

**SEXUAL ASSAULT OF WOMEN WITH MENTAL DISABILITIES:
RETHINKING INCAPACITY AND NON-CONSENT**

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Women with mental disabilities confront sexual assault at an alarming rate. We have argued elsewhere that this reality should be reflected in our understanding of the concepts of consent and capacity in the criminal law of sexual assault (Benedet and Grant 2007a; Benedet and Grant 2007b). In this paper, we examine recent developments in Canadian sexual assault law and consider whether they are adequate to recognize the experience of sexual assault for women with mental disabilities.

In using the term mental disability, we refer to any developmental disability, psychiatric condition or other chronic, non-episodic disability that affects cognition or decision-making. Of course, the range of conditions that might fall within this category is vast and its boundaries not clearly fixed. Disability is both bio-medically and socially constructed in ways that shift with time and place. We are focusing on cases where the complainant is an adult woman with impairments in cognition, memory, and/or intellectual development that affect her ability to understand and make decisions about her sexuality. Our cases include those with formal diagnoses, such as Down syndrome or autism, as well as brain injuries and impairments for which there is no identified cause or label. This variation leads to different challenges for each woman, yet despite these differences we see several issues of common concern.

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Women with mental disabilities are at a higher risk of physical and sexual violence than women generally. Indeed, studies suggest that women with mental disabilities are from 2-10 times more likely to be the victim of sexual assault than a woman without a disability (Roeher Institute 1995; Ticoll and Panitch 1993). In the specific context of Canada, one prevalence study suggests that 39 to 68% of women with a mental disability will be sexually assaulted before they reach the age of 18 (Roeher Institute, 1992). Sexual assaults against women with mental disabilities are also reported and prosecuted at a lower rate than sexual assaults generally (McCarthy, 1999; Keilty & Connelly, 2001). One study, for example, estimated that only one in 30 sexual assaults of a woman with a disability is reported, as compared to one in five for women who do not have a disability (Sobsey 1994).

There are many reasons for the high incidence of sexual assault against women with mental disabilities. Such women are more likely than other women to be dependent on others for their basic needs and their economic welfare. It may be more difficult for them to meet and to develop relationships with people who are not in a position of trust or authority over them. Women with disabilities face high levels of intervention and control in their lives, be it medical, social or parental. This may lead some women with mental disabilities to develop a high level of compliance toward people in a position of authority. They may not be aware that they can refuse to participate in sexual activity simply because they do not want to participate (McCarthy 1999).

There is also a high-level of social segregation for women with mental disabilities both in institutions and in the community. Women with mental disabilities may be denied equal access to education, employment and housing. Poverty is widespread for women with mental disabilities, and poverty and social isolation are both risk factors for sexual assault (Petersilia 2001).

In most studies, caregivers, broadly defined to include doctors, teachers and other service providers, constitute a significant percentage of those who sexually assault women with mental disabilities (Sobsey 1994). Caregivers have ongoing access to women with mental disabilities and there is a relationship of dependency. In addition, a large number of offenders who are not personally in care-giving positions, gain access to women through their caregivers (Sobsey and Doe 1991). Women with mental disabilities become targets for sexual assault, given the low rate of reporting and the tendency to disbelieve their claims.

Canada's criminal sexual assault laws have undergone several major revisions in the last three decades that have attempted to address some of the criticisms of traditional rape law by the women's movement. In this paper, we describe the specific provisions that have been used to address disability in the context of sexual assault, concluding that they have been generally ineffective. Because most sexual assault cases involving women with mental disabilities are prosecuted using general sexual assault laws, we next consider how prosecutions using such laws have failed to offer substantive equality to these women. Instead, women with mental disabilities are often infantilized and disbelieved.

Applying the current legal definition of “non-consent” to women with mental disabilities can also be problematic. Judges, unsure of whether to prioritize protection from abuse or the promotion of sexual autonomy, in the end offer neither.

In our view, these conditions combine to require a reconsideration of basic principles of sexual assault law in a way that foregrounds the issues and concerns of women with mental disabilities. Specifically, we consider both the limitations of our understanding of consent for women with mental disabilities and whether *incapacity* to consent is a concept that should be used more frequently in prosecutions of sexual assaults against these complainants. We use a recent House of Lords decision on capacity to argue against an all-or-nothing view of incapacity, recognizing that a woman may be capable of consenting to some people in some circumstances but not in others. The more traditional approach to capacity may deny a woman with a mental disability any opportunity to consent freely to sexual activity. We also examine other options, such as the requirement that consent be ‘voluntary’ or a shift in focus to the exploitative conduct of the defendant. We evaluate the possibilities of these concepts against a framework that demands both respect for the entitlement of women with mental disabilities to develop a positive sexuality and their right to protection from men’s exploitation and violence.

CANADIAN LEGISLATIVE HISTORY

Canada has used a variety of legislative responses to address the sexual assault of women with mental disabilities (Benedet and Grant 2007a; Backhouse 2008). Canada's first

Criminal Code of 1892 (S.C. 1892, c. 29) contained a provision making it an offence to have ‘unlawful carnal knowledge’ of any ‘female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but which prove that the offender knew, at the time of the offence, that the woman belonged to one of the groups listed² Later versions were expanded to include women who were ‘feeble-minded’, which the *Code* defined as ‘a person in whose case there exists from birth or an early age, mental defectiveness not amounting to imbecility yet so pronounced that he or she requires care, supervision and control’ (S.C. 1922, c. 16, s. 10).

In the major 1982 redrafting of the sexual offences in the *Criminal Code*, the old offences of rape and indecent assault were replaced with the gender-neutral offence of sexual assault, which requires proof of the application of force (any physical contact) in circumstances of a sexual nature, without consent. The ‘carnally knowing idiots’ offence was repealed (S.C. 1982, c. 125). The only vestige of it is a reference in the *Code*’s definition of consent, added in 1992, that ‘no consent is obtained where the complainant submits or does not resist because of . . . the complainant’s incapacity to consent’ (R.S.C. 1985, c. C-46, s. 273.1(2)(b)).

In the 1980s and 90s, disability rights groups campaigned for changes in the law which would recognize that persons with disabilities are especially vulnerable to sexual abuse from caregivers and other persons in authority. They lobbied for a specific criminal offence to address sexual assault of persons with disabilities, while also arguing that the

² The provision first entered Canadian law in 1866: S.C. 1866 (49 Vic.), c. 52, s. 1 (2).

law should not prevent women with disabilities from freely consenting to sexual activity, even in some circumstances with a caregiver (Department of Justice 2001).

In 1998, Parliament enacted the offence of sexual exploitation of a person with a disability in s. 153.1 of the *Code*, which makes it an offence to have sexual contact with a person with a disability where there is a relationship of authority or dependency between the accused and the person with a disability, and where the complainant does not consent. The term 'disability' is not defined and consent has the same definitions as for other sexual assault offences. The maximum penalty for the offence is five years' imprisonment. This new offence was clearly modeled on the offence of sexual exploitation of a young person aged 14-17 by a person in authority, found in s. 153(1) of the *Code*, but with one critical difference: it is not necessary for the Crown to prove non-consent in order to establish sexual exploitation of a young person, whereas the Crown must prove the absence of consent by the disabled person to convict under s. 153.1.

The requirement of non-consent in s. 153.1 means that the offence adds nothing to the existing sexual assault provisions. The crime of sexual assault already criminalizes sex without consent. Because sexual assault has a greater maximum penalty than the five year maximum provided for in s. 153.1, and is easier to prove, there is little incentive to lay charges under the new section.³ It is therefore not surprising that in the ten years since s. 153.1 was enacted, it has rarely been used. Four of the seven cases we have found were

³ Both in the House of Commons and in Committee, MPs raised concerns that "the current section 271, which refers to sexual assault for anyone, is much broader and calls for a stronger sentence of 10 years as opposed to 5". MP Richard Marceau, Hansard, April 30, 1998 at 6383-6386. See also *JURI* (March 12, 1998) at 16:45-16:50 (Hon. Anne McLellan); Canada, *Senate Debates* (October 19, 1997) at 269 (Hon. Noel Kinsella).

guilty pleas; a fifth was a decision on a pre-trial procedural motion. In six of the seven cases, the accused was a caregiver or service provider to the complainant; in the seventh case he was the victim's brother (*R. v. Houle*, [2002] J.Q. no 9316 (C.Q.); *R. v. L.(K.)*, [2004] J.Q. no 6783); *R v. Ashley-Pryce*, [2004] 204 B.C.A.C. 186; *R .v Sitch*, [2005] O.J. No. 5969 (C.J.); *R v. MacDonald*, [2008] O.J. No. 97 (S.C.J.); *R v. Kiared*, 2008 ABQB 767). In *R. v. Kiared*, the trial judge convicted the accused of the more serious offence of sexual assault causing bodily harm, but acquitted him of the charge under s. 153.1 because the Crown had failed to prove that the accused, who had driven the victim's bus on a single occasion prior to the assault, occupied a position of trust or authority.

One of these cases resulted in an appeal to the Supreme Court of Canada, and demonstrates how issues of credibility take on particular significance in this context. In *R. v. Dinardo* ((2008) 231 C.C.C. (3d) 177), the complainant alleged that the accused taxi driver had touched her sexually after picking her up at 'a home for mentally challenged persons'. On cross-examination, the complainant testified that she did lie on occasion and that she sometimes made up stories. However, her assertions of sexual assault at the time of the event were consistent with her subsequent accounts. The trial judge disbelieved the accused and convicted him of sexual assault and sexual exploitation of a person with a disability. The Court of Appeal upheld the conviction but the Supreme Court of Canada ordered a new trial on the basis that the trial judge had not given adequate reasons for accepting the complainant's testimony despite its inconsistencies.

The Supreme Court essentially reversed the trial judge's finding on credibility in the guise of an inquiry into the adequacy of reasons for judgment. Even in the context of a provision specifically designed to protect complainants with mental disabilities, the Court was unable to understand that, even if the complainant occasionally made up stories, her repeated and consistent accounts of the sexual assault were not necessarily false. The Court did concede that most of her evidence about the allegations was consistent, but emphasized that she gave inconsistent evidence, particularly about whether and how often she made up stories. At one point during cross-examination she did state that the allegation was a "story" but corrected herself on further questioning, making it clear that she stood behind her allegations. Cross-examination was clearly very difficult for this complainant who was easily led into giving the answer defence counsel wanted to hear. The Court never got to the question of consent because, it appears, it did not believe that a sexual touching even occurred.

This decision illustrates the tendency, even in Canada's highest court, to equate mental disability with an inability to give an accurate account of reality or to know what that reality is. The majority of the cases we reviewed involved women with developmental disabilities, not women who were psychotic or out of touch with reality. Yet the tendency to disbelieve women because of their disability is pervasive. Courts often disbelieve such complainants without any empirical support for the proposition that women with developmental disabilities are more likely to lie or be unable to convey the truth.

NON-CONSENT IN CANADIAN CRIMINAL LAW

In most cases of sexual assault or exploitation of women with disabilities, sexual activity is acknowledged and proof of non-consent is the critical element. In a series of decisions culminating in 1999 in *R. v. Ewanchuk* ([1999] 1 S.C.R. 330), the Supreme Court has held that non-consent as an element of the *actus reus* must be seen from the perspective of the complainant. The issue is whether ‘the complainant in her mind wanted the sexual touching to take place’ (para. 27). If the trial judge believes that the complainant did not want the sexual activity to take place, then there is no consent. There is no such thing as implied consent, and silence or passivity cannot be substituted for consent. The accused’s *perception* of whether the complainant was saying ‘yes’ is strictly a *mens rea* issue. Any assertion by the accused of honest belief in consent is subject to s.273.2 (b) of the *Code*, which requires an accused to take reasonable steps in the circumstances to inquire into whether consent was given.

Ewanchuk may be useful for some women with mental disabilities. For women who acquiesce in sexual activity although not wanting the sexual activity to take place (McCarthy 1999), *Ewanchuk* clarifies that acquiescence is not consent. However, in many cases involving women with mental disabilities, the *Ewanchuk* formulation is problematic because it focuses the consent inquiry on the complainant's thought processes, thus making her credibility a critical issue. The trier of fact must believe that the complainant did not want the sexual activity to take place. Credibility may be assessed in terms of her words and actions before and during the alleged assault as well as by her testimony at trial. This shift to a focus on credibility may disadvantage women

with mental disabilities given that they are less likely to be believed both as complainants and as witnesses (Benedet and Grant 2007a). The recent decision in *Dinardo*, discussed above, shows how this tendency may exist even in Canada's highest court.

This is not the only problem with the *Ewanchuk* formulation. How does the test work, for example, for a woman who is unable to remember what was going on in her mind at the time of the assault (*R. v. Harper*, [2002] Y.J. No. 38 (QL) (S.C.)), or the woman who has difficulty communicating those thoughts to a court (*R. v. Parrott*, [2001] 1 S.C.R. 178)? Similarly, what of the woman who never even thought about consent because she didn't know she had the right to say no to sexual activity, particularly with an authority figure? Or a woman who may acquiesce to sexual activity because she thinks it is the price of social inclusion? Clearly, *Ewanchuk* has its limits in addressing the nature of non-consent for some women with mental disabilities and it is these limits that lead us to look elsewhere for other legal doctrines that might better address the reality of sexual assault for women with mental disabilities.

Voluntary Consent

Section 273.1(1) of the *Code* defines consent as requiring 'the *voluntary* agreement of the complainant to engage in the sexual activity in question'. If a woman feels that she has no option but to consent, is that consent voluntary? In a leading case on voluntariness, *R v. Stender* ((2004) 188 C.C.C.(3d) 514 (Ont.C.A.), *aff'd* [2005] 1 S.C.R. 914), the accused and the complainant had been in a romantic relationship, which had ended prior to the

sexual assault. The accused wanted to reconcile and threatened to disclose sexually explicit photos of the complainant if she did not have sex with him again; she complied. The accused was acquitted at trial because, although there was an abuse of power, the trial judge did not find that the coercion in question came within the scope of a criminal ‘threat’ that would vitiate consent.

The Ontario Court of Appeal overturned this finding on the basis that the apparent consent of the complainant was not voluntary. The complainant had repeatedly stated that she only went to the accused’s apartment to delete the photos and that she had told him on both occasions that she did not want to have sex with him. Since she did not want the sexual touching to take place, no consent was present. The Supreme Court of Canada affirmed this decision. In order for consent to be voluntary it has to be the free choice of the complainant, and not the product of a “deceived, unconscious or compelled will” (*St-Laurent v. Québec* (1993), 90 C.C.C. (3d) 291, leave to appeal to S.C.C. refused, [1994] C.S.C.R. No 55, quoted with approval in *Stender, supra.*).

One could extend this finding to a woman with a mental disability who believes she has no choice but to acquiesce to sexual activity. It remains difficult, however, to set clear boundaries around the concept of voluntariness. Decisions made to engage in sexual activity can be constrained by numerous factors. What about the woman who agrees to engage in sexual activity with her bus driver because she is afraid of losing access to adapted bus services (*R. c. Gagnon* 2000 CanLII 14683 (C.Q.)? What if a woman is encouraged to engage in sexual activity in exchange for small gifts or tokens? It is not

clear that such cases are qualitatively different from the woman who acquiesces in sexual activity to avoid the release of sexually explicit photos. Do any of the women in these instances really want the sexual activity to take place? The open-ended nature of voluntariness may render it no more helpful than the non-consent inquiry generally.

Incapacity to Consent

One option for avoiding the problems with the definition of voluntary consent is to make greater use of the doctrine of incapacity. In Canada, s. 273.1(2)(b) of the *Criminal Code* states that no consent is obtained ‘where the complainant is incapable of consenting to the activity.’ This provision, added in the 1992 revisions, can be understood as codifying the common law, which always held that intercourse with an unconscious woman amounted to rape, and that resistance need not be proven where the woman was incapable of resisting (*R. v. Ladue*, [1965] 4 C.C.C.264 (Y.T.C.A.)). However, it is also of potentially broader application and might be used to find a lack of consent where the complainant’s decision-making ability is impaired by intoxication or mental disability.

Canadian courts have relied on the incapacity provision in both of these situations, but sporadically and without developing a clear standard for how to measure capacity to consent to sexual activity. In the cases involving mental disability that we have reviewed, the Crown typically concedes the complainant’s capacity to consent, even where the ‘mental age’ of the complainant is fixed by experts at a point below the statutory age of

consent which, until recently, was set at 14 years.⁴ For example, in *R. v. Parsons* ((1999) 170 Nfld. & P.E.I.R. 319 (Nfld. S.C.)), the 26 year old complainant was picked up by a stranger in a truck. The complainant was found to have the capacity to consent, notwithstanding evidence that she had a ‘mental age’ of 7 years.⁵

We are critical of the practice of reducing women with mental disabilities to children through the application of crude measurements of intellectual ability, and our reference to the discrepancy between mental age and age of consent should not be understood as an endorsement of this practice. We simply find it surprising that where ‘mental age’ is measured, it is seldom related to the statutory age of consent so as to trigger a consideration of capacity.

The reluctance of the Crown to argue incapacity can be explained in a number of ways. First, as currently constructed, finding a complainant legally incapable of consent amounts to a statement that she cannot have any consensual sexual activity with another person. This approach is a significant limitation on women’s sexual self-determination and thus ought to be applied sparingly. Indeed, Canadian cases that proceed on the basis of the complainant’s incapacity to consent are typically ones in which the complainant has little or no understanding of sexual activity in even the most basic mechanical sense, let alone its consequences or social meaning. Thus in *R. v. Parrott* ([2001] 1 S.C.R. 178), the adult complainant had Down syndrome with cognitive impairments that left her with mental abilities and communication facility similar to a pre-school child. The trial judge

⁴ The age was raised to 16 in 2008: *Tackling Violent Crime Act*, S.C. 2008, c. 6, ss. 13, 54.

⁵ See also *R. v. Hundle*, (2002) 10 C.R.(6th) 37 (Alta. Q.B.) [complainant’s mental age substantially under 16]; *R. v. N.J.D.*, [1990] 112 N.B.R.(2d) 271 (C.A.) [complainant had mental age of 11 year old child].

appears to have accepted her incapacity to consent. Other cases have found incapacity where the complainant has advanced Alzheimer's disease or no real awareness of the parts of her body or of the mechanics of sexual activity.⁶ In most of these cases, the complainant's incapacity appears to be conceded by the defence, and the focus is on whether the sexual activity took place at all. Using incapacity only rarely may be a kind of recognition, however oblique, that women's sexual autonomy ought to be recognized.

Second, if the prosecution argues incapacity to consent, this may undermine the complainant's credibility generally. A consideration of the complainant's capacity to understand sexual matters often opens the door to evidence about her sexual history, which can be extremely destructive of credibility. Where such evidence is introduced by the Crown to show the complainant's limited understanding of sexual matters, it is not even subject to the balancing process normally applied to defence applications to admit such evidence because s. 276(2) of the *Criminal Code*, which creates a screening process for such evidence, refers only to evidence adduced by or on behalf of the accused. Some cases have used an inquiry into capacity as an opportunity to introduce evidence that the complainant is sexually promiscuous (Razack 1999). This kind of evidence fuels stereotypes of women with mental disabilities as over-sexed and sexually indiscriminate. More generally, a detailed inquiry into the complainant's cognitive limitations may cast a pall on her credibility by labeling her as child-like, unreliable and easily confused.

A focus on incapacity to consent does not avoid the possibility that the defendant will raise a mistaken belief defence with respect to consent and also a mistaken belief in

⁶ *R. v. McPherson*, [1999] B.C.J. No. 518 (S.C.); *R. c. Duhamel*, 2002 CanLII 41275 (Que. C.A.).

capacity to consent (*R. v. R.R.* [2001] 159 C.C.C. (3d) 11 (Ont. C.A.)). Such an argument has been successful in the intoxication context, where incapacity is raised more frequently (*R. v. Millar* [2008] CanLII 28225 (Ont. S.C.)).

Do the cases involving incapacity based on intoxication tell us anything by analogy about how to measure capacity to consent? Courts generally require a high degree of impairment by alcohol or drugs before a finding of incapacity is made. Incapacity has been defined as ‘unable to understand the risks and consequences associated with the activity and the sexual nature of the act and [to] realize that [one] can decline to participate’ (*R v. Siddiqui* 2004 B.C.S.C. 1717, para. 55). Conversely, capacity has been defined as ‘some awareness of what is happening and . . . a state of mind capable of processing the information and making a choice’ (*R v. Cedenó* (2005) 27 C.R.(6th) 251 (Ont. C.J.)). The threshold for incapacity appears to be set at quite a high level; even passing in and out of consciousness is not necessarily sufficient for some judges. One challenge that flows from this high standard is that the only women who meet it are so intoxicated that they may have no memory of the events. This catch-22 is also present for women with mental disabilities in that those women incapable of consent may also be incapable of giving evidence in court.

Incapacity, under various definitions, is used much more frequently in American jurisdictions in cases involving sexual assault against complainants with mental disabilities. The American experience highlights another problem with over-reliance on capacity as a way of resolving these cases. Using incapacity as the litmus test may

encourage courts to focus solely on the complainant and to ignore clear evidence of violence by the defendant. Once the court finds that the complainant is mentally capable of consent, the accused is acquitted, without further reference to the clear evidence of force that emerged from the testimony (Stefan 1993). While this result does not flow inevitably from an incapacity test, it is clearly influenced by the view that these are not real sexual assaults but are another form of technical “statutory rape.” A similar pattern has been observed in American cases involving the age of consent (Oberman, 1994; Oberman 2001).

American state penal codes typically contain a provision that makes it an offence to have sexual contact with a person who may be described as some variation of “mentally incapacitated.” For example, the Maryland Penal Code provides (2002, S. 3-307):

“A person is guilty of a sexual offense in the third degree if the person engages in . . . sexual contact with another person who is mentally defective, mentally incapacitated or physically helpless, and the person knows or should reasonably know the other person is mentally defective, mentally incapacitated or physically helpless.”

The maximum penalty for this offence is 10 years’ imprisonment, lower than for the most serious category of sexual offence, which requires proof of force and/or non-consent.

The standard applied by courts to determine whether someone lacks the capacity to engage in sexual activity varies from state to state, but the approaches can be grouped into three categories. One state, New Jersey, requires only that the complainant understand the physical mechanics of sexual activity. A few others require that the complainant understand not only the physical but also the moral and social dimensions of sexual activity. Most adopt a middle ground, and try to determine if the complainant

understands both the physical act and its possible consequences, such as pregnancy and sexually transmitted infections. (Reed, 1997)

Overall, it appears that American courts are much more willing to find a complainant mentally incapacitated, and thus not capable of consenting to sexual activity, than their Canadian counterparts. The label is frequently applied to persons who have some autonomy in the community, for example those who have employment or attend special education classes at college: *State v. Ash*, 2008 WL 2965555; *People v. Mobley* (1999) 72 Cal. App. 4th 761; *People v. Beasley*, 314 Ill. App. 3d 840 (2000).

On one level, this might be applauded as evidence of courts acting to protect vulnerable women from sexual violence. This is particularly true because in some of these cases it appears that courts focus not only on the woman's understanding of sexual matters in the abstract, but also whether she truly has the capacity to refuse the accused in the circumstances before the court. What is of concern, however, is that in so many of these cases there is clear evidence of non-consent on the part of the complainant, and little evidence of anything approaching affirmative or voluntary consent. In many cases, disability is only one factor, along with age, positions of trust or authority and threats or coercion that could contribute to a finding of non-consent. Yet because the "mentally incapacitated" offence removes non-consent as an element, this context is not acknowledged.

An example of this tendency is found in *People v. Thompson* (142 Cal App. 4th 1426 (4th Dist. 2006)). The complainant was an adult woman with Down syndrome who resided in a group home. It was the accused's first day of work as a caregiver. The complainant reported that the accused entered her room at 2:00 a.m. while she was "in a deep sleep" and forcibly penetrated her vaginally and orally, ejaculating on to her bedcovers. He told her not to tell anyone; she reported the assault the next morning. The accused initially denied the contact but when confronted with DNA evidence, acknowledged that he entered the complainant's room while she was sleeping and claimed that he had digitally penetrated her and rubbed his penis on her vagina. He did not indicate that the complainant did anything to invite or encourage this conduct. In fact, he acknowledged that he could not tell whether she was awake or not during the sexual activity and that she never said anything.

There was absolutely no evidence on either version of events to indicate the complainant's voluntary agreement. Indeed, the evidence pointed entirely in the opposite direction: the accused was in a position of trust by virtue of his employment, a near stranger to the complainant, and he described the complainant as entirely passive and silent throughout, and possibly asleep.

Yet the Court reasoned that the prosecution did not proceed under the standard definition of unlawful sexual penetration requiring proof of force and non-consent, because the complainant's detailed recall of events was hard to reconcile with her claim to have been in a "deep sleep" during the assault:

Renee, who is trusting and docile, did not resist; instead, she dissociated—at trial, she was able to describe everything defendant did to her, yet she insisted that she had been “in a deep sleep.” Thus, while the record leaves no doubt that she did not consent, there was some question as to whether defendant *knew* that she did not consent, and also as to whether he used force.

The complainant’s evidence is not inconsistent. Her description of what happened may be quite accurate to describe the experience of being woken from sleep by a sexual assault and freezing in a state of shock.

If the accused did not believe that the complainant was awake, he can in no way argue a belief in consent. Where the complainant does not consent, and the accused takes no steps to ascertain consent and can point to no affirmative indications of consent, proof of additional force should be unnecessary. Unfortunately, the definition of the offence in California requires, in addition to proof of non-consent, proof of force additional to what is inherent in the sexual act itself-, although the force required is not great: *People v. Mom* (2000) 80 Cal. App. 4th 1217, 1224-25. Nonetheless, proof that the victim was asleep can be substituted for proof of force (see West’s Ann. Cal. Penal Code s. 289) and there seems little doubt that, at a minimum, the complainant was asleep when the touching commenced. Surely the state should have made the effort to prove this as an alternate basis for conviction.

At the level of abstract principle, the Court’s description of capacity to consent is laudable. The Court confirms that the capacity to reject sexual activity is less complex than the capacity to give truly informed consent, and that mere assent is not equivalent to consent. In addition, the Court rejects the defence argument that finding the complainant

lacked capacity in this case would mean that no one could ever lawfully engage in sexual activity with her.

As the Court noted at the outset of its reasons, “Obviously, it is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people.

Less obviously, however, in doing so, the state has restricted the ability of

developmentally disabled people to have consensual sex.” The Court avoids this

outcome by noting that:

We do not agree, however, that Renee's incapacity to consent in this case necessarily debars her from all future consensual sexual activity. The relevant statutes require proof that the victim was "*at the time* incapable ... of giving legal consent" (*Pen. Code, §§ 288a, subd. (g), 289, subd. (b)*, italics added.) "It is important to distinguish between a person's *general* ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation.

The Court noted that the accused's caregiving role created a situation of particular

vulnerability that was relevant to the complainant's capacity to consent in this context.⁷

This is no doubt true, but this was not even a case of compliance or purported agreement, it was a case in which the complainant was entirely unresponsive and uncommunicative prior to the sexual touching.

Rather than focus on the predatory and grossly unprofessional actions of the accused, the Court's focus was then turned to the complainant's understanding of sexual matters (and her sexual history), as part of the inquiry into her capacity. The Court recited detailed evidence about the complainant's deficiencies in math, driving, using public transport,

⁷ For another endorsement of a situational approach to capacity, see *People v. Whitten*, 647 N.E.2d 1062 (II. App. 5th 1995) at 1067.

cooking and even remembering to wear underwear. The complainant was examined in detail on her understanding of sexual matters and on a previous sexual relationship she had shared with a developmentally disabled man. This record was achieved through the testimony of her mother and others who were effectively encouraged to list every manifestation of the complainant's disabilities in order to protect her. This was demeaning to the complainant and should have been entirely unnecessary.

We are reluctant to encourage expanded use of 'incapacity' by prosecutors and judges in Canada, at least as that standard is currently applied. Adult women with mental disabilities ought to be presumed to have the right to form intimate sexual relationships, and ought to be supported, wherever possible, in developing such relationships in ways that do not leave them open to violence and abuse. The focus should be on the exploitative behaviour of the accused and not on the complainant's sexual history or her deficiencies in driving or banking.

The current judicial approach to incapacity in Canada tends to assume that the capacity to consent to sexual activity and the capacity *not* to consent to sexual activity are equivalent (*R. v. Jensen*, (1996) 47 C.R.(4th) 363 (Ont. C.A.)). This leads courts to hold that it would be inconsistent to find both that the complainant was incapable of consent and that she did not consent. We are of the view that it is entirely possible, as the California Court of Appeals recognized in *Thompson*, that the complainant may have the capacity to withhold consent, in the sense of knowing that she does not want to be touched by the accused, even where she cannot be said to have the capacity to consent, in the sense of

making a free and informed choice to engage in sexual activity. Thus, in the absence of any evidence that the complainant communicated a clear ‘yes’ to the accused, by her words or actions, it should be found that the complainant has the capacity to not consent and that she in fact did not consent.

The more difficult case is the one in which the complainant appears to go along willingly with the accused’s requests, but there is real concern that the accused may be exploiting the complainant’s disability. Such cases are hard to prosecute successfully. Under the current law, a finding of incapacity makes these women unable to have any legal sex, while a finding of capacity makes their disabilities disappear.

One solution to this problem is to reject an understanding of capacity as an all- or-nothing measure. Such an approach would be more consistent with the way that capacity is understood in other settings. Certainly, mental health professionals would not consider a client’s ability to make financial decisions as an all-or-nothing assessment. The client might be considered capable of making decisions about how to spend a sum of discretionary income, but incapable of making investment decisions. The client might be capable of making certain kinds of financial decisions but only with some support. This situational approach to capacity recognizes that individuals ought to, in so far as possible, be given the opportunity to participate in self-care and decision-making about their own lives.

Applied to the context of sexual activity, we might consider, for example, that a woman with mental disabilities has the capacity to decide to engage in sexual activity with a friend of either sex, and the right to information and support that promotes her sexual health and sexual fulfillment, but that she does not have the capacity to decide to have unprotected sex with a man she does not know in exchange for token compensation.

Recently, the House of Lords, in *R. v. Cooper* ([2009] UKHL 42) recognized an approach to capacity that is situation and person-specific. In *Cooper*, the complainant was a 28 year old woman with the diagnosis of schizo-affective disorder and emotionally unstable personality disorder and had an IQ of less than 75. The effects of schizo-affective disorder may come and go such that the complainant was not necessarily always experiencing symptoms of her condition.

The accused met the complainant in the parking lot outside a mental health resource centre. The complainant had previously been seen by a psychiatrist who was initiating compulsory admission to hospital for her. She told the accused she had been in hospital for nine years and had just been released. She wanted to leave the area as she thought people were "after her". The accused offered to help her and took her to his friend's house. He sold her phone and her bicycle and gave her crack cocaine. She went into the bathroom and he entered the room asking her for a blow job. She testified she was panicking, saying to herself "those crack heads... they do worse to you." She said she did not want to die, so she stayed there and "took it". She then called emergency services and was found by the police running down the street screaming "they are going to kill

me". She was taken back to her hostel; the next day social workers found her distressed and withdrawn, lying in bed in a fetal position. She told them what had happened and they called the police. Her psychiatrist testified at trial that she would not have had the ability to consent to sexual contact at the time of the alleged offence.

The accused was charged under section 30 of the *Sexual Offences Act, 2003*, which provides that:

A person (A) commits an offence if

- (a) he intentionally touches another person (B);
- (b) the touching is sexual;
- (c) B is unable to refuse because of or for a reason related to a mental disorder, and
- (d) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse.

B is unable to refuse if she "lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason)" or if B is unable to communicate the choice to A.

The accused was convicted at trial but that conviction was set aside by the Court of Appeal which held that capacity is an all-or-nothing measure -- a woman either has the capacity to consent to sexual activity or she does not. It is not situation or person specific. In other words, one is either capable of consenting to everyone, in any context or to no one, ever.

The House of Lords held that it was an error to conclude that capacity is not situation or person specific. With respect to situational capacity, the House of Lords made clear that capacity was not an all or nothing phenomenon:

... it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention on Human Rights. The object of the 2003 Act was to get away from the previous "status" based approach which assumed that all "defectives" lacks capacity, and thus denied them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprive them of autonomy in other ways." (at para. 27)

The House of Lords also described the potentially fluctuating nature of capacity, recognizing that a person may have sufficient understanding to consent on one day but not on another day because of variations in her mental state. On the facts of the present case:

The complainant here, even in her agitated and aroused state, might have been quite capable of deciding whether or not to have sexual intercourse with a person who had not put her in the vulnerable and terrifying situation in which she found herself... The question is whether, in the state that she was in that day, she was capable of choosing whether to agree to the touching demanded of her by the defendant" (at para. 26, emphasis added).

It is important to note that non-consent was not an element of the offence charged in *Cooper*. Had the accused been charged with the standard offence of sexual assault, it is significant that there is no evidence in this case that the complainant gave consent to sexual activity. While we welcome this more nuanced analysis of capacity and think that it has the potential to better recognize some of the power imbalances found in many cases

of sexual assault against women with mental disabilities, we also believe that it is important and preferable to recognize non-consent where a woman is able to choose not to engage in sexual activity. It was clear on the facts of this case that, if the complainant's evidence was believed, she did not want the sexual activity to take place. Only if consent is falsely equated with compliance or submission does a consideration of capacity become necessary.

There are potential problems with a situational capacity approach that the House of Lords did not address. It can be hard to distinguish between an assessment of the kinds of decisions that a woman can make, and judgment on the wisdom of those decisions. Deciding that a woman only has the capacity to consent in the context of a long-term relationship is akin to saying that a person has the capacity to spend a sum of discretionary income if they spend it on an umbrella but not on lottery tickets. Our problem with either scenario is that it suggests that the woman does not have the capacity to make bad decisions, only good ones. Such a highly nuanced assessment of capacity may be workable in a care-giving capacity, but harder to apply as a threshold for criminal responsibility.

In our view, capacity should only be raised where there is some indication that the complainant said "yes" to sexual activity. It is only where there is evidence of apparent consent that the inquiry should be made into whether the complainant was capable of giving that consent. This is because the threshold for the capacity to say "no" to sexual activity should be lower than the threshold to say "yes". One need not understand the

nature and character of a sexual touching, or its potential consequences, in order to say one does not want it. By contrast, such understanding is essential in order to give a meaningful “yes” to sexual activity.⁸ Thus, where there is no evidence that a woman has said yes to sexual activity, a finding of non-consent should prevail and it should be unnecessary to examine her capacity to consent. Incapacity should not trump non-consent. It is only where there is evidence that complainant did give positive indications that she wanted sexual activity to take place that capacity should come into play.

A finding that a woman is capable of consenting should not render her disability irrelevant. The disability should also form an important part of the context for assessing whether the complainant consented and/or whether the accused thought she was consenting. Another problem with capacity is that it places all the focus on the complainant and not on the accused and his predatory behaviour. What bothers us about so many of these cases is the clear and purposeful exploitation by the defendant of the complainant where he is so obviously taking advantage of a position of power based on both sex and ability.

Exploitation

We remain troubled by the gap between what the courts recognize as sexual assault and the kind of abusive or exploitative sexual experiences reported by women with mental disabilities. Canadian criminal law fails to deal adequately with cases in which the

⁸ The possibility of different tests for capacity and incapacity was supported by the Court in *Thompson, supra*. The accused argued that one could not withhold consent if one was incapable of giving consent. The Court disagreed, holding that even a person with a severe disability, who was incapable of consenting to sexual activity, could still object to a sexual touching because it felt uncomfortable or like a “bad touch”.

woman's cognitive or intellectual challenges are exploited by a man who targets such a woman because of his belief that she is sexually deprived, compliant or eager to please. Such cases are similar to those where the complainant is intoxicated but not legally incapable of consent, and the accused targets the complainant because of that intoxication. Can these cases be recognized as abuse without disqualifying the complainant from all sexual activity on the ground that she is incapable of consent?

In several of the cases we found examples of what looked like consent, but which was only obtained as a result of the accused's exploitation of the complainant. The *Criminal Code* may partially deal with this situation in that s. 273.1 (3) (c) provides that no consent is obtained where the accused: 'induces the complainant to engage in the activity by abusing a position of trust, power or authority'. This section should capture some situations of exploitation, particularly where a caregiver, a teacher, a doctor or other person in a position of authority or trust is involved. However, there will be cases where exploitation is evident despite no formal relationship of trust, power or authority. In such cases, we would argue that it would be useful to add a similar clause that 'no consent is obtained where the accused induces the complainant to engage in the activity by exploiting her disability.'

The recent decision in *R v. Prince* ((2008) 232 Man.R. (2d) 281 (Q.B.)) demonstrates a number of the problems we have explored in this chapter. The complainant in *Prince* had a mental disability and was said to function at the age of a 6 to 8-year-old in spite of the fact that she lived on her own. The accused lived in her building and had met the

complainant in the hall on a couple of occasions. The accused walked into her apartment uninvited and began to kiss her and to feel her breasts. On the second occasion, he sat briefly with her on the couch and talked to her, then led her into the bedroom and had sexual intercourse with her. His main argument was that she did not say no and did not tell him to stop.

An expert witness testified that the complainant was likely to give the answers she thought the questioner wanted to hear. Despite this testimony, when there were inconsistencies in her testimony on cross examination, the trial judge was unable to assess these inconsistencies in the context of a woman with a mental disability and instead declined to accept her evidence. While we agree with the trial judge's rejection of the Crown's argument that she was incapable of consenting to sexual activity in any circumstance, a more nuanced fact-specific approach might have inquired as to the relevance of her disability to her capacity to consent to sex with a near-stranger who entered her apartment uninvited.

Most importantly, we believe that the Court's attention should have focused more on the accused's behaviour. The accused did not testify, but admitted to police that he was not interested in the complainant and that he felt badly afterwards because he had been 'just using her'. He indicated that she probably had said 'no' but he could not remember. He admitted to knowing that she had a mental disability and yet he took absolutely no steps to determine whether she was consenting. The trial judge found that there was nothing in the situation that should have alerted him to the need to make inquiries and, had the trial

judge not found consent, he would have found that there was an honest but mistaken belief in capacity and consent. The trial judge characterized the accused as someone who ‘regrett[ed] his insensitive behaviour,’ not someone admitting to sexual assault.

This is precisely the type of case where we believe a provision dealing with the exploitative behaviour of the accused could be useful. Perhaps the complainant in *Prince* had difficulty asserting non-consent. However, *Ewanchuk* makes clear that compliance is not consent. Given his knowledge of her disability, Prince’s failure to inquire into consent was exploitative and should have led to criminal liability. In *R. v. Kiared*, discussed above, the trial judge specifically noted that the accused’s actions were exploitative of the complainant’s disability and suggested that such a provision be added to s. 153.1 to capture situations where there is no relationship of trust, authority or dependency.

CONCLUSION

So long as criminal law measures proof of sexual assault according to a non-consent standard, it will be necessary to interpret that element of the offence in light of the realities of women with mental disabilities. If these women are even more likely to be sexually assaulted than other women, our understandings of non-consent, and of affirmative consent, need to be developed in a way that treats these women as paradigmatic, rather than exceptional, victims. At a minimum, this means that behaviour that appears compliant should not be equated with consent, and the definition of

voluntariness ought to be enriched by the recognition that capacity to consent exists along a spectrum and that the effect of external pressures on volition will vary accordingly.

Any assessment of the complainant's capacity to consent should recognize that the threshold level of understanding for the capacity to say no is lower than that required for the capacity to say yes. A capacity analysis should only be applied where there is evidence of consent. Where there is no evidence that a woman said yes to sexual activity, we should not risk removing her autonomy by inquiring into her capacity. Finding that the complainant has the capacity to consent to sexual activity should not make her disability irrelevant. The law must also recognize that intellectual or cognitive disabilities do not make women more likely to lie about being sexually assaulted, even if they may have difficulty communicating their evidence in a way that meets the exacting standards of the criminal trial process.

A more robust understanding of non-consent by necessity shifts the inquiry to the defendant's state of mind and his awareness of that non-consent. Once again, disability is a relevant consideration here, even where the complainant does have the capacity to consent. Canadian law requires the accused to take reasonable steps to ascertain the presence of consent as part of the requirements for a mistake of fact claim. Where the complainant has a mental disability that is in any manner known to the accused, this ought to 'increase exponentially' the steps that are required as 'reasonable' in the circumstances (*R. v. R.R.* (2001), 159 C.C.C. (3d) 11 (Ont.C.A.) at para. 57 *per* Abella J.A.). No single provision will address the difficulties in prosecuting men who sexually assault women with mental disabilities. A complainant's disability must be understood as

relevant to our understanding of consent and voluntariness. A more nuanced approach to capacity, recognizing that the threshold for capacity to say no to sexual activity may be lower than the threshold to say yes, and that capacity is not strictly an on/off switch, but exists in degrees, will help prevent women with disabilities being denied all sexual autonomy. Finally, a provision which focuses on the exploitative behavior of the accused can assist in cases where it is difficult for a complainant to convey what was going on in her mind at the time of the sexual activity. Real reform, however, requires a more fundamental shift in attitudes. This means that women with mental disabilities are no longer to be seen as outside the circle of 'typical' complainants and that judges not treat their evidence in court as inherently suspect.

BIBLIOGRAPHY

Backhouse, C. (2008) *Carnal Crimes*, Toronto: Osgoode Society.

Benedet, J. & Grant, I. (2007a) 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Equality' *McGill Law Journal*, 52: 243-290.

Benedet, J. & Grant, I. (2007b) 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Procedural and Evidentiary Issues' *McGill Law Journal*, 52: 515-554.

Boyle, C. (1984) *Sexual Assault*, Toronto: Carswell.

Clark, L. & Lewis, D. (1977) *Rape: The Price of Coercive Sexuality*, Toronto: Women's Press.

Department of Justice Website, Index of Past Consultations, <http://Canada.justice.gc.ca/en/cons/accea/I.html> (accessed May 10, 2001).

Keilty, Jennifer and Connelly, Georgina. (2001) 'Making a Statement: an exploratory study of barriers facing women with an intellectual disability when making a statement about sexual assault to police' *Disability & Society*, 16. 273-291.

McCarthy, M. (1999) *Sexuality and Women with Learning Disabilities*, London: Jessica Kingsley.

Oberman, M. (2001) 'Girls in the Master's House: Of protection, patriarchy and the potential for using the master's tools to reconfigure statutory rape law,' *De Paul Law Review*, 50: 799-826.

Oberman, Michelle. (1994) 'Turning Girls into Women: Reevaluating Modern Statutory Rape Law,' *J. Crim. L. & Criminology*, 85: 15-79.

Petersilia, J. (2001) 'Crime Victims with Developmental Disabilities: a Review Essay' *Crim. Justice & Behaviour* 28: 655-694.

Razack, S. (1999) *Looking White People in the Eye*, Toronto: UTP.

Roehrer Institute (1992) *No More Victims: A Manual to Guide Counselors and Social Workers In Addressing the Sexual Abuse of People with a Mental Handicap*, North York: Roehrer Institute.

Roehrer Institute (1995) *Harm's Way: The Many Faces of Violence and Abuse Against Persons with Disabilities*, North York: Roehrer Institute.

Sobsey, D. (1994) *Violence and Abuse in the Lives of People With Disabilities: The End of Silent Acceptance?*, Baltimore: Paul H. Brookes.

Sobsey, D., & Doe, T. (1991) 'Patterns of Sexual Abuse and Assault' *Sexuality and Disability*, 9(3): 243.

Stefan, S. (1993) 'Silencing the Different Voice: Competence, Feminist Theory and Law' *U. Miami L. Rev.*, 47: 763-816.

Tharinger, D., Burows Horton, C. & Millea, S. (1990) 'Sexual Abuse and Exploitation of Children and Adults with Mental Retardation and Other Handicaps' *Child Abuse and Neglect*, 14: 301-312.

Ticoll, M. & Panitch, M. (1993) 'Opening the Doors: Addressing the Sexual Abuse of Women With an Intellectual Disability' *Canadian Women's Studies*, 13: 84-87.