children: "My experience has shown me that children of a very tender age may have vicious propensities."

²¹⁶ In *R. v. Nichol*, *supra*, footnote 169, and *R. v. McGavaran*, *supra*, footnote 169, the judges at Assizes found that the thirteen year old complainants were assaulted but, in both cases, D. was a schoolmaster and V. was a student. But see *R. v. Page* (1846), 2 Cox C.C. 133 (C.C.C.) where the court held D. not guilty of rape where V. was D.'s thirteen year old child. In *R. v. Locke* (1872), 2 L.R.C.C. 10 (C.C.R.), the court distinguished between consent and submission to convict D. of indecently assaulting an eight year old boy (is this reasoning the result of gender bias?).

²¹⁷ *Supra*, footnote 189.

²¹⁸ *Ibid.*, at pp. 15 (W.L.R.), 58 (Cr. App. Rep.), quoting Humphreys J. in *R. v. Harling*, [1938] 1 All E.R. 307, (1937), 26 Cr. App. Rep. 127.

anyone to suggest that a girl of that age [that is, six] had sufficient understanding and knowledge [to make that decision]".²¹⁹

Historically, Parliament passed laws to protect young persons (normally females) from sexual activity²²⁰ and exploitation.²²¹ For example, the former subsection 246.1(2) read:²²²

Where an accused is charged with an offence under subsection (1) [sexual assault]. . . in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant.

However, under the Charter, the courts began striking down²²³ or reading down²²⁴ many of those sections of the Criminal Code. Before the Supreme Court of Canada ruled on the constitutional validity of these provisions, Parliament repealed some of these laws including section 246.1(2), and enacted comprehensive new provisions.²²⁵ The legislation creates new offences²²⁶ and recasts some of the former provisions in new language, presumably to withstand better the inevitable constitutional challenges.²²⁷

Sub-sections 139(1) and (2) of the Criminal Code now govern the age of consent to sexual conduct for the crime of sexual assault. They read:²²⁸

²¹⁹ *Ibid.*, at pp. 15 (W.L.R.), 59 (Cr. App. Rep.).

²²⁰ For example, the former s. 146 (R.S.C. 1970, c. 34) prohibited sexual intercourse with a previously chaste female under fourteen who was not the accused's wife (repealed by An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3, s. 2).

²²¹ See former s. 153(1)(a) (R.S.C. 1970, c. 34) which stated: "Every male person who has illicit sexual intercourse with his step-daughter, foster daughter or female ward is guilty of an indictable offence"; (repealed by An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3, s. 3).

²²² *Supra*, footnote 1.

²²³ See: G.T. Trotter, *The Demise of Statutory Rape in Canadian Criminal Law* (1986), 52 C.R. (3d) 240, A. Stalker, *LeGallant: Law Reform and the Charter* (1987), 54 C.R. (3d) 61.

²²⁴ See *R. v. Roche* (1985), 46 C.R. (3d) 160, 9 O.A.C. 391, 20 C.C.C. (3d) 524 (Ont. C.A.).

²²⁵ An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3.

²²⁶ See, for example, *ibid.*: sexual interference (s. 140); invitation to sexual touching (s. 141); sexual exploitation (s. 146); anal intercourse under eighteen years of age (s. 154(2)(b)); bestiality in presence of or by a child (s. 155(3)); procuring sexual activity by a parent or guardian (s. 166); and juvenile prostitution (s. 195(4)).

²²⁷ For instance, the former s. 146 (R.S.C. 1970, c. 34) which prohibited sexual intercourse by a male with a female under fourteen is repealed and the new sexual conduct prohibition applies to males and females alike (s. 2, *ibid.*).

²²⁸ *Ibid.* It seems inconsistent to pass a provision withdrawing the *defence* of consent when, in fact, the absence of consent is a definitional element of the crime of sexual assault. It would, perhaps, have been clearer to remove consent as an element of

- (1) Where an accused is charged . . . with an offence under section 246.1 . . . in respect of a complainant under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.
- (2) Notwithstanding subsection (1), where an accused is charged with an offence under . . . section 246.1 in respect of a complainant who is twelve years of age or more but under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused
 - (a) is twelve years of age or more but under the age of sixteen years;
 - (b) is less than two years older than the complainant; and
 - (c) is neither in a position of trust or authority towards the complainant nor is a person with whom the complainant is in a relationship of dependency.

Speaking generally, section 139 follows a noticeable trend in the language of recent Criminal Code amendments.²²⁹ Section 139 reads as if it were part of an income tax statute or a municipal plumbing code rather than the criminal law.²³⁰ Apart from being overly complex, it may be conceptually flawed. Consent is a definitional element of the crime of sexual assault. But section 139 does not negate consent as an element of the *actus reus*; instead, the proviso excludes the application of the defence of consent for a class of complainants defined by chronological age. The section then exempts the application of this exclusionary proviso in particular circumstances. I suggest that it would have been preferable to create a separate offence of sexual assault defined by chronological age and to remove consent as an element of the *actus reus* for such a crime.²³¹ If Parliament had wished to limit the scope of the offence, it could then have provided special defences. I will now set out the scope of sub-sections (1) and (2) of section 139.

Section 139(1) establishes two general classes of complainants for the crime of sexual assault, each defined by reference to chronological

the offence where the complainant is under a set age, or to create a separate offence without that element. But see Stuart, *op. cit.*, footnote 9, p. 469, who states that, subject to exceptions, “. . . the true consent of the victim is always a defence to criminal responsibility”.

²²⁹ See, for example, Invasion of Privacy (Part IV.1) and the breathalyzer provisions (R.S.C. 1970, c. 34 as am.).

²³⁰ The cause for this trend in drafting is uncertain. It could be attributable to any of the following: (1) the subject-matter of the legislation; (2) the draftsman does not have a fundamental understanding of the principles of criminal law; (3) the legislation is the product of pressure groups (see Canada's rape shield laws, Criminal Code, s. 142 en. Criminal Law Amendment Act, 1975, S.C., 1974-75-76, c. 93, s. 8, as interpreted in *Forsythe v. The Queen*, [1980] 2 S.C.R. 268, (1980), 15 C.R. (3d) 280, 53 C.C.C. (2d) 255); or (4) the draftsman is attempting to insulate the legislation from constitutional challenges.

²³¹ This suggested legislative approach, like s. 139, could be challenged under the Charter; see *Vaillancourt v. The Queen*, [1987] 2 S.C.R. 636, (1987), 60 C.R. (3d) 289.

age. Complainants who are fourteen or more years of age fall within one class and complainants under fourteen years are members of a second class. Section 139(2) establishes two sub-categories within the second class of complainants. Members of the first sub-group are twelve or over but under fourteen; members of the second sub-group are under twelve years of age. Section 139(2) also establishes two classes of accused, again defined by reference to chronological age. Members of the first group are sixteen or over and members of the second group are twelve or more years of age but under sixteen.

Section 139(1) withdraws the defence of consent to sexual activity if the complainant is under fourteen years of age and (subject to section 139(2)) renders such consent legally ineffective. Put differently, an apparent consent by a person under fourteen years of age is negated with respect to the crime of sexual assault. However, pursuant to section 139(2), if the complainant is twelve or more but under fourteen years of age and if the accused is between twelve and sixteen years old, is less than two years older than the complainant, and is not in a position of trust or authority nor is a person with whom the complainant is in a dependent relationship, then the defence of consent is available. For instance, consensual sexual activity between a thirteen year old complainant and a fourteen year old accused is non-culpable provided that the vitiating circumstances listed in sections 233(4) and 239(2) are not present. However, if the complainant is eleven and the accused is twelve years old then the defence of consent is not available. Simply put, a defence of consent is open to the accused if the complainant fits within the older sub-group of complainants classified by section 139(2), (that is persons between twelve and fourteen years of age) and the accused meets all the criteria listed in the same sub-section.

Although sub-sections (1) and (2) of section 139 reduce the scope of the defence of consent for the crime of sexual assault, the effect of these sub-sections on the issue of culpability is tempered by sub-section (4) of section 139. It states:²³²

It is not a defence to a charge under . . . section 246.1 that the accused believed that the complainant was fourteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

This provision statutorily recognizes a new common law defence of mistake of age.²³³ This defence is open to an accused charged with sexual

²³² An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3.

²³³ In *R. v. Roche*, *supra*, footnote 224, Brooks J.A. held that a reasonable mistake as to age was a common law defence preserved by s. 7(3) of the Criminal Code. Unfortunately, he did not cite any authority for the origins of this defence.

assault even though the defence of consent is negated by reason of subsections (1) and (2) of section 139. However, the accused is required to exercise due diligence in seeking to ascertain the complainant's age in order to plead successfully the defence.

One of the underlying justifications for section 139 is to protect a particularly vulnerable class of society from sexual exploitation by adults and by an identifiable class of adolescents.²³⁴ The latter class is composed of persons who are two or more years older than the complainant and therefore are presumably more mature and experienced than the complainant. The adolescent class also includes persons who are in a position of trust, *etc.*, even though an age differential between the accused and the complainant is not present. Because of the accused's position of trust or the existence of a special relationship between the accused and the complainant, the complainant is particularly vulnerable to sexual exploitation in these circumstances. However, the legislation recognizes that sexual encounters are part of the normal process of maturing and it exempts adolescent sexual activity if the circumstances listed in section 139(2) are present. On the other hand, if the complainant is over fourteen, and there are no vitiating circumstances, then consent is a defence even if the relationship is exploitative.

It is beyond the scope of this article to address the question whether section 15 of the Charter renders section 139 inoperative.²³⁵ However, for the purposes of this article, assume that an activist judiciary did strike down section 139 on the grounds that it discriminates by age, and cannot be justified under section 1 of the Charter. Because it would be absurd to instruct a jury that a child of ten (six! four!!!) is able to consent to sexual activity, the courts will be required to select an age below which a child is incapable of consenting in law to sexual activity.²³⁶ Unless the age selected is absurdly low, the judiciary's age of consent will be subject to some of the same criticisms as the present legislation.²³⁷ If the courts select an alternative measure, such as exploitation, that criteria would create problems of interpretation and application.²³⁸ The

²³⁴ See Stalker, *loc. cit.*, footnote 223, for a good analysis of the former s. 246.1(2).

²³⁵ See Stalker, *ibid.*; also see M. Gold, *A Principled Approach to Equality Rights: A Preliminary Inquiry* (1982), 4 Sup. Ct. Rev. 131; *Re McDonald and The Queen* (1985), 21 C.C.C. (3d) 330, 7 C.R. (3d) 355, *sub nom. R. v. A.M.* (1985), 51 O.R. (2d) 745 (Ont. C.A.); *R. v. LeGallant* (1986), 33 D.L.R. (4th) 444, 29 C.C.C. (3d) 291, 54 C.R. (3d) 46 (B.C.C.A.); *Andrews v. Law Soc. of B.C.* (1986), 27 D.L.R. (4th) 600, 2 B.C.L.R. (2d) 305 (B.C.C.A.); *R. v. Holway and Soul*, [1986] Ont. D. Crim. Conv. 6108-07 (Ont. P.C.).

²³⁶ But see *R. v. Howard*, *supra*, footnote 189.

²³⁷ See D. Stuart, Annotation to *R. v. Roche*, *supra*, footnote 223, at p. 161 (C.R.): "With any age limit some arbitrariness seems inevitable."

²³⁸ See Stalker, *loc. cit.*, footnote 223, at p. 63.

product might look better but I am not convinced it would work more fairly or efficiently.²³⁹

II. Consent: The Mental Element of Sexual Assault

A. General Principles

A question arises concerning the precise mental state required to constitute the *mens rea* for sexual assault. Although there is no mental state associated with the circumstance of "sexual",²⁴⁰ there is a *mens rea* requirement for the remaining elements of the *actus reus*. In *Leary v. The Queen*,²⁴¹ Dickson J. succinctly set out the elements for the crime of rape:²⁴²

... 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.

I suggest that the analysis of Dickson J. applies to the offence of sexual assault.²⁴³ Therefore, "[t]he mental state required to constitute a sexual assault is an intention [or recklessness²⁴⁴] to do the act which in fact constitutes a sexual assault knowing that the complainant does not consent or being reckless as to whether or not she consents".²⁴⁵

²³⁹ See *R. v. Holway and Soul*, *supra*, footnote 235.

²⁴⁰ See *The Queen v. Chase*, *supra*, footnote 2.

²⁴¹ [1978] 1 S.C.R. 29, (1977), 74 D.L.R. (3d) 103, 37 C.R.N.S. 60.

²⁴² *Ibid.*, at pp. 35 (S.C.R.), 116 (D.L.R.), 76 (C.R.N.S.).

²⁴³ The Supreme Court of Canada held that the scope of the new offence differed from its predecessors, but it is clear that the principles articulated by the Supreme Court with respect to the former offences of indecent assault and rape also apply to the new offence of sexual assault; see *The Queen v. Chase*, *supra*, footnote 2, at pp. 301 (S.C.R.), 104 (D.L.R.), 199 (C.R.).

²⁴⁴ The Criminal Code defines assault in part as follows: "he applies force intentionally". Because the Supreme Court classified assault as a general intent offence (*The Queen v. George*, [1960] S.C.R. 871, (1960), 34 C.R. 1, 128 C.C.C. 289), the offence may be committed recklessly (see also *R. v. Chapin*, *supra*, footnote 11, for an example of an assault committed recklessly at common law). Perhaps the word "intentionally" is part of the Code's definition so as to exclude the possibility that accidental contact would not constitute the offence. It would be anomalous if murder (s. 212(a)(ii)), but not assault, could be committed recklessly.

²⁴⁵ *R. v. Moreau* (1986), 51 C.R. (3d) 209, at p. 227 (Ont. C.A.). The former crime of rape was defined in the alternative: (1) without consent, and (2) with consent if the consent was obtained by reason of a listed vitiating circumstance; *supra*, footnote 41. The orthodox view was that Parliament defined alternative ways of committing rape; see J. Williams, *Mistake of Fact: The Legacy of Pappajohn v. The Queen* (1985), 63 Can. Bar Rev. 597, at p. 601. In *Sansregret v. The Queen*, *supra*, footnote 91, McIntyre J. held that the legislation created two distinct definitions of the crime with a distinct *mens rea* for each definition. However, the new crime of sexual assault is not defined in the alternative. Although a vitiating circumstance listed in s. 244(3) may vitiate consent, s. 246.1, and not s. 244(3), defines the offence.

There are three possible mental states in relation to the element of consent. A person may: (1) know (or its equivalent, wilful blindness)²⁴⁶ that the complainant does not consent (intent/knowledge); or (2) know that he is unsure whether the complainant is consenting (recklessness); or (3) know or believe that the complainant consents (mistaken belief).²⁴⁷

Recklessness, in the legal sense, is a subjective state of mind importing foresight with respect to a particular consequence.²⁴⁸ In *Leary v. The Queen*,²⁴⁹ Dickson J. correctly characterized recklessness as:

. . . foresight or realization on the part of the person that his conduct will probably cause or may cause the *actus reus*, together with assumption of or indifference to a risk, which in all the circumstances is substantial or unjustifiable.

Recklessness is an intermediate step between negligence²⁵⁰ and intent and is used to describe the subjective mental state of one who consciously runs a substantial and unjustifiable risk. For the crime of sexual assault, a person acts recklessly when he is aware there is a probability, a likelihood, or a possibility that the complainant may not consent. The test for determining whether a risk is substantial and unjustifiable is determined objectively²⁵¹ and it involves a balancing of social values.²⁵² When a person becomes aware that the complainant may not be consenting, is there any social value in taking the risk of non-consent?²⁵³

The Canadian legal definition of recklessness differs from the definition fashioned by the House of Lords. In *R. v. Caldwell*²⁵⁴ Lord Diplock stated that an accused is reckless:²⁵⁵

²⁴⁶ In *Sansregret v. The Queen*, *ibid.*, at pp. 584 (S.C.R.), 588 (D.L.R.), 206 (C.R.), McIntyre J. described the term wilful blindness: ". . . wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant."

²⁴⁷ Williams, *op. cit.*, footnote 55, p. 131.

²⁴⁸ *Leary v. The Queen*, *supra*, footnote 241, at pp. 46 (S.C.R.), 124 (D.L.R.), 86 (C.R.N.S.).

²⁴⁹ *Ibid.*, at pp. 34 (S.C.R.), 116 (D.L.R.), 76 (C.R.N.S.).

²⁵⁰ A person is negligent if he should have been aware of the risk.

²⁵¹ Was it reasonable to take the risk of non-consent? See Williams, *op. cit.*, footnote 55, p. 128.

²⁵² "Was there any social justification for the defendant causing more than the usual accepted risks of life?"; Williams, *ibid.*, p. 98.

²⁵³ This risk may be compared with the surgeon who performs an emergency operation on an unconscious car accident victim. There is a possibility the patient may be a practicing Jehovah's Witness but the risk that the patient may not consent is not justified in our society. Stuart, *op. cit.*, footnote 9, p. 476, says that the defence of necessity would apply here.

²⁵⁴ [1982] A.C. 341, [1981] 1 All E.R. 961, [1981] 2 W.L.R. 509 (H.L.).

²⁵⁵ *Ibid.*, at pp. 354 (A.C.), 967 (All E.R.), 516 (W.L.R.).

. . . (1) if he does an act which in fact creates an obvious risk. . . and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has none the less gone on to do it.

The *Caldwell* definition includes an objective mental state and so a person is reckless in the legal sense when, had he stopped to think about it, he would have realized the possibility that the complainant was not consenting.²⁵⁶ In Canada, this proposition is relevant to the accused's credibility and, as well, acts as a standard by which to measure the evidentiary foundation for the accused's defence of lack of *mens rea*.²⁵⁷

B. *The Defence of Drunkenness*

The next issue is whether drunkenness is a defence to the crime of sexual assault. In *The Queen v. Chase*,²⁵⁸ the Supreme Court of Canada recently held that sexual assault was a general intent offence. This decision is consistent with the court's earlier reported opinions that indecent assault and rape were crimes requiring a general intent only.²⁵⁹ Because McIntyre J. reasoned that the mental states motivating sexual assault are many and varied, he concluded that "[t]o put upon the Crown the burden of proving a specific intent would go a long way toward defeating the obvious purpose of the enactment".²⁶⁰ He reasoned that there were strong policy reasons to support his view.²⁶¹

²⁵⁶ It was once thought that *Caldwell* was limited to consequences and that perhaps the case was not of general application; this view has since been proved wrong. The English Court of Appeal held that the *Caldwell* definition of recklessness applies to the offence of rape: "But, in the end, it seems to us that in the light of that decision [*R. v. Lawrence*, [1982] A.C. 510, [1981] 1 All E.R. 974 (H.L.)], so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk she was not. . ."; *R. v. Pigg*, [1982] 1 W.L.R. 762, at p. 772, [1982] 2 All E.R. 591, at p. 599, 74 Cr. App. Rep. 352, at p. 362 (C.A.).

²⁵⁷ In *R. v. Sharp* (1984), 39 C.R. (3d) 367, 12 C.C.C. (3d) 3 and *R. v. Waite* (1986), 52 C.R. (3d) 355, the Ontario Court of Appeal applied an objective test for the offence of criminal negligence. *Waite* is presently under appeal to the Supreme Court of Canada. One ground of appeal will probably be the issue of the constitutional validity of a Criminal Code offence of negligence; see *Reference re s. 94(2) Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, (1985), 48 C.R. (3d) 289, 23 C.C.C. (3d) 289; and *Vaillancourt v. The Queen*, *supra*, footnote 231.

²⁵⁸ *Supra*, footnote 2.

²⁵⁹ See *Swietlinski v. The Queen*, [1980] 2 S.C.R. 956, (1980), 18 C.R. (3d) 231, 55 C.C.C. (2d) 481.

²⁶⁰ *The Queen v. Chase*, *supra*, footnote 2, at pp. 302-303 (S.C.R.), 105 (D.L.R.), 200 (C.R.).

²⁶¹ *Ibid.*, at pp. 303 (S.C.R.), 105 (D.L.R.), 200 (C.R.) However, evidence indicating the accused's purpose or motive for committing the act, for example an utterance accompanying the act, is relevant to determine whether the accused's conduct was sexual.

To import an added element of specific intent in such offences, would be to hamper unreasonably the enforcement process. It would open the question of the defence of drunkenness, one which has always been related to the capacity to form a specific intent and which has generally been excluded by law and policy from offences requiring only the minimal intent to apply force.

Because the offence is classified as a general intent offence, the defence of drunkenness is not available to a person charged with sexual assault. A person is culpable even though self-induced intoxication negated his intent to commit the act constituting the sexual assault.²⁶²

C. The "Defence" of Mistake of Fact

The common law "defence" of mistake of fact was recognized as early as the publication of Blackstone's Commentaries on the Laws of England.²⁶³ The so called "defence" arises when an accused commits the prohibited act but honestly²⁶⁴ believes in the existence of circumstances which, if present, would render his act nonculpable.²⁶⁵ Put differently, because the accused lacks the requisite *mens rea*, he is not guilty.²⁶⁶ Smith and Hogan²⁶⁷ succinctly set out the scope of the defence:

[M]istake is a defence where it prevents D from having the *mens rea* which the law requires for the crime with which he is charged. Where the law requires intention of recklessness with respect to some element in the *actus reus*, a mistake, whether reasonable or not, which precludes both states of mind will excuse. Where the law requires only negligence [strict liability²⁶⁸], then only a reasonable

²⁶² *Leary v. The Queen*, *supra*, footnote 241. "... there is a substantive rule of law that in crimes of basic intent, the factor of intoxication is irrelevant. . . [and] the accused is precluded by a rule of substantive law from negating the inference of intention that would ordinarily be drawn from the doing of the act, by evidence that intoxication prevented him from being aware of what he was doing."; Martin J.A. in *R. v. Swietlinski* (1978), 22 O.R. (2d) 604, at p. 627, 5 C.R. (3d) 324, at p. 351, 94 D.L.R. (3d) 218, at p. 240 (Ont. C.A.). Recently, some Supreme Court of Canada judges have questioned the constitutional validity of this principle; *Bernard v. The Queen*, unreported, December 15, 1988 (S.C.C.).

²⁶³ Vol. 4 (Beacon Press, Boston, 1962), p. 25, as cited in *Bulmer v. The Queen*, [1987] 1 S.C.R. 782, at p. 788, [1987] 4 W.W.R. 577, at p. 582.

²⁶⁴ Williams, *op. cit.*, footnote 55, p. 119, states that the qualifiers of "honest", "bona fide" or "genuine" are unnecessary because "one cannot believe ungenerously or dishonestly or in bad faith". However, these terms are useful for instructing a jury. *Quaere* whether wilful blindness is a form of dishonest belief?

²⁶⁵ "The defence has been variously described and may be conveniently stated in these terms. If an accused entertains an honest belief in the existence of a set of circumstances which, if they existed at the time of the commission of an otherwise criminal act, would have justified his act and rendered it non-criminal, he is entitled to an acquittal."; McIntyre J., in *Bulmer v. The Queen*, *supra*, footnote 263, at pp. 789 (S.C.R.), 582 (W.W.R.).

²⁶⁶ See *Beaver v. The Queen*, [1957] S.C.R. 531, (1957), 26 C.R. 193, 118 C.C.C. 129.

²⁶⁷ *Op. cit.*, footnote 6, p. 207.

²⁶⁸ In *The Queen v. Sault Ste Marie*, [1978] 2 S.C.R. 1299, (1978), 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, the Supreme Court of Canada classified crimes into three

mistake can afford a defence; for an unreasonable mistake, by definition, is one which a reasonable man would not make and is therefore negligent. Where strict liability [absolute liability²⁶⁹] is imposed, then even a reasonable mistake will not excuse. . .

The rules are simply an application of the general principle that the prosecution must prove its case. . . The so-called "defence" is simply a denial that the prosecution has proved its case.

Because sexual assault is a *mens rea* offence the test for mistake of fact is subjective: ". . . the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining that essential question."²⁷⁰

In the leading case of *Beaver v. The Queen*,²⁷¹ and again in *Pappajohn v. The Queen*,²⁷² the Supreme Court of Canada recognized this common law "defence". Recently, the court reaffirmed the principle that this "defence" goes to the issue whether "the accused had the necessary *mens rea* for the crime".²⁷³ Therefore mistake of fact is simply a denial of *mens rea*²⁷⁴ and it is not a defence in the strict sense of that term.²⁷⁵ In contrast, the term "defence" does apply when an accused commits the *actus reus* with the necessary *mens rea* but there are circumstances present which justify or excuse his conduct.²⁷⁶

categories: (1) full *mens rea* /criminal offence; (2) strict liability/regulatory offence; and (3) absolute liability offence. The Canadian strict liability offence requires an objective mental state or negligence.

²⁶⁹ The Canadian absolute liability offence is the same as the authors' strict liability category.

²⁷⁰ *Beaver v. The Queen*, *supra*, footnote 266, at pp. 538 (S.C.R.), 201 (C.R.), 137 (C.C.C.).

²⁷¹ *Ibid.*

²⁷² *Supra*, footnote 41.

²⁷³ See *Bulmer v. The Queen*, *supra*, footnote 263, at pp. 789 (S.C.R.), 582 (W.W.R.); and see also *The Queen v. Robertson*, *supra*, footnote 8.

²⁷⁴ "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 none the less commits the *actus reus* of an offence."; Dickson J. in *Pappajohn*, *supra*, footnote 41, at pp. 148 (S.C.R.), 14 (D.L.R.), 261 (C.R.).

²⁷⁵ "Although mistake of fact is commonly referred to as a 'defence', a mistake as to the definitional element of an offence requiring *mens rea* negates the mental element required to constitute the offence and therefore is not a defence in the strict sense."; Martin J.A. in *R. v. Moreau*, *supra*, footnote 245, at p. 225.

²⁷⁶ See Stuart, *op. cit.*, footnote 9, p. 386.

When Parliament changed the law relating to assaults, it codified mistake of fact. Unfortunately, the legislature also referred to it as a defence. Section 244(4) states:²⁷⁷

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.

Labelling mistake of fact as a defence causes confusion when attempting to allocate properly the evidentiary and persuasive (or legal) burden of proof. Normally, the allocation of the persuasive burden of proof to a party means they also have the evidentiary burden. When the Crown has the persuasive burden in relation to the accused's mental state, then the Crown usually carries (as a matter of law) the evidentiary burden unless this principle is altered by a rule of substantive law.²⁷⁸ In contrast, in a true defence such as self-defence or provocation, the accused has an evidentiary burden to adduce sufficient evidence to justify putting his defence to a jury;²⁷⁹ however, the Crown has the persuasive burden once the accused adduces sufficient evidence to pass the trial judge.²⁸⁰

In most trials, once the Crown proves the *actus reus*, there may be a tactical shifting of the evidentiary burden to the accused because the jury *may* draw the inference from the proof of the *actus reus* that the accused intended to commit the prohibited act. However, this tactical shifting occurs as a matter of common sense and not law. Therefore, if an accused was operating under a flawed perception of the facts, he should adduce some foundational evidence to support his mistaken belief,²⁸¹

²⁷⁷ An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 1.

²⁷⁸ For an example of a mandatory shifting of the evidential burden see s. 306(2) of the Criminal Code: "For the purposes of proceedings under this section, evidence that an accused (a) broke into and entered a place is, in the absence of any evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein." However, the Crown retains the persuasive (legal) burden of proof for intent.

²⁷⁹ See *Latour v. The King*, [1951] S.C.R. 19, [1951] 1 D.L.R. 834, (1950), 98 C.C.C. 258, for the defences of self-defence and provocation. See also Stuart, *op. cit.*, footnote footnote 9, p. 393.

²⁸⁰ Stuart, *ibid.*

²⁸¹ "Mistake is a defence though, in the sense that it is raised as an issue by the accused."; Dickson J. in *Pappajohn v. The Queen*, *supra*, footnote 41, at pp. 148 (S.C.R.), 14 (D.L.R.), 261 (C.R.). "The accused, however, has the evidential burden of introducing evidence of mistake *if he wishes the court to consider it.*"; Martin J.A. in *R. v. Moreau*, *supra*, footnote 245, at p. 225. (Emphasis added). The accused, through the cross-examination of Crown witnesses or evidence called on his behalf or upon other evidence in the record, may make mistake a live issue. See *R. v. Gill*, [1963] 2 All E.R. 688, [1963] 1 W.L.R. 841 (C.C.A.), cited in Stuart, *op. cit.*, footnote 9, p. 382.

otherwise he runs the risk of conviction.²⁸² Obviously, if there is an absence of evidence of mistaken belief, the trial judge will not instruct the jury to consider the possibility that the accused was operating under a flawed perception of reality.²⁸³ However, this practical shifting of the burden of adducing evidence does not relieve the Crown of the evidentiary or legal burden of proof relating to the accused's mental state.²⁸⁴

The Supreme Court has not adopted this approach and recently reaffirmed that the law allocates to the accused the evidentiary burden for the "defence" of mistake of fact at common law and under section 244(4).²⁸⁵ Since the "defence" of mistake of fact is in reality a denial of *mens rea*, and because the Crown has the evidentiary and legal burden of proving the accused's mental state in the crime of sexual assault, one would expect mistake of fact to be dealt with in the same way as a simple denial of *mens rea*. I am not aware of any policy reasons²⁸⁶ or

²⁸² The recent case of *The Queen v. Robertson*, *supra*, footnote 8, is a classic example of this situation: "The accused did not testify. He called no witnesses. The accused and the complainant did not know each other. The complainant suffered physical injury. The complainant did not scream because of threats of violence and because of actual violence. The complainant's version of events has been consistent. The inconsistencies pointed to by the accused are trivial."; *ibid.*, at pp. 940 (S.C.R.), 44-45 (C.R.), 337 (D.L.R.). According to the evidence set out in the reported case, there was not a scintilla of evidence to support a defence of mistaken belief in consent.

²⁸³ It is well recognized that as a matter of law the trial judge should not instruct the jury in the absence of an evidential basis for a "defence"; *Bulmer v. The Queen*, *supra*, footnote 263, at pp. 789 (S.C.R.), 582 (W.W.R.).

²⁸⁴ Put differently, if the accused adduces no evidence of mistaken belief in consent, is the judge entitled to direct the jury that the Crown is not required to prove *mens rea*? Professor Williams points out the difference between a denial of an element of an offence and a defence: "The weight of authority favours the view that if there is no sufficient evidence of provocation, accident or self-defence to leave to the jury, the judge may withdraw these issues from the jury. The rule is acceptable for provocation and self-defence, but does not accord with principle for accident, which, as a defence to a charge of murder, is merely a denial of intention. Since intention is necessarily in issue in murder, it is hardly possible for this question to be withdrawn from the jury and decided against the accused by direction of the judge, whether the accused gives evidence on the subject or not. For, in the words used in *Woolmington*, such a course would 'enable the judge to say that the jury must in law find the prisoner guilty, which is not the common law.'"; Williams, *op. cit.*, footnote 27, p. 893.

²⁸⁵ See *Pappajohn v. The Queen*, *supra*, footnote 41. If there was a question on this issue, the recent decisions in *Bulmer v. The Queen*, *supra*, footnote 263, and *The Queen v. Robertson*, *supra*, footnote 8, state in clear and unambiguous language that the accused has the evidentiary burden: "There is an evidentiary burden on the accused. . . to adduce sufficient evidence to put the defence in issue."; Wilson J. in *The Queen v. Robertson*, *ibid.*, at pp. 936 (S.C.R.), 41-42 (C.R.), 334 (D.L.R.).

²⁸⁶ The defence of automatism is also a denial of *mens rea* and the accused carries the evidentiary burden but this is based on practical policy reasons: "While it is recognized that there are genuine cases of automatism the Courts. . . tend to approach the questions raised by such a defence with a wholesome skepticism, and have insisted upon

principles of criminal law which would lead to a differentiation in law between a denial of *mens rea* by reason of lack of knowledge and a denial of *mens rea* by reason of mistaken knowledge—both are species of ignorance of the true state of affairs.²⁸⁷ With respect to the court's ruling, I suggest that it would have been preferable not to place the evidentiary burden on the accused but rather to have put a tactical obligation on the defence to adduce some evidence to make it a live issue. If the accused fails to do so, the judge will not instruct the jury on this alternative plea.

Speaking practically, the Supreme Court's evidentiary ruling may not, by itself, significantly affect the accused's position. However, the court's ruling, that the evidence must have an "air of reality" in order for an accused to discharge this burden,²⁸⁸ may have substantial implications depending upon the trial judge's interpretation and application of this standard, as well as on his or her assessment of the evidence. To date, appellate judges have held divergent views on these issues.²⁸⁹

In the majority judgment in *Pappajohn v. The Queen*,²⁹⁰ McIntyre J. commented on the quality and the source of the evidence necessary before a judge puts a defence of mistake of fact to a jury.²⁹¹

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 or be supported by sources other than the appellant in order to give it any air of reality.

The first sentence is correct. However, the second sentence has been the subject of some controversy.²⁹² More recently, McIntyre J. elaborated on the meaning of these words:²⁹³

These words appear, on occasion, to have been misunderstood, but I do not withdraw them. There will not be an air of reality about a mere statement that "I

the adduction of positive evidence for its support. . . It is a defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel."; Schroeder J.A. in *R. v. Szymusiak*, [1972] 3 O.R. 602, at pp. 606, 608, (1972), 8 C.C.C. (2d) 407, at pp. 411, 413 (Ont. C.A.).

²⁸⁷ See Williams, *op. cit.*, footnote 27, p. 151.

²⁸⁸ See *The Queen v. Robertson*, *supra*, footnote 8, at pp. 933 (S.C.R.), 39 (C.R.), 332 (D.L.R.). See also *Bulmer v. The Queen*, *supra*, footnote 263, at pp. 793 (S.C.R.), 587 (W.W.R.).

²⁸⁹ *Pappajohn v. The Queen*, *supra*, footnote 41, is a classic example. See also *R. v. Bulmer* (1983), 10 C.C.C. (3d) 256 (B.C.C.A.) and *Trottier v. R.* (1981), 21 C.R. (3d) 330 (B.C.C.A.).

²⁹⁰ *Supra*, footnote 41.

²⁹¹ *Ibid.*, at pp. 133 (S.C.R.), 34 (D.L.R.), 283 (C.R.).

²⁹² Williams, *loc. cit.*, footnote 245, at p. 616, analyzes the implications of the evidentiary ruling of the Supreme Court.

²⁹³ *Bulmer v. The Queen*, *supra*, footnote 263, at pp. 790-791 (S.C.R.), 583-584 (W.W.R.).

thought she was consenting” not supported to some degree by other evidence or circumstances in the case. If the mere assertion were sufficient to require a trial judge to put the “mistake of fact” defence, it would be a simple matter in any rape case to make such an assertion and regardless of all other circumstances, require the defence to be put. . . The question he [trial judge] must answer is this. In all the circumstances of this case, is there any reality in the defence? To answer this question he must consider all the evidence, all the circumstances. The statement of the accused alleging a mistaken belief will be a factor but will not by itself be decisive, and even in its total absence, other circumstances might dictate the putting of the defence.

There are reasons for which the present standard and its application should be favoured over the alternative approach. According to conventional wisdom, a jury will not acquit an accused if the defence lacks an air of reality.²⁹⁴ Because some evidentiary standard for passing the trial judge must be established, the “air of reality” test appears reasonable on its face and is as good as any other test when properly applied. Although the sufficiency of the evidence cannot be calibrated according to precise rules,²⁹⁵ there are some cases where the evidence clearly falls short of the “air of reality” test or the issue does not arise at all. For example, cases may arise where the complainant’s testimony is diametrically opposed to that of the accused: either the complainant consented or the accused intended non-consensual intercourse.²⁹⁶ Put differently, there is “little if any room for the suggestion that she may not have been consenting but he thought she was”.²⁹⁷ Therefore, even when an accused testifies that there was consent, the defence may not be available because for one or more reasons it is not a live issue. Similarly, the defence should not be put to a jury simply on the basis of an accused’s

²⁹⁴ This conventional wisdom is based on the words of Dickson J. in *Pappajohn v. The Queen*, *supra*, footnote 41, at pp. 155-156 (S.C.R.), 20 (D.L.R.), 267 (C.R.): “The ongoing debate in the courts and learned journals as to whether mistake must be reasonable is conceptually important. . . but in my view practically unimportant because the accused’s statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable.” Speaking generally, this is probably correct, but I am unaware of how one would verify it.

²⁹⁵ *R. v. Guthrie* (1985), 8 O.A.C. 277, at p. 283, 20 C.C.C. (3d) 73, at p. 84 (Ont. C.A.). See also *Bulmer v. The Queen*, *supra*, footnote 263, at pp. 796 (S.C.R.), 587 (W.W.R.).

²⁹⁶ Williams, *loc. cit.*, footnote 245, pp. 610-617, points out the implications of the “two conflicting stories” theory and suggests that this theory may be inconsistent with the standard jury instruction that the jurors are entitled to accept some, all, or nothing of a witness’s testimony. Of course the trial judge is not required to take this latter proposition to extremes and instruct the jury on some farfetched patchwork of the evidence suggested by defence counsel.

²⁹⁷ *Pappajohn v. The Queen*, *supra*, footnote 41, at pp. 132 (S.C.R.), 34 (D.L.R.), 282 (C.R.). Also see *R. v. Guthrie*, *supra*, footnote 295, where in order for the jury to accept the defence of mistaken belief in consent, they would have been required to find that the accused lied about the complainant’s behaviour.

throw-away statement that he believed she was consenting. Testimony of this sort must be supported by other evidence.²⁹⁸ If the rule were otherwise, most accused would be able to convince themselves of the advantages of mentioning their belief in consent after being advised of the niceties of the law by their counsel.

The courts have formulated similar²⁹⁹ evidentiary rules for passing the trial judge for other defences. For example, the trial judge does not leave the pleas of alibi or accident to a jury unless there is foundational evidence to support them. From the point of view of good trial administration, an instruction concerning a theory of the Crown or the defence which is wholly unsupported by the evidence would tend to confuse a jury and therefore should not be left with them.³⁰⁰

On the other hand, there are shortcomings in the present test when it is applied in such a manner that it results in the withdrawal of a legitimate theory of the defence from the jury's consideration. According to the test formulated by McIntyre J., the mere statement "I thought she was consenting" is not sufficient evidence, without more, to pass the trial judge.³⁰¹ Because of the nature of the crime, the accused may be the best, and perhaps the only, witness who is able to testify whether he believed in consent. In *Bulmer v. The Queen*,³⁰² Lamer J. rightly points out that the "air of reality" test should not be applied so as to require corroboration of the accused's testimony. Also, the removal of this alternative plea on the basis that the testimony of the complainant and the accused are diametrically opposed, and that there is a lack of common ground for the defence is based, in part, on the premise that the complainant's version is complete—a questionable assumption in some cases. Moreover, a requirement for corroboration may wrongly encourage an accused to dovetail partially his testimony with that of the complainant in order to supply the necessary common ground for the defence.

²⁹⁸ *Contra* Lamer J. in *Bulmer v. The Queen*, *supra*, footnote 263, at pp. 799 (S.C.R.), 589 (W.W.R.): "... the issue of mistaken belief in consent should also be submitted to the jury in all cases where the accused testifies at trial that the complainant consented. The accused's testimony that the complainant consented must be taken to mean that he believed that the complainant consented."

²⁹⁹ The rulings are similar because the accused has a tactical obligation to adduce some evidence to make alibi or accident a live issue. The rulings are not identical, however, because, for the mistake of fact "defence", the accused has the evidentiary burden which must meet the "air of reality" standard, a higher threshold than simply adducing some evidence.

³⁰⁰ See *Bulmer v. The Queen*, *supra*, footnote 263, at pp. 789-790 (S.C.R.), 583 (W.W.R.).

³⁰¹ *Ibid.*, at pp. 790 (S.C.R.), 583 (W.W.R.).

³⁰² *Ibid.*, at pp. 798-799 (S.C.R.), 588-589 (W.W.R.).

It is arguable that the "air of reality" standard may be inconsistent with the evidentiary rulings for passing the trial judge in other areas of the law. For example, the testimony of a complainant that she did not consent, without more, is sufficient evidence for a committal.³⁰³ Similarly, when a defendant denies committing the *actus reus* or makes a "mere assertion" that he did not intend to do the prohibited act, a judge is required to charge a jury on the basis of these simple denials.³⁰⁴ In both situations the sufficiency test is met because the testimony of the witness constitutes some evidence to make it a live issue for the jury's factual determination. Further, it should be kept in mind that in *Beaver v. The Queen*³⁰⁵ the accused's testimony, that he thought he was selling sugar of milk and not heroin, was sufficient to pass the threshold requirements for the defence.³⁰⁶

Because the threshold requirement of an "air of reality" approaches the rejected standard that the belief must be reasonable (at least in the view of the trial judge) it is, perhaps, too high a standard. It would be unusual if the sufficiency test to pass the trial judge was more rigorous than the one the jurors apply in determining guilt or innocence. I question whether the evidence in *Beaver v. The Queen*³⁰⁷ could pass the present "air of reality" test.

The mistake of fact "defence" involves two steps. As a matter of law, the trial judge must examine all the evidence and determine if there is an air of reality to the defence. If the evidence meets this sufficiency test, the trial judge then instructs the jury on the scope of the defence and the related evidence. Unlike the common law where the jury instruction was discretionary, section 244(4) requires that "when reviewing all the evidence relating to the determination of the honesty of the accused's belief, the trial judge shall instruct the jury to consider the presence or absence of reasonable grounds for belief".³⁰⁸ Subject to the noted qualification, section 244(4) does not change the common law.

³⁰³ See *Martin v. The Queen*, [1978] 2 S.C.R. 511, (1978), 41 C.C.C. (2d) 342; *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, [1986] 4 W.W.R. 577.

³⁰⁴ See comments by Williams, *loc. cit.*, footnote 245.

³⁰⁵ *Supra*, footnote 266.

³⁰⁶ *Ibid.* See the very brief reasons given by Laidlaw J.A., in *R. v. Beaver* (1956), 116 C.C.C. 231, at p. 232 (Ont.C.A.): "It is sufficient to state very briefly that the appellant relied for his defence upon his own evidence that he intended to sell "sugar of milk" in a package. . ."

³⁰⁷ In the facts as set out in the reasons of Fauteux J., *supra*, footnote 266, at pp. 544-545 (S.C.R.), 207-208 (C.R.), 142-143 (C.C.C.), the accused followed some elaborate plans to obtain the "drugs". If the accused believed that he was selling sugar of milk, and not heroin, there is no rational explanation for his conduct. I question whether an experienced criminal would sell the real product thinking it was a placebo—the reverse is plausible but not the accused's version.

³⁰⁸ Wilson J. in *The Queen v. Robertson*, *supra*, footnote 8, at pp. 939 (S.C.R.), 44 (C.R.), 336 (D.L.R.). (Emphasis added).

The question then arises whether a mistake induced by intoxication is capable of negating *mens rea*. In *The Queen v. Chase*³⁰⁹ the Supreme Court of Canada held that drunkenness was not a defence to a crime of sexual assault. In *R. v. Moreau*³¹⁰ Martin J. held that "where the mistake is induced by voluntary intoxication, the mistake on policy grounds does not exempt an accused from liability for an offence of general intent".³¹¹ He reasoned:³¹²

For the purpose of criminal liability no distinction is made between a person who by reason of self-induced intoxication does not realize that the complainant does not consent and one who has a positive belief produced by self-intoxication that she consents.

Martin J.A. also held that the trial judge should put the defence of mistake of fact to the jury in the case of the intoxicated offender if there is a basis in the evidence for a mistaken belief in consent apart from intoxication.³¹³ He held that the test is whether the accused would have made the same mistake if he had been sober.³¹⁴ He acknowledged that the juror's task would be difficult and artificial in these circumstances.³¹⁵

The final issue is whether mistake of fact is a viable defence when the complainant is under fourteen years of age. Section 139 states that ". . . it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge".³¹⁶ As stated above, section 139 negates the apparent consent of such complainants and renders their consent legally ineffective. Because section 139 does not withdraw the alternative "defence" of mistake of fact,³¹⁷ one can reasonably argue

³⁰⁹ *Supra*, footnote 2.

³¹⁰ *Supra*, footnote 245, at p. 231.

³¹¹ *Ibid.* See also *R. v. Woods*, [1982] Crim. L. Rev. 42 (C.A.) where the court held that self-induced intoxication is not a legally relevant consideration in relation to the reasonable grounds for belief.

³¹² *Ibid.*

³¹³ *Ibid.*, at p. 238. Martin J.A. cites a decision to support his position: *Bresse v. R.*, [1980] C.A. 443, (1978), 7 C.R. (3d) 50, 48 C.C.C. (2d) 78 (Que. C.A.).

³¹⁴ *Ibid.*, at p. 239.

³¹⁵ *Ibid.*, at pp. 238-239: "In those circumstances the jury is required to engage in difficult, and perhaps somewhat artificial, task of putting out of their minds the evidence of intoxication on the issue whether the accused honestly believed that the complainant consented. The test is not whether a reasonable and sober person would have made the same mistake if he had been sober. . ." See also *Bernard v. The Queen*, *supra*, footnote 262, per Dickson C.J.C.

³¹⁶ An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3.

³¹⁷ See former s. 146 of the Criminal Code, R.S.C. 1970, c. C-34, for an illustration of such legislation: "Every male person who has sexual intercourse with a female person who. . . (b) is under the age of fourteen years, whether or not he believes she is fourteen years of age or more is guilty. . ."

that such a defence remains open to an accused charged with sexual assault. If that proposition is correct, then section 139 is, practically speaking, rendered useless since an accused will be able to plead successfully mistaken belief in consent. On the other hand, if the courts rule that section 139 also negates the "defence" of mistake of fact, the accused will argue that the provision is contrary to section 7 or 11(d) of the Charter.³¹⁸ Again, the constitutional issue is beyond the scope of this article.

Conclusion

The matter of the consent of the complainant to sexual activity is a difficult issue. Because a person does not consent in the abstract but rather consents *to* something, consent must be understood in the context in which it is given.³¹⁹ The meaning of consent is markedly different for the offence of sexual assault than for other areas of law, such as property offences or tort law.³²⁰ Sexual offences have historically been seen as crimes of violence, and the meaning of consent must be understood in light of the purpose and underlying policy reasons for creating this offence. Consent to sexual activity can be placed on a continuum from a consent given under a threat of death to a consent desirously given to a lover. As stated, some frauds and certain kinds of abuse of authority will result in conduct being classified as criminal while other frauds, or the exercise of authority, will not have this legal effect. A feminist may argue that any economic pressure should be recognized as a vitiating circumstance in order to deter unwelcome pressure. Reasonable persons may differ on the type or kinds of pressure that the law should recognize as a vitiating circumstance. I suggest that the further one moves away from the "actual or apprehended violence" category of vitiating circumstance, the more difficult it is to draw the boundaries of individual vitiating circumstances. Because the matter of consent is a mixed question of fact and law, judges are required to instruct juries on the meaning of consent for the crime of sexual assault by drawing the line between those circumstances which vitiate consent in law from those that are not capable of causing that result.

The introductory part of section 233(4) states that "no consent is obtained where the complainant submits or does not resist [because of a

³¹⁸ See *Vaillancourt v. The Queen*, *supra*, footnote 231. In *R. v. Roche*, *supra*, footnote 224, at pp. 170 (C.R.), 397 (O.A.C.), 533 (C.C.C.), Brooke J.A. stated with respect to the former s. 246.1(2): "It is a fundamental principle of justice that a person should not be convicted of a crime if he honestly though mistakenly believes in circumstances which, if they were true, would render his conduct innocent."

³¹⁹ Hancock, *loc. cit.*, footnote 113, at p. 572.

³²⁰ *Ibid.*, at pp. 572 *et seq.*; P. Young, *The Law of Consent* (1986), pp. 7-11. *Contra* Stuart, *op. cit.*, footnote 9, pp. 469 *et seq.*

listed circumstance]”. I do not think that these words will be of any great assistance to the judiciary in distinguishing between consensual and non-consensual sexual activity in a borderline case. The Shorter Oxford English Dictionary defines “submit” in part as follows: “to yield. . . [or] consent to”.³²¹ “Submit” like “consent” is best understood by explaining the kinds of circumstances which vitiate consent for the crime of sexual assault. It is immaterial whether we use “consent” or “submit” to express this concept. In my view, the inclusion of the words “does not resist [because of a listed circumstance]” in section 233(4) will cause mischief.

The statutory recognition of fear and threats of the application of force as vitiating circumstances is an improvement over the former statutory provisions. However, the scope of the vitiating circumstances of fraud and the exercise of authority will undoubtedly be the subject-matter of litigation and the courts, in a case by case approach, will be required to flesh out their meaning. When Parliament listed these matters as vitiating circumstances, I do not think that the legislature intended to create new offences, such as fraudulent sexual contact or sexual exploitation. On the other hand, I do think that the scope of these vitiating circumstances should not be limited by their predecessors; as a result, the scope of the offence of sexual assault will be broader than its forerunners.

Although the *mens rea* for consent and the “defence” of mistake of fact are often contentious issues, both at trial and in the minds of the public, they are, conceptually, not remarkable. Simply put, a person who lacks the requisite *mens rea* for a crime is not culpable and, thus understood, the mental state for sexual assault is not different from any other crime requiring *mens rea*. However, since the decision of the trial judge to leave mistake of fact to the jury is dependent upon an assessment of whether or not the foundational evidence passes the “air of reality” test, the matter will continue to be a contentious one. The issue whether the new legislation³²² negates the “defence” of mistake of fact when the complainant is under fourteen must be decided by the courts. If the courts rule that the defence is open to an accused, then section 139 will be mostly cosmetic because an accused will surely have an honest belief in consent when the complainant gives an actual consent. This determination will, in turn, affect the constitutional issue. If section 139 removes the *mens rea* in relation to the consent of the complainant then the courts must determine whether Parliament’s interest in protecting a vulnerable class of society is sufficiently important to over-

³²¹ *Op. cit.*, footnote 85, p. 2169. See also Young, *ibid.*, pp. 12-14 concerning various dictionary definitions of consent.

³²² An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3.

ride a constitutionally protected right or freedom.³²³ Parliament has attempted to balance these interests and the unanswered constitutional question is whether the activist members of the Supreme Court of Canada approve its efforts.

³²³ See Dickson C.J.C.'s remarks in *Morgentaler v. R.*, [1988] 1 S.C.R. 30, at p. 73, (1988), 44 D.L.R. (4th) 385, at pp. 414-415, 62 C.R. (3d) 1, at p. 33. In *R. v. Stevens* (1988), 64 C.R. 297 (S.C.C.), three members of the Supreme Court of Canada, in a dissenting opinion, held that the former s. 146(1) of the Criminal Code, R.S.C. 1970, c. C-34 violated s. 7 of the Charter of Rights and Freedoms, Constitution Act 1982, Part I. Wilson J. held that section 146(1), created an absolute liability offence with respect to the element of consent where the victim was under fourteen years of age. Because Parliament had enacted s. 139(4), An Act to amend the Criminal Code and the Canada Evidence Act, *supra*, footnote 3, "a provision that infringes the accused's s. 7 rights less than the section challenged in the present appeal [s. 146(1)]", *ibid.*, at p. 318, the section "... cannot be viewed under section 1 of the Charter as a reasonable limit on the accused's s. 7 rights", *ibid.*, at p. 319. Under s. 52 of the Charter Wilson J. would have expunged the words that created the absolute liability offence. The majority decision did not consider this constitutional issue. Because the conduct took place before the Charter was in force, the majority held that the Charter should not have a retrospective effect.