

SEXUAL ASSAULT AND INTOXICATION: DEFINING (IN)CAPACITY TO CONSENT

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This article considers how the law of sexual assault in Canada addresses cases involving intoxicated complainants. There are two main aspects to the law of capacity to consent to sexual touching in the context of intoxicated women. The first involves the evidence of intoxication courts typically require in order to prove lack of capacity. The second pertains to the legal standard to which that evidence is applied. The nature of the evidence required to establish incapacity turns on the level of capacity the law requires. A comprehensive review of Canadian caselaw involving intoxicated complainants reveals a legal standard that is too low and an evidentiary threshold that is too high. The result: no matter how severely intoxicated a woman was when the sexual contact occurred, courts are unlikely to find that she lacked capacity to consent unless she was unconscious during some or all of the sexual activity.

Dans cet article, l'auteure examine la manière dont le droit en matière d'agressions sexuelles au Canada traite les cas impliquant des plaignantes en état d'ébriété. Le droit relatif à la capacité de consentir à des attouchements sexuels dans le contexte de plaignantes en état d'ébriété comporte deux éléments principaux. Le premier a trait à la preuve de l'état d'ébriété généralement exigée par les tribunaux afin d'établir l'absence de capacité. Le second concerne la norme juridique à laquelle s'applique cette preuve. La nature de la preuve exigée pour établir l'absence de capacité dépend du degré de capacité exigé par la loi. Un examen approfondi de la jurisprudence canadienne impliquant des plaignantes en état d'ébriété témoigne d'une norme juridique qui n'est pas assez exigeante et un seuil de preuve trop élevé. Résultat : peu importe la gravité de son intoxication lors des attouchements à caractère sexuel, il est peu probable que les tribunaux concluent qu'une femme n'avait pas la capacité de consentir, à moins qu'elle ait été inconsciente pendant toute la durée ou une partie de l'activité sexuelle.

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1. Introduction

A woman who was too drunk to insist on a condom when she was ovulating, or notice the multiple sores on and around the accused’s penis before he penetrated her vagina, or understand the risks associated with allowing an unmedicated HIV positive man to ejaculate inside her, but aware enough to know she was being penetrated and could say no, is unlikely to be afforded legal protection under the law of sexual assault in Canada.¹ A woman who was so intoxicated she was “falling down drunk,”²

¹ As will be explained in Part 4, these are the logical implications of the Nova Scotia Court of Appeal’s reasoning in *R v Al-Rawi*, 2018 NSCA 10 [*Al-Rawi* (NSCA)].

² *R v Tariq*, 2016 ONCJ 614 at para 94 [*Tariq*]: “the court cannot conclude incapacity to consent from the mere fact that the complainant is effectively falling down drunk”.

had vomited on herself and cannot remember anything that happened,³ or was unable to dress herself properly and was “puking up leaves,”⁴ is unlikely to be found by a Canadian court to have lacked the capacity to consent to the sexual touching that occurred while she was in this state. Unless she was also unconscious. Recent amendments to the *Criminal Code* definition of consent to sexual touching are unlikely to remedy this failure of the criminal law in Canada.

This article considers how the law of sexual assault in Canada addresses cases involving intoxicated complainants. There are two main, interrelated aspects to the law of capacity to consent to sexual touching in the context of intoxicated women. The first involves the evidence of intoxication courts typically require in order to prove lack of capacity. The second pertains to the legal standard to which that evidence is applied. The nature of the evidence required to establish incapacity turns on the level of capacity the law requires. A comprehensive review of Canadian caselaw involving intoxicated complainants reveals a legal standard that is too low and an evidentiary threshold that is too high.

Two legal developments to the law of capacity to consent to sexual touching have occurred in the past two years in Canada: one through revisions to the *Criminal Code* pursuant to Bill C-51,⁵ and a second through interpretation by appellate courts in Nova Scotia and Ontario.⁶ Neither of these legal developments will serve to clarify this uncertain and difficult area of sexual assault law. Neither of these legal developments will aid in protecting the sexual integrity of severely intoxicated women—a group who are at greatly increased risk of sexual violence and who currently receive very little legal protection.⁷

The remainder of the article is divided into four parts. Part 2 explains why the federal government’s recent revision to the *Criminal Code* definition of consent to sexual touching was both unnecessary and illogical. Part 3 examines the evidentiary approach courts have taken in

³ *R v TJ*, 2018 ONSC 6385 at paras 12, 27 [TJ] (complainant found to have capacity despite evidence she was “very intoxicated”, slurring her words and had vomited on herself).

⁴ *R v C(K)*, 2016 ABPC 242 at para 19 [KC].

⁵ Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018, (assented to 13 December 2018), SC 2018, c 29 [Bill C-51].

⁶ *Al-Rawi* (NSCA), *supra* note 1; *R v GF*, 2019 ONCA 493 at para 37, rev’g 2016 ONSC 3465, leave to appeal to SCC granted, 38801 (9 January 2020) [GF].

⁷ See Janine Benedet, “The Sexual Assault of Intoxicated Women” (2010) 22:2 CJWL 435; Sharon Cowan, “The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent” (2008) 41:4 Akron L Rev 899.

sexual assault cases involving severely intoxicated women. One of the challenges with the lack of certainty in the caselaw, and the lack of an adequate statutory definition for incapacity, is that judges risk conflating incapacity and unconsciousness such that they inadvertently become co-extensive. The result is an extremely onerous evidentiary requirement in which, absent evidence of unconsciousness, even profoundly intoxicated women will not be found to have lacked capacity to consent. Of course, the evidentiary approach taken in incapacity cases will turn on the legal standard for capacity that courts rely upon.

Part 4 shifts focus from the statutory framework and evidentiary approach to incapacity due to intoxication to the legal standard for capacity recently established by the Nova Scotia Court of Appeal,⁸ and subsequently adopted by the Court of Appeal for Ontario in *R v GF*.⁹ The legal standard articulated by the Nova Scotia Court of Appeal in *R v Al-Rawi*, that borrows from the sexual fraud caselaw, uses language which was rejected by the Supreme Court of Canada in the sexual fraud context as unclear and difficult to apply. Moreover, the standard in *Al-Rawi* and *GF* is inconsistent with the Supreme Court's description in *R v (A)J* of "meaningful consent" and is insufficiently protective of women's sexual integrity and the right of everyone to make meaningful choices about their sexual activities.

Building on the previous section, Part 5 articulates a legal standard for capacity to consent and its application by courts that would be more protective of severely intoxicated individuals. A capacity standard should include the ability to understand the context specific risks and consequences of engaging in the sexual activity in question. A more robust legal standard for capacity would encourage judges to give more weight to evidence of severe intoxication short of unconsciousness. Part 5 suggests that judges must do more than articulate this standard. They must apply it to the evidence before them. This may require, in part, further excavation and disruption of our stereotypical assumptions about drunk women and sex.

2. Adding Unconsciousness to Section 273.1(2) Was an Unnecessary and Illogical Revision to the *Criminal Code*

In order to understand the problems with the federal government's recent revisions to the *Criminal Code* and recent appellate decisions in Nova Scotia and Ontario, it is useful to first consider the legislative framework for the criminal law definition of consent to sexual touching, as well as how

⁸ *Al-Rawi* (NSCA), *supra* note 1.

⁹ *GF*, *supra* note 6 at para 37.

it has been interpreted by the Supreme Court of Canada. The legislative framework is found in sections 265(3) and 273.1 of the *Criminal Code*.¹⁰

In *R v Hutchinson*, the Supreme Court of Canada explained the two-stage process for analyzing consent to sexual touching as set out in the *Criminal Code*.¹¹ The first step—which is found in section 273.1(1)—involves determining whether the complainant did not voluntarily consent to the sexual activity in question. The second step of the analysis requires an assessment of whether the complainant’s voluntary agreement was not legally effective. Section 265(3) enumerates circumstances in which a complainant’s voluntary agreement will not be legally effective, such as consent vitiated by fraud. Section 273.1(2) also identifies some of the circumstances in which a complainant’s voluntary agreement will not be legally effective—one such circumstance being because the complainant lacked the capacity to consent to the sexual activity in question.

The first stage of the analysis, whether the complainant voluntarily agreed to the sexual activity in question under section 273.1(1), encompasses consideration of three factors: did the complainant voluntarily agree to engage in the specific physical act at issue, with knowledge that the act was of a sexual nature (for example, that it was a sexual act not a medical exam), and awareness of the identity of the individual with whom the sexual contact occurred.¹²

If the Crown proves beyond a reasonable doubt that the complainant did not voluntarily agree to the touching, its sexual nature, or the identity

¹⁰ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

¹¹ *R v Hutchinson*, 2014 SCC 19 at para 4 [*Hutchinson*].

¹² *Ibid* at para 57. The *Hutchinson* majority’s description of the two-stage framework established by the *Criminal Code* encourages a problematic application of the law of consent not directly related to the issue of capacity. See Lise Gotell, “Thinly Construing the Nature of the Act Legally Consented To: The Corrosive Impact of *R v Hutchinson* On the Law of Consent” (2020) 53:1 UBC L Rev 53. Lise Gotell demonstrates how an unduly narrow understanding of the ‘specific physical act at issue’ at stage one of the analysis will result in legal reasoning that expects women to prevent sexual violence and that holds complainants responsible for the sexual harms that they have suffered. As Gotell notes, an interpretation of the physical act at issue which fails to include factors such as the degree of force used or whether the voluntary agreement was contingent on the use of a condom is not sufficiently protective of the complainant’s sexual integrity and personal autonomy. Nor, as the minority in *Hutchinson*, *supra* note 11 noted, is it consistent with the definition of consent established in *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193 [*Ewanchuk* cited to SCR]. Whether a complainant voluntarily agreed to the sexual act at issue is based on her subjective state of mind at the time the sexual touching occurred. Take the example of condom use. A woman whose voluntarily agreement to engage in sexual intercourse was contingent on the use of a condom cannot be said to have, as a subjective matter, voluntarily agreed to sexual intercourse which occurred after

of the individual touching her, then lack of consent is established.¹³ The consent analysis is complete. The (lack of) consent element of the *actus reus* for the offence of sexual assault is satisfied.

However, if the evidence suggests that the complainant did voluntarily agree to the sexual activity in question or there is a reasonable doubt as to her lack of agreement, then the second stage of the analysis is applied. The second stage asks: are there circumstances, such as those enumerated under sections 265(3) and 273.1(2), which render the complainant's supposed voluntary agreement, or apparent consent, legally ineffective? Under the *Criminal Code's* framework, the complainant's capacity to consent is not assessed until this second stage of the analysis. In other words, the issue of capacity only arises in cases in which the evidence demonstrates voluntary agreement or raises a reasonable doubt as to the complainant's involuntariness.¹⁴

In December 2018, the *Criminal Code* definition of consent to sexual touching was revised for the first time in more than 25 years.¹⁵ One of the amendments under Bill C-51 added a provision to the *Criminal Code* stipulating that an unconscious person is incapable of consenting.¹⁶ This newly added section (section 273.1(2)(a.1)) states that "no consent is obtained if ... the complainant is unconscious."¹⁷ Parliament's stated purpose for this amendment was to codify the decision of the Supreme Court of Canada in the case of *R v (A)J*.¹⁸ This revision to the *Criminal Code* was unnecessary. There is no indication in the reported caselaw that trial judges were struggling with how to apply this aspect of the decision in *JA*. It is clear that trial judges in Canada consistently recognized that an unconscious person cannot consent to sexual activity. There have

the accused surreptitiously removed the condom. Some lower courts have refused to find that there was voluntary agreement where consent was contingent on the use of a condom and the accused removed the condom without consent: see *R v Rivera*, 2019 ONSC 3918 at para 24; *R v SY*, 2017 ONCJ 798 at para 40. But this flaw in the majority's reasoning in *Hutchinson* does risk creating this type of problematic outcome. See *R v Lupi*, 2019 ONSC 3713 at para 31.

¹³ *Hutchinson*, *supra* note 11 at paras 4–5.

¹⁴ *Ewanchuk*, *supra* note 12 at 353. See also *GF*, *supra* note 6 at para 41; *R v Kishayinew*, 2019 SKCA 127 at para 19.

¹⁵ Bill C-51, *supra* note 5.

¹⁶ *Ibid*, ss 10(1), 19(1).

¹⁷ *Criminal Code*, *supra* note 10, s 273.1(2)(a.1).

¹⁸ *R v A(J)*, 2011 SCC 28 [*JA*]. See Bill C-51, *supra* note 5 and legislative Summary: "[Legislative Summary of Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act](#)" (accessed 21 April 2020) online: *Parliament of Canada* <lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C51E#a29>.

been no reported cases, since *JA*, in which a court made the legal error of concluding otherwise.¹⁹ One appellate court went so far as to characterize this aspect of the legal definition of consent as axiomatic.²⁰ The Canadian judiciary was not confused as to whether an unconscious person could consent to sex, making this amendment unnecessary.

In addition, given the two-stage analytical framework for consent established under sections 273.1(1) and 273.1(2) of the *Criminal Code* (and illuminated in *Hutchinson*), it was illogical to specify unconsciousness as a circumstance in which apparent consent, or voluntary agreement, under section 273.1(1) is vitiated under section 273.1(2).

Recall that section 273.1(2) is only considered if the complainant did voluntarily agree (or there is a reasonable doubt as to whether she did not voluntarily agree) to the sexual activity in question.²¹ Voluntary agreement to the sexual activity in question means she agreed to the specific physical act at issue, knowing both the identity of the individual with whom the sexual contact occurred, and that it was a sexual act (rather than, for example, a medical exam or an airport pat down).²² An unconscious person cannot voluntarily agree to be touched, nor can they know the identity of the person touching them, nor that the contact is of a sexual nature.²³ Agreeing and knowing these facts in advance is insufficient; consent to sexual touching must be contemporaneous.²⁴ Thus, even if when the sexual activity commenced the complainant was in voluntary agreement, the moment she became unconscious this voluntary agreement, or apparent consent, vanished. In other words, if the Crown has proven beyond a reasonable doubt that sexual contact occurred while the complainant was unconscious, or shifting in and out of consciousness, then the 'lack of voluntary agreement to the sexual activity in question' test under section 273.1(1) is satisfied. The *actus reus* is proven.²⁵ There is no need following this conclusion, nor does it make sense, to then consider the issue of capacity (or any of the other subsections of section 265(3)

¹⁹ A search of sexual assault cases since *JA* on CanLII, conducted on September 12, 2019, did not produce any cases in which trial judges found that sexual touching of an unconscious complainant was consensual.

²⁰ *Al-Rawi* (NSCA), *supra* note 1 at paras 33–34.

²¹ *Hutchinson*, *supra* note 11 at para 4.

²² *Ibid* at paras 4–5.

²³ *JA*, *supra* note 18 at para 66.

²⁴ *Ibid*. Bill C-51, *supra* note 5 also codified this aspect of *JA*; See *Criminal Code*, *supra* note 10, s 273.1(1.1).

²⁵ *Ewanchuk*, *supra* note 12.

and 273.1(2) that render a complainant's voluntary agreement legally ineffective).²⁶

Again, an unconscious, or intermittently conscious, complainant cannot voluntarily agree to the sexual activity in question. It is true that 'no consent is obtained if the complainant is unconscious' but this is because unconscious people cannot voluntarily agree to the sexual activity in question, not because they lack the capacity to grant an agreement they voluntarily provided.

Given the structure of section 273.1(1) and (2) (prior to the amendment), and the clear direction of the Supreme Court in *Hutchinson* and *Ewanchuk* to analyze the consent element of the *actus reus* as a two-stage process, it was illogical to codify unconsciousness as a capacity issue under stage two. Instead, courts should consider at stage one whether the complainant was unconscious during some or all of the sexual touching that occurred. Any sexual activity that occurred while the complainant was unconscious occurred without her voluntary agreement.²⁷ In addition to making the analysis of consent more coherent, this would have the added benefit of helping courts to avoid wrongly relying on evidence of unconsciousness as the proxy for findings of incapacity, as explained in Part 3.

More problematic than its lack of necessity and logic, this law reform effort on the part of Parliament was a wasted opportunity to revise the *Criminal Code* to clarify and improve what is an area of ambiguity and confusion in the caselaw regarding capacity to consent: the level of intoxication, short of unconsciousness, at which an individual lacks capacity to consent to sexual touching.²⁸ Even worse, and as will be

²⁶ See e.g. *Ibid* at 353: "Section 265(3) identifies an additional set of circumstances in which the accused's conduct will be culpable. The trial judge only has to consult s. 265(3) in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent".

²⁷ Even before this unfortunate amendment to the *Criminal Code* some courts failed to recognize where evidence of unconsciousness fit in this two-step framework. See e.g. *R v Cadieux*, 2019 CM 2011. For a pre-*Hutchinson* example, see *R v Ashlee*, 2006 ABCA 244. Other courts, however, have properly applied this analytical framework. See e.g. Judge Buckle's recent decision in *R v Percy*, 2018 NSPC 57 at para 78 [*Percy*].

²⁸ The opportunity need not have been lost. During the legislative process, Senator Kim Pate repeatedly advocated for a definition of capacity which included the ability to assess risks and consequences to be added to Bill C-51. While the Senate adopted Senator Pate's amendment to Bill C-51 it was later rejected by the House of Commons. Brian Platt, "[Despite appeals from women's groups, Liberals reject Senate amendments to bill on sexual consent](#)" (11 December 2018), online: *National Post* <nationalpost.com/news/

demonstrated in the next section, the unnecessary codification of the ruling in *JA*, that an unconscious person is incapable of consent, risks inadvertently reifying a problematic trend in the caselaw: the reliance on a state of unconsciousness as the proxy for incapacity. Instead of helping trial judges not to rely on unconsciousness as the marker of incapacity such that the two are treated as co-extensive, this amendment to the *Criminal Code* definition of consent may, by emphasizing or singling out unconsciousness, make this mistake more likely.²⁹

To summarize, the newly enacted section 273.1(2)(a.1)—stipulating that no consent is obtained if the complainant is unconscious—was both unnecessary and illogical. Unconsciousness has no place in section 273.1(2) of the *Criminal Code*. Most importantly, and as explained in Part 4, its inclusion in section 273.1(2) risks creating further problems with the application of the law of consent in cases involving severely intoxicated women.

3. The Evidentiary Threshold: Intoxication Short of Unconsciousness Will Almost Never Result in a Finding of Incapacity

With the exception of the newly adopted provision regarding unconsciousness, the *Criminal Code* does not define what constitutes incapacity to consent to sexual touching. This leaves it to courts to identify and apply the threshold for capacity to consent. Courts have applied different legal standards and have struggled to identify those circumstances, short of unconsciousness, in which an intoxicated complainant should be found to have lacked the capacity to grant the voluntary agreement they provided.³⁰ While it is clear that an unconscious individual cannot consent to sexual touching, and that this is not where the line should be drawn, there is inconsistency and uncertainty about what level of intoxication does render a complainant's voluntary agreement, or apparent consent, legally ineffective. The result is that unconsciousness continues to serve as the primary marker of incapacity due to intoxication.

The role that evidence of unconsciousness continues to play in assessments of capacity—despite explicit recognition by courts that the legal standard does not require unconsciousness—is perhaps best

politics/despite-appeals-from-womens-groups-liberals-reject-senate-amendments-to-bill-on-sexual-consent>.

²⁹ *Criminal Code*, *supra* note 10, s 273.1(2)(b). It is true that section 273.1(2)(b) of the *Criminal Code* stipulates that “[no consent is obtained if] the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1)”. Nevertheless, the effect of the amendment is to single out unconsciousness.

³⁰ Benedet, *supra* note 7.

demonstrated by one of the most significant trends in capacity to consent cases involving intoxication. Professor Janine Benedet's 2010 study revealed that, in the vast majority of cases, judges only found that a voluntarily³¹ intoxicated complainant lacked capacity if she was asleep or unconscious during some or all of the sexual touching that occurred (and in some cases only if she was asleep or unconscious at the time the sexual activity commenced).³² A review of the past ten years of caselaw, since Benedet's study was conducted, reveals a similar pattern.³³ While there are exceptions, cases involving intoxicated complainants tend to only result in convictions on the basis of lack of capacity to consent if there is evidence that the complainant was asleep or unconscious during some or all of the sexual touching that occurred.³⁴ In many of these convictions the evidence demonstrated an expressed lack of voluntary agreement on the part of the complainant, in addition to the evidence of unconsciousness.³⁵ In other words, in most of the cases in which an accused is convicted of non-consensual sexual touching involving an intoxicated woman, the complainant's evidence was that she regained consciousness or awoke

³¹ *Ibid.* Benedet identified an important distinction between cases involving voluntarily intoxicated complainants and those that were drugged. Courts were more likely to find incapacity if the complainant was involuntarily intoxicated. As she notes, findings of incapacity should not turn on whether the complainant's intoxication was voluntary. That they do suggests that victim blaming stereotypes might be operating in those cases in which the complainant chose to consume intoxicating substances.

³² *Ibid.*

³³ A search was conducted of the CanLII database for all sexual assault cases between January 2010 and November 2019 in which the issue of capacity was raised, or the complainant's level of intoxication, voluntary or involuntary, was discussed. Over 250 cases were examined.

³⁴ For cases in which findings of incapacity were made (all of which involved evidence that the complainant was unconscious or asleep for all or some part of the incident) see e.g. *Percy*, *supra* note 27; *R v Joe*, 2010 YKTC 134; *R v CL*, 2017 ONSC 3202; *R v James*, 2013 BCCA 159; *R v JLW*, 2011 ABPC 255; *R v Tweneboah-Koduah*, 2017 ONSC 640, *aff'd* 2018 ONCA 570 [*Tweneboah*]; *R v Smarch*, 2013 YKTC 114; *R v Rosenthal*, 2014 YKTC 35; *R v Ransom*, 2011 NWTSC 33; *Randall v R*, 2012 NBCA 25; *R v WAR*, 2013 BCSC 1767; *R v BLP*, 2011 ABCA 384 [*BLP*]; *R v Ningiuk*, 2017 NUCJ 06; *R v Mitrovic*, 2017 ONSC 1829 [*Mitrovic*]; *R v McNab*, 2010 SKQB 169 [*McNab*]; *R v McLean*, 2014 BCSC 1293; *R v Gai*, 2014 ABPC 158; *R v Cubillan*, 2015 ONSC 969; *R v SAA*, 2014 ONCJ 261. But see *R v FBP*, 2016 ONCJ 860; *Tariq*, *supra* note 2. (In these cases, the accused was convicted on the basis of strong evidence of extreme intoxication but which did not include evidence of lack of consciousness). In *R v CL*, 2017 ONSC 3202 at para 104, the accused was convicted on the basis that the complainant, who had been unconscious within a very short time period before the sexual touching, was "not totally asleep" but was "very drunk, barely conscious and blacking out".

³⁵ See e.g. *Tweneboah*, *supra* note 34; *R v Stewart*, 2012 YKSC 75; *BLP*, *supra* note 34; *Mitrovic*, *supra* note 34; *McNab*, *supra* note 34.

to find herself being sexually assaulted by the accused and that she, at that point, attempted to resist verbally or physically. In several cases this resistance upon awaking was met with significant physical violence perpetrated against the complainant by the accused.³⁶

What happens in cases in which there is no evidence that the severely intoxicated complainant was unconscious when the sexual touching occurred?

A) Some judges explicitly, but erroneously, require evidence of unconsciousness to find incapacity

The most obvious problem occurs in cases in which judges explicitly determine that lack of sufficient evidence of unconsciousness raises a reasonable doubt regarding incapacity. In two recent cases, courts of appeal have overturned trial decisions to acquit on the basis of this error.³⁷ In *R v WLS*, the accused's 11-year-old son testified that he witnessed his father drag his maternal aunt from her bedroom into the living room while she was asleep, undress her, and sexually assault her repeatedly.³⁸ Judge Moher acquitted the accused on the basis that lack of consent had not been proven because “‘unconsciousness’ was [not] the only reasonable inference available on the evidence.”³⁹ In affirming the Court of Appeal of Alberta's decision to overturn the acquittal, the Supreme Court of Canada stated: “[i]n our view, the act of dragging the complainant while asleep and drugged is inconsistent with any sort of consent.”⁴⁰ As the Court noted, it is an error of law to conclude that nothing short of unconsciousness will amount to incapacity.⁴¹

The same type of error was overturned by the Nova Scotia Court of Appeal in *R v Al-Rawi*. *Al-Rawi* involved allegations of sexual assault against a Halifax taxi driver who was found by the police in his cab late at night with an unconscious and naked from the breasts down woman passenger. He was in between her legs with his pants undone and partially lowered. There was a condom on the console in the front seat. The complainant had urinated in her clothing and had no memory of what occurred. *Al-Rawi* was acquitted.⁴² On appeal, Justice Beveridge agreed

³⁶ See e.g. *R v Roberts*, 2016 NWTSC 47.

³⁷ *R v WLS*, 2018 ABCA 363 [*WLS* (ABCA)]; *Al-Rawi* (NSCA), *supra* note 1.

³⁸ *WLS* (ABCA), *supra* note 37 at para 2.

³⁹ *Ibid* at paras 4–5.

⁴⁰ *R v WLS*, 2019 SCC 27 at para 4.

⁴¹ *Ibid* at paras 4–5.

⁴² *R v Al-Rawi* (9–10 February 2017), Halifax 2866665 (NS Prov Ct (Crim Div)) [*Al-Rawi* 2017]. *Al-Rawi* was acquitted in a second trial on the basis of different reasoning: *R v Al-Rawi*, 2019 NSPC 37 at para 42 [*Al-Rawi* 2019].

with the Crown that the trial judge had erred by “equat[ing] incapacity only with unconsciousness.”⁴³

In *R v M(RN)* the 20-year-old complainant, who was described by her parents as less mature and sophisticated than other young women her age, spent the weekend drinking alcohol at the 45-year-old accused’s residence.⁴⁴ The trial judge dismissed the issue of incapacity on this basis:

The issue of whether she had the capacity to consent in this particular case therefore does not arise because in light of the evidence of the complainant as I have reviewed it, I find that her assertion that she did not consent is not reliable. There is, as pointed out by Ms. Adams, no suggestion on the evidence that at the particular time when she became aware of the act that she was apparently unconscious, and her evidence is that she was conscious at that particular time.⁴⁵

Judge Baird Ellan’s reasons erroneously imply that a finding of incapacity requires evidence that the complainant was unconscious at the time the sexual touching occurred. The complainant’s evidence was that she awoke to find the accused penetrating her and that she recalled trying to say ‘no’, but that she was half asleep and drunk and “couldn’t really do anything.”⁴⁶ Having found she had a reasonable doubt regarding the complainant’s absence of consent, Judge Baird Ellan should have considered whether her possible apparent consent was legally ineffective due to her level of intoxication. In assessing this, she should have looked at more than just whether there was evidence she was unconscious at the time of the sexual touching.⁴⁷

In the preceding cases, unconsciousness and incapacity were conflated such that the court treated them as co-extensive. Another type of error related to the sufficiency of evidence occurs when trial judges use unconsciousness as the reference point or evidentiary proxy for the capacity threshold.

B) In some cases (lack of) unconsciousness is relied upon as the evidentiary proxy for identifying incapacity

In some cases, judges correctly note that unconsciousness is not the only state in which lack of capacity due to intoxication may be found, but their

⁴³ *Al-Rawi* (NSCA), *supra* note 1 at para 116.

⁴⁴ *R v M (RN)*, 2011 BCPC 199 at paras 4–8 [MRN].

⁴⁵ *Ibid* at para 89.

⁴⁶ *Ibid* at para 20.

⁴⁷ *Ibid* at paras 88–89.

analysis of the evidence of intoxication suggests that they may nevertheless be relying on unconsciousness as a type of proxy to identify incapacity.⁴⁸

In *R v TJ*, evidence of the 18-year-old complainant's state of intoxication included her testimony that she had experienced an alcohol-induced blackout, testimony from a friend who described her as "very intoxicated" and "slurring [her] words," and evidence from the accused that she had vomited on her clothing.⁴⁹ With the exception of her loss of memory (which he treated not as circumstantial evidence of lack of capacity but as a detriment to the Crown's case on the issue of consent), Justice de Sa's capacity analysis made no mention of any of this evidence of her level of intoxication. Instead he focussed on the lack of evidence of unconsciousness. He highlighted the Crown's acknowledgment that there was no evidence that the complainant was unconscious or incapacitated on the way back from the party.⁵⁰ He noted the complainant's memory of observing the accused on top of her having intercourse, just before turning her head to the side and closing her eyes.⁵¹ He concluded that

to rely on this evidence of the complainant to conclude she was unconscious at this specific time would be dangerous in my view. I have no context for this memory, or any understanding of where in the sexual encounter it may have taken place ... The complainant has no actual memory of the events, nor is there any meaningful evidence indicating she lacked the capacity to consent.⁵²

Evidence of an alcohol-induced blackout, slurred words, and vomiting is "meaningful evidence indicating she lacked the capacity to consent."⁵³ Whether this evidence established lack of capacity beyond a reasonable doubt is a separate (and in this case unanswered) question. The point is that Justice de Sa does not appear to have given it any weight, and instead focussed his capacity analysis on what he deemed to be insufficient evidence of unconsciousness.

In some cases, courts identify evidence of apparent consent, highlight the lack of evidence of unconsciousness, and then stop the analysis without assessing whether the evidence of extreme intoxication establishes lack of capacity. This type of reasoning also seems to be relying upon lack of

⁴⁸ See e.g. *R v McKitty and Parris-Thompson*, 2019 ONSC 1501 at para 60; *R v MS*, 2013 ONSC 7066 at para 117, aff'd *R v Shahbaz*, 2016 ONCA 636; *R v NB*, 2018 ONCJ 527 [NB].

⁴⁹ *TJ*, *supra* note 3 at para 27.

⁵⁰ *Ibid* at para 62.

⁵¹ *Ibid*.

⁵² *Ibid* at paras 63–64.

⁵³ *Ibid*.

evidence of unconsciousness as the reference point for incapacity.⁵⁴ For example, in *R v Bisailon* the police found the complainant on the grass outside the accused's apartment at 3:42 a.m. with the accused on top of her.⁵⁵ Neither was wearing pants, nor underwear. She was unable to maintain her balance. Justice Blouin commented that "she was conscious but intoxicated and when asked whether she wanted to be there her answer was unintelligible."⁵⁶ She had no memory of these events. According to the decision, "[t]he Crown led a significant body of evidence which suggested the complainant was extremely intoxicated."⁵⁷ A toxicologist testified that her blood alcohol content would have been between 201 and 278 at the time of the incident. Even the accused's evidence was that she "was pretty drunk."⁵⁸ He testified that he had to help her up to sit on a patio chair after she fell and hit her head on a concrete step. All three police officers who attended the scene that early morning testified to her "disoriented state, her inability to stand unaided, her slurred speech and incoherence, her extreme intoxication."⁵⁹

The accused was acquitted on the basis that the Crown failed to prove absence of consent. Justice Blouin based his decision on the evidence of two other witnesses. One of these witnesses testified that the complainant and the accused had been flirting and kissing and that the complainant seemed "all over him."⁶⁰ The other witness testified that from his balcony he saw a naked woman on top of a man on the grass and that she appeared to be "leading" the sexual activity.⁶¹

This evidence could raise a reasonable doubt as to whether there was voluntary agreement or apparent consent. The problem with Justice Blouin's reasoning is that he should have, in light of this evidence and conclusion, fully considered the second stage of the analysis. He failed to properly assess whether this apparent consent was legally effective given the complainant's level of intoxication.

In *R v C(K)*, the 15-year-old complainant and 16-year-old accused attended the same party on the date of the complainant's 15th birthday.⁶²

⁵⁴ See e.g. *R v Bisailon*, 2014 ONCJ 577 [*Bisailon*]; *R v MLF* (2013), BCPC 0183; NB, *supra* note 48.

⁵⁵ *Bisailon*, *supra* note 54.

⁵⁶ *Ibid* at para 3.

⁵⁷ *Ibid* at para 12.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* at para 13.

⁶⁰ *Ibid* at para 16. Oddly Justice Blouin relied on this witness' evidence despite finding that she was not credible earlier in his decision, at para 11.

⁶¹ *Ibid* at para 17.

⁶² *KC*, *supra* note 4.

She testified that at the party, the accused approached her repeatedly. Eventually she agreed to follow him to his truck, which was locked. According to her, they walked away from the party to a secluded area. She alleged that the accused then placed her on the ground, removed her pants and penetrated her vaginally with his penis. He did not use a condom.⁶³

The complainant testified that when they left the party, prior to the alleged sexual assault, she was stumbling and slurring her words. She estimated that her level of intoxication at that point was an eight or nine out of ten. When she returned to the party she was upset, her thong underwear was on the outside of her pants.

The complainant's friend testified that the complainant was at a level of intoxication of approximately eight or nine out of ten and that she got progressively drunker as the party went on. She stated that she went with the complainant to the bathroom after the incident and witnessed her "puking up leaves."⁶⁴ She said the complainant's underwear was on outside of her pants; she was stumbling; she had to hold herself up to keep her balance; and she had an impaired ability to speak.⁶⁵ A third friend also testified that the complainant's level of intoxication by the end of the party was an eight out of ten.⁶⁶

In his decision to acquit, Judge Norheim accepted that the 15-year-old complainant was "highly intoxicated,"⁶⁷ "significantly affected by alcohol"⁶⁸ and that she had consumed a "large amount of liquor."⁶⁹ Despite the evidence of two other witnesses that she was an eight or nine out of ten on the scale of intoxication, and the evidence of one of those witnesses that she was stumbling, unable to keep her balance, had reappeared at the party with her underwear on outside of her pants, and was vomiting up leaves directly following the incident, Judge Norheim determined that there were no grounds to vitiate consent. He noted that there was no "substantiated evidence" that she was staggering and slurring her words prior to the incident and that the brief video clip introduced by the Crown "showed her walking in a relatively normal fashion immediately before the sexual encounter."⁷⁰

⁶³ *Ibid* at paras 8–16, 27.

⁶⁴ *Ibid* at para 19.

⁶⁵ *Ibid* at paras 18–20.

⁶⁶ *Ibid* at para 22.

⁶⁷ *Ibid* at paras 54, 62.

⁶⁸ *Ibid* at para 69.

⁶⁹ *Ibid* at para 59.

⁷⁰ *Ibid* at para 69.

Judge Norheim's discussion of the caselaw on the issue of capacity was as follows, "[t]he authorities establish that if the complainant is drunk to the point of unconsciousness she cannot consent to sexual activity from that unconscious state. I have found no authority which directs that a person under the influence of alcohol cannot consent to sexual activity."⁷¹ The only authorities he relied on were *R v (AJ)* and *R v Ashlee*.⁷² In both *JA* and *Ashlee* the complainant was unconscious. This was the extent of his treatment of the jurisprudence on capacity. While he did concede that "there *may* be cases where the evidence establishes that a person was so intoxicated that they were unable to give consent,"⁷³ he determined that this was not one of them.⁷⁴

Reflective of the paradox that complainants who were intoxicated at the time of the sexual incident often face, Judge Norheim concluded that, "the consumption of alcohol has affected the reliability of her memory. However, the evidence tends to show a functioning mind and a conscious, if somewhat reckless decision, to accompany the defendant."⁷⁵ Too drunk to be believed, not drunk enough to lack capacity.

In *R v Tariq*, a case that has been cited numerous times since its 2016 release,⁷⁶ Justice Greene reviews the caselaw on capacity to consent.⁷⁷ Some of the cases cited with approval by Justice Greene in *Tariq* articulate a shockingly onerous evidentiary burden resulting in a shockingly low standard for capacity to consent to sexual touching. For example, she states that "[t]he *extreme* level of intoxication that is required to prove incapacity to consent was recently illustrated ... in *R v Hinds* [2016] OJ No

⁷¹ *Ibid* at para 66.

⁷² *Ibid* at paras 67–68.

⁷³ *Ibid* at para 71 [emphasis added].

⁷⁴ *Ibid*.

⁷⁵ *KC, supra* note 4 at para 70. Of note, the complainant's capacity to decide to leave the party with the accused was not the issue and the characterization of this decision as "reckless" raises the spectre of discriminatory and victim blaming attitudes about women who make so called 'risky choices' such as to consume alcohol, or allow themselves to be alone with men. See Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 *Akron L Rev* 865 [Gotell 2008]. *KC, supra* note 4 at para 59, Judge Norheim further stated, "The totality of the evidence, however, suggests that it is equally likely that the large amount of liquor she consumed that night lowered her inhibitions and clouded her memory having the effect of causing her to engage in risky sexual behavior that she would not have otherwise engaged in. Specifically having unprotected sex with someone she hardly knew".

⁷⁶ *Al-Rawi* (NSCA), *supra* note 1; *GF, supra* note 6; *R v CP*, 2017 ONCJ 277; *R v Kodwat*, 2017 YKTC 66; *R v DC*, 2018 NUCJ 20; *R v PJB*, 2019 NSSC 109; *R v MM*, 2018 ONCJ 15; *R v JP*, 2018 ONSC 889; *R v Whitteker*, 2019 ONCJ 180; *R v Carpov*, 2018 ONSC 6650.

⁷⁷ *Tariq, supra* note 2.

257 (SC)).”⁷⁸ She notes that the complainant in *Hinds* was “so impaired that she was unable to dress herself” and that according to another witness she “looked blank at times and was zigzagging.”⁷⁹ The trial judge in *Hinds* found that the Crown had not proven incapacity.

In Justice Greene’s view, “this judgment establishes *just how intoxicated* one must be to lose capacity to consent.”⁸⁰ She states that “[c]ases where extreme intoxication have led to findings of incapacity to consent tend to be cases where the evidence of intoxication is far beyond the loss of gross motor skills and balance. These cases tend to include evidence of a loss of awareness or loss of consciousness.”⁸¹ Indeed, a woman whose level of intoxication is *far* beyond the loss of gross motor skills likely is unconscious.⁸² The toxicologist in *Al-Rawi* explained the progression of intoxication as follows:

A low blood alcohol concentration, meaning up to 150 milligrams percent, is associated with talkativeness, sociability, euphoria, and muscle relaxation. There is deterioration in mental functioning such as judgement, attention, perception and comprehension. There is an increase in risk-taking behaviour and in self-confidence.

At a blood alcohol concentration of 150 milligrams percent, the effects of alcohol become more numerous and pronounced ... The individual may display gross motor incoordination, meaning slurred speech, staggering gait, motor incoordination and emotional disturbances. Intoxication is an advanced state of impairment such that the outward physical signs of the deteriorating effects of alcohol become apparent.

A blood alcohol concentration of 250 milligrams percent is associated with severe intoxication, meaning marked muscular incoordination, an inability to stand or walk, as well as feelings of apathy and ataxia, meaning loss of motor control. There may also be exaggerated emotional states as well as incontinence or loss of consciousness.⁸³

⁷⁸ *Ibid* at para 86 [emphasis added].

⁷⁹ *Ibid* at para 86.

⁸⁰ *Ibid* at para 87 [emphasis added].

⁸¹ *Ibid* at para 92.

⁸² See for e.g. Steven S Nemerson, “Alcoholism, Intoxication, and the Criminal Law” (1988) 10 *Cardozo L Rev* 393:3 at 403, citing Frank Seixas, “The Course of Alcoholism” in Nada J Estes & M Edith Heinemann, eds, *Alcoholism: Development, Consequences, and Interventions*, 3rd ed (St. Louis: Mosby, 1986). See also Rolla N Harger, “The Pharmacology and Toxicology of Alcohol” in *Chemical Tests for Intoxication: Manual* (Committee on Medicolegal Problems, American Medical Association, 1959) 11 at 13.

⁸³ *Al-Rawi* 2019, *supra* note 42 at paras 118–20.

Justice Greene's suggestion that a finding of incapacity must be based on evidence of intoxication far beyond loss of gross motor skills, such as evidence of loss of awareness or consciousness, is essentially an instruction to courts to use unconsciousness as the evidentiary proxy for lack of capacity. While she did not rely on unconsciousness as the proxy for incapacity in *Tariq*,⁸⁴ and she was correct that this is what courts have typically demanded before making a finding of incapacity, requiring evidence of intoxication far beyond the loss (not the impairment but the *loss*) of gross motor skills sets the threshold too low. It sets the evidentiary standard at bare consciousness. As a practical matter, stipulating that findings of incapacity cannot be made without evidence of intoxication far beyond the loss of gross motor skills, such as evidence of unconsciousness or loss of awareness, is no different than concluding that the legal standard for incapacity is unconsciousness.

In addition to being unnecessary, enumerating unconsciousness, and only unconsciousness, as a circumstance in which "no consent is obtained" might inadvertently perpetuate this problem. It is true that the *Criminal Code* now clearly stipulates that unconsciousness is not the only state in which incapacity will be found.⁸⁵ However, given that unconsciousness is the only guidance Parliament gives on conditions of incapacity, the 2018 *Criminal Code* amendment may encourage judges to continue to rely inexplicitly on lack of consciousness as the evidentiary proxy for incapacity.

C) Requiring evidence of unconsciousness as the evidentiary proxy for incapacity fails to distinguish between complainants with lowered inhibitions and loss of inhibitions

Justice Greene states in *Tariq* that, based on the caselaw, courts cannot conclude incapacity to consent from the mere fact that the complainant is effectively "falling down drunk."⁸⁶ The failure to find incapacity in cases with this level of intoxication may flow, in part, from a lack of distinction between someone with relaxed or lowered inhibitions and impaired gross motor skills and someone with no inhibition, someone who has lost the ability to control themselves.

In *Tariq* Justice Greene commented, "[h]aving sexual intercourse with someone whose inhibitions are relaxed due to the consumption

⁸⁴ *Tariq*, *supra* note 2 at para 30. Justice Greene did make a finding of incapacity without evidence of unconsciousness. However, in that case there was substantial videotape evidence of the severely intoxicated complainant including evidence of the complainant in an elevator being held up by the accused, with her eyes closed, and appearing to fall asleep.

⁸⁵ *Criminal Code*, *supra* note 10, s 273.1(2)(b).

⁸⁶ *Tariq*, *supra* note 2 at para 94.

of alcohol is not a crime. Some might find this conduct unethical. But our law does not criminalize unethical conduct.”⁸⁷ It seems obvious that having sex with someone whose “inhibitions are relaxed due to the consumption of alcohol” ought not to inspire the imposition of a criminal law sanction. As Justice Greene implies, not everyone would even find this to be unethical, let alone criminal, sexual conduct. But lowered inhibition and lack of inhibition are not the same thing. The cases being critiqued here involve women who were severely intoxicated—women who were slurring their speech, unable to dress themselves properly, vomiting, and/or falling down—not women whose inhibitions were simply ‘relaxed’.

In many cases, including *Tariq*, courts have relied upon the statement in *R v Cedeno* that “[m]ere drunkenness is not the equivalent of incapacity. Nor is alcohol-induced imprudent decision making, memory loss, loss of inhibitions or self control.”⁸⁸ Of course mere drunkenness is not the equivalent of incapacity. But nor is imprudent decision-making equivalent to loss of self-control. How can an individual who has lost control of themselves have the capacity to make a meaningful choice to have sex? If these decisions are genuinely referring to someone who has lost the ability to control themselves (rather than implicitly invoking the stereotype that drunken women will have sex with anyone), it makes little sense to liken imprudent decision-making with loss of self-control. Courts must be careful not to equate very different levels of cognition through imprecise wording. Regardless, *Cedeno* is not a helpful precedent to rely on in assessing these distinctions. The complainant in *Cedeno* was unconscious when the sexual touching occurred. The issue in that case, as Justice Duncan recognized, was whether the Crown had proven lack of voluntary agreement, not whether the complainant lacked capacity.⁸⁹

That consumption of alcohol causes lowered inhibitions and risk-taking behavior is often highlighted in capacity to consent cases.⁹⁰ Judges in some cases raise the prospect of complainants who, with lowered inhibitions due to alcohol consumption, consent to sex that they would not have agreed to if sober.⁹¹ Decreased inhibitions and diminished judgment are among the first clinical signs of alcohol influence.⁹² In other

⁸⁷ *Ibid* at para 77.

⁸⁸ *R v Polo Cedeno*, 2005 ONCJ 91 [*Cedeno*]. See e.g. *R v Meikle*, 2011 ONSC 650 at para 57, citing *Cedeno* at para 18. See also *R v Nyznik*, 2017 ONSC 4392; *R v CS*, 2019 YKTC 43; *Bisaillon*, *supra* note 54 at para 14.

⁸⁹ *Cedeno*, *supra* note 88.

⁹⁰ See e.g. *Al-Rawi* 2019, *supra* note 42 at para 118; *KC*, *supra* note 4 at para 59; *R v Zadeh*, 2015 BCPC 192 at para 63; *R v MD*, 2017 ONSC 6776 at para 37; *Percy*, *supra* note 27 at para 86.

⁹¹ See e.g. *NB*, *supra* note 48 at para 30: “A person’s after-the-fact regret does not allow them to convert an ill-considered, drunken choice on their part into a sexual

words, these symptoms occur at the early stages of alcohol intoxication, before mental confusion, vomiting, significantly slurred speech, and loss of gross motor skills.⁹³ In cases involving evidence that a complainant was ‘falling down drunk’, judicial emphasis on ‘mere drunkenness’ and sober second thoughts of post-sex regret suggests a failure to recognize the significant distinction between alcohol induced ‘relaxed inhibitions’ and loss of control of, or inability to protect, oneself. A number of factors inform the relationship between blood alcohol content, outward signs of intoxication, and cognitive capacity. Even with evidence of blood alcohol content at the time of the incident, toxicologists are typically unable to draw definitive conclusions regarding a complainant’s level of capacity in relation to her consumption of alcohol—unless she was unconscious. This uncertainty contributes to the challenges in this area of sexual assault law. Precise knowledge of the relationship between blood alcohol content, symptoms of intoxication, and cognitive capacity is unavailable. However, the stages of intoxication—in terms of the symptoms caused by progressive levels of alcohol influence—are described fairly consistently by toxicologists and alcohol scientists.⁹⁴ Decisions that do not distinguish between these different stages have not appropriately assessed the issue of capacity.

Judges should not conflate the feelings of euphoria, increased confidence, and relaxed inhibitions symptomatic of the early stages of intoxication with the vomiting, slurred speech, mental confusion and loss of gross motor skills that occurs in individuals who are conscious but extremely intoxicated.⁹⁵ Courts must attend carefully to the distinctions between impaired judgment and loss of judgment, impaired gross motor skills and loss of gross motor skills. Imprudent decision making fuelled by the increased confidence and risk-taking behavior symptomatic of early stage intoxication should not be equated with the loss of self-control experienced by those who are severely intoxicated. While Justice Greene appears to have identified these distinctions in her analysis of the facts in *Tariq*, her treatment of the case law⁹⁶—her emphasis on ‘just how drunk a woman needs to be’—was not helpful in this regard.⁹⁷

assault by a defendant”. *Al-Rawi* 2019, *supra* note 42; *KC*, *supra* note 4; *Percy*, *supra* note 27.

⁹² *Al-Rawi* 2019, *supra* note 42 at paras 118–20.

⁹³ *Ibid.*

⁹⁴ *Ibid.* See also Kurt Dubowski, “Alcohol Determination in the Clinical Laboratory” (1980) 74 *Am J Clin Pathology* 747 at 747.

⁹⁵ *Al-Rawi* 2019, *supra* note 42 at paras 118–20.

⁹⁶ *Tariq*, *supra* note 2 at para 30.

⁹⁷ While she did not cite *Tariq* for this passage in *R v CK*, 2017 ONCJ 277 at para 68, Justice Crossbie repeated this problematic passage about the evidentiary burden in capacity to consent cases verbatim. Like Justice Greene, she also found the complainant

In cases in which the complainant has little or no memory of what occurred, making an after-the-fact determination of her level of capacity while intoxicated will often require relying on some form of evidentiary proxy. She cannot give direct evidence of her level of cognition because she does not remember. Moreover, absent evidence of blood or urine alcohol concentration (which is not always available) the evidence of intoxication typically introduced in sexual assault proceedings is circumstantial evidence of intoxication (such as vomiting, loss of gross motor skills, or unconsciousness). Even evidence of blood alcohol concentration, which is direct evidence of intoxication, is far from direct evidence of a complainant's cognitive capacity. In other words, judges are frequently required to make capacity findings by assessing circumstantial evidence of intoxication as a proxy for cognitive ability (or capacity). This, of course, raises the question: a proxy to determine what? The weight to be given particular evidence of intoxication—the value of the evidentiary proxy so to speak—turns on the legal standard for capacity. The lower the legal standard for capacity—the closer it is to bare consciousness—the more onerous the evidentiary requirement.

While capacity to consent to sexual touching is frequently characterized by courts as an exclusively factual matter,⁹⁸ common law assertions of 'just how intoxicated a woman must be' before a court will conclude that she lacked capacity reveal an underlying policy position regarding the level of protection our criminal law ought to afford intoxicated complainants. Whether an intoxicated individual has the level of sobriety to meet a particular capacity standard is, indeed, a question of fact. However, underpinning this question of fact is a legal question: What is the standard of capacity required by law? Determining this standard is a policy decision. The level of sobriety our criminal law should require—the standard itself—is as much a norm-driven, policy decision as is adopting a prohibition on sexual interactions with individuals below a certain level of maturity.

The legal standard for capacity to consent described by the Supreme Court in *JA* supports rejecting the evidentiary approach articulated in cases like *Tariq* in favour of an assessment that is more protective of severely intoxicated women and more reproachful of the individuals who sexually exploit them. Consent, as determined by the majority of the Supreme Court in *JA*, requires a conscious, "capable' or operating mind"—one that is capable of granting, revoking or withholding consent to each and every

lacked capacity. In that case there was evidence she was unconscious, had vomited on herself, and was unable to speak or walk proximate in time to the sexual activity.

⁹⁸ See e.g. *NB*, *supra* note 48 at para 32.

sexual act.⁹⁹ A complainant must have the ability to decide, at each and every point of sexual contact, whether and on what terms she is willing to engage in the activity. She must be able to evaluate each and every sexual activity or encounter; and she must be able to change her mind partway and withdraw her earlier consent.¹⁰⁰

It seems highly unlikely that individuals at the level of intoxication described in the cases cited in *Tariq*, women whose symptoms of intoxication go far beyond loss of gross motor skills, would be capable of deciding at each and every point of a sexual encounter whether and on what terms they are willing to engage in the sexual act at issue. A legal standard for capacity that is informed by the principles articulated in *JA* should encourage courts to place weight on evidence of outward signs of severe impairment such as loss of gross motor skills, vomiting, loss of bladder control, and significantly impaired speech, instead of relying on unconsciousness as the evidentiary proxy for incapacity.

4. The Legal Standard: The Threshold Established by the Nova Scotia Court of Appeal in *Al-Rawi* Fails to Sufficiently Protect the Sexual Integrity of Intoxicated Women

The caselaw establishing the legal standard for capacity to consent to sexual touching is inconsistent.¹⁰¹ Different jurisdictions (or courts within them) articulate different thresholds. The standard has been described as the capacity to understand the risks and consequences associated with the activity,¹⁰² the ability to understand and agree,¹⁰³ or something more than the ability to execute baseline physical functions.¹⁰⁴

The Supreme Court of Canada has not yet provided lower courts with clear guidance on how to assess capacity to consent to sexual touching in the context of intoxication. *JA* is helpful but it did not involve an intoxicated

⁹⁹ *JA*, *supra* note 18 at para 43.

¹⁰⁰ *Ibid* at paras 3, 34, 36, 40. The phrase “operating mind” might, were it used alone, suggest quite a low legal standard. However, Chief Justice McLachlin’s use of the term in the context of a case involving an unconscious complainant as well as the other aspects of her description of consent (such as the ability to decide whether to consent or withdraw consent to each and every sexual act and the use of the term meaningful consent) suggest otherwise.

¹⁰¹ Janine Benedet & Isabel Grant, “Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions” (2017) 37:7 *Crim Reports* 375; Cowan, *supra* note 7.

¹⁰² *R v Siddiqui*, 2004 BCSC 1717 at para 55 [*Siddiqui*]; *R v (A)A*, 2001 CanLII 3091 at paras 7–11, 144 OAC 382 (Ont CA) [*AA*].

¹⁰³ *R v P*, 2004 NSCA 27 at para 15.

¹⁰⁴ *R v Haraldson*, 2012 ABCA 147 at para 7 [*Haraldson*].

complainant. Nor, as discussed in Part 2, has Parliament provided sufficient guidance. Unfortunately, the Nova Scotia Court of Appeal's recent decision in *R v Al-Rawi* has become the case to which other courts, including the Court of Appeal for Ontario,¹⁰⁵ are now turning.¹⁰⁶ This is unfortunate because there are significant flaws with the Nova Scotia Court of Appeal's reasoning in *Al-Rawi*. The legal standard for capacity adopted in *Al-Rawi* offers extremely intoxicated, but conscious, women very little protection under the criminal law.

Recall that the original trial decision in *Al-Rawi* was overturned because Judge Lenehan equated lack of capacity with unconsciousness. The problems with the Nova Scotia Court of Appeal's decision in *Al-Rawi* do not relate to its treatment of the trial judgment in this case. Rather, it is the legal standard Justice Beveridge adopted for determining incapacity, and his application of the precedents he marshalled in support of this standard, that are problematic. The legal standard for incapacity articulated by the Nova Scotia Court of Appeal in *Al-Rawi* is as follows:

[a] complainant lacks the requisite capacity to consent if ... the complainant did not have an operating mind capable of:

- 1) appreciating the nature and quality of the sexual activity; or
- 2) knowing the identity of the person or persons wishing to engage in the sexual activity; or
- 3) understanding she could agree or decline to engage in, or to continue, the sexual activity.¹⁰⁷

In adopting this test, Justice Beveridge relied on the body of case law addressing sexual fraud. His language of “the nature and quality of the sexual activity” at issue is borrowed directly from the sexual fraud caselaw.¹⁰⁸ Relying on the law of sexual fraud to establish a standard for

¹⁰⁵ *GF*, *supra* note 6.

¹⁰⁶ See e.g. *Ibid*; *R v Smalley*, 2019 NSSC 32; *R v ECC*, 2018 YKSC 37; *R v TW*, 2019 ONSC 4028; *R v Shrivastava*, 2018 ABQB 998.

¹⁰⁷ *Al-Rawi* (NSCA), *supra* note 1 at para 66.

¹⁰⁸ This phrase is also used in cases in which the accused's mental state renders him or her not criminally responsible. It is clear, based on the authorities that Justice Beveridge draws upon (*R v Cuerrier*, [1998] 2 SCR 371, 162 DLR (4th) 513 [*Cuerrier*]; *R v Mabior*, 2012 SCC 47 [*Mabior*]; and *Hutchinson*, *supra* note 11), that it is the sexual fraud jurisprudence, not the ‘not criminally responsible’ jurisprudence from which he has borrowed. To be clear, it is different to rely on *Hutchinson* (which was a sexual fraud case) for the overall framework for a consent analysis than it is to rely on the sexual fraud jurisprudence for the standard for capacity.

capacity to consent was an unprecedented shift in the doctrinal approach to capacity.¹⁰⁹ It is not clear that the principles and legal test developed to establish criminal prohibitions on deceptive sex should govern the criminal law's standard for capacity to consent. Certainly the factual context and policy implications associated with these two areas of sexual assault law seem different. Regardless, three failings in particular should be highlighted in Justice Beveridge's decision in *Al-Rawi*.

First, a legal standard for capacity to consent that is based on the capacity to appreciate the 'nature and quality of the sexual activity' establishes an extremely low legal threshold for capacity. Second, devising a threshold based on a broad, adjectival standard like 'the nature and quality of the sexual act' creates an illusive and confusing standard that courts have struggled to apply. Third, a standard that focuses on whether one understands that they can say 'yes or no', rather than on whether one has the capacity to give meaningful consent, encourages courts to conclude that any evidence of non-consent is dispositive of the issue of capacity—even if such evidence is not sufficient to establish lack of voluntariness beyond a reasonable doubt.

A) A standard based on the 'nature and quality of the sexual activity' rather than the risks and consequences it presents creates an inappropriately low threshold for capacity

The language of 'the nature and quality of the sexual activity' used in Justice Beveridge's decision is, as noted, borrowed from the sexual fraud caselaw. At common law, prior to the Supreme Court of Canada's decision in *R v Cuerrier*, an accused's deception would only vitiate consent if the deception went to the nature and quality of the sexual activity.¹¹⁰ In *Cuerrier*, an aggravated assault case involving the non-disclosure of HIV positive status, the Court highlighted the very narrow scope of the common law interpretation of the "nature and quality of the sexual

¹⁰⁹ There are numerous, frequently cited, decisions from trial and appellate courts across Canada involving interpretations of the standard for capacity to consent. None of these decisions turn to the law of sexual fraud to determine the appropriate standard for capacity to consent. See e.g. *R v Jensen*, 90 OAC 183, 1996 CanLII 1237 (Ont CA) [*Jensen* cited to CanLII]; *Tariq*, *supra* note 2; *Haraldson*, *supra* note 104; *Siddiqui*, *supra* note 102; *AA*, *supra* note 102 at para 9; *R v JWM*, 2004 CarswellOnt 1214 (WL Can), [2004] OJ No 1295 (QL) (Sup Ct); *R v Hinds*, 2016 ONSC 95. While it is true that courts in capacity cases have looked to *Hutchinson*, *supra* note 11, a sexual fraud case, for the overall analytical framework for consent, this is much different than relying on the old common law definition of sexual fraud to determine the definition of incapacity.

¹¹⁰ *R v Petrozzi* (1987), 13 BCLR (2d) 273, 1987 CanLII 2786 (CA); *Cuerrier*, *supra* note 108 at 421.

activity.”¹¹¹ A fraud with respect to the presence of sexually transmitted infections,¹¹² or the fact that one of the individuals present was a voyeur, not a medical intern,¹¹³ or that the accused held himself out to be a faith healer in order to seduce the complainant,¹¹⁴ would not go to the nature and quality of the act. According to its common law interpretation, the nature and quality of the sexual act refers to the specifics regarding the physical act itself.¹¹⁵ For example, inserting a penis into a complainant’s vagina when what she consented to was penetration with a finger would go to the nature and quality of the act. However, the nature and quality of the act would not include someone’s HIV positive status or the fact that they had gonorrhea.¹¹⁶ This is why, in the context of sexual fraud, the Supreme Court of Canada established an additional circumstance in which apparent consent will be vitiated by fraud. In addition to deceptions that go to the nature and quality of the sexual act, ones that result in a significant risk of serious bodily harm may also vitiate voluntary agreement or apparent consent.¹¹⁷

Again, according to a long line of sexual fraud cases in which the phrase has been interpreted, the nature and quality of the sexual activity refers only to the basic physical act and its sexual nature. Unless the nature and quality of the act standard is to be interpreted differently in the context of capacity to consent than it has been in the jurisprudence from which this standard was drawn, Justice Beveridge’s inability to “appreciate the nature and quality of the activity” threshold for a finding of incapacity creates an extremely low standard. Indeed, he refers to it as a standard of “only a ‘minimal capacity.’”¹¹⁸

Al-Rawi is not the first decision to employ the language of minimal capacity. The case most frequently cited, and one that was relied upon by Justice Beveridge, is *R v Jensen*.¹¹⁹ It is true that in *Jensen* the Court of Appeal for Ontario concluded that the complainant in that case should not have been found to lack the “minimal capacity” necessary to consent

¹¹¹ *Cuerrier*, *supra* note 108 at 410; See *R v Maurantonio*, [1968] 1 OR 145, 65 DLR (2d) 674 (CA), in which the majority concluded that pretending to be a doctor conducting vaginal exams did go to the nature and quality of the act. The complainants thought they were consenting to a medical procedure. See *Mabior*, *supra* note 108.

¹¹² *Cuerrier*, *supra* note 108 at 425; *R v Clarence* (1888), 22 QBD 23 (Eng QB) (failure to disclose gonorrhea) [*Clarence*].

¹¹³ *Bolduc v The Queen*, [1967] SCR 677, 63 DLR (2d) 82 [*Bolduc*].

¹¹⁴ *R v Ramos*, 1997 CanLII 1425 at para 11, 101 OAC 211 (Ont CA).

¹¹⁵ *Clarence*, *supra* note 112; *Bolduc*, *supra* note 113.

¹¹⁶ *Cuerrier*, *supra* note 108 at 412, 424–25; *Hutchinson*, *supra* note 11.

¹¹⁷ *Cuerrier*, *supra* note 108 at 424, 428, 432.

¹¹⁸ *Al-Rawi* (NSCA), *supra* note 1 at para 59.

¹¹⁹ *Jensen*, *supra* note 109.

to sex.¹²⁰ However, the Court in *Jensen* also said the following, “[s]he was sufficiently aware that she was able to make decisions and act upon them.”¹²¹ A level of awareness sufficient to ‘make decisions’ (plural) may suggest a standard that is higher than the one proposed in *Al-Rawi*. Not only that, in *Jensen*, the complainant herself testified that she was alert, knew what was going on and expressed her non-consent repeatedly.¹²² The Court in *Jensen* was not grappling with an extremely intoxicated woman who was conscious enough to understand that she was being touched sexually but aware of little, if anything, else.

In *Al-Rawi*, Justice Beveridge suggests that the Supreme Court of Canada’s decision in *R v (A)J* supports a standard of ‘only a minimal capacity’ because Chief Justice McLachlin concluded in that case that “Parliament intended consent to mean the conscious consent of an operating mind.”¹²³ This interpretation of *JA* seems wrong. First, Chief Justice McLachlin was referring to the difference between a conscious and unconscious mind, making this particular passage from *JA* an inappropriate one to rely on in establishing the minimum threshold for capacity (unless one seeks to draw the line at unconsciousness).

Second, whether requiring an ‘operating mind’ can or should be equated with a standard of minimal capacity is not self-evident. An operating mind may very well require more than the minimal capacity needed to know that one is being, for example, vaginally penetrated with a penis, and that this is a sexual act to which one could say no. Under a nature and quality of the sexual activity standard for capacity that would be the extent of awareness/understanding required. Instead, to have an ‘operating mind’ sufficient to grant consent to sex may well require the capacity to assess something further, such as the risks and consequences of the sexual activity in question.

Chief Justice McLachlin’s conclusion in *JA* was that Parliament was concerned with ensuring that individuals have the capacity to give “meaningful consent.”¹²⁴ It seems reasonable to suggest that the capacity to give meaningful consent requires more than the rudimentary ability to understand that one is, for instance, being penetrated with a penis and that this act is a sexual one to which one could say no. The capacity to give meaningful consent referred to by the Supreme Court of Canada in *JA*,

¹²⁰ *Ibid* at 8.

¹²¹ *Ibid* at 10.

¹²² *Ibid*.

¹²³ *JA*, *supra* note 18 at para 36: That only a “minimal capacity” suffices is supported by comments by the Supreme Court of Canada that a complainant must have had an “operating mind” in order to be capable of consenting to sexual activity.

¹²⁴ *Ibid*.

and this notion of minimal capacity capable of understanding the nature and quality of the act, do not appear to establish the same legal standard. Chief Justice McLachlin's language of an operating mind capable of giving meaningful consent seems more akin to the cases in which judges have asserted that while the standard for capacity is not high, it does require the capacity to make reasonably informed decisions. In *R v JR*, Justice Ducharme described the threshold in this way, "[t]he question is whether or not the complainant was able to make a voluntary and *informed decision*, not whether she later regretted her decision or whether she would not have made the same decision if she had been sober."¹²⁵ In *R v Innes* the Court stated, "[t]here is no requirement that a complainant be a virtual robot before she will be found to be incapable of consenting to sexual activity. Consent requires a *reasonably informed choice*, freely exercised, without interference with the freedom of a person's will."¹²⁶ In *R v Saint-Laurent*, Justice Fish stated, "[a]s a matter both of language and of law, consent implies a *reasonably informed choice*, freely exercised."¹²⁷ In *R v (A)A* (in discussing the capacity of complainants with intellectual disabilities), the Court of Appeal for Ontario specified that, "no consent is obtained where the complainant is incapable of consenting. A valid consent is an *informed consent*. Therefore, the individual must be able to understand the risks and consequences associated with the activity to be engaged in."¹²⁸

Intervenors before the Nova Scotia Court of Appeal in *Al-Rawi* suggested that the standard for capacity should include: the ability to assess the physical and social risks and consequences associated with the act in the particular circumstance confronting the complainant.¹²⁹ Courts in several other cases have articulated a threshold that requires the ability to assess the risks and consequences of engaging in the sexual activity in question.¹³⁰ Justice Beveridge rejected this approach. He stated, "requiring the cognitive ability necessary to weigh the risks and consequences of agreeing to engage in the sexual activity goes too far."¹³¹ He offered no reasons, examples, or explanation as to why such a standard would "go too

¹²⁵ *R v JR*, 2006 CanLII 22658 at para 43, 40 CR (6th) 97(Ont Sup Ct) [*JR*] [emphasis added].

¹²⁶ *R v Innes*, [2004] OJ No 4150 (QL) at para 24, [2004] OTC 888 (Sup Ct) [emphasis added].

¹²⁷ *R v Saint-Laurent* (1993), [1994] RJQ 69, 1993 CarswellQue 2111 (WL Can) at para 95 (CA) [*Saint-Laurent* cited to WL Can] [emphasis added].

¹²⁸ *AA*, *supra* note 102 at para 9 [emphasis added] (capacity in this case related to the complainant's intellectual disability).

¹²⁹ *Al-Rawi* (NSCA), *supra* note 1 at para 36 (LEAF Factum).

¹³⁰ See e.g. *Siddiqui*, *supra* note 102; *AA*, *supra* note 102; *JR*, *supra* note 125; *R v Zadeh*, 2015 BCPC 192.

¹³¹ *Al-Rawi* (NSCA), *supra* note 1 at para 61.

far.”¹³² Similarly, in *GF*, the Court of Appeal for Ontario stated, “capacity for considered evaluation of the collateral risks and consequences of sexual activity sets the bar too high for capacity to consent to sexual relations.”¹³³ Like Justice Beveridge, Justice Pardu offered no reasons or analysis to support this assertion (beyond reliance on the Nova Scotia Court of Appeal’s decision in *Al-Rawi*). Nor did her decision include any explanation as to what constitutes collateral risks and consequences, as opposed to primary or non-collateral risks and consequences.

Justice Beveridge’s rejection of a ‘capacity to appreciate risks and consequences standard’ in favour of ‘the capacity to understand the nature and quality of the sexual act standard’ is insufficiently protective of women’s sexual integrity. Oddly, the conflation in *Al-Rawi* of two discrete areas of sexual assault law (fraud and capacity to consent) inadvertently raises an example that demonstrates this insufficiency.

Consider the following scenario. The accused and the complainant engage in voluntary, unprotected, vaginal penetration to the point of ejaculation. The accused is HIV positive and unmedicated, making his viral load (his degree of infectiousness)¹³⁴ higher than it would be if he was properly medicated. Prior to the sexual activity, he told the complainant of his HIV status. The complainant was severely intoxicated at the time of the sexual activity but had the ‘minimal capacity’ necessary to understand that she was being vaginally penetrated by the accused and that she could say no. She was too drunk, however, to assess the risks and consequences of engaging in unprotected, vaginal intercourse with someone who was HIV positive and unmedicated. The level of minimal functioning needed to comprehend that one is being vaginally penetrated and by whom, and that one could say no, is clearly lower than the capacity needed to assess the risks and consequences of having sex with someone who is HIV positive, which turn on the presence or absence of a condom, whether ejaculation occurs and if so whether it occurs inside or outside the vagina, whether the individual is properly and consistently medicated and for how long, and whether they have a high viral load.¹³⁵

Based on the reasoning in *Al-Rawi*, the offence of sexual assault in Canada offers no legal protection for this woman. In other words, based on Justice Beveridge’s decision and provided he discloses his status, our sexual assault law does not prohibit this accused from ejaculating inside of severely intoxicated women he knows are too drunk to assess the risks of

¹³² *Ibid.*

¹³³ *GF*, *supra* note 6 at para 36.

¹³⁴ *Mabior*, *supra* note 108 at para 100.

¹³⁵ *Ibid* at paras 93–103.

permitting someone with his HIV status to do to them. Similarly, the law of sexual assault would offer no protection to, nor prohibit him from doing this to, a woman whose intellectual disability meant she could appreciate the sexual nature of the act to which she was consenting, but lacked the mental capacity to understand the risks and consequences of consenting to this act with someone with his medical condition, without a condom.¹³⁶

Now consider a slightly modified scenario in which the above facts remain the same except that the accused does not disclose his HIV status to the severely intoxicated (or intellectually disabled) complainant. The Supreme Court of Canada adopted a two-part test to determine whether consent to sexual activity was vitiated by deceptions with respect to HIV status in *Cuerrier*: (1) there must be proof of dishonesty and either deprivation or risk of deprivation. The deprivation may consist of actual harm or a significant risk of harm; and (2) the trier of fact must be convinced beyond a reasonable doubt that the complainant would not have consented to the sexual activity had they known that the accused was HIV positive.¹³⁷ How could the Crown prove the latter in a case in which the evidence suggests a severely intoxicated or intellectually disabled complainant who knew she was having sex and could say ‘no’ but lacked the capacity to understand the risks imposed upon her of doing so? In that situation what difference would it make if the accused had told her of his HIV status—she may well have engaged in the sexual activity anyway because she lacked the capacity to understand the significance of that status for her. Indeed, how could we not have a reasonable doubt as to what she would have done if the accused had shared his HIV status with her given that she lacked the capacity to assess this information? Based on the reasoning in *Al-Rawi* it would certainly be open to defence counsel to make this argument.

¹³⁶ Conversely, a standard which focussed on a complainant’s ability to appreciate the risks and consequences of the act would offer this protection to an intellectually disabled woman. In *R v Comeau*, 2017 NSSC 62, a pre-*Al-Rawi* decision, Justice Duncan found that a woman in her mid 70s with dementia and living in a residential care facility did not have capacity to consent to the sexual contact which occurred with the facility’s custodian. She could walk and talk with others and had the capacity to express voluntary agreement. She initiated the sexual contact with the accused. Justice Duncan concluded at para 49: “Ms. W. was unable to understand the risks and consequences associated with the activity she engaged in with Mr. Comeau ... Ms. W. lacked the necessary capacity to consent to the sexual activity that she engaged in with Mr. Comeau”.

¹³⁷ *Cuerrier*, *supra* note 108. See e.g. *R v Pottelberg*, 2010 ONSC 5756, in which the Court acquitted on the basis of a reasonable doubt as to whether the complainant would not have consented had he known the accused was HIV positive. The *Cuerrier* test was affirmed in *Mabior*, *supra* note 108, at paras 104–05.

There are problems with Canada's sexual fraud laws.¹³⁸ However, given that the law of sexual assault criminalizes the non-disclosure of HIV positive status in circumstances in which there is (what the Court has deemed to be¹³⁹) a sufficient risk of transmission, it is unjust to exclude from its protection severely intoxicated women and some intellectually disabled women. It makes little sense to establish a legal regime in which women who are more vulnerable (whatever the cause of their incapacity) receive less legal protection than those with greater capacity to protect themselves. Yet in Nova Scotia (and Ontario as well, depending on what the Court in *GF* meant by *collateral* risks and consequences) women who lack the capacity to understand the risks and consequences of allowing an unmedicated, HIV positive accused to ejaculate inside of them, do not receive the same legal protection as women who are not incapacitated in this manner. This is also true for severely intoxicated and some intellectually disabled men who have sex with men. It was inappropriate to base his rejection of the capacity to understand risks and consequences as part of the necessary threshold for capacity to consent on the Supreme Court's deceptive sex jurisprudence. In addition, the standard Justice Beveridge adopted in *Al-Rawi* in fact undermines the objectives underpinning the sexual fraud jurisprudence in Canada.

Justice Beveridge appears to have based his rejection of a capacity standard that requires the ability to assess risks and consequences on a misunderstanding of the Supreme Court of Canada's sexual fraud jurisprudence. He asserts that:

[t]he proposed requirement that a complainant have the cognitive ability to appreciate and assess the risks and consequences of the sexual act in question is contrary to the Supreme Court's rejection in *R v Cuerrier*, *R v Mabior* and *R v Hutchinson* that knowledge of the risks and consequences of the act are necessary components of a valid consent.¹⁴⁰

He then notes that, "[d]eception about risks and consequences that expose a complainant to serious risk of harm may vitiate consent, but it is not part of the initial analysis."¹⁴¹ What Justice Beveridge's reasoning appears to have overlooked is that capacity is also not a part of the initial analysis.

¹³⁸ See Isabel Grant, "The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV" (2008) 31:1 Dal LJ 123; Isabel Grant, "The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink *Cuerrier*" (2011) 5:1 McGill JL & Health 7; Isabel Grant, "Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions" (2009) 54:2 McGill LJ 389; Martha Shaffer, "Sex, Lies and HIV: *Mabior* and the Concept of Sexual Fraud" (2013) 63:3 UTLJ 466.

¹³⁹ *Mabior*, *supra* note 108.

¹⁴⁰ *Al-Rawi* (NSCA), *supra* note 1 at para 38.

¹⁴¹ *Ibid* at para 39.

Recall that the legislative framework for determining consent involves a two-stage process.¹⁴² The issue of capacity, like fraud, is considered at the second stage of the analysis, under section 273.1(2) (or in the case of fraud under section 265(3)(c)). While unconsciousness should be considered at the first stage of the analysis, because an unconscious person cannot voluntarily agree to have sex, whether a complainant's voluntary agreement was legally ineffective due to lack of capacity is to be assessed at the second stage. It occurs after a trier of fact has determined that there was apparent consent or voluntary agreement or a reasonable doubt regarding lack of apparent consent.

The Supreme Court of Canada in *Cuerrier, Mabior and Hutchinson* did determine that knowledge of some risks and consequences is a necessary component of a valid consent, such as the risk of pregnancy¹⁴³ or the non-trivial risk of contracting HIV.¹⁴⁴ In all three of these cases, the Court found that the complainant's lack of knowledge of the physical risks and consequences caused by the accused's deception rendered the complainants' apparent consent legally ineffective. Indeed, the majority in *Cuerrier*, the first in this line of decisions, determined that the scope of the duty to disclose turns on the degree of risk, "[t]o put it in the context of fraud the greater the risk of deprivation the higher the duty of disclosure ... The nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented."¹⁴⁵ Similarly, the majority in *Hutchinson* stated that, "[w]hat was critical to [the complainant] was contraception and what she sought to mitigate was the risk of pregnancy."¹⁴⁶ *Cuerrier, Mabior and Hutchinson* did not remove knowledge of risks and consequences as a necessary component of valid consent. To the contrary, the concept of physical risks and consequences is the operative part of the sexual fraud doctrine developed in *Cuerrier, Mabior and Hutchinson*. That the issue of fraud, like the issue of capacity, is to be considered at the second stage of the analysis does not change the fact that under Canadian law a valid consent does indeed require knowledge of risks and consequences that pose a significant threat of serious harm. But why require that this knowledge be given to severely intoxicated and some intellectually disabled women if the law does not require that they have the capacity to understand its significance for them? Justice Beveridge's reasons appear not to have accounted for this implication of his decision.

¹⁴² *Hutchinson*, *supra* note 11 at para 57; *GF*, *supra* note 6 at para 41.

¹⁴³ *Hutchinson*, *supra* note 11 at para 70.

¹⁴⁴ *Cuerrier*, *supra* note 108; *Mabior*, *supra* note 108.

¹⁴⁵ *Cuerrier*, *supra* note 108 at 431.

¹⁴⁶ *Hutchinson*, *supra* note 11 at para 48.

To be clear, the Court in each of *Cuerrier*, *Mabior* and *Hutchinson* did confirm that an accused is not required to disclose knowledge of all risks and consequences, physical or social. For example, an individual does not have to disclose risks to a sexual partner's health that fall below the threshold of serious bodily harm. Presumably this is because we assume, as a policy matter, that people should be responsible for assessing these types risks for themselves and that a failure to disclose them does not warrant criminal sanction.¹⁴⁷ After all, sex and risk are familiar bedmates. Absent risks and consequences that pose a significant risk of serious bodily harm¹⁴⁸ or that could result in fundamental physical changes to a woman's body (such as pregnancy),¹⁴⁹ Canadian sexual fraud jurisprudence places responsibility on complainants to gather information for themselves or to take necessary steps to protect themselves before voluntarily agreeing to the sexual activity in question. The correlative implication of this legal distribution of responsibility, one that arises directly from the sexual fraud jurisprudence, is as follows: if there is no legal burden on an accused to disclose a broader range of known risks and consequences, surely we must require a threshold of capacity that includes a woman's ability to identify at least some of these risks and consequences for herself. That is to say, since an individual is not legally obligated under the law of sexual assault to, for example, disclose sexually transmitted infections like chlamydia, shouldn't the standard for capacity to consent require at least the level of awareness and understanding necessary to observe and assess the risks associated with agreeing to be vaginally penetrated by someone whose penis is obviously oozing discharge or whose testicles are red and inflamed? Similarly, since an individual is not legally obligated to disclose that they have, for example, contracted chlamydia or gonorrhoea and could infect someone, it is only just that the standard for capacity to consent not be less than that necessary to insist that a condom is used (whether that be to avoid pregnancy or a sexually transmitted infection).¹⁵⁰ Fairness and even a modest commitment to protecting women's sexual integrity and physical autonomy demands that we have a standard of capacity that corresponds to the legal approach to sexual fraud.

¹⁴⁷ *Gotell* 2008, *supra* note 75. As Lise Gotell's work has ably demonstrated, this neo-liberal risk allocation approach to the issue of sexualized violence perpetuates victim blaming and fails to account for the systemic inequalities that produce this gendered violence. My argument is not intended to detract from this important critique or endorse the neo-liberalism inherent in our current laws. My point is that this allocation of responsibility to sexual actors in the sexual fraud jurisprudence should be recognized in the incapacity to consent jurisprudence.

¹⁴⁸ *Cuerrier*, *supra* note 108; *Mabior*, *supra* note 108.

¹⁴⁹ *Hutchinson*, *supra* note 11 at para 70.

¹⁵⁰ That any particular woman may not be inclined to insist on condom use or watch for outward symptoms of sexually transmitted infections, sober or intoxicated, has no bearing on what level of protection should be afforded under the criminal law.

While it was problematic to establish a legal standard for capacity based on the sexual fraud jurisprudence, Justice Beveridge's reasoning does encourage us to consider these discrete legal issues in relation to one another. However, contrary to Justice Beveridge's conclusions, the Supreme Court of Canada's approach to the issue of sexual fraud very much suggests that the ability to appreciate at least some risks and consequences should be part of the legal standard for capacity to consent to sexual touching.

B) The 'nature and quality of the sexual activity' standard is inherently unclear and difficult to apply

The second problem with relying on 'the ability to appreciate the nature and quality of the sexual activity' as the standard for capacity is that there are inherent difficulties with attempting to make legal distinctions based on this language. As the Court highlighted in *Hutchinson*, "courts experienced great difficulty in formulating principled reasons for why a certain deception did or did not relate to the nature and quality of the act."¹⁵¹ In *Hutchinson* the majority unequivocally rejected this approach, stating, "[t]he problem was where and how to draw the line between those aspects of the sexual activity that went to the 'nature and quality of the act' and those that did not."¹⁵² The Court went on to conclude that, "[t]he lesson is clear. Broad adjectival approaches to 'the sexual activity in question' ... [are] too unclear, too easily manipulated, and too unconnected with underlying policy rationales to provide a useful marker of liability."¹⁵³ There is no reason to think a standard based on the nature and quality of the sexual act will be clearer, less easy to manipulate, or more connected to policy rationales in the capacity context than it was in the sexual fraud context.

C) A standard which focuses on whether one understands they can say yes or no rather than on whether one has the capacity to give meaningful consent is insufficiently protective of women's sexual integrity

The third criterion included in the standard for capacity articulated in *Al-Rawi* focuses on whether the complainant had the capacity to understand that she could agree or decline to participate in the sexual activity in question. This criterion is also a problem. In some cases, if the complainant provides any evidence of non-consent the court uses that as evidence that

¹⁵¹ *Hutchinson*, *supra* note 11 at para 50.

¹⁵² *Ibid* at para 30.

¹⁵³ *Ibid* at paras 52–53. The majority's approach in *Hutchinson* requires further consideration. The majority's interpretation of section 273.1 is problematically narrow.

she did not lack capacity.¹⁵⁴ A standard of capacity that requires only the ability to know that a sexual act is occurring and that one can say ‘yes or no’ encourages this type of reasoning. A state of non-consent and lack of capacity to consent should not be treated as necessarily incongruent.

That a woman has the minimal capacity necessary to mumble an incoherent ‘no’ or manage an attempt at evasion in response to unwanted sexual touching should not be equated with the capacity to give “meaningful consent” to engage in the sexual activity at issue.¹⁵⁵ A standard of capacity that turns on whether a complainant understood that she could agree or decline to participate, rather than on her capacity to make a meaningful choice, encourages judges to conclude that if she was sober enough to say no at any point during the sexual contact, incapacity cannot be established. The risk is that any evidence that the complainant communicated non-consent may be deemed dispositive of the capacity issue while insufficient to establish involuntariness beyond a reasonable doubt.

In addition, as Grant and Benedet have argued, the capacity to say no may be lower than that necessary to meaningfully consent.¹⁵⁶ A legal test that turns on a complainant’s capacity to understand that she can agree or decline to participate risks obscuring this important distinction.

To summarize, the legal standard established in *Al-Rawi* does not protect severely intoxicated women in some of the most vulnerable sexual circumstances. It sets the legal standard too low and does not provide courts with clear language upon which to make assessments of capacity, which will undoubtedly encourage trial judges to continue to rely on unconsciousness as the evidentiary proxy for incapacity. It is not consistent with the Supreme Court of Canada’s articulation of consent in *JA* and it risks encouraging courts to treat any evidence of non-consent as dispositive of the issue of incapacity.

5. Capacity to Assess the Risks and Consequences of the Sexual Activity at Issue Would Provide a Clearer, More Just Standard

A standard that requires the ability to assess the risks and consequences of engaging in the sexual activity in question is more consistent with the Supreme Court of Canada’s approach in cases like *JA* and more

¹⁵⁴ See e.g. *R v Palmer-Coke*, 2017 ONSC 4501 at paras 91–92; *MRN*, *supra* note 44; *R v Sawyer*, 2014 ONCJ 186.

¹⁵⁵ *JA*, *supra* note 18 at para 36.

¹⁵⁶ See Benedet & Grant, *supra* note 101 at 3.

appropriately protective of intoxicated women's sexual integrity. Professors Benedet and Grant argue that an assessment of capacity to consent should be context-specific. A legal standard for capacity that is based on the ability to appreciate risks and consequences must recognize that the level of cognitive ability required to give meaningful consent will vary depending on the context. It may, for example, require a higher level of capacity to consent to sex with a stranger in a taxicab than to consent to an intimate partner in a non-abusive relationship. It may also require a higher level of capacity to consent to unprotected sexual intercourse than to a kiss.¹⁵⁷ Their suggestion is not intended to encourage judges to inquire into the advisability of a woman's particular sexual choices, but rather to suggest that the level of capacity required turns on the degree of risk and the nature of potential consequences: "the risks and consequences of consenting are different in different situations and the ability to understand more serious risks and consequences may in turn require a higher level of capacity."¹⁵⁸ For instance, the level of capacity needed to make a meaningful choice to have unprotected sex with someone who is HIV positive will be higher than that required to consent to have protected sex with an HIV positive individual. A higher level of capacity may be necessary to make a meaningful choice to have sex with multiple, unknown men at once than would be needed to consent to the same sexual activities with one's ongoing sexual partner.

This situational or contextual approach to assessing capacity to understand the risks and consequences associated with the sexual activity in question is compelling. It is important to emphasize that the threshold legal question under this approach should be context-specific rather than complainant-specific. In addition, the inquiry should not be whether the complainant did assess the risks and consequences presented by a particular context, but rather whether she had the capacity to make this assessment. This is because a complainant-specific inquiry, as opposed to a context-specific one, might encourage questions about, or reasoning based on, the complainant's individual tolerance for risk. This approach would inevitably lead to consideration of her past sexual choices. A context-specific inquiry should focus the analysis on factors such as the type of sexual activity, the location, the relationship between the parties, and the health status of the accused, not the complainant's sexual propensities.

The same is true with respect to a focus on whether she assessed the risks and consequences, rather than on whether she had the capacity to make this assessment given her level of intoxication. A focus on whether she assessed the risks and consequences might encourage questions such as

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

the following: ‘well, is it not true that you have had consensual, unprotected sex with strangers when you were not intoxicated?’ Conversely, a focus on whether she had the capacity to assess the particular risks and consequences should emphasize her level of intoxication and make her previous sexual choices, drunk or sober, irrelevant.

In other words, a standard that is context (not complainant) specific and that focusses on whether a complainant could (not did) assess the risks and consequences associated with that context should not create a basis for admitting (or relying upon) evidence of a complainant’s other sexual activity that would otherwise be excluded under section 276 of the *Criminal Code*.

In their recent work, Professors Benedet and Grant observe that even judges who articulate a standard that includes the ability to understand risks and consequences often do not then apply it when assessing the evidence:

While judges often refer to the standard of being able to understand “the risks and consequences associated with the activity to be engaged in,” when asked to apply the standard to an individual complainant, the ability to assess potential risks and consequences disappears from the analysis, even though it is at the heart of consent standards outside of sexual assault.¹⁵⁹

It is not clear why the risks and consequences element of the standard seems to fall away at the application stage of the analysis in some cases. One plausible explanation is that this tendency is rooted in stereotypical assumptions about drunk women.¹⁶⁰ Common stereotypes about women who consume alcohol include the beliefs that they are: responsible for

¹⁵⁹ *Ibid.*

¹⁶⁰ There has been substantial empirical research demonstrating the pervasiveness of these stereotypes. See Karla Stormo et al, “Attributions About Acquaintance Rape: The Role of Alcohol and Individual Differences” (1997) 27:4 *J Applied Soc Psychology* 279 at 301; Ashley A Wenger & Brian H Bornstein, “The Effects of Victim’s Substance Use and Relationship Closeness on Mock Jurors’ Judgments in an Acquaintance Rape Case” (2006) 54:7 *Sex Roles* 547 at 552; Emily Finch & Vanessa E Munro, “Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Finding of a Pilot Study” (2005) 45:1 *Brit J Crim* 25 [Finch & Munro, “Juror Stereotypes”]; Emily Finch & Vanessa E Munro, “The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants” (2007) 16:4 *Soc & Leg Stud* 591 [Finch & Munro, “The Demon Drink”]; Amy Grubb & Emily Turner, “Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity, and Substance Use on Victim Blaming” (2012) 17:5 *Aggression & Violent Behavior* 443 at 444.

any consequences they suffer;¹⁶¹ sexually promiscuous or indiscriminate in their sexual choices;¹⁶² and more likely to lie about rape.¹⁶³ These stereotypes have certainly informed the body of caselaw we are left with today.¹⁶⁴ It may be that even in cases in which a higher legal standard for capacity is articulated—such as one that includes the ability to appreciate risks and consequences—the application of this standard to the evidence is distorted by stereotypical thinking about women, sex, and alcohol.

One further point regarding the legal standard in cases involving intoxicated complainants should be flagged. Accused individuals should not be permitted to avail themselves of the honest but mistaken belief in communicated consent defence on the basis that they were unaware of a complainant's state of severe intoxication.¹⁶⁵ Unless there is evidence that the accused took reasonable steps (in the circumstances known to him) to ascertain both her consent and the complainant's capacity to consent the defence should not be considered. Unfortunately, courts have not reliably applied this doctrine.¹⁶⁶

¹⁶¹ For a general discussion of victim blaming stereotypes involving women who were intoxicated at the time of the alleged sexual assault, see e.g. Wenger & Bornstein, *supra* note 160 at 552; Finch & Munro, "Juror Stereotypes", *supra* note 160 at 29–32, Emily Finch and Vanessa Munroe's research demonstrating that mock jurors are more likely to blame sexual assault complainants for what occurred than those who are involuntarily intoxicated raises the prospect of this victim blaming; Stormo et al, *supra* note 160.

¹⁶² There is a difference between accepting the increased confidence, sociability and diminished judgment of someone who is moderately intoxicated (to which experts have testified, *Al-Rawi* 2019, *supra* note 42 at paras 118–20) and believing the stereotype that when women consume alcohol, they become sexually indiscriminate.

¹⁶³ Philip Rumney, "False Allegations of Rape" (2004) 65:1 Cambridge LJ 128 (disputing the prevalence of false allegations); Finch & Munro, "Juror Stereotypes", *supra* note 160.

¹⁶⁴ See *supra*, note 161.

¹⁶⁵ For a discussion of this defence in the context of incapacitated complainants see Elizabeth Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth Sheehy, eds, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 483 at 517. See also section 273.2(a)(iii) of the *Criminal Code*, *supra* note 10.

¹⁶⁶ *Ibid.* See e.g. *R v Dippel*, 2010 CarswellAlta 2713 (WL Can) (QB) (acquitted on the basis of the defence despite no discussion of any evidence indicating that he took reasonable step in the circumstance known to him, rev'd 2011 ABCA 129); *R v Lariviere*, 2017 SKPC 41 (acquitted on the basis of the defence in reasons which conclude he took reasonable steps but did not identify what those steps were); *R v Alboukhari*, 2013 ONCA 581 (in which a conviction was overturned on the basis of the trial judge's misapprehension of evidence with respect to the circumstances known to the accused but the Court of Appeal failed to explain what possible steps, based on the evidentiary record, could have been relied upon by the defence).

6. Conclusion

The criminal law, as the Supreme Court noted in *Hutchinson*, draws a line between conduct deserving of the harsh sanction of the criminal law, and conduct that is undesirable or unethical but “lacks the reprehensible character of criminal acts.”¹⁶⁷ Is having sex with someone you know is severely intoxicated—someone you know is, for example, too drunk to insist on a condom, or notice the multiple sores on and around your penis, or appreciate the social consequences of doing so in front of your whole hockey team—sufficiently reprehensible such that it warrants the censure of the criminal law? Or is this merely unethical or undesirable, but not reprehensible, sexual conduct?

The trial judge in *Al-Rawi* suggested that the accused had a “moral” or “ethical” (but not legal) obligation not to “tak[e] advantage” of the severely intoxicated complainant by “going along” with any flirtation or sexual invitation that the trial judge speculated might have occurred in that case.¹⁶⁸ Recall that the complainant in that case was so intoxicated she had lost control of her bladder and was either unconscious, or within seconds or minutes of becoming unconscious, when her clothing was removed. Is ‘taking advantage’ of a woman in that condition merely undesirable or unethical or is it the type of sexual conduct that the criminal law should prohibit?

A trial judge’s task in a case involving an intoxicated complainant is unenviable and made harder by the lack of guidance courts have received from Parliament. Toxicology evidence is often unavailable or inconclusive. The legal precedents by which they are bound articulate a legal standard which encourages judges to rely on unconsciousness as the evidentiary proxy. But the failure to find that severely intoxicated women—women who cannot walk properly, who have vomited on themselves, or are confused as to their whereabouts and what happened—lack capacity may also stem in part from a refusal to recognize that engaging in sex with someone in this condition is sufficiently reprehensible such that it should be criminally prohibited. To return to the questions posed in the opening paragraph: why can’t courts find that a woman who is “falling down drunk,”¹⁶⁹ or has vomited on herself and can’t remember anything that happened,¹⁷⁰ or is unable to dress herself properly and is “puking up leaves”¹⁷¹ lacks the capacity to consent to sex? Why would incorporating

¹⁶⁷ *Hutchinson*, *supra* note 11 at para 18.

¹⁶⁸ *R v Al-Rawi* 2017, *supra* note 42.

¹⁶⁹ *Tariq*, *supra* note 2.

¹⁷⁰ *TJ*, *supra* note 3.

¹⁷¹ *KC*, *supra* note 4.

into the legal standard the ability to appreciate the risks and consequences (or some of them) of choosing to engage in the sexual activity in question “go too far?”¹⁷² Unfortunately the answer to these questions may be rooted in problematic social assumptions about women who get drunk: that they are partly to blame for what occurred; that they are not to be trusted; that, when drunk, women will consent to sex anywhere with anyone even if they would not engage in this same behavior when sober. Equally problematic is the attitude that the sexual predation of women in this condition is caddish not criminal.

The legal standard applied in sexual assault cases involving severely intoxicated women should require more than the rudimentary ability or awareness necessary to know that sexual contact is occurring and that one could say no. Providing trial judges with a more demanding legal standard would encourage them to give more weight to evidence of severe intoxication short of unconsciousness. However, raising this threshold (through both the evidentiary proxies relied upon to establish lack of capacity and the legal standard itself) will only be effective if we can eliminate the influence of discriminatory social assumptions and recognize that the sexual predation of drunk women warrants the criminal law’s censure.

¹⁷² *Al-Rawi* (NSCA), *supra* note 1 at para 61.