November 24, 2015

While You Were Sleeping: Sexual Assault Involving Intoxicated or Unconscious Complainants

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Case Commented On: *R v Garrioch*, 2015 ABCA 342

One of the contexts in which women are particularly susceptible to sexual assault is when they are intoxicated, asleep or unconscious. This context also creates challenges when it comes to assessing consent. Section 273.1(2)(b) of the *Criminal Code* specifically provides that no consent to sexual activity is obtained where "the complainant is incapable of consenting to the activity", and this section has been interpreted to include circumstances where the complainant is unconscious or incapacitated by intoxication (see *R v Esau*, [1997] 2 SCR 777). Advance consent to sexual activity that takes place while the complainant is unconscious or asleep is also outside the scope of the consent provisions (see *R v JA*, [2011] 2 SCR 440; 2011 SCC 28 and see my post on that decision here). In addition, section 273.2 of the *Criminal Code* requires the accused to take reasonable steps to ascertain whether the complainant was consenting before he can raise the defence of a mistaken belief in consent. The difficult cases arise where the complainant's intoxication is seen to fall short of producing incapacity to consent, but at the same time creates problems with her ability to recollect the incident in question. This type of scenario was at issue in a recent Alberta case, *R v Garrioch*, 2015 ABCA 342.

In *Garrioch* the accused was charged with sexual assault against two complainants, both described as having been "very intoxicated" at the time. The sexual assaults were alleged to have occurred at a party. At trial, the accused was convicted of sexual assault against only one of the complainants, N. N testified that "she fell asleep or passed out on a couch in the living room, [and] woke up in pain to find the appellant having anal sex with her. She told him to stop and fell back asleep until morning." In the morning she noted blood in the toilet, anal pain, and soreness in her "other area" (at para 2). She testified that she did not consent to either vaginal or anal sex with the accused, but could not recall if she had said anything that would have led him to believe she was consenting. The accused testified that he and N had consensual vaginal sex and denied having anal sex, although he had earlier provided a statement to the police that he had both vaginal and anal sex with N. The trial judge found that the complainant was not so intoxicated that she was unable to consent to some sexual activity, but also that her level of intoxication meant that she did not have a good recollection of events. She was "prepared to accept that the complainant had consented to vaginal intercourse although she could not remember having done so" (at para 5), but convicted the accused of sexual assault in relation to the anal sex.

On appeal, the accused argued that the trial judge's findings on consent to the vaginal and anal intercourse were inconsistent and that his conviction should accordingly be overturned. The Court of Appeal (Justices Picard, Paperny, and Rowbotham) disagreed, accepting the Crown's argument that the trial judge's finding of consent to vaginal intercourse was not based on a negative credibility determination against the complainant that would have tainted her credibility regarding anal sex as well. Rather, it was the complainant's level of intoxication that led the trial

judge to conclude that she could not remember the events clearly (at para 7). On the other hand the trial judge "gave detailed reasons as to why she believed the complainant's evidence that anal intercourse had occurred, including the pain the act caused her at the time and for days following the event" (at para 9). The accused's conviction based on non-consensual anal intercourse was upheld on appeal. The Court did not mention *R v JA* and the legal inability to consent to sexual activity that occurs during unconsciousness, which one would have thought to be relevant on these facts.

Cases involving women who were unconscious or asleep at the time of the sexual assault, whether because of intoxication, disability, medication or otherwise, are numerous, yet in spite of the *Criminal Code* provisions relating to capacity to consent and the reasonable steps requirement, acquittals are not uncommon in these cases (see e.g. Elizabeth Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration against Unconscious Women" in Sheehy, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012) 483; Janine Benedet, "The Sexual Assault of Intoxicated Women" (2010) 22 Canadian Journal of Women & the Law 435). Acquittals may be based on the memory issues already noted, or on the failure of intoxicated complainants to live up to the standards of the "ideal victim" (see e.g. *R v Wagar* and ABlawg posts on that case here and here; see also Emily Finch & Vanessa Munro, "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study" (2005) 45 British Journal of Criminology 25).

This context was, in part, what led the Women's Legal Education and Action Fund (LEAF) to argue against the recognition of advance consent in *JA* (see LEAF's factum here; I was a member of the committee that developed LEAF's arguments). In situations involving intoxication especially, it would be relatively easy for the accused to argue that the complainant had simply forgotten that she consented beforehand to sexual activity that occurred while she was passed out. As determined by a majority of the Supreme Court in *JA*, however, consent requires an ongoing, conscious state of mind while the sexual activity is occurring. Only this interpretation protects against the risk that the conscious party might exceed the limits of specific sexual activity that was agreed to in advance of the other party becoming unconscious. Similarly, only this interpretation protects the unconscious party's right to revoke her consent if circumstances change, are not as she expected, or she otherwise changes her mind. The right to revoke consent is recognized in section 273.1(2)(e) of the *Criminal Code*, which provides that no consent is obtained "where the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity."

Nevertheless, there have been arguments that advance consent should be permitted in cases involving truly consenting sexual partners. Several dissenting justices (led by Fish J) took this position at the Supreme Court, raising concerns about the "sleeping spouse" scenario and whether intimate partners might be criminalized for awakening each other with a kiss or caress (For discussions see Elaine Craig, "Capacity to Consent to Sexual Risk" (2014) 17 New Criminal Law Review 103; Joshua Sealy-Harrington, "Tied Hands?: A Doctrinal and Policy Argument for the Validity of Advance Consent" (2014) 18 Canadian Criminal Law Review 119; Hilary Young, "*R. v. A.(J.)* and the Risks of Advance Consent to Unconscious Sex" (2010) 14 Canadian Criminal Law Review 273).

One solution proposed by Justice Fish to deal with this scenario was the approach taken in England and Wales, where the *Sexual Offences Act 2003* (UK), c 42, introduced an evidential presumption of non-consent where the complainant was asleep or otherwise unconscious. For

Justice Fish, this legislation offered a suggestion for how Parliament might respond to evidentiary concerns arising from a recognition of advance consent in Canada, such as the complainant not being able to recall what happened while she was asleep or unconscious coupled with the usual absence of corroborative evidence.

The *Sexual Offences Act 2003* provides in section 74 that "a person consents if he agrees by choice, and has the freedom and capacity to make that choice." Section 75 lists a number of evidential presumptions related to consent. Generally, if it is proved that the accused committed the relevant act and that certain circumstances existed to his knowledge, the complainant is presumed not to have consented unless sufficient evidence is adduced to raise an issue as to consent or reasonable belief in consent (section 75(2)). In addition to the presumption created where "the complainant was asleep or otherwise unconscious at the time of the relevant act," evidential presumptions also exist in circumstances where there was violence or threats of violence against the complainant or another person; the complainant was unlawfully detained; the complainant was unable to communicate consent because of physical disability; and the complainant was given a stupefying substance (section 75(2)(a)-(f)). Additionally, the *Sexual Offences Act 2003* provides for conclusive presumptions against consent in circumstances where the accused "intentionally deceived the complainant as to the nature or purpose of the relevant act" or "intentionally induced the complainant to consent to the relevant act" by impersonation (section 76).

This is a very different scheme than Canada's *Criminal Code*, where we have a number of conclusive presumptions against consent in section 273.1(2) but no evidential presumptions. Indeed, the *Sexual Offences Act 2003* has been critiqued on the basis that there is no apparent rationale for differentiating between the circumstances leading to conclusive versus evidential presumptions. Moreover, the lists of presumptions are closed, and omit certain circumstances where consent might reasonably be presumed to be absent, such as the complainant's incapacity caused by voluntary intoxication (See Jennifer Temkin and Andrew Ashworth, "The Sexual Offences Act 2003:(1) Rape, sexual assaults and the problems of consent" [2004] Criminal Law Review 328, 336-7).

With respect to the evidential presumption involving complainants who were asleep or otherwise unconscious, Temkin and Ashworth argue that it "takes the law backwards" by altering the conclusive presumption at common law that there was no consent in these circumstances (at 337). The common law position was based on the understanding – similar to that of the majority of the Supreme Court of Canada in *JA* – that consent must be present at the time of the sexual act.

Case law on the application of the evidential presumption regarding sleeping or unconscious complainants in England and Wales raises some of the concerns enumerated by LEAF in its intervener factum in *JA*.

R v White, [2010] EWCA Crim 1929, involved a scenario where the accused took intimate photographs of himself engaged in sexual activity with the complainant, his former intimate partner, on his mobile phone. She testified that she did not consent to the photos being taken or the sexual activity they captured, which must have occurred while she was asleep. In cross-examination "she agreed that the images could have been taken after an act of consensual sexual

intercourse [and that there] had been occasions when she had consented to sexual intercourse with the appellant when she had been drinking alcohol" (at para 3). This evidence was seen to be sufficient to rebut the evidential presumption relating to unconscious complainants by raising an issue of consent or belief in consent. According to the Court of Appeal, the jury's question: "If she gave consent beforehand and then fell asleep during the photo preparation, is the consent still current?" should be answered in the affirmative and provide a defence to the accused (at paras 9, 12).

In another case, *R v Ciccarelli,* [2011] EWCA Crim 2665, the Court of Appeal considered a situation where the complainant was sexually touched by the accused while she was "fast asleep or unconscious through drink, and possibly drugs, without her consent" (at para 4). The only issue was the accused's reasonable belief in consent. The trial judge concluded that sufficient evidence had not been raised to leave the issue of belief in consent with the jury. The Court of Appeal upheld this ruling, but also suggested that if there had been a previous relationship between the parties, that may have affected the question of whether there was sufficient evidence to rebut the presumption (at paras 5, 19).

This case law on section 75(2) of the *Sexual Offences Act 2003* reinforces concerns with respect to the difficulties of proof in cases involving sleeping or unconscious partners. My research on marital rape in Canada shows that cases involving sleeping or unconscious complainants often only come to light where the accused recorded the sexual activity, as in *White* (see e.g. *R v Berry*, 2013 BCSC 1878; 2014 BCSC 284; 2015 BCCA 210; *R v Truong*, 2012 ABQB 661; 2013 ABCA 373; *R v NW,* 2013 ABCA 393; *R v Cassels*, 2013 MBPC 47; *R v BJW*, 2011 ONSC 5584; *R v JH*, 2013 ONCA 693; *R v DR*, 2013 ONSC 161). But in *White* the finding of sufficient evidence to rebut the presumption meant the case should have gone to the jury to decide whether the complainant consented to the sexual activity that occurred while she was asleep. In Canada, that activity would fall outside the parameters of the consent provisions. The evidential presumption in the *Sexual Offences Act 2003* also raises the possibility of the introduction of sexual history evidence and the relaxation of standards around consent and mistaken belief in consent in cases involving a previous relationship between the parties, as the Court of Appeal adverted to in *Ciccarelli*.
I therefore maintain that the Supreme Court majority was correct in *JA* by holding that advance consent should not be permitted within the context of Canadian sexual assault law, and disagree with the dissent's suggestion that it would be appropriate to introduce an evidential presumption similar to that under the *Sexual Offences Act 2003*. Even without an evidential presumption, it can be difficult to maintain Canada's affirmative understanding of consent in cases involving complainants who were intoxicated, even to the point of passing out, as *Garrioch* shows.