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Refining the Judicial Lexicon: The Supreme Court of Canada Refines the Defences of Consent and Mistaken Belief in Consent

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In Canada, the *Criminal Code of Canada*, R.S.C. 1985, contains a number of "sexual offences" including the broad and general one of "sexual assault." The offence of sexual assault has been defined as the touching of "another person in a sexual way without her consent" (see ***R. v. J.A.***, [2011] 2 S.C.R. 440, at paragraph 23), in "circumstances of a sexual nature, such that the sexual integrity of the victim is violated" (see ***R. v. Ewanchuk***, [1999] 1 S.C.R. 330, at paragraph 24). Thus, lack of consent is one of the key elements of the offence of sexual assault.

In ***R. v. Darrach***, 2 S.C.R. 443 (2000), the Supreme Court noted that it "is common for the defence in sexual offence cases to deny that the assault occurred…or to claim an honest but mistaken belief in consent" (at paragraph 58).

These two issues, the nature of consent and the defence of mistaken belief in consent, have been recently considered by the Supreme Court of Canada.

R. V. BARTON

In ***R. v. Barton***, 2019 SCC 33, May 24, 2019, the Supreme Court considered, amongst other issues, how the defence of honest but mistaken belief in consent is to be applied in sexual offence trials. The Court said it was "refining the judicial lexicon" in relation to this defence.

THE TRIAL

Mr. Barton was charged with murder. It was alleged that he killed the victim (Ms. Gladue) in the course of sexually assaulting her, which is characterized in Canada as first-degree murder by section 231(5) of the *Criminal Code*. The accused testified, without a *voir dire* being held or a written application being filed (as required by section 276 of the *Criminal Code*) that he had engaged in sexual activity with the victim on a prior occasion and that his sexual contact with her on the day of her death was consensual. In the alternative, he argued that he believed it to be consensual. He was acquitted.

An appeal to the Supreme Court of Canada was allowed.

THE SUPREME COURT'S RULING

The Supreme Court considered a multitude of issues in this decision, including:

- The scope of the applicability of section 276 of the *Criminal Code*;
- The defence of mistaken belief in consent;
- The meaning of "consent" in the context of the offence of sexual assault;
- The requirement for the accused to take reasonable steps to ascertain consent; and
- When a purported mistake of fact, in the context of the defence of mistaken belief in consent, constitutes an error of law and thus does not constitute a defence.

In addressing these issues, the Supreme Court indicated that it was reformulating the defence of honest, but mistaken, belief in consent to the defence of mistaken belief in "communicated consent." As will be seen, this reformulation could be seen as having significantly limited the availability of the former defence of mistaken belief in consent. To explain the impact of *Barton*, it is useful to start with what "consent" means in Canadian criminal law.

WHAT CONSENT MEANS IN THE CONTEXT OF SEXUAL OFFENCES

The Court noted in *Barton* that the meaning of "consent" in the context of the offence of sexual assault is defined in section 273.1(1) of the *Criminal Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question." The Supreme Court pointed out that consent "is treated differently at each stage of the analysis," including at the *mens rea* stage and the *actus reus* stage.

THE *ACTUS REUS*

The Court held that for "purposes of the *actus reus*, 'consent' means 'that the complainant in her mind wanted the sexual touching to take place.'… Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent — plain and simple…. At this point, the *actus reus* is complete. The complainant need not *express* her lack of consent, or revocation of consent, for the *actus reus* to be established" (at paragraph 89).

THE *MENS REA*

The Court held that for "purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, 'consent' means 'that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused.'… Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed 'the complainant effectively said 'yes' through her words and/or actions" (at paragraph 90).

In summary, in sexual offence trials in Canada, a lack of consent is effectively established when the complainant testifies that she or he did not consent. The complainant does not have to have expressed this lack of consent to the accused. Once lack

of consent is established, the accused will be convicted, subject to the defence of honest, but mistaken, belief in consent.

THE DEFENCE OF HONEST, BUT MISTAKEN, BELIEF IN CONSENT

The Supreme Court commenced its analysis on this issue by considering the general nature of the defence. It noted that a "mistake of fact defence operates where the accused mistakenly perceived facts that negate, or raise a reasonable doubt about, the fault element of the offence…. Honest but mistaken belief in communicated consent falls within this category of defences" (at paragraph 95).

The Supreme Court suggested that though it has "consistently referred" to this defence as "being premised on an 'honest but mistaken belief in consent'… this Court's jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct." Therefore, "it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an 'honest but mistaken belief in communicated consent.' This refinement is intended to focus all justice system participants on the crucial question of communication of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent" (at paragraphs 91 and 92).

The Supreme Court indicated that focusing "on the accused's honest but mistaken belief in the communication of consent has practical consequences." In particular, it significantly limits the manner in which prior sexual contact with a complainant can be used by an accused person to form the basis of the defence of honest belief in consent (at paragraphs 93 and 94):

> Most significantly, in seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she communicated consent to the sexual activity in question at the time it occurred.…For example, in some cases, prior sexual activities may establish legitimate expectations about how consent is communicated between the parties, thereby shaping the accused's perception of communicated consent to the sexual activity in question at the time it occurred… a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.…
>
> However, great care must be taken not to slip into impermissible propensity reasoning. The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the "twin myths", which is prohibited under s. 276(1)(a) of the *Code*.

Thus, in a sexual offence trial in Canada, when an accused person claims that they believed the complainant was consenting to the sexual activity that occurred, the concentration will not be on the accused's belief in consent, but on the accused's belief that the complainant had "communicated" his or her consent.

[T]hree consent-related mistakes of law are relevant: implied consent, broad advance consent, and propensity to consent.

This is a potentially significant difference. This is illustrated by how the Court in *Barton* makes a distinction between when honest belief will constitute a mistake of fact (and thus a defence) and when it will constitute a mistake of law (and thus not a defence).

MISTAKE OF LAW

On this issue, the Supreme Court indicated that if an accused's defence of honest but mistaken belief in communicated consent "rests on a mistake of law — including 'what counts as consent' from a legal perspective — rather than a mistake of fact, the defence is of no avail" (at paragraph 96). The Court also indicated that "three consent-related mistakes of law are particularly relevant: implied consent, broad advance consent, and propensity to consent" (at paragraph 97).

IMPLIED CONSENT

The Supreme Court suggests that the "defence of implied consent 'rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent.'" The Court stated that it is "a mistake of law to infer that 'the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant.'… In short, it is an error of law — not fact — to assume that unless and until a woman says 'no,' she has implicitly given her consent to any and all sexual activity" (at paragraph 98).

BROAD ADVANCE CONSENT

The Supreme Court indicated that broad advance consent "refers to the legally erroneous notion that the complainant agreed to future sexual activity of an undefined scope… a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact" (at paragraph 99).

PROPENSITY TO CONSENT

The Supreme Court indicated that the "law prohibits the inference that the complainant's prior sexual activities, by reason of their sexual nature, make it more likely that she consented to the sexual activity in question…. This is the first of the 'twin myths'. Accordingly, an accused's belief that the complainant's prior sexual activities, by reason of their sexual nature, made it more likely that she was consenting to the sexual activity in question is a mistake of law" (at paragraph 100).

In summary, when an accused person seeks to base a purported belief in consent on such things as the nature of the relationship, silence, or past consensual sexual activity, the defence will fail because it will be based upon a mistake of law.

In Canada, there is an additional factor. It involves the

Taking reasonable steps to ensure that consent is being communicated is not very difficult.

requirement for the accused to have taken "reasonable steps" to ascertain consent.

THE REASONABLE STEPS REQUIREMENT

When mistaken belief in consent is raised in Canada, section 273.2(b) of the *Criminal Code* indicates that this will "not" be a defence unless the accused had taken "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting" (it appears that this should now be read as requiring the accused to take reasonable steps to ascertain that the complainant communicated his or her consent). The Court considered in *Barton* what constitutes reasonable steps.

The Supreme Court of Canada suggested that the "jurisprudence on the reasonable steps requirement under s. 273.2(b) remains underdeveloped, and academic commentators have highlighted the need for greater clarity…. With that in mind… a few comments and observations are warranted to promote greater clarity in the law and provide guidance for future cases" (at paragraph 103).

The Court noted that section 273.2(b) "has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time" (at paragraph 104).

The Court indicated that though "it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps… it is possible to identify certain things that clearly are not reasonable steps" (at paragraph 107):

> …steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law (see *Ewanchuk*, at para. 51, citing *M.* (*M.L.*)). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see *Sheehy*, at p. 518). Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants (see *Sheehy*, at p. 537).

The Court indicated that it "is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated." As an example, the Court referred to a situation in which "the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case" (at paragraph 108).

Though section 273.2(b) of the *Criminal Code* requires that an accused person who seeks to rely on the defence of honest but mistaken belief in consent took reasonable steps to ascertain that the complainant was consenting, it now appears, based upon *Barton*, that such an accused must have taken reasonable steps to ascertain that the complainant had communicated her or his consent.

Taking reasonable steps to ensure that consent is being communicated is not very difficult. Asking is not an onerous requirement. This change in focus has the potential to make it more difficult for an accused person in Canada, who argues that they had a belief in consent, to point to evidence of having taken reasonable steps to ascertain the communication of consent. For instance, anything less than asking if the other party is consenting might subsequently be seen as not having taken reasonable steps. It is important to note that in Canada if the trial judge concludes that the accused did not take reasonable steps to ensure consent was being communicated, the defence of mistaken belief in consent cannot be considered. In *R. v. Daigle*, (1998) 1 S.C.R. 1220, for instance, the Supreme Court held that the accused in that case "could not rely on the defence of honest but mistaken belief since he had not taken reasonable steps to ascertain that the victim was consenting" (at paragraph 3).

One might expect that Crown counsel will now be asking the accused the following question in every case in which the defence of mistaken belief in communicated consent is raised: "Did you ask the complainant if [he or she] was consenting"? Since in most sexual assault trials the answer to this question will be "no," where does this leave the defence of mistaken belief in consent?

The Supreme Court held that a failure to take reasonable steps to ascertain if consent was being communicated, will be "fatal" (at paragraphs 111 and 112):

> …where the accused is charged with a sexual offence under ss. 271, 272, or 273, a failure to take reasonable steps is fatal to the defence of honest but mistaken belief in communicated consent by virtue of s. 273.2(b).
>
> With this in mind, in the context of a charge under ss. 271, 272, or 273 where the accused asserts an honest but mistaken belief in communicated consent, if either (1) there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent or (2) the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain consent, then there would be no reason to consider the presence or absence of reasonable grounds to support an honest belief in consent under s. 265(4), since the accused would be legally barred from raising the defence due to the operation of s. 273.2 (b).[1]

Footnotes

1. Section 272 defines the offence of "sexual assault with a weapon," and section 273 defines the offence of "aggravated sexual assault."

SECTION 276 OF THE CRIMINAL CODE

As we saw earlier, the accused testified concerning his prior sexual contact with the complainant without a *voir dire* being held or a written application being filed. The Supreme Court indicated that "[w]here the accused seeks to adduce evidence of the complainant's prior sexual activities, the accused must make a written application to the court setting out (a) detailed particulars of the evidence the accused seeks to adduce, and (b) the relevance of that evidence to an issue at trial" (at paragraph 64).

In *R. v. R.V.*, 2019 SCC 41, the Supreme Court considered section 276 of the *Criminal Code* and indicated that "[b]road exploratory questioning is never permitted under s. 276. Open-ended cross-examination concerning a complainant's sexual history clearly raises the spectre of the impermissible uses of evidence that the provision was intended to eliminate. Section 276(2)(a) requires the accused to identify 'specific instances of sexual activity' to avoid unnecessary incursions into the sexual life of the complainant" (at paragraph 47).

THE APPLICATION OF SECTION 276 TO THE OFFENCE OF MURDER

Section 276 of the *Criminal Code* lists a number of sexual offences to which it applies. This list does not include the offence of murder. However, the Supreme Court held that that "the s. 276 regime applies to any proceeding in which an offence listed in s. 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document…. In Mr. Barton's case, the s. 276 regime was engaged because the offence charged, first degree murder under ss. 231(5)(c) and 235(1), was premised on sexual assault with a weapon contrary to s. 272, which is an offence listed in s. 276(1). That alone was sufficient to engage the s. 276 regime" (at paragraphs 76 and 77).

As a result, the Court held that "[i]t follows that before adducing evidence of Ms. Gladue's sexual activity on the night before her death, Mr. Barton was required to make an application under s. 276.1(1) and (2)" (at paragraph 82). The Supreme Court concluded that this error warranted the ordering of a new trial (at paragraph 9):

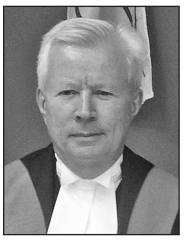
> The central error committed by the trial judge was his failure to comply with the mandatory requirements set out under the s. 276_ regime. That error had ripple effects, most acutely in the instructions on the defence of honest but mistaken belief in communicated consent, upon which Mr. Barton relied. In particular, non-compliance with the s. 276 regime, which serves a crucial screening function where an accused relies on the complainant's prior sexual activities in support of his defence, translated into a failure to expose and properly address misleading evidence and mistakes of law arising from Mr. Barton's defence. This in turn resulted in reversible error warranting a new trial.

CONCLUSION

Barton raises several issues that have the potential of having a significant impact on sexual assault trials in Canada.

At the forefront of the possible impacts is the limiting of the defence of honest, but mistaken belief in consent. Based upon *Barton*'s refinement of the judicial lexicon as regards this defence, its future applicability may be limited. The combination of it being necessary for the accused to have (1) believed the complainant had communicated her consent to the sexual activity and (2) the requirement that the accused took reasonable steps to ascertain that this occurred, may make this a difficult defence to rely upon in Canada in the future.

In addition, the Supreme Court's formulation of when the defence of honest but mistaken belief that consent was communicated will constitute a mistake of law, may further limit this defence.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. *Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.*

Answers to Crossword
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