

Consciousness and Consent in Sexual Assault Cases

By Jennifer Koshan

Cases Considered:

[R. v. J.A.](#), 2011 SCC 28

Can a person consent in advance to sexual activity that occurs while she is unconscious? A majority of the Supreme Court of Canada recently answered this question in the negative in *R. v. J.A.*, 2011 SCC 28, taking the same approach as a majority of the Alberta Court of Appeal in *R. v. Ashlee*, 2006 ABCA 244. There were strong dissents in each case, however, indicating that the resolution of this issue is far from obvious for some judges. Also interesting is that judges on both sides of the issue frame their analyses in terms of the sexual autonomy of the complainant, and see their decisions as consistent (or at least not inconsistent) with the leading Supreme Court of Canada authority on consent, *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. This comment will discuss the *J.A.* and *Ashlee* decisions and assess the merits of the different reasons for decision in light of the applicable statutory provisions and case law and the courts' attention (or lack thereof) to context.

The Law of Consent

Consent is one of the essential elements of the *actus reus* of all assault offences. Since 1992, the *Criminal Code of Canada*, R.S.C. 1985, c.C-46, has defined consent in sexual assault cases as follows:

273.1 (1) Subject to subsection (2) and subsection 265(3), “consent” means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) 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.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 31, the Supreme Court interpreted this provision to mean that there is no concept of implied consent recognized in Canadian sexual assault law. The Court held that the consent element is an affirmative one which can be satisfied by evidence that the complainant did not say “yes”, as well as by evidence that she said “no” (at para. 45).

The complainant was conscious in *Ewanchuk*, so no issue specifically arose in that case as to the interpretation of consent in those circumstances. However, in the earlier case of *R. v. Esau*, [1997] 2 S.C.R. 777 at para. 73, Justice Beverley McLachlin (as she then was, in dissent) had this to say about unconscious complainants (albeit in the context of mistaken belief in consent, an aspect of *mens rea* rather than *actus reus*):

The complainant in this category lacks the capacity to communicate a voluntary decision to consent. Such lack of capacity would be obvious to all who see her, except the wilfully blind. This makes any suggestion of honest mistake as to consent implausible. To put it another way, the necessary (but not sufficient) condition of consent - the capacity to communicate agreement - is absent. The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent.

The Ashlee decision

In *R. v. Ashlee*, 2006 ABCA 244, a driver came upon two men lying on a sidewalk in Edmonton with a woman in between them, and both men appeared to be fondling the woman’s breasts. After circling the block, the driver noted that the woman appeared to be unconscious, and called the police. The driver stayed until the police arrived, and observed that the woman was “out cold” and did not move during this time. When the police arrived about five minutes later, they found the woman’s shirt pulled up with her left breast exposed, and each man had a hand on one of her breasts. The woman was unresponsive and was taken by ambulance to the hospital, where she was still unconscious thirty minutes after arriving.

At trial, the Crown called the driver as its primary witness and did not call the woman to testify. The defence argued that absent evidence from the woman that she had not consented prior to losing consciousness, the accused must be acquitted. The trial judge accepted the Crown’s argument that even if the woman had consented prior to becoming unconscious, her consent was vitiated by unconsciousness. On summary conviction appeal, the defence arguments on consent were accepted and the convictions were overturned.

In a decision written by Justice Marina Paperny (Justice Donald Lee concurring), a majority of the Alberta Court of Appeal restored the decision of the trial judge. The majority began its decision by noting that the preamble of the 1992 amendments to the *Criminal Code* “expresses concern about the prevalence of sexual assault against women and children and was intended to ensure the full protection of their *Charter* rights. It was drafted to reinforce the understanding

that women have an inherent right of control over their own bodily integrity and that human dignity and equality rights demand nothing less” (at para. 12).

Turning to the wording of s.273.1 of the *Criminal Code* and its proper interpretation, Justice Paperny set out several general principles. First, incapacity to consent, now codified in s.273.1(2)(b) but deriving from the common law, is a question of fact that can be established without the testimony of the complainant in some circumstances (at paras. 18-21). Second, consent must be assessed in relation to the activity in question at the time of the activity (at para. 24, citing *Ewanchuk* at para. 26). Third, consent is ongoing and can be revoked after initially given (at para. 25, citing s.273.1(2)(e)). Fourth, just as there is no defence of implied consent, there is no defence of prior consent to sexual activity – consent must be assessed at the time of the activity in question. Because consent is an ongoing state of mind, it ends when the complainant becomes unconscious and incapable of consenting (or of revoking consent) (at paras. 27-29, citing McLachlin J. in *Esau* and s.273.1(2)(e)).

Applying these principles to the case at hand, the majority noted that there was uncontradicted evidence at trial which established the incapacity of the complainant to consent to the sexual activity in question. The summary conviction appeal judge’s finding that the complainant may have consented prior to becoming unconscious “resurrected gender stereotypes that have long been laid to rest” (at para. 37). According to Justice Paperny, “It is highly unlikely, bordering on the absurd, that a woman would consent, in anticipation of her pending unconsciousness, to two men exposing and fondling her breasts on a public street in broad daylight in downtown Edmonton” (at para. 38). In any event, any prior consent would have been vitiated by the complainant’s unconsciousness as a matter of law (at para. 40).

Justice Carole Conrad wrote a dissenting judgment in *Ashlee*. For Justice Conrad, consent need not be contemporaneous with the sexual activity in question, provided the complainant had agreed to the particular activity, even if it was to occur while she was unconscious, and had not withdrawn consent (at paras. 67, 70). Justice Conrad argued that the key word in s.273.1(2) was “obtained”, such that the focus should be on the complainant’s capacity to consent at the time when consent was given rather than subsequent to that time (at para. 68). The relationship between the accused and complainant was also seen as important by Justice Conrad: “It is certainly foreseeable that in intimate relationships partners may well have agreed to sexual touching while one partner or the other is asleep or, for that matter, in circumstances where either becomes unconscious from alcohol” (at para. 71). Even in cases regarding strangers, however, the Crown was required to prove subjective lack of consent on the part of the complainant (unless there was evidence that the accused came upon the complainant while she was already unconscious) (at paras. 68, 81). Justice Conrad rejected the Crown’s argument that Parliament intended to create an offence for touching anyone sexually while unconscious (at paras. 75, 83), and found that instead, Parliament had chosen to “preserve and protect the integrity of an individual’s right to choose when and how to be touched” (at para. 75). Because there was no evidence that the complainant had not consented in advance to being fondled while unconscious (at para. 90), Justice Conrad would have dismissed the Crown’s appeal.

The J.A. decision

J.A. and K.D. were long-term intimate partners. On the evening in question, J.A. and K.D. engaged in erotic asphyxiation, a practice they had experimented with before with K.D.’s consent. J.A. choked K.D. until she was unconscious, and when K.D. regained consciousness after what she estimated to be about three minutes, her hands were tied behind her back, she was

on her knees, and J.A. was inserting a dildo into her anus. In a videotaped statement to the police, K.D. indicated that she did not consent to anal penetration. J.A. was charged with a number of offences including aggravated assault, sexual assault, and breach of probation.

At trial, K.D. recanted her testimony that she had not consented to the sexual activity in question, and was treated as a hostile witness. Even in the face of K.D.'s inconsistent evidence, Madam Justice D.M. Nicholas found that while K.D. had consented to being choked into unconsciousness, she had not consented to being anally penetrated while unconscious. K.D.'s conflicting testimony on the issue of consent was said to be "typical ...of a recanting complainant in a domestic matter" ([2008 ONCJ 195](#) at para. 8). In the alternative, the trial judge found that as a matter of law, K.D. could not consent to sexual activity that took place while she was unconscious. She based this decision on the holding in *Ewanchuk* that consent cannot be implied in sexual assault cases, and adopted the reasoning of the Alberta Court of Appeal in *Ashlee* that a person cannot consent to sexual acts committed on them while unconscious ([2008 ONCJ 195](#) at para. 40).

A majority of the Ontario Court of Appeal (Madam Justice Janet Simmons and Mr. Justice R.G. Juriansz) overturned the trial decision on the question of whether the complainant could have consented as a matter of law. According to the majority, there was "no basis for holding that, as a matter of general principle, a person cannot legally consent in advance to sexual activity expected to occur while the person is either unconscious or asleep" ([2010 ONCA 226](#) at para. 69). Instead, permitting consent in such circumstances was seen as "entirely consistent" with the Supreme Court's statement in *Ewanchuk* that control over one's body "lies at the core of human dignity and autonomy" (at para. 78, citing *Ewanchuk* at para. 28). Justice Harry La Forme dissented, holding that "*Ewanchuk* conclusively establishes that ... prior consent is not effective as a matter of law because unconsciousness deprives the person consenting of the ability to express consent or know whether they are consenting at the time the sexual activity occurs" (at para. 117).

All justices at the Ontario Court of Appeal agreed that the evidence could not support the trial judge's finding that the complainant had not consented in fact to the sexual activity in question on a standard of proof beyond a reasonable doubt. Therefore, in the Crown's appeal as of right to the Supreme Court of Canada, the only question was whether the complainant's consent was legally valid.

The Supreme Court majority judgment in *J.A.* was written by Chief Justice McLachlin (Deschamps, Abella, Charron, Rothstein and Crowell JJ. concurring). McLachlin C.J. framed the issue as "whether consent for the purposes of sexual assault requires the complainant to be conscious throughout the sexual activity" (at para. 21). After setting out the consent provisions of the *Criminal Code*, McLachlin C.J. stated that in her opinion, "Parliament viewed consent as the conscious agreement of the complainant to engage in every sexual act in a particular encounter" (at para. 31). This interpretation did not require the creation of a new category of non-consent under s.273.1(2), but flowed from the interpretation of the existing categories in that section setting out the circumstances in which consent is vitiated.

Chief Justice McLachlin made many of the same points on the interpretation of s.273.1 as Justice Paperny made in *Ashlee*, although she did not cite that decision. For example, the proper focus of s.273.1 was said to be on the sexual activity in question, which suggested that "the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind" (at para. 34). The stipulation that no

consent is obtained where the complainant is incapable of consenting (s.273.1(2)(b)) suggested that “Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent”, including persons who were unconscious, again indicating that consent was intended to mean “the conscious consent of an operating mind” (at para. 36, citing *Esau*). The ability of a complainant to revoke consent at any time was also said to support the position that Parliament intended consent to be on-going and the product of a conscious mind (at para. 40, citing s.273.1(2)(e)). To the extent s.273.1(2)(e) deals with the *expression* of consent, McLachlin C.J. noted that it was applicable to the accused’s *mens rea* rather than to the complainant’s subjective state of mind; however this provision was still seen as relevant to a consideration of the proper interpretation of consent for unconscious complainants.

Similarly, McLachlin C.J. found it useful to consider the *Criminal Code* provisions on mistaken belief in consent, even though this defence was not at issue in the case. Section 273.2 of the *Criminal Code* provides as follows:

273.2. It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused’s belief arose from the accused’s

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Citing s.273.2(b), McLachlin C.J. queried how someone could take reasonable steps to ascertain whether a person was consenting if that person was unconscious (at para. 42). This too supported the view that Parliament did not intend to include advance consent for sexual activity occurring during unconsciousness within the *Criminal Code* definition of consent.

The majority judgment in *J.A.* also responded to the arguments in favour of permitting advance consent, including those relied on by a majority of the Ontario Court of Appeal and the dissenting justices at the Supreme Court (Justices Fish, Binnie and LeBel). First, on the argument that advance consent equates to actual consent since the complainant cannot change her mind once unconscious, McLachlin C.J. noted that this argument is contrary to *Ewanchuk*’s holding that consent must be assessed contemporaneously with the sexual activity in question, and it “effectively negate[s] the right of the complainant to change her mind at any point in the sexual encounter” (at para. 53). Second, the majority rejected the argument that advance consent to medical treatment while unconscious (and other scenarios involving touching during unconsciousness) should be seen as analogous to the case at hand, noting that Parliament had chosen to establish specific rules of consent for sexual assault (at para. 55). Third, the majority responded to concerns about the “kissing a sleeping spouse” scenario and the argument that the interpretation of consent should avoid criminalizing such innocent activity. The majority noted that this hypothetical situation “would only provide a defence where the complainant specifically turns her mind to consenting to the particular sexual acts that later occur before falling asleep” (at para. 60). Further, “[i]f the accused fails to perform the sexual acts precisely as the complainant would have wanted ... the unconscious party will be unintentionally violated” (at

para. 60). The unconscious complainant was seen to be open to exploitation because she typically has no way of knowing what happened to her while unconscious, creating evidentiary problems if a sexual assault prosecution were to ensue (at para. 61). The majority disagreed with the Crown's contention that "mild sexual touching" could be dealt with using the *de minimus* doctrine, stating that "Without suggesting that the *de minimus* principle has no place in the law of sexual assault, it should be noted that even mild non-consensual touching of a sexual nature can have profound implications for the complainant" (at para. 63). More broadly, the majority rejected the argument that consent should be interpreted differently in a marriage or other intimate relationship, finding that this was contrary to Parliament's intent (at para. 64).

Chief Justice McLachlin closed by remarking on the role of the Court (at para. 65):

In some situations, the concept of consent Parliament has adopted may seem unrealistic. However, it is inappropriate for this Court to carve out exceptions when they undermine Parliament's choice. In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.

Turning to Justice Fish's dissenting judgment, he opened by citing a phrase that has been a rallying cry for activists against sexual violence, and then turning that phrase around (at paras. 68-9 and 71, emphasis in original):

It is a fundamental principle of the law governing sexual assault in Canada that no means "no" and only yes means "yes". K.D., the complainant in this case said yes, not no. ... We are nonetheless urged by the Crown to find that the complainant's *yes in fact* means *no in law*. With respect for those who are of a different view, I would decline to do so.

According to Justice Fish, the Crown's position "would deprive women of their freedom to engage by choice in sexual adventures that involve no proven harm to them or to others. That is what happened here" (at para. 73; see also paras. 72, 110-111, 115-116, and 138 for references to sexual autonomy and freedom). Further, the Crown's position "would also require us to find that cohabiting partners across Canada, including spouses, commit a sexual assault when either one of them, *even with express prior consent*, kisses or caresses the other while the latter is asleep. The absurdity of this consequence makes plain that it is the product of an unintended and unacceptable extension of the *Criminal Code* provisions" (at para. 74, emphasis in original). The dissent thus disagreed with the majority that advance consent was vitiated by the existing provisions of the *Criminal Code*.

The dissent also disagreed with how the majority had framed the issue in the case, stating that in its view the issue was "whether a *conscious* person can freely and voluntarily consent in advance to agreed sexual activity that will occur while he or she is briefly and consensually rendered unconscious" (at para. 80, emphasis in original). It found that this question should be answered in the affirmative "absent a clear prohibition in the *Criminal Code*, absent proven bodily harm that would vitiate consent at common law, and absent any evidence that the conscious partner subjected the unconscious partner to sexual activity beyond their agreement" (at para. 80).

Although Justice Fish did not cite *Ashlee* until the end of his judgment (at para. 144), and then only to respond to the Crown's interpretation of the majority judgment in *Ashlee*, his reasons for decision made many of the same points raised by Justice Conrad in dissent in *Ashlee*. For example, Justice Fish focused on the word "obtained" in s.273.1(2)(b), and similarly found that

this wording only vitiated the giving of consent while unconscious and did not preclude advance consent (at para. 101). Nor should s.273.1(2)(e) be interpreted so as to preclude advance consent – “If anything, the wording of s. 273.1(2)(e) suggests that the complainant’s consent *can* be given in advance, and remains operative unless and until it is subsequently revoked” (at para. 104, emphasis in original). As for *Ewanchuk*, Justice Fish disagreed that its rejection of implied consent and its focus on the timing of sexual activity precluded allowing advance consent as a matter of law. His arguments here focused primarily on distinguishing *Ewanchuk* on the facts (at paras. 123-128), and he did not refer to *Esau*.

One point on which the dissent agreed with the majority was that the *de minimus* doctrine was not a satisfactory response to concerns about the criminalization of minor non-consensual touching in the sleeping spouse scenario (at para. 121). However, the inadequacy of this response (in addition to the problems with leaving such matters to prosecutorial discretion – see para. 120) supported Justice Fish’s contention that Parliament could not have intended to criminalize all sexual activity for which advance consent had been given. In terms of how Parliament might respond, Justice Fish pointed to the approach in the United Kingdom, where the *Sexual Offences Act, 2003* (U.K.), 2003, c. 42, introduced a rebuttable presumption of non-consent where “the complainant was asleep or otherwise unconscious” (at para. 144). Based on the law as it currently stands, however, the dissenting justices would have dismissed the appeal.

Commentary

An initial observation about *J.A.* is that the majority’s approach is largely abstract and focused on the law of consent, while the dissenting judgment refers repeatedly to the “facts” of the case. Justice Fish mentioned several times that the complainant had in fact consented to the sexual activity in question and had not revoked her consent (see e.g. paras. 97, 104, 108, 112). He also noted that the complainant had consensual intercourse with the accused immediately after regaining consciousness (at para. 69), suggesting that this supported the view that she had consented to being anally penetrated while unconscious.

Given that the issue was whether the complainant could, as a matter of law, consent in advance to sexual activity that would occur while she was unconscious, the dissent’s focus on the factual existence of consent seems misplaced. Moreover, to the extent that the dissent relied on the facts to support the proposition that its decision promoted sexual autonomy, there were important facts missing from its consideration. As noted in the [Factum of the Intervener](#) of the Women’s Legal Education and Action Fund (LEAF), the accused had been convicted of assaulting the complainant on two previous occasions, and as noted by the trial judge, the complainant’s recantation on the issue of consent was typical of a domestic violence context (at para. 2). A related point made by LEAF is that choking is a major risk factor for intimate femicide (LEAF factum at para. 3). More broadly, LEAF argued that the issue of consent should be addressed with a view to the prevalence of sexual violence against women who are unconscious for a variety of reasons, including “sleep, medication, voluntary or involuntary intoxication, accident, illness, or disability” (LEAF factum at para. 5). Recognition of advance consent to unconscious sexual activity runs the risk of reinstating presumed consent for such women, and of “draw[ing] upon racist narratives about Aboriginal women ... creating real risk to their lives and safety.” (LEAF factum at para. 29).

The abstract nature of the majority judgment is also insufficiently attuned to the context of the case and the broader context of sexual violence. Chief Justice McLachlin’s language seems deliberately gender neutral (see e.g. paras. 3, 24), including in her discussions of sexual

exploitation and the historical stereotypes surrounding sexual assault (at paras. 60, 65). This approach belies the social context of sexual violence, in which women are overwhelmingly the victims and men the perpetrators, which was recognized in the preamble to the 1992 amendments to the *Criminal Code* on consent. Justice Paperny’s judgment in *Ashlee* is to be preferred for its recognition of the broader context of sexual violence. Neither does the majority judgment mention the history of violence between J.A. and K.D. Although the majority’s focus was properly on the law of consent in light of the issue it had to decide, it missed an important opportunity to situate this issue within the broader context of domestic violence and marital rape (for a recent study on marital rape, see my report for the Equality Effect [here](#)).

At the same time, while the majority judgment is focused on the law of consent, it does seem more pragmatic in its approach to consent than the dissenting judgment. For example, Justice Fish repeatedly acknowledges that advance consent “affords no defence where it is later revoked or where the ensuing conduct does not comply with the consent given” (at para. 76, see also paras. 89, 103-104, and 108). However, as noted by the majority, an unconscious complainant is vulnerable to the possibility that the sexual activity may go beyond the scope of consent without her knowledge, and evidence of this non-consensual activity would be difficult to gather (at paras. 60-61). The dissent does not respond to this problem other than by referring to the lack of revocation of consent by the complainant K.D. (at paras. 105, 112), thus failing to deal with the broader issue of how an unconscious complainant could revoke consent.

The majority judgments in *J.A.* and *Ashlee* are also more compelling in terms of their interpretation of the consent provisions of the *Criminal Code* and their application of the case law on consent. *Ewanchuk* in particular seems determinative, having taken a principled approach to interpreting consent in light of the intentions of Parliament evidenced in ss. 273.1 and 273.2 of the *Criminal Code* and the preamble to those amendments. The dissenting judgment in *J.A.*, which distinguishes *Ewanchuk* primarily based on its different factual context (at paras. 126-128), is not persuasive in its approach to the law of consent.

There are at least a couple of questions that remain following *J.A.* First, the Court did not address the issue of whether individuals may consent to bodily harm during sexual activity and whether choking constitutes bodily harm. According to Chief Justice McLachlin, “it would be inappropriate to decide the matter without the benefit of submissions from interested groups” (at para. 21). Second, and as noted above, McLachlin C.J. spoke of a possible constitutional challenge to the law of consent on the basis that it may be “unrealistic” in its exclusion of advance consent. Presumably, a challenge on either issue would be based on the fair trial rights of accused persons. Much of the law of sexual assault has been shaped by such challenges, and it is to be hoped that if such a challenge is brought, the Court will take an approach that sufficiently accounts for the context of sexual violence and the efforts that went in to drafting the law of consent with that context in mind.

Jennifer Koshan was a member of the LEAF subcommittee in R. v. J.A.