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"Marriage is not a rugby match": Choking, Consent and Domestic Violence

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Case Commented On: *R. v Gardiner*, 2018 ABCA 298 (CanLII)

Sexual violence – how it is perpetrated and how allegations are handled by those in power – is at the forefront of public consciousness at the moment as a result of #MeToo and, most recently, the Brett Kavanaugh confirmation hearings. But discussions about the legal definition of consent have been happening in Canada for a long time. The current definition of consent dates back to 1992 and was the result of a law reform process that included consultations with groups representing the interests of survivors as well as accused persons. Consent is defined in s 273.1 of the *Criminal Code*, RSC 1985, c C-46, as "the voluntary agreement of the complainant to engage in the sexual activity in question" and it is to be assessed from the complainant's subjective perspective (*R v Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 (SCC)). Among several important principles that are well accepted in the case law (even if they are not always properly applied), consent cannot be implied or given in advance, can always be revoked, and must be present for each sexual activity in a particular encounter as well as the degree of force used for each activity (see e.g. *Ewanchuk*, *R. v. J.A.*, [2011] 2 SCR 440, 2011 SCC 28 (CanLII); *R v Barton*, 2017 ABCA 216 (CanLII); leave to appeal granted, 2018 CanLII 11543 (SCC)).

How does this approach to consent change when the offence is one of domestic violence rather than sexual violence? For a majority of the Alberta Court of Appeal in a recent case, *R. v Gardiner*, 2018 ABCA 298 (CanLII), the answer is – wrongly, in my view – quite a lot.

Facts

Following a trial, Bradan Gardiner was convicted of assault against his common-law partner. That is all the majority judgment of Justices Peter Costigan and Frans Slatter tells us about the relationship between the parties. Justice Myra Bielby's dissenting judgment elaborates that the accused and his partner, Ms. Janvier, had cohabited for 12 years and had three children together. They lived in Janvier South, a hamlet in the Regional Municipality of Wood Buffalo. The altercation that was the subject of criminal charges took place after Ms. Janvier "returned home from her neighbouring sister's house, admittedly intoxicated" (at para 10).

Ms. Janvier was a reluctant witness – according to Justice Bielby, she "clearly did not want to testify against Mr. Gardiner" (at para 12). She failed to attend court despite being served with a subpoena and a warrant for her arrest was issued. Despite her reluctance, Ms. Janvier did testify and her memory was refreshed using an audio recording of her police statement. Here is her account of the incident as described by Justice Bielby (at para 13):

> Ms. Janvier testified that she and Mr. Gardiner "fought consensual" and by this she said she meant "we both fought together... [we] were both equal." After refreshing her

> memory from hearing an audio recording of her written police statement, she testified that during the fight she hit Mr. Gardiner, he pushed her and took her to a window where he grabbed her around the neck and began to choke her. As he was choking her, she was hitting him back. When asked whether she wanted Mr. Gardiner to choke her she replied, in what the trial judge described as being a sarcastic manner, "Yeah, I was asking him to choke me". She later clarified that this meant her answer was "no", she did not want to be choked. While, in cross-examination, she maintained the fight was consensual, she also stated that she did not "like" being choked.

Ms. Janvier and an RCMP officer were the only parties to testify at trial. The officer had responded to Ms. Janvier's call to the police, and arrived at the parties' home to find Ms. Janvier "in distress" and "in a panic" with red marks on her throat and a bleeding nose (at para 25).

Trial Decision

Judge J.R. Jacques convicted Mr. Gardiner of assault, finding that Ms. Janvier did not consent to being choked. His reasoning was as follows (as quoted in paragraph 4 of the Court of Appeal decision):

> … mutual assaults are not consensual fights. Retaliation does not make a consensual fight. And I am inclined to agree with the witness' own sarcasm about who wants to be choked, that it is difficult to imagine that a person would engage in a consensual fight in anticipation that they would be choked. And it is clear that she did not consent to being choked. She characterizes it as a consensual fight, using those words. What she describes does not, to me, appear to be a consensual fight at all. However it started, he backs her up against a window and starts choking her, and she, in what seems to me to be self-defence, punches him back. I find that although it took a review of the statement to elicit it from her, that her description of what happened with respect to the choking is credible. I am of the view that she did not consent to being choked, and that therefore he is guilty of this offence of common assault.

Alberta Court of Appeal Decision

Majority Reasons

In a very short set of reasons, Justices Costigan and Slatter allowed Mr. Gardiner's conviction appeal. Their approach was "that a valid consent to a fight does not require a consent to each and every blow" (at para 3). Rather, drawing an analogy to sporting events, "If the parties do not expressly agree, the consent extends to those blows that might reasonably be anticipated to occur in the course of the fight. The consent is to the risks associated with the fight, not to each and every blow" (at para 3). They found that the trial judge erred by "ask[ing] the wrong question" in assessing whether the complainant consented to the choking (at para 4). According to the majority:

> The proper question was not whether the complainant consented to each and every application of force during the course of the fight, or whether she "wanted" to be choked or hit. The proper question was whether choking was something that both parties accepted might reasonably occur during the fight. In other words, was choking within the ambit of the consent that the two fighting parties gave, or did it materially change the nature of the fight… (at para 5).

Citing *Ewanchuk*, they also found the trials judge's analysis "flawed because it overlooks the rule that consent is a "purely subjective" concept … If the complainant testified that she consented, it is no answer to say that a reasonable person would not have consented in the circumstances, or that viewed objectively it did not appear that she had consented" (at para 7).

In addition to the question of whether Ms. Janvier consented to choking as a matter of fact, the majority also raised the issue of whether she could consent to choking as a matter of law. They noted that one cannot consent to the infliction of bodily harm in the course of a fight, citing *R. v Jobidon*, [1991] 2 SCR 714, 1991 CanLII 77 (SCC), and explained that the Supreme Court had not resolved whether choking constitutes bodily harm. In *R. v. J.A.*, cited above – a spousal sexual assault case – the Supreme Court did not face this issue, but the Ontario Court of Appeal unanimously decided that choking to the point of unconsciousness did amount to bodily harm (see 2010 ONCA 226 (CanLII)). In *Gardiner*, however, the majority indicated that the trial judge had not considered this issue, so they did not pursue it any further.

Although the usual outcome of a successful conviction appeal is a new trial, Mr. Gardiner had served his sentence by the time of the appeal, so the majority allowed his appeal and ordered the charges stayed (at para 9).

Dissenting Reasons

Justice Bielby commenced her reasons by noting that the standard of review for overturning a finding of fact, such as whether there was consent, is that of palpable and overriding error (at para 15). She also noted at the outset of her analysis that the domestic context was a key backdrop for considering the trial judge's reasons and whether there was consent (at paras 21-24, citing *R v Keepness*, 2010 SKCA 76 (CanLII) and *R v Coston***,** 1990 ABCA 200 (CanLII)). In this context, she found that "[e]ven had the trial judge concluded that Ms. Janvier agreed to fight Mr. Gardiner, it was open to him to conclude that consent did not include consent to be choked. He made an express finding that there was no consent to choking based, in large measure, on her express evidence to that effect" (at para 27). In response to the defence argument that Ms. Janvier's consent should be implied from the fact that she struck the first blow, Justice Bielby stated that the trial judge "was not bound to infer that a consent to a physical fight between spouses included implicit consent to be choked" (at para 27). She concluded her assessment of consent in fact as follows (at para 29):

> Marriage is not a rugby match. While it is possible to imagine circumstances where parties agree to participate in activities that create a risk of choking, those circumstances did not arise on the facts in this case. While the law may be, in relation to sporting events or even barroom brawls, that consent to fight extends to each blow that might reasonably be anticipated in the course of the fight, the social interest in ensuring fair play in a sporting event differs considerably from the social interest in preventing domestic abuse.

As to whether there could be consent as a matter of law, Justice Bielby indicated that this issue did not need to be resolved given the trial judge's finding of a lack of consent in fact. However, she noted that *Jobidon* stood for the principle that consent to bodily harm was only available in situations involving "significant social value" such as sporting events (at para 30, citing *Jobidon* at pp 766-77). In her view,

> Domestic violence has no social value whatsoever, and so may form another situation where consent is not operative, or does not go so far as to include consent to every possible type of blow that might be landed, short of one causing grievous bodily harm. More importantly, perhaps, there are legitimate policy reasons for a strong resistance to recognizing the validity of consent to intentional applications of force in family situations, including notions of breach of trust in domestic/family relationships, preserving the sanctity/safety of one's home, the time and money that goes into policing and prosecuting these matters, the strain on social and family services and the reality that women's shelters are often at full capacity (and may well not exist in remote rural communities such as Janvier South) (at para 31).

With respect to choking more specifically, Justice Bielby noted its "potential to cause serious harm or death" and observed that the injuries sustained by Ms. Janvier might meet the test for bodily harm (at paras 32-33). She questioned whether consent to choking should be available either by implication or as a matter of law, and quoted *R v Bruce*, 1995 CanLII 2442 (BCCA) at paragraph 8, for the point that "consent cannot be inferred in some circumstances where public policy assumes an interest in what goes on between individuals... [including] cases of serious or non-trivial injuries incurred in the course of family violence" (at para 35). Even if consent to choking could be given by implication, Justice Bielby rejected the argument that "withdrawal of that consent can only be effected by express statement," noting that "it would be difficult to make such a statement when one is being choked" (at para 39). She would have dismissed the appeal.

Commentary

In my view, the judgment of Justice Bielby is far superior to that of the majority for its contextual approach to the issues at hand. But even taken on its own terms, the majority judgment is internally inconsistent, as well as being inconsistent with the case law on consent that the majority cites. At first, the majority appears to say that the approach in the context of a consensual fight is an objective one: consent extends to those applications of force that might reasonably be anticipated to occur in the course of the fight. But then, they state that the approach to consent is subjective – seemingly to make the point that Ms. Janvier had indeed consented. However, the trial judge made a finding of fact, based on what he found to be credible evidence, that Ms. Janvier did not consent to being choked. Having relied on a subjective approach to consent based on *Ewanchuk*, the majority should also have considered whether there was consent to each activity in the encounter, or put another way, whether Ms. Janvier revoked her consent when Mr. Gardiner began to choke her. To find that Ms. Janvier consented required reliance on implied consent, an approach discredited in *Ewanchuk*. Although *Ewanchuk* was a sexual assault case and was based on an interpretation of the statutory definition of consent for sexual offences, it is difficult to argue with the logic of the Supreme Court's decision or the policy reasons behind its subjective approach to consent, many of which are relevant in the domestic violence context.

And in any event, isn't the issue of what might reasonably be anticipated to happen during a fight a matter of *mens rea*, going to the accused person's belief in consent, rather than an issue going to the *actus reus*, which focuses on the complainant's subjective consent?

Even if we were to take an objective approach to consent, would we accept that choking was reasonably anticipated to occur in the course of what started as a shoving match? Can we even

answer that question unless we consider reasonableness in light of the domestic context of this case? The majority did acknowledge that "when consent will be recognized in domestic assaults raises difficulty policy issues" but went on to explain that this difficulty was based on the need to avoid the situation where "both participants in a consensual domestic fight would be guilty of assault" (at para 2). However, the domestic violence context obliges the police and Crown to use a "primary aggressor" policy to guide the charging and prosecution of offences, which focuses on "the individual who was the principle excessive aggressor rather than the individual who initiated the violence" and considers the overall context of the relationship (See the Domestic Violence Handbook for Police and Crown Prosecutors in Alberta at 104). Although research shows that this policy is not always applied in practice, it does refute the majority's concern about mutual charges to some extent.

Justice Bielby's judgment does a much better job of recognizing the context of domestic violence and the problems with treating these cases as akin to barroom brawls or fights during sporting events. It also bears mention that in domestic violence cases there may be a power imbalance and history of violence and that the "vast majority" of victims are women (see Statistics Canada, *Family Violence in Canada: A Statistical Profile 2016* at 56).

Justice Bielby was also correct to consider that choking is a particularly harmful form of violence. The Domestic Violence Handbook contains an entire section on strangulation, which states (at 111) that:

> Historically, "choking" was minimized and rarely prosecuted as a serious offence because victims will minimize the level of violence and uninformed officers and prosecutors may fail to recognize it. … Strangulation is one of the most lethal forms of domestic violence. When perpetrators use strangulation to silence their victims, this is a form of power and control. Strangulation has a devastating psychological effect on victims and a potentially fatal outcome.

It is significant to note that amendments to the *Criminal Code* that are currently before Parliament in Bill C 75 would effectively recognize choking as a form of bodily harm in relation to assault and sexual assault, which – if passed – will have implications for whether one can consent to choking as a matter of law:

> **Assault with a weapon or causing bodily harm**
>
> s. 267 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,
>
> (a) carries, uses or threatens to use a weapon or an imitation thereof,
>
> (b) causes bodily harm to the complainant, or
>
> (c) chokes, suffocates or strangles the complainant.
>
> **Sexual assault with a weapon, threats to a third party or causing bodily harm**
>
> **272 (1)** Every person commits an offence who, in committing a sexual assault,
>
> (a) carries, uses or threatens to use a weapon or an imitation of a weapon;

(b) threatens to cause bodily harm to a person other than the complainant;

(c) causes bodily harm to the complainant;

(c.1) chokes, suffocates or strangles the complainant; … (emphasis added to denote amendments)

In terms of the outcome of the appeal, a new trial would have been problematic given the fact that Mr. Gardiner had served his time. However, the staying of the charges by the majority means that the history of violence may not be accurately reflected if these parties were to come before the courts again. A history of domestic violence is relevant not only to issues such as bail and sentencing in the criminal context, but also to custody, access and child protection issues (in Alberta, see the *Family Law Act*, SA 2003, c F-4.5, s 18(2)(b)(vi) and the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 1(3)(a)(ii)(C)).

A new trial would also have been difficult in light of Ms. Janvier's reluctance to testify – a not uncommon situation in domestic violence cases, as many complainants have emotional and financial ties to the accused, as noted by Justice Bielby (at para 24). The judgment doesn't indicate whether the parties are Indigenous, but if that was the case then an important dimension for courts to consider is that reluctance to testify is often intensified for Indigenous women, especially those living in small communities. To return to the social context that I invoked at the beginning of this post, it is important to recognize that not all victims of violence choose to tell their #MeToo stories for a whole host of reasons. But Ms. Janvier did tell her story, even if reluctantly and with some sarcasm, and the majority of the Court of Appeal failed to provide compelling reasons for overturning the trial judge's finding that she did not consent to being choked.

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