

# SEXUAL ASSAULT: AVAILABILITY OF THE DEFENCE OF BELIEF IN CONSENT

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*Despite amendments to the sexual assault provisions in the Criminal Code, decisions about the availability and operation of the defence of belief in consent remain vulnerable to the influence of legally extraneous considerations. The author proposes an approach designed to limit the influence of such considerations.*

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*En dépit d'amendements aux dispositions du Code criminel sur l'agression sexuelle, les décisions sur la disponibilité et la présentation de la défense fondée sur une croyance de consentement demeurent vulnérables à l'influence de considérations juridiquement extrinsèques. L'auteur propose une approche dont l'effet serait de limiter l'influence de telles considérations.*

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The conceptualization of the offence of sexual assault is changing in response to the constitutional imperative in sections 7, 15, and 28 of the *Charter* that the law must be interpreted in a manner that is effective to secure legal protection for the substantive liberty and equality of all persons in Canada.<sup>1</sup> Yet what is essential in theory can easily be lost in the process of translating principle into practice.<sup>2</sup> That concern arises in the interpretation of the defence of mistaken belief.<sup>3</sup> The primary cause of the gap between substantive law and its effect lies in rulings made in the course of applying the law to the facts. Effects always depend on evidentiary and procedural rulings. There is an evident need for clear legal criteria to ensure that judicial deliberations are *grounded in fact, circumscribed by law and undistorted by stereotype and myth*.<sup>4</sup> Rigorous

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<sup>1</sup> See *R. v. Park*, [1995] 2 S.C.R. 836 at 866-67; *R. v. Esau*, [1997] 2 S.C.R. 777 at 793-824; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at 348. In "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault" (2004) 42 *Osgoode Hall L.J.* (forthcoming), I examine the substantive law of the defence of belief in consent in relation to culpable awareness and the theory of criminal responsibility. Here I apply that analysis to clarify the legal criteria for the availability of the defence. Model jury instructions based on the analysis are forthcoming in the *Criminal Law Quarterly*.

<sup>2</sup> See the comments of Justices L'Heureux-Dubé and McLachlin in *Esau*, *ibid.* at 797 and 814-15, respectively, on the risks involved in putting the defence of belief in consent to the jury in that case.

<sup>3</sup> See *R. v. Ewanchuk* (1998), 57 Alta. L.R. (3d) 235 (C.A.); *Ewanchuk*, *supra* note 1 at 376.

<sup>4</sup> The unreported trial decisions in *R. v. Malcolm* and *R. v. M (B.S.)*, for example,

adherence to proper standards of deliberation appears to be especially challenging in sexual assault cases. I examine the provisions that govern the availability and practical operation of the defence of “belief in consent” and develop guidelines for their use. The proposed approach uses the fact/law distinction to delineate the roles of the judge and jury<sup>5</sup> and to restrict the influence of extraneous factors on the interpretation of the legal definition of consent.<sup>6</sup>

### *The Elements of the Offence of Sexual Assault*

The actus reus of sexual assault is defined as direct or indirect contact with another person’s body that is (1) sexual in nature and (2) engaged in without the consent of the other person.<sup>7</sup> The mens rea requirement is that the physical contact be the result of an intentional act by an accused who knew that the complainant had not communicated consent or that consent was not voluntary, not capable, or otherwise not valid, or who was reckless or wilfully blind in one or more of those respects. Criminal culpability is based on what the accused actually knew, not what the trier of fact believes the “reasonable person” would have been aware of in the same situation.<sup>8</sup>

The absence of consent is an essential element of the actus reus of the offence of sexual assault. Culpable awareness in relation to consent is an essential aspect of mens rea. A mistake of fact that creates a reasonable doubt that the accused was aware that consent had not been communicated, or was not or might not be voluntary or valid, requires acquittal if the mistake negatives mens rea or culpable awareness in relation to the issue of consent. The mistake need not be a “reasonable” mistake, but it must be “honest.”<sup>9</sup> The mistake must be one that the accused *might* have made. If the trier of fact is not able to conclude beyond a reasonable doubt that there was no such mistake, the accused must be acquitted *if* the effect of such a mistake would be to negative all culpable awareness. A mistake that is reckless or wilfully blind does not negative culpable awareness. Section

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suggest that judges remain uncertain about the operation of the defence of belief in consent. See the Court of Appeal judgments at *R. v. Malcolm (R.E.)* (2000), 35 C.R. (5th) 365 (Man. C.A.) and *R. v. M. (B.S.)* (2001), 40 C.R. (5th) 370 (Alta. C.A.).

<sup>5</sup> *R. v. Cinous*, [2002] 2 S.C.R. 3. See also *R. v. Fontaine*, [2004] 1 S.C.R. 702.

<sup>6</sup> The distinction between mistake of fact and mistake of law was first used to address this problem in L. Vandervort, “Mistake of Law and Sexual Assault: Consent and *Mens Rea*” (1987-1988) 2 C.J.W.L. 233.

<sup>7</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 265.

<sup>8</sup> In *R. v. Darrach* (1998), 122 C.C.C. (3d) 225 (Ont. C.A.), Justice Morden concluded that the issue to be determined under section 273.2(b) continues to be framed in terms of the subjective awareness of the accused. The question is what the accused actually knew, not what the accused “ought” to have known.

<sup>9</sup> *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120 at 156.

273.2(a)(ii) therefore bars the defence of belief in consent where the belief arises from recklessness or wilful blindness. When the defence is raised, the crucial question is: Was the accused aware of *any* reason to believe or suspect that consent was not present or not voluntary, that the complainant lacked capacity, or that consent was tainted by any of the factors enumerated in section 273.1(2)?<sup>10</sup>

In the absence of evidence to the contrary, accused individuals are assumed to have ordinary cognitive abilities, just as they are assumed to act voluntarily. Where there is no evidence of mistake (or cognitive impairment not excluded from consideration by law), it is taken to be established that the accused was aware of the material facts the trier of fact finds to be proved beyond a reasonable doubt. Thus, an accused's knowledge or awareness of the material facts bearing on the absence of consent is easily established.<sup>11</sup> In most cases, the accused is found to have been aware of all the facts relied on by the trier of fact to determine whether the complainant consented. For this reason, judges commonly state that in the vast majority of sexual assault cases the verdict turns on one issue – consent.

### *The Availability of the Defence*

The substantive legal framework of the defence of belief in consent is comprised of sections 19, 265(3), 265(4), 273.1, and 273.2 of the *Criminal Code*, and the common law of consent and mens rea. These provisions are applied to the evidence to determine whether the defence of belief in consent *could* result in acquittal. They also determine which “mistakes of fact” have a material bearing on “belief in consent” and, in turn, which portions of the available evidence are relevant and of probative value for establishing whether the alleged belief in consent might have existed. Section 265(4) specifies that the defence of belief in consent may not be considered unless the defence *could* result in acquittal. Acquittal may be precluded by a substantive legal provision or because the evidentiary foundation for the defence is insufficient to give rise to a reasonable doubt, even on the view of the available evidence most favourable to the accused. If acquittal could not result, the defence is not available. Section 273.1(1) defines consent for the purposes of sexual assault as “the voluntary agreement of the complainant to engage in the sexual activity in question.”<sup>12</sup> That definition is subject to sections 273.1(2) and 265(3).<sup>13</sup> Section 273.1(2) provides that “no consent is obtained” where agreement is expressed by the words or conduct of a person other than the

<sup>10</sup> See *Ewanchuk*, *supra* note 1 at 360-61.

<sup>11</sup> *Esau*, *supra* note 1 at 807-808.

<sup>12</sup> *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s.1.

<sup>13</sup> *Ibid.*

complainant, the complainant is incapable of consenting to the activity, the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority or the complainant expresses a lack of agreement to engage or to continue to engage in the activity. Section 265(3) provides that there is no consent if the complainant “submits or does not resist” due to the application of force or threats thereof, fraud or the exercise of authority. Thus, section 265(3), like the common law on which it is based, bars a finding of consent when a complainant reacts with passivity or lack of resistance to one or more of the specified forms of coercion.<sup>14</sup> The section is of limited relevance for the defence of belief in consent precisely because it concerns non-resistance rather than affirmative *communication* of consent by verbal or non-verbal conduct. Only affirmative communication of consent can provide a basis for an accused’s claim of “moral innocence.”<sup>15</sup> Belief that passivity or non-resistance *is* communication of consent by non-verbal *conduct* is a mistake of law, not the basis for a defence of belief in consent.<sup>16</sup> Accordingly, the principal application of section 265(3) is in relation to consent in the *actus reus*.

In *Ewanchuk*, Justice Major held that to rely on the defence of belief in consent, an accused must have “believed that the complainant *communicated consent to engage in the sexual activity in question*.”<sup>17</sup> Facts that are material in determining whether the accused believed that valid consent was communicated include the verbal and non-verbal conduct by which the complainant affirmatively communicated agreement (or the absence of agreement) to engage in the sexual activity in question, and all facts that have a bearing on the voluntariness of the complainant’s conduct or on the determination of whether consent was “obtained” by operation of law.<sup>18</sup> A crucial development in the last decade is explicit judicial recognition that non-communication of consent must be viewed as equivalent to communication of non-consent for the purposes of proof of *mens rea* in sexual assault.<sup>19</sup> Justice Major adopted that position in

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<sup>14</sup> In *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3 the court held that at common law lack of resistance is not “consent.”

<sup>15</sup> *Ewanchuk*, *supra* note 1 at 354-55.

<sup>16</sup> *Ibid.* at 356.

<sup>17</sup> *Ibid.* at 354.

<sup>18</sup> This article focuses on *mens rea* in relation to consent, not on the *actus reus*. The Supreme Court has been consistent in holding that consent in the *actus reus* is determined by reference to the complainant’s subjective “internal state of mind.” See, for example, *Ewanchuk*, *ibid.* at 348. The definition of consent as an aspect of the *actus reus* has no bearing on the matters addressed in this article.

<sup>19</sup> In dissent in *Esau*, *supra* note 1 at 794, Justice L’Heureux-Dubé states: “In my view, the *mens rea* should also be established where the accused is shown to have been aware of or reckless or wilfully blind as to the fact that the complainant has *not communicated consent* to the activity in question.”

*Ewanchuk* and made it clear that in the absence of affirmative communication of consent, consent cannot be “assumed,” “presumed,” “implied” or “intuited.”<sup>20</sup> Expressed or communicated consent, as defined by statute and the common law, is necessary to negative an inference of culpability. A sexual act is not “morally innocent” unless the accused knew there was valid consent communicated by a capable person who was not subject to coercion. There is express consent – and there is *everything else*. Consequently, a complainant is not required to communicate refusal in order to enjoy the protection of the criminal law against non-consensual sexual touching.

Sections 273.1 and 265(3) are consistent with the common law and largely restate rather than amend the law of consent. The effect of the definition of consent in section 273.1 is to require that consent be personal, expressed, voluntary, informed, capable, specific, and revocable. These criteria are in accordance with legal principles recognizing the inherent right of individuals to exercise autonomy and self-determination in matters affecting bodily integrity, physical well-being, and intimate social relationships.<sup>21</sup>

#### *Mistake of Law/Fact*

Section 19 of the *Criminal Code* states: “Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.”<sup>22</sup> Ignorance of the law encompasses mistakes about the meaning, interpretation, or application of the law, as well as lack of appreciation of the legal significance of facts.<sup>23</sup> The trier of fact may only consider the defence of mistaken belief in consent if there is some evidence to support the conclusion that the accused may have made a mistake of fact, not law, that led to the conclusion that the complainant had communicated valid consent, as the law defines “consent.” The distinction between a mistake of law and a mistake of fact is therefore of fundamental importance. A belief that a person has communicated valid consent is a belief about the application of the law to facts or the legal significance of facts, not a belief

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<sup>20</sup> *Ewanchuk*, *supra* note 1 at 349-50, 354-55. See also S. Coughlan, “Annotation” (1999) 22 C.R. (5th) 1 at 6.

<sup>21</sup> The preamble to the legislation states that the amendment is intended to “promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*,” *supra* note 12. That requires protection of the autonomy of the person as a decision-maker, not merely protection from physical coercion.

<sup>22</sup> *Supra* note 7.

<sup>23</sup> See *Molis v. The Queen*, [1980] 2 S.C.R. 356; *R. v. Forster*, [1992] 1 S.C.R. 339; *R. v. Théroux*, [1993] 2 S.C.R. 5; *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *Esau*, *supra* note 1 at 807-808; *Ewanchuk*, *supra* note 1 at 356.

about a question of fact.<sup>24</sup> To provide the basis for a defence of “belief in consent” the accused must make a mistake about the facts. It must be the case that, had the facts been as the accused claims to have believed them to be, the accused would have been correct to believe that valid consent was communicated. Such an accused would not be aware of any facts that indicated consent might be incapable, not voluntary, or otherwise vitiated by one or more of the factors listed in section 273.1(2). The choice to rely on the belief would therefore be “innocent” and the accused not culpable.<sup>25</sup> The accused is entitled to have such a claim considered by the trier of fact. To acquit, the trier of fact must conclude that the mistake of fact (1) might have been made by the accused and (2) creates a reasonable doubt that the accused was aware or suspected that consent was not communicated, not voluntary, not capable, or not valid for any reason, including the factors enumerated in section 273.1(2).

The first step in evaluating a claim of mistaken belief in consent is to characterize the claim as a mistake of fact or a mistake of law by reference to the definition of consent in section 273.1. To take a simple example, assume a case in which an accused, in reliance on folk wisdom, claims belief in consent based on the proposition that “no” means “yes,” even when “no” is accompanied by resistance, unless the complainant becomes hysterical. Defence counsel asserts that the complainant’s conduct corresponded to his client’s understanding of “consent” in that she said “no” repeatedly and did resist but did not become hysterical. Counsel asserts that to convict his client would be unjust. It would condemn an individual who acted “innocently” in the sense that he did not “know” he was doing anything wrong. The defence is not available in such a case because the “mistake” is a mistake about the law of consent. It is not a mistake about any facts material to the issue of consent. In this hypothetical, the accused is aware that the complainant is communicating refusal to agree to the accused’s activity, both verbally and by physical resistance. Here, because the alleged mistake is one of misinterpretation of the law or misapplication of the law to facts of which the accused was aware, section 19 of the *Criminal Code* governs. The mistake has no exculpatory effect.<sup>26</sup>

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<sup>24</sup> For an example of the application of the fact/law distinction to prohibit exculpatory reliance on extra-legal beliefs in consent, see *Ewanchuk*, *supra* note 1 at 356. The distinction was applicable, though not used, in *R. v. M. (B.S.)*, *supra* note 4, and in *Sansregret v. The Queen*, [1985] 1 S.C.R. 570. Both cases involved consent extorted by fear.

<sup>25</sup> *Ewanchuk*, *supra* note 1 at 356, 361.

<sup>26</sup> *Ibid.* at 356. In *Pappajohn*, *supra* note 9 at 164, Justice Dickson observed that jurors could construe physical resistance as “token resistance.” He thereby implied that an accused’s failure to appreciate such resistance as a reason to suspect non-consent would not necessarily be viewed as “blameworthy” by the public in 1979. With the

The distinction between mistake of fact and law is clear in theory. In this context, the question is whether the mistake was a mistake about the complainant's communicative conduct or a factor affecting voluntariness or capacity, or, on the other hand, a mistake about the legal definition of consent in section 273.1. Accused persons who are aware of the facts and yet act as if their conduct is subject to extra-legal norms do not make an exculpatory mistake of "fact." Rather, they defy the law and run the risk of conviction.<sup>27</sup> Where all the material facts are *known*, there is no exculpatory belief in a mistaken set of *facts*. An accused who claims to have mistakenly believed there was consent, may have failed to appreciate the legal significance of particular facts. Section 19 applies to bar the excuse. When the bar against excuses based on mistakes of law is not enforced, the defence of mistaken belief functions as a "Trojan horse" to license reliance by accused persons on myth and stereotype.

Assume that an accused believes that accepting a ride in a vehicle signifies consent to sexual contact with the driver. Here the mistake lies in reliance on the general proposition that conduct of a particular type constitutes what the law defines as "communication of consent." That is a mistake of law, not a mistake of fact. Failure to apply section 19 to bar consideration of the excuse tacitly invites the trier of fact to rely on extra-legal definitions and norms in deliberating about the case. That only reinforces existing public ignorance about what constitutes "communication of consent" in law. There are many other examples of mistaken belief about consent, all of which are mistakes of law. In each case, a specific conduct, choice or characteristic is taken to be communication of "consent." The conduct and characteristics include such varied matters as wearing clothing deemed sexually provocative by local standards, going unaccompanied to bars or clubs, accepting an invitation to share a meal or sleep in another person's residence, consenting to sexual contact with the accused or someone else on a previous occasion, active or even passive participation in an activity of a sexual nature with someone other than the accused, failure to resist, failure to succeed in resisting or escaping, previously reporting an "unfounded" assault, or membership in

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1992 enactment of section 273.1(2)(d) (which arguably codified the common law as it then was), it is clear that the resistance can not be consent in law. This shows that codification is useful even when it restates the common law. Section 273.1, in particular, should serve as a reminder that there are *legal* limits to the effective scope of judicial discretion in interpreting the definition of consent. With a *statutory* definition of consent, judges will be more likely to recognize that a belief that resistance is an invitation to "try again" *is a mistaken belief about the law, not a mistake about the facts*. See the divergent approaches of Justices Fraser and McClung in *Ewanchuk* (Alta. C.A.), *supra* note 3, and the application of section 272.1(2)(d) by Justice Major in *Ewanchuk*, *supra* note 1 at 361.

<sup>27</sup> *Ewanchuk*, *supra* note 1 at 379-80.

a particular social, ethnic, racial, economic or occupational group. To rely on conclusions about the “social significance” of a person’s characteristics or activities to decide whether a person has “communicated consent” within the meaning of section 273.1 is to make one or more mistakes about the law. The mistaken belief may be “sincere” or bona fide, but it is not a lawful excuse for sexual assault. It is a mistake about the law of consent. As a matter of law, such a mistake has no exculpatory effect.

An accused may make a mistake of fact *and* a mistake of law. If the mistake of fact would be material only if the law was what the accused allegedly believed it to be, the mistake does not excuse. For example, assume an accused man believes that any woman who has sex with him once has thereby agreed to have sex with him again. He alleges that on the occasion in question he believed that the complainant was a person with whom he had sex a year earlier. In fact, he mistook the complainant for her cousin. The mistake about the complainant’s identity provides no support for a defence of mistaken belief in consent. The mistake, even if sincere, relates to a fact that could not render the accused’s actions innocent in law unless the law was also as he believed it to be.

Evidence in support of the defence is thus limited to evidence of one or more mistakes of fact about communication of consent to the activity or about factors bearing on the validity of the consent communicated. This includes facts related to what the complainant said, the complainant’s legally relevant non-verbal communicative conduct, the scope or nature of the activity agreed to, and whether the complainant was sane and sober and had a “real choice” to refuse. If the accused’s conduct would be “innocent” only if the *law* of consent was as the accused supposed it to be, the defence of mistaken belief may *not* be considered by the trier of fact.

### *A Statutory Bar*

Sexual assault is a general intent offence. Section 273.2(a)(i) codifies the common law bar, applicable to all general intent offences, against reliance on mistakes of fact that are due to self-induced intoxication or impairment. Section 273.2(a)(ii) bars reliance on the defence of belief in consent where the belief arose from recklessness or wilful blindness. Because sexual assault is a general intent offence, culpable awareness may take the form of knowledge, recklessness, or wilful blindness. Reliance on a belief in consent that is mistaken due to recklessness or wilful blindness indicates an accused’s indifference or callous disregard – not “innocence.” Such beliefs do not negate mens rea. There is a well-established common law tradition that supports this view of reckless and wilfully blind mistakes in general intent offences.<sup>28</sup>

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<sup>28</sup> *Leary v. The Queen*, [1978] 1 S.C.R. 29 at 34-35; *Pappajohn*, *supra* note 9 at



In *Esau*, Justice McLachlin observed that at common law the term “honest belief” was only applicable to beliefs that were neither reckless nor wilfully blind.<sup>29</sup> That way of stating the matter reverses the emphasis in some previous cases on the credibility of the alleged “honest belief” and indicates a fundamental shift in focus in the analysis of mens rea. It is now clear that the crucial question in relation to mens rea for a general intent offence is whether the accused was reckless or wilfully blind. Only the accused who is neither can be said to have an “honest belief” in consent or in any other exculpatory circumstance, because “honest belief” has no legal meaning in the criminal law context other than a belief that is neither reckless nor wilfully blind. Two years later, in *Ewanchuk*, Justice Major adopted Justice McLachlin’s view and stated that “to be honest the accused’s belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2.”<sup>30</sup> The crux of the matter is no longer whether the accused had an honest belief in consent. Instead, the question is: Was the accused aware of any reason to believe or suspect that consent was not present or not voluntary, that the complainant lacked capacity, or that consent was tainted by any of the factors enumerated in section 273.1(2)?

After *Ewanchuk*, the approach that must be taken when applying section 273.2(a)(ii) is clear. A choice to act in reliance on a belief that another person has consented, despite awareness that consent, as such, has not been communicated or may not be voluntary or capable, is not an “innocent” choice. Proof that the accused was aware that no consent had been communicated, or that consent was not voluntary or not capable, establishes culpable awareness and requires conviction. Proof that the accused was aware of facts that in law indicate that the consent communicated might not be voluntary or capable suffices to establish recklessness or wilful blindness. An alleged mistake of fact, even if credible, cannot negative mens rea based on proof beyond a reasonable doubt that the accused was nonetheless aware of facts and circumstance that signify, as a matter of law, either that consent was absent or, if present, might be invalid because it was not voluntary and capable. Only if the alleged mistake of fact raises a reasonable doubt that the accused was aware of any reason *at all* to suspect that valid consent was or might be absent, does the mistake negative mens rea.<sup>31</sup>

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146; *Sansregret*, *supra* note 24 at 587. See Vandervort, *supra* note 1.

<sup>29</sup> *Supra* note 1 at 807-808, 813-14. These aspects of the dissent deal with matters not addressed in the judgment for the majority and are subsequently referred to as reasons “for the Court” and affirmed in *Ewanchuk*, *supra* note 1 at 357.

<sup>30</sup> *Ewanchuk*, *ibid.* at 361. The relevant section is 273.1(2). Section 273.2 contains no relevant factors.

<sup>31</sup> The question is not simply whether the accused believed valid consent had been voluntarily communicated, but also whether the accused was aware of any facts

Consider, lastly, the “reasonable steps” provision in section 273.2(b). It is, I submit, best viewed as an alternate formulation of “wilful blindness.” In the vast majority of cases, if section 273.2(a)(ii) is applied properly, section 273.2(b) will be redundant. Failure to take steps (to inquire about consent) that are “reasonable” *in the circumstances known to the accused* inevitably demonstrates intent, callous disregard, or wilful blindness under section 273.2(a)(ii). The alternate formulation in section 273.2(b) serves to confirm that an accused who made a deliberate choice to ignore the significance of known facts is properly said to have been “wilfully blind.” That reading of section 273.2 is supported by the observation that when the evidence about what the accused knew is equivocal or insufficient in its totality to determine whether belief in consent would have been reckless or wilfully blind under section 273.2(a)(ii), section 273.2(b) will not generate a result either.<sup>32</sup> When there is doubt about the accused’s ability to appreciate the significance of the material facts and circumstances, and to take appropriate steps, it is unlikely that either section will bar reliance on belief in consent. In many such cases, however, the cause of disability would be self-intoxication or impairment and therefore section 273.2(a)(i) would apply to bar the defence of belief in consent. Appellate discussion of the operation of section 273.2 as a *whole* is needed to provide trial judges with authoritative guidance.

#### *The Application of Section 265(4)*

The defence of belief in consent is a mistake of fact defence. Section 265(4) must be applied when there is evidence that the accused may have made a mistake of fact in relation to the communication or validity of consent. The availability of the defence is a question of law and an incorrect decision on its availability constitutes reversible error.<sup>33</sup> The objective of section 265(4), like that of the general rule at common law, is to ensure that the case put to the jury is limited to issues not precluded by

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inconsistent with that belief. An accused who was aware of such facts was culpably aware. When it is recognized that awareness of facts always has priority over mistaken beliefs in an analysis of *mens rea*, it is readily apparent that reliance on non-legal definitions of consent entails criminal culpability. See Vandervort, *supra* note 1, for a discussion of section 273.2, its basis in common law and related issues in the theory of criminal responsibility.

<sup>32</sup> See Vandervort, *ibid.*, for a discussion of the “reasonable steps” provision in section 273.2(b). When none of the conditions set out in section 237.2 apply to bar reliance on the defence, the trier of fact proceeds to assess culpability pursuant to the principles of subjective liability in sexual assault at common law. Therefore, section 273.2 is not a statutory definition of the mental element in sexual assault. Rather, it is a *statutory bar* to reliance on the defence under specific conditions.

<sup>33</sup> *R. v. Osolin*, [1993] 4 S.C.R. 595 at 676.

operation of law. The defence of belief in consent is unavailable if there is *no evidence* of mistake of fact related to the complainant's verbal and non-verbal communication of "consent," the voluntariness of "consent," the complainant's capacity or "tainting" of consent by any of the factors in section 273.1(2). Where there is *some* evidence, it must be "sufficient" to result in acquittal.

To avoid error, decisions about availability of the defence should be based on legal criteria, not on whether the alleged mistake seems "plausible" or "sincere" in the opinion of the judge. The legal issue is whether, on at least one view of the evidence, the defence is available in law. That determination is to be made without weighing the evidence, assessing the credibility of witnesses, or otherwise trenching on the functions of the jury. These legal limits on the discretion of trial judges are easily overlooked. Criteria and tests are needed that will be effective to identify the cases in which the defence is not available even though there is "some" evidence that the accused may have made a mistake of fact that could have been the basis for a "belief in consent."

In *Cinous*, the court reviewed the jurisprudence related to the "air of reality" test, both generally and in relation to sexual assault cases under section 265(4).<sup>34</sup> The majority of the court affirmed that there is a single test for all defences. I suggest, however, that the test is a more restrictive screening device for some combinations of offences and defences than for others. The interaction of the substantive definition of an offence with the substantive criteria for the operation of a specific defence generates a set of legal limits that are unique to that particular offence/defence combination. It is this set of limits, not the legal requirements of the defence alone, which determines the effective availability of the defence when the limits are applied to the evidence in a case. Furthermore, the issues that arise when considering the availability of the defence of belief in consent are distinguishable from those related to availability of the defence of self-defence. Unlike self-defence, availability of the defence of belief in consent does not require a judge to determine that the accused's choice was objectively *justified* in the circumstances. *Justification* in a sexual context depends entirely on whether the parties consented to the sexual activity. If they did, there is no offence. If it is proven that there was no consent, the only question is whether the accused is to be *excused* on the ground of mistake of *fact*. Rational criteria, strictly limited by the definitions of substantive law, apply to determine the availability of the mistake of fact defence in fact and law. There is no latitude for the operation of normative criteria to broaden or narrow the substantive scope of the defence of belief in

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<sup>34</sup> *Supra* note 5 at 28 *et seq.* See also *Fontaine*, *supra* note 5, where Justice Fish articulates and applies the "air of reality" test.

consent.<sup>35</sup> The substantive legal criteria produced by the interaction of the offence/defence dyad therefore provide a highly effective mechanism to assess the availability of the defence under section 265(4).

The criteria and tests commonly used to assess sufficiency of the evidence under section 265(4) can be separated into three categories: (1) those that scrutinize the source(s) of evidence, (2) those that examine the patterns of logical consistency in the evidence and (3) those that examine culpable awareness in relation to consent to determine whether the defence of belief in consent could rationally result in an acquittal. In any particular case, one, two, or all three of these approaches may lead to the conclusion that the defence is *not* available. Approaches utilizing “logical consistency” and “rational consistency” are still under development. Uncertainties with respect to limits based on the sources of evidence appear to be resolved.

Consider the sources of evidence. Where the evidence in support of a defence is a bare assertion by the accused, unsupported by *any* other evidence, the defence is not available.<sup>36</sup> When the testimony of the accused is the only evidence in support of the defence, the defence is not unavailable on that ground alone. The testimony of the accused is “evidence.” By testifying, the accused is subject to cross-examination. The Crown has the opportunity to question the accused about matters related to the alleged belief/mistake. Accused persons who claim to have believed that the complainant voluntarily communicated consent are unlikely to be believed if they cannot give an account of the factual beliefs that supported their conclusion. Similarly, those who merely assert that they lacked awareness of any reason to suspect that consent might be absent will not do well under cross-examination.<sup>37</sup> The evidence will ordinarily show they were aware of the material facts. Those who claim otherwise may simply persuade the jury that they are liars or were callously indifferent or wilfully blind to the issue of consent.<sup>38</sup>

The second category involves the “logical consistency” of the

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<sup>35</sup> By contrast, in recent decisions on the defences of self-defence and necessity (*Cinous*, *supra* note 5, and *R. v. Latimer*, [2001] 1 S.C.R. 3) the Supreme Court uses common law standards of “reasonableness” to *construct restrictive norms* in the very process of interpreting and applying the provisions of substantive law. The effect is to limit the *substantive scope* of these defences by reference to an *objective test* based on community values and constitutional rights. The court, rightly or wrongly, clearly views these instances of norm construction to be within the *judicial* function.

<sup>36</sup> *R. v. Robertson*, [1987] 1 S.C.R. 918.

<sup>37</sup> See *R. v. Bulmer*, [1987] 1 S.C.R. 782 at 796-99 on trials where the only evidence of mistake is the accused’s testimony.

<sup>38</sup> The evidentiary foundation for the defence may also come from a source *other than* the accused. See *Osolin*, *supra* note 33 at 648-49, 687.

evidence. In the absence of a specific evidentiary foundation, the defence should not go to the jury.<sup>39</sup> Cases go to the jury as a whole, however, rather than in stages. It cannot be assumed that a finding that consent was not communicated, not voluntary or not capable will inevitably imply a total rejection of the portion of the evidence that might support a finding of possible mistake of fact bearing on the accused's awareness of flaws in consent.<sup>40</sup> In *Park*, Justice L'Heureux-Dubé proposed that when the narratives by the accused and the complainant are diametrically opposed, the trier of fact could "splice some of each person's evidence...and settle upon a reasonably coherent set of facts...that is capable of sustaining the defence of mistaken belief in consent."<sup>41</sup> If not, the case turns on the credibility of the evidence on the issue of consent and the defence is not available.<sup>42</sup> Second, approaching the issue as an assessment of the totality of the evidence, Justice L'Heureux-Dubé stated that the defence is unavailable where "(1) the totality of the evidence for the accused is incapable of amounting to the defence being sought; or (2) the totality of the evidence for the accused is clearly, logically inconsistent with the totality of evidence which is not materially in dispute."<sup>43</sup> In addition, she noted that a case may lack sufficient evidence to support a particular defence despite a failure to find an "absence of the air of reality" through the application of any particular legal test.<sup>44</sup> Such a sweeping caveat risks being seen as judicial licence to trench on jury functions.

The third category under section 265(4) is based on the approach Justice McLachlin used in *Esau* to assess the significance of belief in consent for culpable awareness. The effect is to clarify the relationship between "honest belief," recklessness and wilful blindness, and radically simplify the task of determining when the defence of belief in consent is available. It must now be taken as established that a defence of belief in consent *cannot* result in acquittal, and therefore may *not* be considered by the trier of fact, if no available interpretation of the evidence could support the conclusion that the accused might have been unaware of *any* facts that signify in law that consent might not have been communicated, voluntary, capable, or "obtained" within the meaning of section 273.1 and the common law. If no such interpretation is available, sexual contact in reliance on the mistaken belief could not be anything other than knowing,

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<sup>39</sup> See *Osolin, ibid.* at 648-49, 676-77; *Robertson, supra* note 36 at 938; *Bulmer, supra* note 37 at 789-90; *Lee Chun-Chuen v. The Queen*, [1963] A.C. 220 (P.C.).

<sup>40</sup> In *Osolin, ibid.*, five members of the court rejected the view that the defence of mistake is not available where the evidence of the accused and the complainant is "diametrically opposed" on the issue of consent.

<sup>41</sup> *Supra* note 1 at 856.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* at 859.

<sup>44</sup> *Ibid.* at 857-58.

reckless, or wilfully blind, and the accused is culpable, not “innocent.” Section 273.2 applies to bar the availability of the defence in these circumstances because the belief is due to the accused’s recklessness or wilful blindness. Because the defence is unavailable, the issue under section 265(4) is resolved as well.

This approach moves beyond questions of “logical consistency” to develop criteria based on what I provisionally refer to as “substantive rational consistency.”<sup>45</sup> In *Osolin* and later in *Esau*, Justice McLachlin assessed beliefs in consent by examining them within the context of the totality of the facts of which the accused was aware. Where there are patent contradictions between the *legal significance* of the facts of which the accused is aware and belief in consent, as consent is defined in law, no belief in consent could be “honest” in any legally recognizable sense of the word. Belief in consent is not *rationaly consistent* with the balance of the evidence going to establish the accused’s state of mind and the defence is not available.<sup>46</sup> The accused is assumed to be a rational social agent. In the absence of evidence casting doubt on the reasoning capacity of accused individuals, they are assumed to have ordinary capacities of reasoning and are held accountable on that basis. The approach does not, I suggest, signal movement to an “objective” standard, but simply explicates existing common law, as does section 273.2, and is constitutionally sound. The development arguably reflects an evolving appreciation of the *legal significance* of awareness of facts and circumstances for proof of mens rea. In the context of the offence of sexual assault, this affects interpretation of the legal significance of the awareness of facts and circumstances related to communicated consent. The effect is to eliminate the latitude accused persons have often been given to assert “moral innocence” based on the alleged “social ambiguity” of facts related to consent. “Culpability” and “innocence” turn directly on the legal significance of the accused’s awareness of material facts and circumstances.

If the accused was aware of facts that (1) communicated refusal (such as resistance, saying no, attempting to escape) or (2) were consistent with no communication about consent (e.g., lack of resistance without verbal or non-verbal conduct that communicated agreement) or (3) signified, as a matter of law, that any consent communicated might not be voluntary or capable, *then* the fact that an accused persevered demonstrates not “innocence,” but rather the accused’s culpable knowledge, recklessness, or wilful blindness in relation to consent. In these circumstances, belief in

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<sup>45</sup> The phrase “substantive rational consistency” indicates that inferences from the evidence about the accused’s awareness of the facts must be strictly structured and limited by the substantive definitions of the relevant law. That is distinct from some uses of “reasonableness,” which often encompass normative judgments.

<sup>46</sup> *Esau*, *supra* note 1 at 807-814.

consent can have no bearing on the outcome of the case and the defence is not available under section 265(4). The relationship between knowledge, belief, awareness and culpability, like the distinction between mistake of fact and mistake of law, discussed above, is therefore of central importance for the analysis of mens rea and the defence of belief in consent. Use of sections 19 and 273.2 as substantive bars to the availability of the defence of belief in consent should ensure that rulings made under section 265(4) are based on clear legal criteria. That should also mark an end to much of the controversy surrounding the significance of evidence of “honest mistaken belief in consent” for mens rea.

### *An Example – Esau Revisited*

Consider a leading sexual assault case where the availability of the defence was disputed. In *Esau*, the Supreme Court ordered a new trial on the ground that the defence was available in law and should have been considered by the jury. Application of the approach proposed here, however, suggests that the appeal was wrongly decided. At trial the complainant testified that she was intoxicated. She had no memory of the alleged assault, but asserted she would not have consented to sexual intercourse with the accused because they were cousins. Three other persons who were present in the complainant’s home immediately prior to the alleged assault testified that the complainant looked “pretty drunk.” The accused testified that though he and the complainant had both been drinking, they both knew what they were doing and actively participated in sexual intercourse. Thus, the accused’s defence was that the complainant communicated her consent through words and conduct and he believed the complainant had the capacity to consent even though she was intoxicated. The Crown’s position was that the complainant lacked capacity to consent due to intoxication. Defence counsel submitted that on the evidence the jury should have a reasonable doubt about the complainant’s lack of capacity and find the accused not guilty. The trial judge determined that the only issue was consent and therefore did not instruct the jury on the defence of belief in consent. He instructed the jury that to convict they must find that there was no consent and that the accused was at least reckless. Defence counsel did not object to the instruction. After some deliberation, the jury asked the judge to provide a definition of consent given while impaired. The judge recharged the jury on the issue of consent and discussed the effect of incapacity induced by alcohol on a person’s ability to consent. The jury found the accused guilty. The jury may have disbelieved the accused and concluded that he assaulted an unconscious person. On the other hand, the jury may have concluded that even if the complainant did participate actively, she was so intoxicated that any consent communicated by her words and conduct was invalid. The

question for the judge under section 265(4) was simply whether, on the view of the evidence most favourable to the accused, the jury could find there was no consent and yet have a reasonable doubt that the accused was reckless. The answer to that question determines whether the jury should have been instructed on the defence of belief in consent.

Two lines of analysis are available. Both show the defence to be unavailable. First, if the accused's evidence is characterized as an assertion that he believed there was consent *because* he believed that words and conduct communicating consent *always* constitute capable consent, the belief in consent would be based on a mistake of law. The defence would be unavailable under sections 19, 273.1(2)(b), and 265(4). The accused's failure to appreciate the legal significance of facts of which he was well aware would not excuse him. Similarly, if the belief is characterized as one based on a mistake of fact about the complainant's capacity to consent, application of sections 265(4) and 273.2(a)(ii) shows that the defence of belief in consent was unavailable. There was undisputed evidence that the accused was aware that the complainant was intoxicated and that, nonetheless, the accused proceeded to engage in sexual activity with the complainant. That demonstrates wilful blindness towards the impact of intoxication on the complainant's legal capacity to consent pursuant to section 273.1(2)(b). Wilful blindness toward the validity of the complainant's consent renders the defence of belief in consent unavailable pursuant to section 273.2(a)(ii). Whenever the trier of fact concludes that a complainant lacked legal capacity to consent due to impairment, undisputed evidence that the accused was aware that the complainant might be intoxicated will render the defence of belief in consent unavailable in law pursuant to section 273.2(a)(ii). Belief in the validity of consent communicated by a person who may be intoxicated is always wilfully blind. The choice to rely on such a belief is reckless. Section 273.2(b) adds little to the analysis. In the absence of a legal sobriety standard for capacity to consent to sexual activity, or devices similar to the breathalyzer to test consensual capacity, there are no reasonable steps to be taken to ascertain the validity of consent given by a person who has been drinking or taking drugs. Anyone who engages in sexual activity with a person who they know may be impaired is wilfully blind to that person's capacity to consent. The defence of belief in consent will be unavailable, pursuant to the statutory bar in section 273.2 and the common law.<sup>47</sup> The issue in such a case is consent or no consent. The answer under each of the two lines of analysis is the same.

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<sup>47</sup> In *Esau, ibid.* at 792, Justice Major concluded that because section 273.2 was not raised at trial or on appeal, the Supreme Court's ability to consider it was restricted. That is surely incorrect given that the appeal dealt with availability of the very defence barred under that section. In any event, the same result flows at common law. A wilfully blind belief affords an accused no defence to a general intent offence.



### Conclusion

Section 265(4) of the *Criminal Code* serves a double function in sexual assault cases. First, it protects the legal definition of consent against the influence of social mythology and discriminatory stereotypes (generalizations not mandated by law) by precluding defences based on mistakes of law. Second, it ensures that the trier of fact considers only those defences for which there is evidentiary support and which could rationally result in acquittal under the applicable substantive law. The substantive bars in sections 19 and 273.2 provide essential legal criteria for the test under section 265(4). Those bars ensure that legal criteria, not idiosyncratic and potentially biased assessments of “plausibility” or “reasonableness,” will guide decisions about what mistakes provide a foundation for a defence of belief in consent.<sup>48</sup> The entanglement of fact, law, fiction, myth, stereotype and prejudice in the cognitive maps used to interpret human sexuality is a general problem. Decision-makers should not presume themselves to be immune. Used systematically, section 265(4) curtails the influence of extraneous considerations that often interfere with the proper analysis of culpable awareness in sexual assault cases.

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<sup>48</sup> See, for example, comments to the jury reproduced in the dissent by Justice Abella in *R. v. Livermore* (1994), 31 C.R. (4th) 374 (Ont. C.A.). On the analysis adopted in the present article, many of the “common sense” factors drawn to the attention of the jury by the trial judge in *Livermore* would either be irrelevant to the issue of consent as defined in law, or misdirection inviting the jury to adopt an extra-legal definition of consent. Justice Abella, in turn, applied the “air of reality” test to the alleged belief in consent overall, rather than to alleged mistakes of fact that bear directly on the presence of consent as defined in law. The test then operates as an assessment of the “reasonableness” of the belief. However, that is *not* the question of law to be decided under section 265(4).

