



The Legal Treatment of Marital Rape in Canada
Bibliography*

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Spousal/Partner Rape

Backhouse, Constance and Lorna Schoenroth (1983). "A Comparative Survey of Canadian and American Rape Law." Canadian-US Law Journal 6: 48.

The laws of Canada and the United States prove an excellent source for comparable legal research in the area of rape as English common law provided the foundation for the criminal law of both countries. Many similarities developed as a result of this common legal heritage, although some differences emerged since the American jurisprudence was separated from its English influence at an earlier point in time. The socio-cultural resemblance between Canada and the United States also produced notable similarities in the recent movement for rape law reform, although some marked distinctions remain. In an attempt to begin a comparative analysis of Canadian and American rape law, this article will focus on the following issues: spousal exemption, the standards of force, resistance, and consent; the admissibility of the complainant's prior sexual conduct; corroboration; and the recent redefinition and restructuring of the crime of rape.

Boyle, Christine (1981). "Married Women: Beyond the Pale of the Law of Rape." Windsor Yearbook of Access to Justice 1: 192-213.

The author discusses the law relating to marital rape, with some references to the proposed amendments to the Criminal Code. The main argument is that law reform in this area should display sensitivity to the special coercive potential of the marital relationship and that any pressure, including the conscious exploitation of external factors, to engage in sexual activity comes within the appropriate sphere of the criminal law.

Boyle, Christine (1996). "Sexual assault in abusive relationships: common sense about sexual history." Dalhousie Law Journal 19: 223-246.

In this paper, the author, using a hypothetical fact scenario as a focus, discusses competing interpretations of the new "rape shield" provisions in ss. 276-276.4 of the Criminal Code. In spite of identifying appealing arguments based on the importance of examining context in the resolution of legal issues, she argues that s. 276(1) should be read as barring all evidence of sexual history between the complainant and the accused, including "pattern evidence", unless it relates to something other than consent or credibility.

Boyle, Christine (2004). "Sexual assault as Foreplay: Does Ewanchuk Apply to Spouses?" Criminal Reports 20: 359.

There are two, interconnected, issues which courts might have to address, post Ewanchuk. The first one raises a particular issue of whether Ewanchuk should be strictly applied to ongoing relationships. This is the sexual touching of a spouse, who is not consenting and not doing anything, which can be interpreted (including in the context of the relationship) as communicating consent. No reasonable steps to ascertain consent have been taken. For example, a husband approaches a wife who is washing the dishes and rubs her breasts. Should there be some form of implied consent exception to Ewanchuk for ongoing intimate relationships? The criminal law cannot treat such

relationships as falling outside the law of sexual assault without resurrecting some form of presumption of consent from marriage or other ongoing relationship, thus making people in such relationships sexually touchable, irrespective of their wishes, until they actively withdraw consent. It seems plausible that people in relationships do touch each other in the absence of communicated consent, and without taking reasonable steps, but placing the risk of non-consent on the person touching is consistent with respect for the sexual autonomy and physical integrity of persons in relationships, and particularly for wives, a group with the historical experience of disrespect.

The second situation could arise in any context including in an ongoing relationship, the only difference being whether there is evidence of sexual history to provide a context. This is the situation where one spouse misperceives conduct as communicating consent. This is in essence the mistaken belief in consent scenario, post-Ewanchuk. The misperception would need to be of unambiguous communication. This raises a broader issue relating to the role of the reasonable steps provision. How can a person, including a spouse, be expected to take reasonable steps to ascertain consent when he believes that consent is being unambiguously communicated?

Cairns Way, Rosemary (1993). "Bill C-49 and the Politics of Constitutionalized Fault." University of New Brunswick Law Journal 42: 325-334.

The decision of the Supreme Court of Canada in *R. v. Seaboyer* was released on 22 August 1991. Less than one year later, on 15 August 1992 the reform effort, catalyzed by Seaboyer, culminated in the enactment of a package of amendments to the sexual assault provisions of the Criminal Code. What the reform process has made clear is the apparent conflict between the two goals - on the one hand, the progressive political agenda which seeks to respond to the real experiences of Canadian women and on the other, the demands of the Charter. There is a significant risk that the amendments will be successfully challenged as a violation of s. 7 of the Charter. Even if upheld as a justifiable limitation under s.1, such a challenge would send a powerful message to those groups who see in the criminal law an important avenue for change. The spectre of a potential Charter challenge has loomed at every moment of the reform process, most often as a threat to the progressive agenda of the legislation. The author's particular concern is with the evolving doctrine of constitutionalized fault. The article provides a brief introduction to the jurisprudence on constitutionalized culpability, consider its impact, both substantive and political, on the reform process, and evaluate the potential it provides for a successful Charter challenge.

Crocker, Diane (2005). "Regulating Intimacy: Judicial Discourse in Cases of Wife Assault (1970 to 2000)." Violence Against Women 11: 197-226.

This article describes the findings of research into judicial decision making in Ontario courts in cases of intimate violence against women. Judges are condemning the violence, issuing relatively harsh sentences, and arguing that the intimate context of the violence is an aggravating factor. The analysis also reveals that judges often rely on stereotypes and traditional notions of marriage, family, and femininity. As records of decisions, the documents suggest a high level of understanding that wife abuse is a crime. As judicial discourse, they reveal how the justice system regulates intimate relationships and how traditional ideologies persist despite the harsh sentences.

Drumbl, M. A (1994). "Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform." Canadian Journal of Family Law 12: 115-169.

Female partner abuse -- the battering inflicted by heterosexual men upon their wives, common-law spouses and intimate partners -- is a pervasive phenomenon in North American society. Through a comparative analysis of the responses to female partner abuse in Buffalo (New York), Toronto and London (Ontario) this paper demonstrates that pro-arrest policing policies have a vital role in curbing conjugal violence. Nevertheless, any truly effective response to female partner abuse must link the criminal justice system with other areas of the law as well as community services. With this interdisciplinary approach as a governing paradigm, several reforms are proposed. These include: (1) amending the Criminal Code to create a series of provisions that would punish female partner abuse in a manner different than stranger assault, with special emphasis on therapy as a key element of sentencing policy; (2) reducing the weight given to provocation and drunkenness as mitigating factors; (3) introducing a statutory civil remedy similar to that found in New York State with which battered women can expediently obtain protection orders and compensation; (4) placing law enforcement officials under a statutory duty of care to protect potential victims by responsibly issuing and adequately enforcing protection orders. The possibility of developing separate courtrooms with sui generis trial procedures in which all cases involving violence against women would be heard should also be investigated. Victims should also be permitted to participate more actively in the sentencing process. The animus for these reforms is derived from the fact that the gendered nature of domestic violence perpetuates the systemic inequality of women within Canadian society.

Fraser, Gwen (1985). "Taking Spousal Assault Seriously: A Philosophical View of Legal Contradiction." Windsor Yearbook of Access to Justice 5: 368.

The author argues that the present tendency of the legal system to deal with spousal assault in Family Division Court casts serious doubt on responses to the problem. In particular, such treatment is inconsistent with sections 244 and 245 of the Criminal Code and it is argued that attempts to justify differential handling of wife abusers are ill-founded and display institutional sexual bias against the victims of such assaults. Given that criminal offences are involved, the author concludes that the Criminal Division is the only proper forum for dealing with spousal assault.

Fus, Theresa (2006). "Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches " Vanderbilt Journal of Transactional Law 39: 481.

Even though many countries still permit husbands to rape their wives with little or no consequence, there is a growing trend that marital exemption is unjust and has no place in a civilized society. Recognition of the inappropriateness of marital exemption is, however, only the first step towards its elimination. To effectively equalize treatment of marital and non-marital rape, legislatures and judiciaries must take action. Several countries have already been host to the abolition of marital immunity, but their approaches may not be the most effective. This Note examines the experiences of England and Canada as examples of judicial and legislative abolition of marital exemption, respectively. The Author explores several factors that would lead to effective

change, including timely alignment with societal morals, thorough and thoughtful consideration of the issues, and legitimacy in the eyes of citizens. After reviewing the effectiveness of approaches such as those employed in England and Canada, the Author argues that an even better method would rely on equal protection provisions found in state constitutions and international treaties.

Gotell, Lisa (2006). "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Record." Alberta Law Review 43: 743-778.

How can the rights of sexual assault victims be balanced against the rights of the accused in a sexual assault case? Sexual assault remains one of the most under-reported crimes in Canada, largely due to the invasion that results once a sexual assault is reported. Distrust of the criminal justice system continues to deter reporting. Recent amendments to the Canadian Criminal Code aim to protect sexual assault complainants by regulating the introduction of sexual history evidence and third-party records, such as counselling and therapy. However, courts in Canada have increasingly used a standard based on privacy law to interpret these provisions. Does privacy law serve as a useful framework by which to evaluate this legislation? This article explores the gendered issues of privacy law, challenges the privacy approach to the sexual assault provisions of the Criminal Code, and explores a more balanced alternative. All of these cases concerned involve defendants who had personal or professional relationships with the complainants. Among the allegations at issue were sexual assaults by boyfriends, spouses/ex-spouses, relatives, family friends or acquaintances, amongst others.

Hannah-Moffat, K (1995). To charge or not to charge: Front line officers' perceptions of mandatory charge policies. Wife assault and the Canadian criminal justice system: Issues and policies. M. Valverde, L. MacLeod and K. Johnson. Toronto, Ontario, Canada, Centre of Criminology: 35-46.

Jaffe, Peter G. and Claire V. Crooks (2004). "Partner Violence and Child Custody Cases: A Cross-National Comparison of Legal Reforms and Issues." Violence Against Women 10: 917-934.

A review of policies and procedures for addressing partner violence in child custody across four countries shows different pathways to the same issues. In the United States, Canada, Australia, and New Zealand, the reform of child custody legislation faces a debate between fathers' rights groups and domestic violence advocates, within an environment promoting mediation and joint custody as the gold standard. There is a clear need for research to better inform these debates, including cross-national research, and for the development of court and community interventions to support children facing separation and divorce in the context of parental violence.

Johnson, Holly and Valerie Pottie Bunge (2001). "Prevalence and Consequences of Spousal Assault in Canada." Canadian Journal of Criminology 43: 27.

Using data from Statistics Canada's 1999 General Social Survey on Victimization, this article compares and contrasts the prevalence, consequences and outcomes of spousal violence reported by a representative national sample of women and men. The study shows that five-year and one-year rates of self-reported spousal violence victimization

are only slightly higher for women and that this difference is statistically significant. Higher rates were reported in previous as opposed to current unions. The study also found that the nature and consequences of assault inflicted on women by their spouses are more severe than spousal assaults against men. Assaults reported by women are more frequent and result in more serious consequences and outcomes for victims and higher costs for society. Female victims are more likely to be injured, to use medical services, spend time in hospital and take time off paid or unpaid work. They are also more likely to use counselling and shelter services and to report the violence to the police. Women were five times as likely as men to say they feared their lives were in danger from a violent spouse. Negative emotional outcomes for female victims were also more prevalent. Similarities and differences with other comparative studies are discussed.

Jonas, George (1979). "Rape and Marriage are not like Horse and Carriage." Canadian Lawyer 3: 10.

Kennedy, Carole (1978). Evaluation of the Comments Received on Working Paper 22 "Sexual Offences". Ottawa, Law Reform Commission of Canada.

The paper outlines the comments subsequent to and prior to the publication of the working paper on sexual offences by the Law Commission in 1978. The Advisory Council on the Status of Women had recommended four degrees of sexual assault offences (ranging from contact to penetration to bodily harm). Rape crisis centres recommended that the section on consent be written such that consent may not be inferred from a lack of resistance and there should be no doctrine of constructive consent or voluntary assumption of risk. Spousal exception had brought out strong opposing views. Most felt that enforcement might be difficult and one person suggested onus of proof should be put on a third party.

The paper has a list of all the editorials from newspapers that had commented on the new legislation.

Law Reform Commission of Canada (1978). Criminal Law: Sexual Offences. Ottawa, Law Reform Commission of Canada.

This Law Commission working paper was commissioned in 1978 and aims to do three things- first, to devise new, more concise formulations of sexual offences for the Criminal Code; second, to adapt the law to modern Canadian society; and third, to examine the role of the criminal law in relation to sexual conduct. With respect to Section 143, the paper criticized the use of the word "rape" because of the stigma, the limited definition of rape to penetration, and spousal exception. However, the paper states that it "may be extremely difficult, if not impossible" to determine if the victim consented in a specific instance of intercourse with the accused when they have had a long and continuous sexual relationship and suggests that the spouse should resort to general and aggravated assault provisions in the Code (p17). There was no consensus on the question of spousal exception at this point.

The paper seems to emphasize two factors distinguishing rape from general assault 1) rape can cause pregnancy and only women can get impregnated and 2) the essential ingredient of non-consent as consensual sexual intercourse is "esteemed and valued". The paper recommends a new offence of "sexual assault" with no distinction between contact

and penetration.

MacLeod, Lind (1980). *Wife Battering in Canada: The Vicious Circle*. Ottawa, Minister of Supply and Services.

MacLeod, L. (1995). Policy decisions and prosecutorial dilemmas: The unanticipated consequences of good intentions. Wife assault and the criminal justice system. M. Valverde, L. MacLeod and K. Johnson. Toronto, Ontario, Canada, Centre of Criminology: 47-61.

Martin, D. L and J. E Mosher (1995). "Unkept promises: Experiences of immigrant women with the neo-criminalization of wife abuse." Canadian Journal of Women and the Law 8: 3-44.

McGillivray, Anne (1987). "Battered Women: Definition, Models and Prosecutorial Policy." Canadian Journal of Family Law 6: 15-45.

Wife battering, historically and presently endemic to all societies, affects at least four in ten Canadian women. Only within the past fifteen years has professional attention been directed to defining, researching and dealing with the problem. Efforts to derive accurate models and workable policy from narrow research bases have been troubled. The need to make a normative leap regardless of limited information and professional disagreement is nowhere more apparent than in the development of appropriate prosecutorial policy to enforce criminal assault provisions against batterers. The special problems of the battered woman witness must be understood in light of the history, etiology, spoken and unspoken definitions and reform models of wife battering in order to effectively prosecute the batterer. Saskatchewan's recently adopted "no-drop" policy and the experience of working professionals illustrate the unique concerns of spousal assault.

Nova Scotia Family Violence Tracking Project (1994). *The response of the justice system to family violence in Nova Scotia*. Halifax, Nova Scotia, Canada, Solicitor General and Nova Scotia Department of Justice.

Prairie Research Associates (1994). *Manitoba spouse abuse tracking project: Final report volume 1*. Ottawa, Ontario, Canada, Department of Justice.

Randall, Melanie (2004). "Domestic Violence and the Construction of Ideal Victims: Assaulted Women's Image Problems in Law." St. Louis University Public Law Review 23: 107.

Some of the ways domestic violence is addressed in the law - even those ways expressly aimed at remedying the defects and inadequacies of traditional legal responses - inadvertently end up reinforcing the problems they seek to rectify. Two examples of this are found in stereotypical representations of women who are subjected to violence in their intimate relationships. Both of these representations rely on the construction of categories of victims of domestic violence that misapprehend and stigmatize women's ways of coping with intimate violence and its effects on their lives. The first of these is the legal deployment of the victim who suffers from the "battered woman syndrome," a diagnostic category sometimes used as evidentiary support for the self-defence claims of women who, in fear for their own lives, have killed their violent partners. It is specifically drawn upon to address the often asked question about why assaulted women who have

ended up killing their violent spouses did not "just leave" their abusers instead. The second is the victim who recants and/or who refuses to "cooperate" in the prosecution of her violent male intimate.

In this paper, I argue that the use of the "battered woman syndrome" in law represents a double-edged sword. To the extent that it captures the psychological dimensions and harms inflicted by being subjected to violence in an intimate relationship, the "syndrome" has provided critical evidence supporting the self-defence claims of battered women who kill their violent partners. But to the extent it explains the difficulties battered women have leaving their violent partners in terms of a purported psychological incapacity and lacks an acknowledgment of the powerful social forces which inhibit women's very opportunities for "leaving," the "syndrome" is a profoundly inadequate conceptualization.

Randall, Melanie (2008). "Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest But Mistaken Judicial Beliefs." Manitoba Law Journal 32: 144 - 181.

This paper reviews some of the recent case law to illustrate the kinds of conceptual difficulties and legally flawed analyses, which some judges are undertaking in relation to sexual assaults perpetrated in the context of intimate relationships. In these judgments, a number of specific themes are salient, including the mistaken judicial belief that the relational context is critical to assessing whether a sexual assault actually happened. These mistaken judicial beliefs are tied to the traditional assumption, only relatively recently repudiated legally with the 1983 amendments, that marriage confers upon men presumed rights of sexual access to their wives. Tied to this faulty reliance on traditional assumptions, is the apparent mistaken belief evident in the judgments analyzed in this paper, that the legal test for consent differs in an ongoing and "viable" intimate (spousal) relationship, from the legal test applied in other contexts. As is evident from R. v. R.V. and the other cases under review, some judges have trouble seeing a "dividing line" between what is assumed to be normal, typical and acceptable sexual engagement within intimate relationships, and what constitutes criminal sexual assault.

What some judges seem to have problems understanding is that consent to sexual activity, even in an intimate relationship, is a dynamic process, which requires constant negotiation and renegotiation between intimate partners. It cannot be assumed to exist by virtue of the existence of an ongoing intimate relationship, yet this is precisely the inference some judges seem inclined to make. This is one of the fundamental and mistaken judicial beliefs apparent in the spousal sexual assault case law analysed in this article.

Rhynard, Jill and Marlene Krebs (1997). "Sexual Assault in Dating Relationships " Journal of School Health 67(3).

This article focuses on acquaintance rape, which under Canadian law constitutes a form of sexual assault. Frequency of acquaintance rape often is underestimated due to under-reporting, resulting in a local perception that acquaintance rape rarely occurs in a small Canadian community. A survey was conducted to determine whether acquaintance rape does occur in this community.

Schissel, Bernard (1996). "Law Reform and social change: a Time-Series analysis of Sexual Assault in Canada." Journal of Criminal Justice 24(2): 123-138.

In 1963, Canada reformed its laws regarding rape and sexual assault to facilitate a greater reporting of sexual offenses and a more just approach to prosecution and victim rights. Some of the major changes included a shift in the definition of rape from a crime of sex to a crime of violence, a shift in legal policy to eliminate the victim's reputation as a legal consideration, and the elimination of spousal immunity provisions. In this study, a time-series analysis for the years 1962–1990 is employed to test the influence of Bill C-127 and the influences of macro-economic conditions and social control policy on rates of arrests and charges for sexual assault. These trends are contrasted with those for comparable rates of non-sexual assault. Overall, the results suggest that the influence of this particular law reform, in relation to general legal trends for all violent crimes, is moderate for arrest rates and negligible for rates of charges. The variation in rates of arrests and charges, then, are the result of general trends in state social control policy, and not specific law reform.

Steinke, Heather C. (1996). "Starting-point Sentencing for Domestic Assault: A Critical Review of the Brown Guidelines." Alberta Law Review 35: 785.

Today spousal assault is not only considered a crime, it is treated as one. This is reflected in Alberta's leading case on sentencing for domestic assault, *R. v. Brown*; *R. v. Umpherville*; *R. v. Highway*. There the appeals from sentence of three men convicted of spousal abuse were heard together by the Alberta Court of Appeal. In stark contrast to the historical view of wife abuse as a private matter not to be interfered with by the courts, the Court imposed sentences, which ranged from eighteen months to three years incarceration. In setting out the principles, which should govern sentencing, the Court in *Brown* revealed its commitment to combat the problems of spousal abuse in our society through the sentencing process. The significance of the decision, however, lies in its establishment as a guideline judgment: a precedential ruling which provides a starting-point approach to sentencing as a means of guiding lower courts in the determination of a fit sentence. The question to be addressed is whether the guideline judgment, as applied to cases of domestic assault, actually achieves in practice what it endeavours to do in theory. A critical analysis of the *Brown* decision and a review of subsequent case law clearly suggests that it has not achieved much success. This result, it will be argued, is due to the Court of Appeal's failure to comply with its own prior directives on starting-point methodology, as well as a lack of consensus among the judiciary in terms of its stated policy objectives.

Ursel, E. J (1998). Mandatory charging: The Manitoba model. Unsettling truths: Battered women, policy, politics and contemporary research in Canada. K. Bonnycastle and G. Rigakos. Vancouver, British Columbia, Canada, Collective Press: 73-81.

Valverde, M., L. MacLeod and K. Johnson, Eds. (1995). Wife assault and the Canadian criminal justice system: Issues and policies. Toronto, Ontario, Canada, Centre of Criminology.

Vandervort, Lucinda (2004). "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault." Osgoode Hall Law Journal 42(4): 625-660.

The exculpatory rhetorical power of the term "honest belief" continues to invite reliance on the bare credibility of belief in consent to determine culpability in sexual assault. In

law, however, only a comprehensive analysis of mens rea, including an examination of the material facts and circumstances of which the accused was aware, demonstrates whether a "belief" in consent was or was not reckless or wilfully blind. An accused's "honest belief" routinely begs this question, leading to a truncated analysis of criminal responsibility and error. The problem illustrates how easily old rhetoric perpetuates assumptions that no longer have a place in Canadian law. The article analyzes the following cases: Pappajohn, Sansregret, and R. v. MacFie that involved a husband abducting, raping, and killing his wife but where he pled not guilty to charges of sexual assault and was acquitted on the sexual assault charge (and convicted of first degree murder).

Watson, Jack (1996). "When 'No' Means 'Attack Me': Inferring Consent to Assault in Family Violence Cases." Alberta Crown Attorney's Association Newsletter(5).

Describes the evolution of the Law as to Implied Consent, Inferred Consent and in Sexual Assault Cases

Wieggers, Wanda A. (1994). "Compensation for Wife Abuse: Empowering Victims?" University of British Columbia Law Review 28: 247-307.

This article focuses on the question of whether or to what extent women are compensated for abuse or injuries inflicted by legal or common law husbands or intimate partners. In examining this issue, I contrast and evaluate two legal sources of compensation for women: tort proceedings including assault and battery and intentional infliction of mental suffering, and crimes compensation schemes which provide state-funded redress for injuries suffered by victims of violent crimes.

CONSENT

Adjin-Tettey, Elizabeth (2006). "Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery." University of British Columbia Law Review 39: 3-61.

The objective of this paper is to show that the defence of constructive consent as articulated in *Non-Marine Underwriters, Lloyd's of London v. Scalera*,⁴ although intended to benefit victims of sexual abuse, in fact makes it more onerous to obtain a civil remedy. The objective ascertainment of reasonable belief in consent is likely to privilege a gendered, raced, and classed perspective that favours white heterosexual male defendants, and potentially constitutes gender discrimination. Victims of sexual wrongdoing are predominantly women and girls. Yet many women do not meet the standard of the 'typical' victim nor do many exhibit supposedly reasonable responses to unwanted sexual overtures. Misconceptions about women's sexuality in myths of male innocence and female guilt in sexual encounters pervade religious, philosophical, and scientific texts, mass media, and popular culture.⁵ Furthermore, they are likely to influence assessments of constructive consent to the detriment of women victims.

Baker, Brenda M (1988). Consent, Assault and Sexual Assault. Legal Theory Meets Legal Practice. A. Bayefsky. Edmonton, Alberta, Academic Printing and Publishing: 223-238.

Baker, Brenda M (1999). Understanding Consent in Sexual Assault A Most Detestable Crime: New Essays on Rape. K. Burgess-Jackson. Oxford/New York, Oxford University Press: 49-70.

Benedet, Janine and Isabel Grant (2007). "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief." McGill Law Journal 52: 243-289.

Women with mental disabilities experience high rates of sexual assault. The authors trace the history of the criminal law's treatment of cases involving such acts in order to evaluate whether the substantive law of sexual assault is meeting the needs of this group of women. In particular, the authors focus on the legal issues of consent, capacity, and mistaken belief.

The authors conclude that the substantive law of sexual assault is inadequate to meet the needs of women with mental disabilities. The authors propose, as a partial solution, a reformed legal analysis that focuses on the accused's abuse of a relationship of power or trust, the accused's coercive behaviour, and the complainant's voluntariness. While the authors acknowledge that women with mental disabilities face certain unique challenges, they reject the creation of special legislative provisions as a solution; they assert instead the importance of recognizing the common experience of inequality that this group shares with other women.

Bonnycastle, K (2000). Rape Uncodified: Reconsidering Bill C-49 Amendments to Canadian Sexual Assault Laws. Law as a Gendering Practice. D. Chunn and D. Lacombe. Oxford, Oxford University Press.

The article argues that the liberal legal discourse of consent is itself gendered, reinforcing an active masculine sexuality and a reactive and passive feminine sexuality and identifying the measure of sexual violence as not whether a woman desires sex, but instead whether she accedes.

Boyle, Christine and Marilyn MacCrimmon (2001). "To Serve the Cause of Justice: Disciplining Fact Determination." Windsor Yearbook of Access to Justice 20: 55.

There is increasing awareness, however, that the choice may affect fundamental values such as equality and access to justice. The meaning of consent to sexual contact has been contested for some time, including on the level of whether its content is primarily factual or legal. One of the ways that the law of evidence affects access to social context evidence is through the requirement that evidence be material. A requirement that the accused offer evidence of social context in every case would have placed an unnecessary burden on the accused and adversely affected his or her access to justice. Examining fact determination from the perspective of the disadvantaged shows that generalizations or stereotypes based on gender, race, sexual orientation, status, age, etc. have operated in the past to affect access to justice

Brett, Nathan (1998). "Sexual Offenses and Consent." Canadian Journal of Law and Jurisprudence 11: 69-88.

Much work has been done by judges and legal theorists regarding the defendant's beliefs about the consent of the complainant and the mental element or mens rea of this offense. But, any answers to these questions presuppose some answer to a prior question: What is consent? What must be true of a person who does consent? What must be missing, on the other hand, in a situation where sexual activity takes place without consent?

Bryant, Alan W (1989). "The Issue of Consent in the Crime of Sexual Assault." Canadian Bar Review 68: 94-154.

The consent of the complainant is often the only disputed issue in a trial of an accused charged with a crime of sexual assault. Because consent is a question of mixed fact and law, judges are required to instruct juries on the meaning of consent, which is a difficult task because the legally recognized consent reflect policy considerations and social values. This article examines the common law, and the old and new statutory provisions governing the matter of consent of the complainant for the crime of sexual assault.

Chapman, Susan M. (1999). "Section 276 of the Criminal Code and the Admissibility of "Sexual Activity" Evidence." Queen's Law Journal 25: 121-176.

In 1992, Parliament revised section 276 of the Criminal Code to reflect the Supreme Court of Canada's analysis in *R. v. Seaboyer* of the permissible scope of Criminal Code restrictions on access to sexual activity evidence. The author examines subsequent jurisprudence that considers the admissibility of evidence of a complainant's sexual activity in light of section 276. The author argues that, although this section established clear governing principles regarding the admissibility of this type of evidence, questions remain about the application of the Code provisions themselves. After a discussion of the constitutional validity of section 276, the author addresses these questions, focusing on two issues: the admissibility of evidence of other sexual activity between the complainant

and the accused, and the admissibility of evidence of prior allegations of sexual assault by the complainant.

The author's exploration of the first of these issues emphasizes the importance of dispelling the "twin myths", which suggest that prior sexual activity of the complainant means that she is more likely to have consented on the occasion in question and is less credible as a witness. The survey of Canadian case law in the area reveals that, despite the Supreme Court ruling that evidence of ordinary sexual relations between the parties on other occasions is not usually admissible on issues of consent and mistaken belief in consent, the decisions of provincial appellate and trial courts reveal continuing disagreement about the appropriate interpretation of the section. The author's discussion of the second issue reflects a concern about the view of some courts and commentators that alleged non-consensual sexual activity is outside the ambit of section 276. In the author's view, both common law evidentiary rules and a good deal of American jurisprudence support the need for a restrictive approach to the admission of "sexual activity" evidence, it is admitted only where a compelling case can be made that it serves a precise purpose - for example, highlighting occasions when the complainant's testimony is self-contradictory or when the complaint has made previous demonstrably false accusations.

In the final section, the author examines additional bases for the admission of sexual activity evidence, including rebuttal of Crown evidence, prostitution, fabricated stories of sexual activity, sexual remarks and behaviour and sexual reputation. The author concludes that, despite the existence of section 276 and the guidance provided by the Supreme Court, uncertainty remains regarding the admissibility of sexual activity evidence in certain contexts.

Delisle, R.J. (1992). "New Rape Shield Law and the Charter." U.N.B. L.J. 42: 335.

When evidence of a complainant's sexual history is admitted during a sexual assault trial, the evidence has the potential to prejudice the outcome of the trial. The trier of fact may give the evidence an exaggerated probative value when examining the issue of consent. Alternatively, the judge or jury might conclude, as the result of such evidence, that the complainant's worth as a person is suspect, and accordingly they might not take their task of carefully analyzing the evidence as seriously as they should; they might not see a conviction as important as it might be with respect to another victim.' On the other hand, a blanket exclusion of such evidence could cause an injustice. Parliament has tried, for the third time, to draw the appropriate line which will ensure a fair trial and at the same time protect the legitimate interests of both the complainant and the accused. This paper suggests that Parliament has fallen short of the mark once again, and that the evidentiary provisions enacted are unconstitutional.

Gotell, Lisa (2007-2008). "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women." Akron Law Review 41(4): 865.

The article first traces the development of an affirmative consent standard in Canadian law. While the struggle for affirmative consent is typically framed as a feminist law reform project, I contend that we need to understand the legal elaboration of a positive and explicit consent standard in relation to wider shifts in governance. The second section of this article explores how the legal elaboration of affirmative consent in

Canadian law might be seen as a specific expression of neoliberal governmentality, forging new normative sexual subjects who interact within a transactional sexual economy. In section three, I demonstrate how discourses of responsabilization and risk management inform recent Canadian sexual assault decisions, constituting the ideal victim as the rape-preventing subject who exercises appropriate caution (yet fails) and the normative masculine sexual subject as he who avoids the risk of criminalization through securing consent. In the final section, this article interrogates the reconstruction of the good victim/bad complainant dichotomy in Canadian judicial discourses and demonstrates how “risky women” appear to surrender their status as legal subjects capable of having their refusals recognized in law. Under the shadow of affirmative consent, standards of good victimhood are currently being revised. Now less tied to chastity and sexual propriety, constructions of good/credible victims are nonetheless built upon exclusions that draw upon persistent race and class-based ideologies, reconstructing vulnerability as responsibility.

Hatch, Deborah R (1999-2000). "Culpability and Capitulation: Sexual Assault and Consent in the Wake of R. v. Ewanchuk." Criminal Law Quarterly 43: 51.

Sexual assault legislation has always been the subject of much debate, not surprisingly, given that the drafting and interpretation of such legislation reflects the intersection of sexual autonomy, human interaction, criminal culpability, and ideological constructs. Much has occurred of late that is commendable in terms of legislative and judicial reform, but several recent decisions reflect a prevailing sexual orthodoxy in which certain implicit assumptions have merely been allowed to supplant others that were rejected for legitimate reasons.

Last, Gavin (1999). "Advances Less Criminal Than Hormonal: Rape and Consent in R. v. Ewanchuk." Appeal: Review of Current Law and Law Reform 5: 18-27.

The work of MacKinnon and West, although somewhat outdated, still provides insight into patriarchal jurisprudence and the working of the legal system. Critical race theory can further provide the means for a more complex analysis of underlying issues of race, class and gender identity beyond a single focus on gender. The decision in Ewanchuk illustrates MacKinnon's assertion that control of women's sexuality by men is significant and needs to be recognized before any kind of equality can be achieved. West adds the proposal that women, unlike men in general, are not motivated to maximize their own pleasure, but have reconstituted themselves to increase the pleasure of others as a protective strategy in the face of potentially violent male sexual aggression. While this transformation is self-interested in the liberal sense, once the strategy becomes self-definitional, the woman is motivated by reasons antithetical to liberal self-interest, namely, the pleasure of others. The liberal male perspective of the trial and appellate courts lacks even internal consistency with sexual assault legislation, which is itself simply more liberal male legalism, according to West and MacKinnon. Perhaps the fact that a court acquitted Ewanchuk despite the facts and despite the law is the most sobering comment on the true meaning of patriarchy. In that context, controversial declarations challenging how "enlightened" we really are about sexual assault and sexual politics in patriarchal society are more difficult to dismiss.

Lewis, Thomas J. (1979). "Recent Proposals in the Criminal Law of Rape: Significant Reform or Semantic Change." Osgoode Hall Law Journal 17: 446.

It is the thesis of this note that, in light of the prevailing concepts of criminal liability and the resulting role of the consent standard, the proposed emphasis on violence cannot be expected to alleviate the difficulties arising from the existing law. It is submitted that, in fact, this emphasis presently serves to obscure the essential elements of the law that must be addressed. In order to support this contention, it may be helpful to begin by reviewing briefly the proposals of the report on sexual offences and the subsequent provisions of Bill C-52. This will be followed by an examination of the place of consent in existing Canadian law, and the difficulties that consent poses for the proposed reforms. Central to these difficulties is the highly subjective element of mens rea in criminal liability, and, to clarify this aspect of consent, the recent British experience will be examined in some detail.

MacDonald, Gayle and Karen Gallagher (1993). "The Myth of Consenting Adults: The New Sexual Assault Provisions." University of New Brunswick Law Journal 42: 373-380.

The Canadian government has recently (15 August 1992) passed Bill C-491 which revised the sexual assault provision of the Criminal Code. The most important feature of this legislation, however, is a definition of what constitutes "consent" in a sexual assault case. The article discusses the new consent provisions within the context of both sociological and juridical feminist theory, with special attention to the implications these provisions have for women as victims in sexual assault cases.

Marin, Andre (1994-1995). "When Is an Honest but Mistaken Belief in Consent Defence Not an Honest but Mistaken Belief in Consent." Criminal Law Quarterly 37: 451.

An honest but mistaken belief in consent defence in a sexual assault trial is when the accused says: "I honestly but mistakenly believed that the complainant was consenting." If the defence of honest but mistaken belief in consent is the defence raised at a sexual assault trial, it will, of course, be legitimate for the accused to adduce evidence to support this defence. The more problematic question that arises is to what extent should this defence be allowed if the consent is born out of the prior sexual contacts of the complainant? The article then analyzes several cases to explore the issue.

McInnes, John and Christine Boyle (1995). "Judging Sexual Assault Law Against a Standard of Equality." University of British Columbia Law Review 29(2): 341-381.

This paper commenced with the authors observations and speculations about the relative neglect of equality as a standard against which criminal law doctrine should routinely be measured. To encourage more attention to be paid to equality, the authors have attempted an analysis of the "reasonable steps" provision that demonstrated respect for both fundamental justice and equality in the context of sexual assault cases. The article analyses the laws with respect to consent at length. The authors argued that if the meaning of reasonable steps is to be true to its equality supports, the reasonable person must be understood to be committed to equality. There is no neutral place to stand in the construction of objective or quasi-objective tests. Therefore the values enshrined in the Charter, including equality, are the best guide to the values that will inevitably influence the determination of reasonableness.

Neufeld, Andrea (1995). "A.(L.L.) v. B.(A.): A Case Comment on the Production of Sexual Assault Counselling Records." Saskatchewan Law Review 59: 335.

It is generally accepted that in sexual assault trials, where credibility is often crucial to the reconciliation of conflicting stories, the presence of evidence extraneous to the testimony of the accused and the complainant plays a significant role in the outcome of the decision. Consequently, the recent decision by the Supreme Court of Canada in the companion cases *R. v. O'Connor* and *A.(L.L.) v. B.(A.)*¹ to make counselling records held by therapists concerning sexual assault complainants available to the accused under defined circumstances is controversial. The potential for disclosure of these records raises several important issues. What probative value do these records possess under the current definition of relevance in the law of evidence? Are the records so inherently unreliable as to be inadmissible hearsay evidence? Does the expectation of confidence in the therapist-patient relationship as well as the desire of society to encourage the reporting of sexual assaults dictate a recognition of a claim to privilege? What significance should be accorded to the respective rights of the accused and complainant under the Charter of Rights and Freedoms in making such determinations?

Oliver, Marcia (2002). *Governing the politics of consent: gender, expert knowledge*. Windsor, University of Windsor.

Bill C-49 was enacted in the Canadian Criminal Code in 1992. For the first time in Canadian legal history this new legislation provided a definition of consent as it applies to sexual assault offences. The enactment of Bill C-49 by Parliament was clearly aimed at resolving problems that emerged within legal proceedings dealing with sexual assault. Bill C-49 was therefore enacted to govern the legal proceedings of sexual assault cases and actors of the juridical field. The courts, in turn, have adopted complex heterogeneous ways of dealing with, and managing their relations in light of, the legislative amendments of Bill C-49. Employing a feminist understanding of governance in the context of sexual assault, I argue that determinations of consent are governed by a complex assemblage of legal rationalities, expert knowledges and esponsibilization strategies employed by judicial actors in sexual assault cases. The various ways that these governing mechanisms link up and contest with one another plays an essential role in determinations of consent. More specifically, the degree to which these governing mechanisms interconnect reflects elaborate power/knowledge relations within the juridical field that arise from, but also perpetuate, normative constructions of gender and heterosexuality. Determinations of consent therefore constitute a contested site where power is exercised through competing rationalities, knowledges and strategies of various actors within the juridical field.

Pickard, T (1980). "Culpable Mistakes and Rape: Relating Mens Rea to the Crime." University of Toronto Law Journal 30(1): 75-98.

The article explores certain aspects of rape for two reasons: first, to develop a detailed argument in support of the position that a mistake about consent should be accepted as a good answer to a rape charge only if the mistake was reasonable; second, to provide, by way of this argument, an illustration for a more general thesis - that we cannot adequately explicate the concept of mens rea with respect to a particular offense without analysing the nature of the conduct involved in that offense.

Policy Centre for Victim Issues (2009). "Legislation- A Definition of Consent to Sexual Activity." Retrieved January 7, 2010, 2010, from <http://www.justice.gc.ca/eng/pi/pcvi-cpcv/def.html>.

Pinpoints the legislation pertaining to Consent to Sexual Activity and the Restriction of the The Defence Of Honest Belief In Consent [Section 273 of the Criminal Code] and briefly describes the legislation for use by victims of sexual crimes.

Rolfes, Brian (1998). "The Golden Thread of Criminal Law--Moral Culpability and Sexual Assault." Saskatchewan Law Review 61: 87.

The tensions within the criminal law, its theories of justification, and the various competing subjective and objective standards are starkly evident in the context of one offence more than any other: sexual assault. The article canvasses the nature of criminal culpability and discusses the specific mental elements recognized in the offence of sexual assault. It is ironic that it was in the context of sexual assault that the subjectivist paradigm achieved its climax in both England (Morgan) and Canada (Pappajohn). It cannot be denied that a subjectivist understanding of moral culpability fails to reflect contemporary notions of responsibility, particularly in the field of sexual crimes where the recent legitimization of the voice of female victims has done much to change social mores. That a purely subjectivist analysis so fails can be seen in its analytical result that the more drunk, insensitive, boorish, or self-delusional the male, the more likely that an acquittal will ensue. The purely subjectivist approach effectively provides an all-or-nothing answer. Either the drunken student who fails to ask questions at the appropriate time is to be branded a "full rapist" with all of the stigma and gravity of punishment which that implies, or he is adjudged completely innocent, free to continue to cause irresponsible harm to others. Modern social morality is more discerning than this, recognizing that, though advertently caused harm may be more culpable, inadvertently caused harm is not necessarily morally innocent.

Scutt, Jocelyne A. (1975-1976). "Fraud and Consent in Rape: Comprehension of the Nature and Character of the Act and Its Moral Implications." Criminal Law Quarterly 18: 312.

The article analyzes consent in sexual offence laws where fraud is involved. Problems particularly arise where fraud is said to have instigated the "consent". The types of fraud which have been discussed in the many cases involve fraud as to the nature and character of the act, fraud as to the inducement by which the woman has been led to consent, fraud as to the identity of the person doing the act. Where consent to the particular act has in fact been given by the woman concerned, is the charge of rape thereby ousted, or does fraud relating to the giving of that consent vitiate, thus validating the charge that the man has had carnal knowledge of the woman without her consent?

Shaffer, Martha (1992). "Seaboyer v. R.: A Case Comment; ." Canadian Journal of Women and Law 5: 202.

In *R. v. Seaboyer*; *R. v. Gayme*, the Supreme Court of Canada struck down section 276 of the Criminal Code, the so-called rape shield provision, which restricted the introduction of evidence of the complainant's sexual past in sexual assault cases. After reviewing the Court's decision, the author suggests that its impact will be most

problematic in cases involving the defence of mistaken belief in consent. She argues that new legislation is needed to replace section 276 and suggests that the legislation must contain a strong message to trial judges that the complainant's sexual history will virtually never be relevant.

Sheehy, Elizabeth (2000). "From Women's Duty to Resist to Men's Duty to Ask: How Far Have we Come?" Canadian Woman Studies 20: 98.

This article examines how Canada's legal system approaches rape and sexual consent cases, focusing on the legal definition of resistance when women are drugged, intoxicated or asleep when their assault takes place. The author analyzes the question of agency that surrounds these cases.

Vandervort, Lucinda (1990). "Consent and the Criminal Law." Osgoode Hall Law Journal (28): 485-500.

The author examines two proposals to expand legal recognition of individual control over physical integrity. Protections for individual autonomy are discussed in relation to the right to die, euthanasia, medical treatment, and consensual and assaultive sexual behaviours. The author argues that at present, the legal doctrine of consent protects only those individual preferences, which are seen to be congruent with dominant societal values; social preferences and convenience override all other individual choices. Under these conditions, more freedom to waive rights of physical integrity can only place socially vulnerable persons at great risk of abuse.

Vandervort, Lucinda (2005). "The Defence of Belief in Consent: Guidelines and Jury Instructions for Application of Criminal Code Section 265(4)" Criminal Law Quarterly 50: 441-452.

The availability of the defence of belief in consent under s. 265(4) is a question of law, subject to review on appeal. The statutory provision is based on the common law rule that applies to all defences. Consideration of the defence when it is unavailable in law and failure to consider it when it is available are both incorrect. A judge is most likely to avoid error when ruling on availability of the defence if the ruling: (1) is grounded on sound analysis of the substantive basis for the defence and its relationship to the principles of criminal responsibility; and (2) uses precise legal criteria to govern practical application of s. 265(4) to the evidence in specific cases. The guidelines proposed in Part 1 are based on analyses of the substantive defence and culpable awareness and were developed to ensure that appropriate criteria are properly used when s. 265(4) is applied. When a trial judge rules that the defence is available in law, the trier of fact must determine whether the defence is available on the facts as found, based on the evidence in the case. The model jury instructions proposed in Part 2 are designed to ensure that deliberations by the trier of fact are also guided and shaped by appropriate legal criteria. At both stages, the objective is to ground the deliberation process on fact, not fiction, and to regulate the exculpatory effect of the defence by using legal norms to exclude excuses based on extra-legal considerations such as sexual/racial fantasy, stereotype and myth, or community attitudes and custom.

Vandervort, Lucinda (2005). "Sexual Assault: Availability of the Defence of Belief in Consent."

Canadian Bar Review 84: 89-105.

Despite amendments to the sexual assault provisions in the Criminal Code, decisions about the availability and operation of the defence of belief in consent remain vulnerable to the influence of legally extraneous considerations. The author proposes an approach designed to limit the influence of such considerations.

Wright, Joanne (2001). "Consent and Sexual Violence in Canadian Public Discourse: Reflections on Ewanchuk." Canadian Journal of Law and Society 16(2): 173-204.

This paper analyses the public discourse regarding consent and sexual violence that emerged in response to the Ewanchuk ("bonnet and crinolines") case. Analyzing the debate that ensued in the editorial pages of the National Post, the author suggests that the strong response to Ewanchuk stems from the way in which participants in the debate interpreted the case through the lens of their own personal - and gendered - experience. The reaction is also the result of a clash between the dominant cultural-sexual script of heterosexual interaction, on the one hand, - a script which celebrates masculine sexual aggression, and the consensual script encoded in Canada's "No Means No" legislation, on the other. Finally, to a public already skeptical of feminism, Ewanchuk symbolized the feminist "take-over" of the Supreme Court. The article argues that the interpretation of consent embraced in the dominant cultural-sexual script represents a considerable departure from the liberal ideal of free and voluntary consent in its reliance on a notion of "inferred" consent and its Hobbesian obfuscation of coercion and consent. Ultimately, Ewanchuk reflects the persistence of so-called common sense attitudes about sexual violence in spite of legal reforms, and it raises questions about whether consent can be defined in terms that would be meaningful and emancipatory for women

SEXUAL ASSAULT- GENERAL

Backhouse, C (2008). Carnal crimes: sexual assault law in Canada, 1900-1975. Toronto, Irwin Law.

This is an engaging book about sexual assault crimes in Canadian history by one of Canada's foremost legal historians. Using a case-study approach, Constance Backhouse explores nine sexual assault trials from across the country throughout the twentieth century. The book offers insight into the failure of the criminal justice system to protect women from sexual assault.

Boyle, Christine (1984). Sexual Assault. Toronto, Canada, Carswell.

Boyle, Christine (1992). "Disembodied Sexual Assault: *McCraw v. R.*" University of British Columbia Law Review 26: 281-291.

The Supreme Court of Canada, in *McCraw v. R.*,¹ decided that rape can cause serious bodily harm. It is the purpose of this case comment to explore the implications of this decision for the law of sexual assault on two levels.

First, the Court has taken an expansive view of the body which can suffer bodily harm in that it can reason and feel emotion. However, the decision, probably because of the limitations of the charge, does not challenge the view that sexual assault must have involved the bodies of the assaulter and the victim in some fairly direct way. Thus there remains a distinction, albeit blurred at the edges, between a threat to cause bodily harm (which I will call disembodied) and actually causing bodily harm (embodied). Nevertheless, it will be argued that the meaning given to serious bodily harm in *McCraw* could be used to extend the legal understanding of sexual assault to include a form of disembodied sexual assault. While the main focus of sexual assault law is on bodies, it also pays attention to our psychic experiences, and adopts certain positions with respect to them, although in less obvious ways. The judicial approach to fantasies, for example, although largely unarticulated, plays a role in the development of the law relating to the sexual harms that women experience. I want to explore how the device of constructing certain types of behaviour as disembodied is available, where judges want to use it, to put that behaviour on the non-criminal side of the criminal/non-criminal dichotomy. *McCraw* can be used as a jumping-off point for discussion of a theme of words and images as sex, and more particularly as coerced sex. Second, *McCraw* also raises concerns about whether the Court, in its recognition of the force implicit in a threatened rape, used language which may make it more difficult for successful prosecutions to be brought against people who have committed non-forceful, sexual assault.

Boyle, Christine (1994). "The Role of Equality in Criminal Law." Saskatchewan Law Review 58: 203-216.

The article asks the question whether equality is a second class right as far as criminal law is concerned. there are ways in which equality could inform the interpretation or construction of criminal law concepts. There are lots of possible examples here, such as the meaning of consent, at present before the Supreme Court of Canada in *R. v. M.(M.L.)*,³ the meaning of "reasonable steps" in sexual assault law, the construction of

objective tests in defences, and, as a more radical illustration, the construction of a civil disobedience defence. An issue that the courts will have to confront soon is whether the requirement of reasonable steps to ensure consent is constitutional in the context of sexual assault. Parliament has explicitly stated in the Preamble to Bill C-4925 that both equality and fundamental justice are relevant (an important provision in my view since understandings of inequality ought to be deeply embedded in our notions of fundamental justice). So far there has not been the slightest hint in the cases that the minimum fault level might be influenced by the boundaries of another constitutional right. The courts have so far avoided getting any experience in the analysis of co-existing rights. A commitment to at least formal equality might however stop the courts from striking down the reasonable steps provision when an objective fault requirement has been found constitutional for manslaughter, but that requires a willingness to engage on some level of equality analysis.

Boyle, Christine (2009). "Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality." International Journal of Evidence and Proof 13: 269.

Sexual assault prosecutions present particular challenges in making credibility determinations in 'he said/she said' cases. An analysis of Canadian law illustrates how attempts to avoid the 'either/or' error can be vulnerable to a critique that the understanding of reasonable doubt in such cases is inconsistent with sex equality. The possible ways in which accused persons may be given the benefit of a less than reasonable doubt, and the resulting implications for both sex equality and judicial impartiality, are discussed in this article. A return to basic principles is suggested.

Boyle, Christine and Marilyn MacCrimmon (1998). "The Constitutionality of Bill C-49: Analyzing Sexual Assault if Equality Really Mattered." Criminal Law Quarterly 41: 198.

Bill C-49 is a substantive, procedural and evidentiary package which affects the law in three interconnected areas: (i) the meaning of consent; (ii) the mistaken belief in consent "defence", and (iii) the use that can be made of the sexual history of complainants. The three areas are interconnected since the legal meaning of consent will inevitably affect what it is an accused can be mistaken about, and the substantive issues in a trial will inevitably determine the scope of material and relevant evidence. The focus of this article is on the constitutionality of this package of changes in general. However, reference will be made to the constitutional challenge to many of them in *R. v. Darrach*, in which significant parts of the bill were recently upheld by the Ontario Court of Appeal.

Brown, M. G (1988). *Gender equality in the courts: A study by the Manitoba Association of Women and the Law*. Ottawa, Ontario, Canada, National Association of Women and the Law.

Brown, M. G (1991). *Gender equality in the courts: A study by the Manitoba Association of Women and the Law*. Ottawa, Ontario, Canada, National Association of Women and the Law.

Busby, Karen (1997). "Discriminatory Uses of Personal Records in Sexual Violence Cases: Notes for Sexual Assault Counselors on the Supreme Court Decisions in *R. v. O'Connor* and *L.L.A. v A.B.*" Canadian Journal of Women and the Law 0: 148-177.

Cairns Way, Rosemary (1993). "The Charter and the politics of fault: reforming the laws of sexual assault." Feminism and law workshop series: 92-93.

Cairns Way, Rosemary (2005). "Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?" Journal of Law and Equality 4(203-240).

In 1994, Christine Boyle wrote an influential article in which she considered 'whether equality is a second class right as far as the criminal law is concerned.' She concluded that 'equality is not in the forefront of our thinking about the overall burdens and benefits of criminal prohibitions. The purpose of this article is to re-examine the role of equality in the substantive criminal law, ten years after Professor Boyle's analysis and twenty years after the equality rights in the Charter were proclaimed in force. The discussion is focussed on the substantive criminal law decisions delivered by the Supreme Court of Canada between 1995 and 2005, in the period after Boyle's original analysis, including decisions concerned with consent in the mens rea of the sexual assault offence. In the author's view, there may be reason to believe that the existing role of consent in the mens rea of the offence of sexual assault raises some concerns with respect to these two provisions of the Charter [sections 15 and 28]. Briefly put, the current common law approach to consent may perpetuate social stereotypes that have historically victimized women and undermined their equal right to bodily integrity and human dignity. Equality's relative absence in substantive criminal law reflects a deeply entrenched prioritizing of liberal values, operating in combination with an unacknowledged sense that equality analysis is difficult, uncertain, and likely to increase rather than decrease the complexity of already complicated questions.

Chase, G (1984). "An analysis of the new sexual assault laws." Canadian Woman Studies 4(4): 53-44.

Clark, Lorenne M.G. (1993). Evidence of recent complaint and reform of Canadian sexual assault law: still searching for epistemic equality. Ottawa, Canadian Advisory Council on the Status of Women.

Clark, L.M.G. and D. J. Lewis (1977). Rape: The price of coercive sexuality. Toronto, Canada, The Women's Press.

Clark, Scott and Dorothy Hepworth (1994). Effects of Reform Legislation on the Processing of Sexual Assault Cases. Confronting Sexual Assault: A Decade of Legal and Social Chang. J. Roberts and R. Mohr. Toronto, University of Toronto Pres: 113-135.

Cogswell, Catherine (1992). "The Issue of Relevance in R. v. Seaboyer and Gayme." Dalhousie Journal of Legal Studies 1: 197-201.

Cohen, L and C Backhouse (1980). "Desexualizing rape: Dissenting view on the proposed rape amendments." Canadian Woman Studies 2(4): 99-103.

Cornaviera, Rosella (1993). "The Reform of sexual assault laws." Crown's News 2: 1-58.

Coughlan, Stephen G (1994). "Sexual Assault Complainants and Psychiatric Records: Keeping Exceptions to Confidentiality Truly Exceptional." Health Law Journal 2: 135-140.

Cowie, Jan (1994). "Difference, Dominance, Dilemma: A Critical Analysis of *Norberg v. Wynrib*." Saskatchewan Law Review 59: 357.

It has been historically established that a person is tortiously liable for battery if he or she intentionally causes harmful or offensive contact with another person. Tort claims for sexual assault are relatively recent but have nevertheless been accepted as valid claims for compensable injury. Nevertheless, the fact remains that victims of sexual assault and sexual abuse are often blamed for their own injuries because they do not say "no" loudly or frequently enough.

The majority judgment of the Supreme Court of Canada in *Norberg v. Wynrib* is, undoubtedly, a milestone in the legal history of sexual abuse litigation. In finding Dr. Wynrib tortiously liable for battery and expressly finding that Ms. Norberg's consent to the sexual acts in which she engaged was not voluntary, the majority does two significant things: it recognizes new, expanded incidents of culpability on the part of abusers by examining the nature and meaning of consent to sexually abusive conduct, and it acknowledges the relevance of power and status in allegations of sexual abuse.

Currie, D. H (1998). The criminalization of violence against women: Feminist demands and patriarchal accommodation. Unsettling truths: Battered women, policy, politics and contemporary research in Canada. K. B. G. Rigakos. Vancouver, British Columbia, Canada, Collective Press: 44-51.

Daylen, Judith Lynne, Wendy van Tongeren Harvey and Dennis O'Toole (2006). Trauma, trials, and transformation : guiding sexual assault victims through the legal system and beyond. Toronto, Irwin Law.

The goal of this book is to facilitate the emotional and psychological journey of sexual assault victims and to demystify some of the complexities of the legal system. Chapters 1 and 4 describe the law of sexual crimes in Canada and the interaction of law with human factors.

Denike, Margaret (1999). "Dignifying equality: the challenge of reform in sexual assault proceedings." Canadian Woman Studies 19(1-2): 81-85.

The fact that consideration of fundamental rights holds only for the accused has thrown into relief the differential treatment of complainants and witnesses in sexual assault trials. It also shows the extent to which only women's personal histories, including their sexual activity, and their medical, therapeutic or psychiatric records, are used as evidence to impugn their credibility when they testify as witnesses. These defence tactics of personally attacking complainants, and making use of discriminatory myths to do so, are used almost exclusively in sexual assault proceedings. They are very rarely tolerated in other domains of criminal law. The recent historical context of advocacy work sheds light on the significance the Supreme Court's revisitation of the evidentiary issues pertaining to sexual assault. The article summarizes a few studies and concludes that if indeed we are to realize the possibility that both the s.7 rights of the accused and the s.15 rights of the complainant may coexist, then the equality rights of those predominantly

targeted for sexual assault must be "taken into account directly and explicitly in defining the principles of fundamental justice"

Denike, Margaret (2000). "Sexual violence and "fundamental justice": on the failure of equality reforms to criminal proceedings." Canadian Woman Studies 20(3): 151-160.

This article evaluates the impact of equality reforms on Canada's criminal law and sexual assault proceedings. Topics addressed include fundamental justice and women's rights, the history of laws pertaining to rape, and the sexual politics of women's credibility in court. The article's premise is that the concept of rights developed in Canadian constitutional jurisprudence has rendered equality litigation ineffective as a tool for significantly challenging the causes and effects of social and sexual inequality. Legislative reforms such as the corrective and progressive legislation of rape shield law and the measures to restrict the requests for personal records are so quick to be scrutinized by the courts for the burden they allegedly impose on the accused, yet so impossible to see for their viability in addressing, modifying or eradicating the structural inequalities at the heart of "justice." One reason for this phenomenon maybe because of the basic tenets of liberal discourse rooted in protecting individuals from the state and restricting any positive interference from the state. Also, equality has been relatively foreign to common law jurisprudence, and treated as an "interest" in opposition to the accused's "fundamental" freedoms. The article concludes that constitutionally protected criminal justice proceedings, currently and historically constrained by an anti-state ideology and by the individualism of the "reasonable man"--and bereft of the precedent that might enable it to think otherwise, could only benefit by a structural understanding of power and domination as processes rather than as patterns of distribution. For without it, "justice" only perpetuates the existing forms of discrimination as they function in our society and in the legal system.

Du Mont, Janice, Margaret McGregor, Terri Myhr and Karen-Lee Miller (2000). "Predicting Legal Outcomes From MedicoLegal Findings: An Examination of Sexual assault in Two Jurisdictions." Journal of Women's Health and Law 1: 219.

Du Mont, J, K.-L Miller and T. L Myhr (2003). "The role of "real rape" and "real victim" stereotypes in the police reporting practices of sexually assaulted women." Violence Against Women 9: 466-486.

Some feminists have argued that rape myths constrain women's reporting of sexual assault to the police. The authors investigated whether myth-associated characteristics of sexual assaults play a role in police reporting behaviors of women. A sample of 186 sexual assault cases seen at a hospital-based sexual assault care center in 1994 was analyzed using logistic regression. A positive association was found between reporting a sexual assault to the police and two overtly violent components of the "real rape" myth: the use of physical force and the occurrence of physical injury.

Ellis, M. (1986). Judicial interpretation of the new sexual offences in light of the Charter of Rights and Freedoms: An examination of gender-neutrality, discrimination and inequality

Feldberg, Georgina (1997). "Defining the Facts of Rape: The Uses of Medical Evidence in

Sexual Assault Trials " Canadian Journal of Women and the Law 9: 89-114.

Feldthusen, Bruce (1996). "Access to the Private Therapeutic Records of Sexual Assault Complainants." The Canadian Bar Review 75(4): 536-563.

This article discusses the two-stage procedure developed by the Supreme Court to govern production of the private therapeutic records of complainants in sexual assault trials. The majority judgement is criticized as being entirely focussed on the rights of the accused, with no apparent appreciation of the nature or importance of the competing privacy and equality rights of the complainant. While preferring the minority judgement, the author concludes that legal rules alone will matter little. The debate will always turn on conflicting background notions of what material is "relevant" for a full answer and defence. Bill C-46, introduced in response to the majority decision in O'Connor, is remarkable as far its exhaustive and detailed limits to what maybe considered relevant for this purpose. This may make the Bill more 'vulnerable to Charter challenge before the very court that decided O'Connor in the first place.

Fournier, Pascale (2002). "The Ghettoisation of Difference in Canada: "Rape by Culture" and the Danger of a "Cultural Defence" in Criminal Law Trials." Manitoba Law Journal 29: 81-119.

This article presents cultural imperialism in the judicial process and explore the ways in which it asserts its perspective to be universal and neutral. It examines the consequences of cultural imperialism on women of colour and discuss the "race before gender" position adopted by Canadian courts in some sexual assault cases, that is the extent to which courts subjugate the sexes differently and in so doing produce a form of racism that is deeply gendered.

Fuerst, Michelle K (2000). Defending Sexual Offence Cases. Scarborough, ON, Carswell. Practice guide by a Superior Court Justice and ex-criminal law practitioner. This Practice Guide provides insight into the representation of clients charged with a sexual offence. Among the topics addressed are the factors to consider, and procedures involved, in making a Seaboyer application to admit evidence of other sexual activity by the complainant. Consent is addressed in Chapter 8, "The Defences of Consent and Mistaken Belief in Consent".

Girard, April L. (2009). "Backlash or Equality?: The Influence of Men's and Women's Rights Discourses on Domestic Violence Legislation in Ontario." Violence Against Women 15: 5-23.

Through an examination of the public debates from Ontario's Bill 117, An Act to Better Protect Victims of Domestic Violence, this article explores the discourses that men's rights activists used to counter feminist constructions of domestic violence. Using a combined method, the author collapses the data into four important themes: protection, rights, and gender; funding and fairness; numerical and statistical truths; and resistance. By examining how they collectively construct the problem of domestic violence, the author exposes the ways in which men's rights advocates disqualify women's experiences and the responses to such claims.

Gotell, Lisa (2002). "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law." Osgoode Hall

Law Journal 40: 251 - 295.

This article explores the current state of Canadian law on the production and disclosure of complainants' records to reflect upon the implications of the Canadian Charter of Rights and Freedoms for Canadian sexual assault law and jurisprudence. Some scholars assert that the Supreme Court's decision in *R. v. Mills*, upholding section 278 of the Criminal Code governing access to complainants' records, constitutes an erosion of accuseds' rights and an unjustified compromise of constitutional standards. By contrast, this article demonstrates that *R. v. Mills* is a highly contradictory decision that can be read as creating an interpretation of section 278 that privileges defendants' rights and undermines the protections that the legislative regime sought to erect. Emerging out of the tensions inscribed within *Mills*, recent decisions continue to privilege the legal rights of the accused and to reinforce a liberal legalistic construction of sexual violence. Privacy, posed as a "right" to contain narratives of sexualized violence within a bounded personal space, may provide but tenuous protection against vigorous pursuit of records by defence counsel. When complainants can be constructed as failing to enact the characteristics of ideal victimhood, their entitlement to privacy is discounted. Through a discursive analysis of the case law on access to complainants' records, the article contends that the mechanism of disclosure constitutes the central contemporary enactment of the hysterization of the rape victim.

Grant, Isabel (1995). "Second Chances: Bill C-72 and the Charter." Osgoode Hall Law Journal 33: 379-409.

This paper examines the legislative response to the Supreme Court of Canada's decision in *R. v. Daviault*. The author argues that Bill C-72, which limits the defence of extreme intoxication, is constitutional because of its strong underpinnings in equality. The author reviews the statistics on violence against women and the role of intoxication in that violence to illustrate why the defence of intoxication raises issues of sex equality. The author argues that a court assessing the constitutionality of Bill C-72 should consider this strong foundation in equality and the fact that the Bill is the result of a careful balancing of the interests at stake by a democratically elected legislature.

Gregory, Jeanne and Sue Lees (1994). " In Search of Gender Justice: Sexual Assault and the Criminal Justice System " Feminist Review 48: 80.

Gunn, Rita and Rick Linden (1994). The Processing of Child Sexual Abuse Cases. Confronting Sexual Assault: A Decade of Legal and Social Change. J. Roberts and R. Mohr. Toronto, University of Toronto Press: 84-112.

Gunn, Rita and Rick Linden (1997). "The Impact of Law Reform on the Processing of Sexual Assault Cases." Canadian Review of Sociology and Anthropology 34(2): 155-177.

This paper presents the results of an evaluation of the impact of Bill C-127 on the processing of sexual assault cases through the criminal justice system in Winnipeg. Because the law was intended to change the way in which sexual assault cases were treated by the courts, the authors employed logistic regression to examine the impact of several independent variables on charges and convictions before and after the new legislation. Logistic regression made it possible to determine whether the rape reform

legislation led to changes in the way these independent variables affect charge and conviction. The research suggests the legislative reform has had only a modest impact on the treatment of sexual assault cases.

Gunn, R and C. Minch (1985-86). "'Unofficial and Official Response to Sexual Assault.'" Resources for Feminist Research 14: 47.

Gunn, R and C Minch (1988). Sexual assaults: The dilemma of disclosure, the question of conviction. Winnipeg, Canada, University of Manitoba Press.

Hanson, Lynne (1993). "Sexual Assault and the Similar Fact Rule." University of British Columbia Law Review 27: 51-74.

Much of the case law on the rules of similar fact evidence has related to incidents of rape, incest and child sexual assault. The argument put forward in this article is that the predominance of such offences in the case law is not coincidental. Rather, their over-representation can be seen to flow from a number of factors: the historical tendency of the courts to doubt sexual complainants and to search for corroborative evidence; the perceived lack of credibility of some complainants; the law's tendency to confine analysis to a restricted set of facts and to view incidents as discrete events in isolation from their context; and, finally, a reluctance to acknowledge the situatedness of decision-makers and potential bias in determinations of what might be probative or prejudicial. The discussion begins by reviewing the governing principles of the similar fact rule and then turns to a brief overview of the case law. The background discussion is followed by an analysis of several sexual assault cases relating to the similar fact rule of evidence. Issues of credibility, judicial neutrality and the denial of context are all discussed as they relate to the case law and to the resultant preponderance of sexual assault cases. Finally, an attempt is made to relate these observations to the current understanding of the similar fact rule in terms of their impact on conceptions of propensity, probative value and prejudice.

Arguably, this review of the case law reveals an inherent gender bias in the application of the similar fact rule which has tended to preserve adult male conceptions of reality at the expense of female and child victims. It is argued that it is legitimate to focus on propensity, notwithstanding concerns about the dangers inherent in relying on character evidence regarding the accused's "nature" as a bad person. While concerns about prejudice are often justified, they are problematic in that such prejudice might also be understood as being quite logical in light of the context. Finally, it is suggested that the assessments of both probative value and prejudice are themselves value-laden.

Heald, S (1985). "Social change and legal ideology: A critique of the new sexual assault legislation." Canadian Criminology Forum 7: 117-127.

Horner, J. J. (1993). Sexual assault: Public debate and criminal law reform, University of British Columbia, Canada.

Hughes, Patricia (1993). "From a woman's point of view: sexual assault." U.N.B. L.J. 42: 341-347.

Justice, Canada (1992). Sexual assault legislation in Canada: A review of the sexual assault case law 1985-1988 report no. 6. Ottawa, Ontario, Canada, Department of Justice, Research Section.

Kelly, Katharine D (1997). "'You Must be Crazy if You Think You Were Raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials." Canadian Journal of Women and the Law 9(1): 178-195.

Data from a case study indicate that there is an increased reliance on the primary witness' personal and therapy records in sexual assault cases. These records are used to discredit the primary witness. Their use reflects a range of gender-biased social myths under the guise of scientific fact or medical evidence. The strategy works because it ties our socially constructed mechanisms for assessing conflicting or contested accounts of events to gendered myths about women, mental health, and rape. These practices raise serious concerns for women seeking legal redress after sexual assault.

Kinnon, Dianne (1981). Report on Sexual Assault in Canada, Ottawa: Canadian Advisory Council on the Status of Women.

Kobly, Peggy (1992). "Rape Shield Legislation: Relevance, Prejudice and Judicial Discretion." Alberta Law Review 30: 988.

This article analyzes sexual assault legislation as it stands since the Seaboyer case. Through a discussion of the legislation leading up to "rape shield" laws and the accompanying case law, Kobly reveals the strengths and weaknesses of Parliament's effort to effectively handle the problem of sexual assault against women. Ultimately, Kobly concludes that legislation which creates blanket exclusions, such as the legislation considered in Seaboyer, is indeed unconstitutional and that the proper way to ensure only relevant, probative issues are considered in sexual assault cases is to encourage an attitudinal change within society so as to eliminate the negative and pornographic myths and stereotypes that have developed about women and sexuality. According to Kobly, once these have been eliminated, judges should be able to properly exercise their discretion to control what occurs within the courtroom so as to encourage sexual assault victims to step forward and trust the judicial system.

Koshan, Jennifer (1998). "Aboriginal Women, Justice and the Charter: Bridging the Divide?" University of British Columbia Law Review 32: 23-54.

This analysis attempts to show that recent Supreme Court of Canada jurisprudence makes a progressive transformation of the dominant criminal justice system unlikely through Charter litigation. The most significant progress for women in asserting their rights as survivors of violence has been through the political process. While the importance of using the Charter as support for struggles in the political arena cannot be overlooked, the NWAC case leaves unanswered whether a right to participate in that process will be upheld by the courts. The Charter may be useful in some circumstances and may be an important symbol of equality for Aboriginal women, but it would be going too far to say it will ensure their right of participation in the creation of Aboriginal justice systems.

Koshan, Jennifer (2002). "Disclosure and Production in Sexual Violence Cases: Situating

Stinchcombe." Alberta Law Review 40: 655-688.

This article examines the issue of disclosure and the legacy of Stinchcombe through a review of the history of disclosure and production in criminal sexual assault proceedings and an analysis of judicial decisions and legislative enactments in this context. The author presents a feminist analysis of the tension between those representing the rights of accused persons who seek to access a complainant's personal records and the voices of equality-seeking and anti-violence groups that challenge stereotypes about sexual violence against women. The author presents a comprehensive review of the lower court decisions in production applications since the Supreme Court of Canada decision in *R. v. Mills*. The author concludes that while Bill C-46 and *Mills* are positive developments, a great deal of discretion is left to trial judges to decide on the merits of production on a case-by-case basis, and such decisions are granted much deference by appellate courts. The exercise of discretion may encourage the application of stereotypes about women and sexual violence and is the reason an absolute ban on production is preferred by women's and anti-violence groups.

Kristjanson, Freya (1999). "Vicarious liability for sexual assault." Canadian Woman Studies 10(1-2): 93-101.

The rise in sexual assault litigation in the last decade has spurred tremendous developments in legal doctrine, in areas such as limitation periods and fiduciary duty (see *M. (K.) v. M. (H.)*; *Norberg v. Wynrib*). The next frontier for radical legal developments will be the area of vicarious liability for sexual assault. Trial and appellate courts across the country are developing new--often contradictory--tests for determining when a person or institution will be vicariously liable for the tortious sexual misconduct of someone else. This article will provide an overview of legal issues relating to vicarious liability for vicarious assault--the "who, what, where, when, and why." The focus of this paper will be on institutional vicarious liability for the sexual misconduct of employees and agents. Whether it is religious organizations, sports teams, daycare centres, child protection agencies, private employers, residential facilities for the disabled, hospitals, or schools, there is the potential for the sexual exploitation of children and vulnerable adults.

Langer, Rosanna (2005). "Five years of Canadian Feminist Advocacy: Is it still possible to make a difference?" Windsor Yearbook of Access to Justice 23: 225.

This article evaluates feminist legal advocacy at the Supreme Court of Canada over a five year period from 1995-2001, through an examination of facts and judicial reasons, including those pertaining to criminal law provisions around sexual assault. This research builds on existing scholarship about the Women's Legal Education Action Fund (LEAF) and broadens the discussion to include the legal advocacy of other feminist organisations. It poses and answers the questions where has feminist legal intervention had the most influence and whether any patterns of success emerge from the case law. While still highly political in nature, recent Canadian feminist advocacy has focused on legal activism as the premiere mechanism for achieving law reform and social justice. In contrast to early criticisms of dominant homogeneity, the author finds that Canadian feminist legal advocacy reflects successful coalition-building and strategic advancement of the concept of intersectionality or discrimination on multiple grounds. However, not all women's groups benefit equally from these initiatives, and this article discusses the

continued marginalisation of Aboriginal women's issues and the relative under-representation of legal challenges that reflect concerns of working women.

LEAF (Women's Legal Education and Action Fund) (1991). *Factum of the Interveners: R. v. Seaboyer*.

LeBlanc, Diane (1995). "Sexual assault: a question of credibility." *Jus. Report No. 4* 10: 12-14.

Leighton, B (1989). *Spousal abuse in metropolitan Toronto: Research report on the response of the criminal justice system*. Ottawa, Ontario, Canada, Ministry of the Solicitor General.

Liu, Mimi (2000). "Gender Equality Jurisprudence of Madam Justice Claire L'Heureux-Dubé of the Supreme Court of Canada." *Queen's Law Journal* 25: 417-478.

Central to Madam Justice L'Heureux-Dubé's body of jurisprudence is an emphasis on a social-contextual approach to equality issues. She advocates the expansion of judicial notice of social framework evidence in order to provide decision-makers with a backdrop against which they can assess the particular facts and circumstances of a case. As well, Madam Justice L'Heureux-Dubé insists that judges continually question their own beliefs and objectivity, so that the criminal justice system and family law, as well as other areas of law, will progressively dispel their own inherent myths, thus correcting for gender bias. This compassionate and gender-sensitive approach, although often criticized, is evident in many of her most famous decisions, such as *Moge*, *Thibadeau*, and *Ewanchuk*. The author also demonstrates how many of Madam Justice L'Heureux-Dubé's arguments have helped shape legislative responses and judicial inquiries into equality issues, especially in the aftermath of *Egan*, *Seaboyer* and *O'Connor*.

Los, M (1990). *Feminism and rape law reform. Feminist perspectives in criminology*. L. Gelsthorpe and A. Morris. Milton Keynes, UK, Open University Press: 160-172.

Los, M. (1994). *The struggle to redefine rape in the early 1980s. Confronting sexual assault: A decade of legal and social change*. J. V. Roberts and R. M. Mohr. Toronto, Canada, University of Toronto Press: 20-56.

MacMillan-Brown, Heather (1995). "No Longer "Leary" About Intoxication: In the Aftermath of *R. v. Daviault*." *Saskatchewan Law Review* 59: 311.

A six person majority of the court in *R. v. Daviault* held that an absolute bar on evidence of intoxication in a general intent offence violates s. 7 and s. 11(d) of the Charter. The decision in *R. v. Daviault* is disturbing in many respects. If one views the decision from a purely legal perspective, it makes perfect sense. In a complex society such as ours, however, it is impossible to escape questions of policy and competing rights. Despite the apparent "logic" of the *Daviault* decision, some questions beg to be answered: should the accused be any less culpable because he or she was intoxicated when the crime was committed? Is a victim any less a victim because an attacker consumed copious amounts of alcohol before assaulting him or her? At a time when Canada is struggling to cope with a plague of sexual violence, the fact that this case involved a sexual assault only complicates the issues involved.

Majury, D (1994). *Seaboyer and Gayme. A study in equality. Confronting sexual assault: A decade of legal and social change*. J. V. Roberts and R. M. Mohr. Toronto, Canada, University of Toronto Press: 268-292.

Majury, D (2002). "The Charter, Equality Rights, and Women: Equivocation and Celebration." Osgoode Hall Law Journal 40: 297-336.

In this article, the author examines some of the critiques made and some of the aspirations raised in the early days of the Charter by left/feminist/marginalized groups about the Charter, the equality guarantee, and the judicial decision makers. The author explores how these fears and hopes have played out with respect to Charter equality rights for women by looking at some of the sex equality decisions that have been made by the Supreme Court of Canada. The cases are discussed under the headings of reproduction, violence against women, family, employment, and socio-economic claims to explore how the sex equality analysis has fared in these different contexts. As the title of this article reflects, the author's assessment is one of equivocal celebration and celebratory equivocation.

Mandhane, Renu (2001). "Efficiency or Autonomy? Economic and Feminist Legal Theory in the Context of Sexual Assault." University of Toronto Faculty of Law 59: 173-227.

There are two discernable trends in contemporary legal theory: the backlash against feminist legal analysis and the relative expansion of the law and economics movement. Given these trends, this article considers the more general question of whether the theoretical justification given for a particular legal rule has any independent significance. In reaching the conclusion that theoretical justifications are indeed very important, the author focuses on the rules relating to consent in cases of sexual assault. In particular, the consent rules articulated by the Supreme Court of Canada in *R. v. Ewanchuk* are analyzed from both an economic and feminist perspective in order to determine the propriety of such analyses. The author suggests that the feminist perspective must be adopted when arguing in support of the *Ewanchuk* consent rules and that the economic perspective is particularly unsuited to the analysis of sexual assault. More broadly, the author argues that since theoretical justifications are significant in and of themselves, feminists must be cautious about abandoning their particular modes of reasoning, while economists should recognize the limitations of their analyses.

Martin, Dianne L. (1998). "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies." Osgoode Hall Law Journal 36: 151-188.

The essential destructiveness of retribution-based acknowledgement of harm is particularly clear when one considers the situation of the battered wife who wants the violence to stop but who does not wish, or cannot afford (or both), to end the relationship. The criminalization approach that has become the official norm of responses to battering⁸⁰ pits her against her spouse in a contest that individualizes and depoliticizes spousal violence, and threatens her family in fundamental ways. An immediate threat is posed by her partner's inevitable loss of employment if the substantial prison terms called for are imposed. A feminist response should not be to say to this woman, "You are mistaken in your opinion of the harms that may be done to you by the criminal process.

You are mistaken in choosing family integrity over the integrity of the justice system. You are mistaken in relying upon your own opinion about how to deal with your situation and not that of the police or the prosecutor or the counsellor or the expert." These are patronizing and presumptuous attitudes that also alienate women who might benefit from discussing them further and that drive women away from the resources and help they might need. For women who do not want their relationships with accused batterers to continue, similar pressures operate to prevent them from avoiding the criminal route, and preserving their privacy and some retained dignity about their personal lives (and mistakes). It is not enough to say "you shouldn't feel that way," many women do not want to admit that they are battered in an adversarial court, where all that they can expect is a form of punishment imposed on their partner. What, then, is the solution? Leaving men to batter and their partners to deal with it alone is clearly not an acceptable answer. One initiative that has potential is the Family Group Conference model, both as it was developed in New Zealand and as it has evolved elsewhere -- for example in Australia and in Newfoundland and Labrador.

Martin, Sheilah L. (1994). "Some Constitutional Considerations on Sexual Violence Against Women." Alberta Law Review 32: 535.

In this article, the author examines the ways in which women's constitutional rights can, and should, inform our understanding of sexual violence and mandate its proper treatment by the courts. The author argues that a purposive analysis of the rights guaranteed by s. 7 imposes an obligation on the state to protect women's lives, liberty, and physical and mental security against sexual violence. At the same time, the equality provisions of ss. 15 and 28 require that the gender specificity of sexual violence, and its relation to the larger social context of women's inequality, be addressed, with the result that sexual assault is recognized as a form of sex discrimination. Through decisions such as *R. v. McCraw*, determinations of women's individual and group-based rights, in light of their social context, are shown to be essential to a full realization of the Charter's claims to equality and to life, liberty and security of the person.

McIntyre, S (1994). Redefining reformism: The consultations that shaped Bill C-49. Confronting sexual assault: A decade of legal and social change. J. V. Roberts and R. M. Mohr. Toronto, Canada, University of Toronto Press: 293-326.

McIntyre, Sheila and et al (2000). "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law." Canadian Woman Studies 20(3): 72-84.

This article examines the social aspects of criminal law, focusing on the laws relating to women's sexual abuse and rape from 1970 to the present. Topics addressed include how the legal system treats violent crimes against women, combating judicial bias, and reforms to sexual offence law in Canada.

The article describes some of the myths in the 1970s embedded in sexual offence laws and then the resistance to the 1983 reforms and 1992 reforms and the feminist strategy in the face of this resistance. The article critiques the Ewanchuk decision and argues that sections of the Ewanchuk decision undercut some of the positive holdings. Having held that mistakes as to "no" meaning "yes" are mistakes of law, the judgment would seem unnecessarily to have considered whether there was an air of reality to Ewanchuk's

honest mistake claim. More, the opinion largely ignores the "reasonable steps" limitation on the availability of the mistake of fact defence, even had honest mistake been available to Ewanchuk. Equally as confusing, the Court raised the hypothetical spectre of "ambiguous conduct" on the part of a complainant as going to her credibility about consent.

The article then elaborates on how to "reckon" with resistance to and backlash against sexual assault reforms, with criminal law and with criminal lawyers, and with judicial bias.

Meredith, Colin, Renate Mohr and Rosemary Cairns Way (1997). *Implementation Review of Bill C-49*. Ottawa, Department of Justice.

Mewett, Alan (1959-1960). "Sexual Offences in Canada." Criminal Law Quarterly 2: 21.
The article summarizes the sexual offences in Canada during the 1950s.

Mohr, Renate (1994). *Sexual Assault Sentencing: Leaving Justice to Individual Conscience. Confronting Sexual Assault: A Decade of Legal and Social Change*. J. Roberts and R. Mohr. Toronto, University of Toronto Press: 157-191.

Mohr, Renate and Julian Roberts (1994). *Sexual Assault Law in Canada: Recent Developments. Confronting Sexual Assault: A Decade of Legal and Social Change*. J. Roberts and R. Mohr. Toronto, University of Toronto Press: 3-19.

Nightingale, Margo L. (1991). "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases." Ottawa Law Review 23: 71.

In this paper the author discusses the concepts of racism, judicial impartiality and bias. While impartiality is recognized as the judicial ideal, it is argued that impartiality is virtually impossible where a judge's personal predispositions (biases) are viewed as objective realities. A review of Canadian sexual assault jurisprudence involving Native people is undertaken with particular attention given to cases involving Native women as complainants/victims. These cases provide examples of various forms of judicial bias, and show how bias can affect the treatment of Native women appearing in courts as complainants/victims. Cases are also discussed in which judges have attempted to recognize a distinct Native "culture". These cases are reviewed to assess the impact upon Native people, but more specifically, the impact upon Native women. One of the cases analyzed includes the sexual assault on a common-law partner.

Oleskiew, Diane and Nicole Tellier (1997). *Submissions to the Standing Committee on Bill C-46, An Act to Amend the Criminal Code in Respect of Production of Records in Sexual Offence Proceedings*. Ottawa, National Association of Women and the Law.

Osborne, Judith (1984). "Rape Law Reforms: The New Cosmetic for Canadian Women." Women and Politics 4(3): 49-64.

Packard, T (1980). "Culpable mistakes and rape: Harsh words on Pappajohn." University of Toronto Law Review 30: 75-98.

Razack, S (1992). *The Women's Legal Education and Action Fund. Law, politics and the judicial process.* F. L. Morton. Calgary, Canada, University of Calgary Press: 242-251.

Roberts, J. V. (1995). "Sexual assault is a crime of violence." Can. J. Crim 37: 88-93.

In his examination of youth crime statistics, Peter Carrington asserts that: "it is doubtful that the offence categories showing increases [in rates] represent -violence" and further: "it is inaccurate to refer to level I physical and sexual assaults as violent" (Carrington 1995). While the author agrees with many of his observations concerning youth crime statistics, this assertion cries out for a response. This comment examines the question of whether sexual assault is a violent offence on three levels: popular conceptions of violence, criminal justice statistics relating to sexual assault, and sexual assault as a judicial construction.

Roberts, J. V. (1996). "Sexual assaults in Canada: Recent statistical trends." Queen's Law Journal 21: 395-421.

This paper reviews statistics on sexual assault in Canada. The author reviews figures from the Uniform Crime Reporting database, which provides data on incidents of crime reported to the police, and from the Violence Against Women Survey, which provides data on the number of violent crimes committed and on whether they come to the attention of the police. The figures show that sexual assault is a highly underreported crime compared to other crimes of violence. The author examines data on the crime of sexual assault, compared to the crime of assault, from the reporting stage to the laying and processing of charges/or the three levels of seriousness of the two crimes. According to the data, a far greater proportion of sexual assaults than assaults are classified and charged at the lowest level of seriousness. Sexual assault has a higher proportion of unfounded reports and higher attrition rates than most other crimes of violence. Although data for conviction rates was not available, it is likely that almost all sexual assault convictions are at the lowest level of seriousness. The author postulates that police classification procedures and a lack of clarity in the Criminal Code provisions may be to blame/or the discrepancy in the treatment of sexual assault compared' to other crimes of violence. The end result may be that victims perceive the offence as having been more serious than police classification and charging would indicate. They may feel that their complaints are not taken seriously by the criminal justice system. Some may choose not to cooperate by refusing to testify, resulting in still fewer convictions whatever the level of seriousness. The overall effect may be to discourage victims from using the criminal justice process.

Roberts, Julian V and Michelle G. Grossman (1992). *Sexual Assault Legislation in Canada: an Evaluation.* Homicide and Sexual Assault.

Roberts, J. V. and M. G. Grossman (1994). *Changing definitions of sexual assault: An analysis of police statistics.* Confronting sexual assault: A decade of legal and social change. J. V. Roberts and R. M. Mohr. Toronto, Canada, University of Toronto Press: 57-83.

Roberts, J. V. and R. M. Mohr, Eds. (1994). Confronting sexual assault: A decade of legal and social change. Toronto, Canada, University of Toronto Press.

Ruparelia, Rakhi (2006). "Does no "no" mean reasonable doubt? Assessing the impact of Ewanchuk on determinations of consent." Canadian Woman Studies 25: 167.

Given predictions made by both supporters and opponents about the significance of Ewanchuk, the article explores how the decision has actually impacted on the resolution of sexual assault cases over the approximately seven years since it was released. First, it briefly overviews the Ewanchuk case and explain how it more accurately stands for the proposition that "only yes means yes" rather than "no means no" as is commonly asserted. With this clarification in mind, it discusses a number of sexual assault cases to consider how Ewanchuk has affected the determination of consent. The article argues that Ewanchuk has been most clearly and consistently applied in cases in which the complainant expressly communicated her lack of consent. In circumstances where the complainant was silent or her conduct was passive or ambiguous, judges have been less consistent in their application of Ewanchuk. Essentially, many judges determine consent on the basis of "no means no" rather than "only yes means yes." Moreover, even where courts have properly applied Ewanchuk, stereotypical assumptions about women as complainants continue to inform their analysis of the facts and the applicable law.

Sampson, Fiona (1998). The Production and Disclosure of Complainant's Personal Records in Sexual Assault Trials. METRAC Conference Proceedings: Can Confidentiality Survive?, Toronto: METRAC.

Sheehy, Elizabeth (1991). "Feminist Argumentation before the Supreme Court in R.v. Seaboyer; R. v. Gayme: The Sound of One Hand Clapping." Melbourne University Law Review 18: 450-468.

Sheehy, Elizabeth (1999). "Legal Responses to Violence against Women." Canadian Woman Studies 19(1,2): 62-73.

The article traces the history of legal responses to violence against women from the eighteenth century onwards. In spite of our many legal advances, violence against women has not subsided in Canada because women's vulnerability to male violence and our ability to harness law are inextricably linked to women's social, economic, and political position in Canada, in relation to those who hold power. Thus, while law is an important tool in advancing women's equality rights, law alone cannot end this violence until all women's equality is fully realized.

Sheehy, Elizabeth and Christine Boyle (2004). Justice L'Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape. Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé. E. Sheehy. Toronto, Irwin Law.

Sheehy, Elizabeth A (1989). "Canadian Judges and the Law on Rape: Should the Charter Insulate Bias." Ottawa Law Review 21(1): 151-197.

In this article, the author argues that sections 276 and 277 of the older Criminal Code (rape shield laws) must survive constitutional challenges. The author argues that

contradictions inherent in the Charter would be made apparent if the legislation is not upheld, for it is arguable that women in countries such as Australia, which do not have a Charter or a Bill of Rights, may have better access to "equality" than do Canadian women, given that Australian rape shield laws cannot be struck down or altered by the judiciary on this basis. Most important, the consequences of judicial invalidation of sections 276 and 277 would be disastrous for both present and future victims of rape.

Shilton, Elisabeth and Anne S. Derrick (1991). "Sex Equality and Sexual assault: In the Aftermath of Seaboyer." Windsor Yearbook of Access to Justice 11: 107.

This paper discusses the significance of the Seaboyer decision for sexual assault law in Canada. After reviewing the history of the development of sex unequal legal doctrines and practices in rape cases; the authors discuss parliamentary efforts at law reform, and their fate in the courts; including the majority judgment in Seaboyer. Current reform initiatives are discussed. The authors conclude that the law of sexual assault and its administration in the courts fail to meet Charter guarantees for women in a number of ways, but that the Seaboyer setback presents an opportunity for the development of effective new approaches to some of these problems.

Stanley, MG and Canada Dept of Justice (1985). The Experience of the Rape Victim With the Criminal Justice System Prior to Bill C-127. Sexual assault legislation in Canada: an evaluation: 150.

A historical overview of the Canadian rape laws is presented, beginning with a view of ancient societies through the development of contemporary rape laws. In Part Two, the police processing of rape complaints is explored. Relying on a number of Canadian studies, this section reviews the experience of the rape victim from the report to the police to the medical examination for forensic evidence. Police and medical personnel's misperceptions and prejudices regarding rape are discussed. Part Three discusses how the law has developed special rules and conventions to deal with rape cases. The discussion explores the history of the corroboration rule (victim's testimony must be corroborated by independent evidence) and explains why certain classes of witnesses, including female victims of sexual offenses, were believed to be inherently unreliable. The study explores the rationale underlying the rule and reviews a number of empirical studies which have indicated that the rationale is based in an irrational mistrust of women. In the paper's final section, the issues of convictions and sentencing are discussed, including the likelihood that rapists can be rehabilitated.

Steed, Emily (1994). "Reality Check: The Sufficiency Threshold to the Air of Reality Test in Sexual Assault Cases." Criminal Law Quarterly 36: 448-473.

This article is a response to Professor Don Stuart's argument, in his recent article "Sexual Assault: Substantive Issues Before and After Bill C-49", that the Supreme Court of Canada has created a special "air of reality" test for the defence of mistaken belief in consent in sexual assault cases. He asserts that, in light of recently implemented sexual assault laws, this "special" air of reality test violates s. 7 of the Charter because it places a higher burden on those accused of sexual assault than on other accused. This article is structured as a response to this attack on the constitutional validity of the air of reality test for the defence of mistaken belief in consent in sexual assault. It asserts that the air of

reality test does not violate the accused's right to make full answer and defence for three reasons: (1) The air of reality threshold applied to the defence of mistaken belief in consent for the offence of sexual assault is the same test that is applied to other defences in criminal law and it is not special or unique to this defence. (2) The execution of the air of reality threshold does not generally create an unfair corroboration rule against the accused; (3) The execution of the air of reality test under the new law does not affect the fairness of the trial with respect to the admissibility of evidence of complainants' prior sexual history.

Stewart, Hamish (2005). Sexual Offences in Canadian Law. Aurora, On, Canada Law Book. This resource discusses the elements of the sexual offences in the current Criminal Code, the elements of the historic sexual offences, and the particular rules of evidence and procedure that are applicable in sexual assault trials.

Stuart, D. (1992). "Sexual assault: Substantive issues before and after Bill C-49." Criminal Law Quarterly 35.

Stuart, Don (1993). "Pendulum Has Been Pushed Too Far." U.N.B. L.J. 42: 349. I support Bill C-49's efforts to make our Criminal Code reflect the "no means no" philosophy and also to criminalize unreasonable behaviour in the sexual context. However, I believe that the pendulum has been pushed too far in parts of the "rape shield" protection and also in the way that negligent conduct has been criminalized in the same category as deliberate conduct. In these two areas the law is unjust and potentially unconstitutional.

Tang, Kwong-leung (1998). "Rape law reform in Canada: The success and limits of legislation." International Journal of Offender Therapy and Comparative Criminology(42): 258-270. This article reviews the major changes and impacts of rape law reform in Canada. It is held that the 1983 reform addressed some of the key issues relating to sexual assault. In spite of the 1983 legislation, it is clear that critical issues linger in many areas. These include underreporting of sexual assault; low founding, charging, and conviction rates; the status of rape-shield rules; and the defence of honest but mistaken belief of consent. Collective and social actions on the part of women's groups and education are seen as important policy tools to counter sexual assault in our society.

Van Dieen, Jodie (1997). "O'Connor and Bill C-46: Differences in Approach." Queen's Law Journal 23: 165.

Vandervort, Lucinda (1987-88). "Mistake of Law and Sexual Assault: Consent and Mens Rea." Canadian Journal of Women and the Law 2: 233-309. Using the law of sexual assault and "mistaken belief in consent" as the subject matter of her analysis, Lucinda Vandervort radically challenges the social and legal construction of the concept of "consent." She argues that at the most basic level, sexual assault is assault. Thus it should be defined in law as any sexual touching of another without actual consent. She argues that when judges allow accuseds to use the defense of mistaken belief in consent, they are actually permitting social myths about women's sexual tastes to

be treated quite improperly as evidence of consent. The author rejects both the present law and a strict liability approach to redefining the law of consent. Instead, she proposes that the element of consent be subject to positive and affirmative proof. Only if the law requires actual affirmative consent will social definitions of "consensual sex" gradually come to recognize women's physical autonomy and sexual self-determination.

Vandervort, Lucinda (2004). "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault." Osgoode Hall Law Journal 42(4): 625-660.

The exculpatory rhetorical power of the term "honest belief" continues to invite reliance on the bare credibility of belief in consent to determine culpability in sexual assault. In law, however, only a comprehensive analysis of mens rea, including an examination of the material facts and circumstances of which the accused was aware, demonstrates whether a "belief" in consent was or was not reckless or wilfully blind. An accused's "honest belief" routinely begs this question, leading to a truncated analysis of criminal responsibility and error. The problem illustrates how easily old rhetoric perpetuates assumptions that no longer have a place in Canadian law. The article analyzes the following cases: Pappajohn, Sansregret, and R. v. MacFie that involved a husband abducting, raping, and killing his wife but where he pled not guilty to charges of sexual assault and was acquitted on the sexual assault charge (and convicted of first degree murder).

Weiser, Irit (1993). "Sexual assault legislation: the balancing act." U.N.B. L.J. 42: 213-222.

With the advent of the Canadian Charter of Rights and Freedoms, judges, lawyers and legislators must give express consideration to the interaction between societal values, fundamental rights and criminal law norms. Moreover, the Charter requires us to explain how we balance these sometimes competing interests and why we draw the line where we do. The case of R. v. Seaboyer and the government's response to it, Bill C-49, provide one of the best examples of this juggling act. The article examines this issue by discussing the Supreme Court of Canada's decision in Seaboyer, the nature of the problem of sexual assault and its relationship to the Charter and criminal law.

Working Group of Attorneys General Officials- Federal/Provincial/Territorial (1992). Gender equality in the Canadian justice system. Ottawa, Canada, Department of Justice.

CASES

R. v. Pappajohn [1980] 2 S.C.R. 120.

Facts: Accused listed his house for sale with the complainant, a real estate saleswoman, who was associated. After a lunch appointment with lots of liquor consumption by both parties, they went to the appellant's house, the one which was listed for sale. There, the complainant contended, she was raped over her protests and struggles, while the appellant claims he had an amorous interlude involving no more than a bit of coy objection on her part and several acts of intercourse with her consent. The complainant eventually ran out of the house naked with a man's bow tie around her neck and her hands tightly tied behind her back with a bathrobe sash.

Trial: The trial judge refused to put the possibility of mistaken belief to the jury and the appellant was eventually convicted of the rape of the complainant.

Court of Appeal: The conviction was affirmed on the basis that the issue emerging from the evidence was a simple one of consent or no consent.

SCC Held (Dickson and Estey JJ. dissenting): The appeal should be dismissed.

Per Martland, Pigeon, Beetz, McIntyre and Chouinard JJ.: Defence of mistaken belief allowed as long as it is honestly held. The test to be applied is that there must be in the record some evidence which would convey a sense of reality in the submission. In this case, to convey such a sense of reality, there must be some evidence which if believed would support the existence of a mistaken but honest belief that the complainant was in fact consenting to the acts of intercourse. Here, the complainant's version excludes consent and any possible mistaken belief in consent, while the appellant's version speaks of actual consent and no suggestion of any mistaken belief could arise, and in this situation the only realistic issue which can arise is the simple issue of consent or no consent. To require the putting of the alternative defence of mistaken belief in consent, the evidence must appear from or be supported by sources other than the appellant in order to give it any air of reality.

Per Dickson and Estey JJ., dissenting: In a case of alleged rape, where a fact or circumstance is not known to, or is misapprehended by, the accused, leading to a mistaken but honest belief in the consent of the woman, his act is not culpable in relation to that element of the offence. If the accused's act would be innocent, according to facts as he believed them to be, he does not have the criminal mind and ought not be punished for his act. Mistake is a defence where it prevents an accused from having the mens rea which the law requires for the very crime with which he is charged. With respect to whether a defence of honest, though mistaken, belief in consent must be based on reasonable grounds: The mind with which the jury is concerned is that of the accused, not that of a reasonable man. By importing a standard external to the accused, there is created an incompatible mix of subjective and objective factors.

R. v. Sansregret [1985] 1 S.C.R. 570.

Facts: Accused and complainant had a prior one-year relationship which involved "slappings" and "blows". She ended the affair and told him to leave. Subsequently, the

appellant broke into her house twice. On both occasions, complainant feared for her safety because of his threats and violent behaviour. To calm him down and to protect herself from further violence, she held out some hope of reconciliation and consented to intercourse. Although she reported both incidents to the police and complained of being raped, no proceedings were taken after the first time because appellant's probation officer asked her not to press the matter. Appellant was arrested and charged following the second incident.

Trial: The judge found not only that the complainant consented to intercourse solely because of fear engendered by appellant's threats but also that the appellant honestly believed that the consent to intercourse was freely and genuinely given. Applying the Pappajohn case, the trial judge acquitted the appellant.

Court of Appeal: Acquittal set aside and entered a conviction for rape.

SCC Held: Appeal Dismissed

The defence of mistake of fact rests on the proposition that the mistaken belief, honestly held, deprives the accused of the requisite mens rea for the offence. The mens rea for rape under s. 143(h)(i) of the Criminal Code must involve a knowledge that the woman is consenting because of threats or fear of bodily harm, or recklessness as to its nature. An honest belief on the part of the accused -- even though unreasonably held -- that the woman was consenting to intercourse freely and voluntarily and not because of threats would negate the mens rea and entitle the accused to an acquittal. In the present circumstances, the defence of mistake of fact was not available to the accused. The trial judge found that the complainant consented out of fear and that the appellant blinded himself to the obvious and made no inquiry as to the nature of the consent which was given. The evidence revealed that he knew of the complaint of rape caused by the first incident and therefore was aware of the likelihood of the complainant's reaction to his threats. To proceed with intercourse in such circumstances without further inquiry constitutes self-deception to the point of wilful blindness. Where the accused is deliberately ignorant as a result of blinding himself to reality the law presumes knowledge -- in this case knowledge of the forced nature of the consent. There was therefore no room for the application of the defence.

R. v. Seaboyer; R. v. Gayme [1991] 2 S.C.R. 577

Facts: Seaboyer was charged with sexual assault of a woman with whom he had been drinking in a bar. The judge at the preliminary inquiry refused to allow the accused to cross-examine the complainant on her sexual conduct on other occasions. The appellant contended that he should have been permitted to cross-examine as to other acts of sexual intercourse which may have caused bruises and other aspects of the complainant's condition which the Crown had put in evidence. Such evidence might arguably be relevant to consent since it might provide other explanations for the physical evidence. The Gayme complainant was 15, the appellant 18. They were friends. The Crown alleged that the appellant sexually assaulted the complainant at his school. The defence, relying on the defences of consent and honest belief in consent, contended that there was no assault and that the complainant was the sexual aggressor. In pursuance of this defence, the appellant at the preliminary inquiry sought to cross-examine and present evidence on prior and subsequent sexual conduct of the complainant. Accordingly, he brought a

motion that ss. 276 and 277 of the Code were unconstitutional. The judge rejected the motion, on the ground that he lacked jurisdiction to hear it, and committed the appellant for trial.

Held (L'Heureux-Dubé and Gonthier JJ. dissenting in part): The appeals should be dismissed; however, s. 276 of the Criminal Code is unconstitutional

Reasons: s.276 constituted a blanket exclusion of evidence related to complainant's sexual activity with anyone else other than the accused, subject to three exceptions -- rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident. Section 276 has the potential to exclude evidence which is relevant to the defence and whose probative value is not substantially outweighed by the potential prejudices to the trial process. For example, evidence related to honest mistaken belief. The basis of the accused's honest belief in the complainant's consent may be sexual acts performed by the complainant at some other time or place. Yet section 276 would preclude the accused leading such evidence. However striking down s. 276 does not revive the old common law rules of evidence which permitted evidence of sexual conduct and condoned invalid inferences from it. Evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent.

1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct (a) more likely to have consented to the sexual conduct at issue on the trial; or (b) less worthy of belief as a witness.

2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence.

Per L'Heureux-Dubé and Gonthier JJ. (dissenting in part): The exclusion of "pattern" evidence and "habit" evidence is not unconstitutional; the mythical basis of these arguments denies their relevance. Such evidence is almost invariably irrelevant. It is highly prejudicial to the integrity and fairness of the trial process and, in any event, is nothing more than a prohibited propensity argument. Consent is to a person and not to a circumstance; the use of the words "pattern" and "similar fact" deny this reality. Such arguments are implicitly based upon the notion that women will, in the right circumstances, consent to anyone and, more fundamentally, that "unchaste" women have a propensity to consent. The relevance of evidence of mistaken belief in consent in some cases does not conclusively demonstrate the infirmity of the provision. No relevant evidence regarding the defence of honest but mistaken belief in consent is excluded by the legislation under attack here. Any evidence excluded by this subsection would not satisfy the "air of reality" that must accompany this defence nor would it provide reasonable grounds for the jury to consider in assessing whether the belief was honestly held. The structure of the exception set out in s. 276(1)(c) is thus not offensive to the defence of honest belief.

Facts: The accused was charged with sexual assault. Two weeks before the incident, the complainant and the accused had dated for the first time. The accused testified that later, at her apartment, they became quite intimate, fondling one another's private parts and talking of sex and birth control, and that she masturbated him to ejaculation. She maintains that they only kissed and talked of birth control and about the fact that, as a born again Christian, she did not believe in premarital sex. On the day of the incident, the accused called the complainant early in the morning and she agreed that he could come over. He arrived shortly thereafter and she greeted him at the door with a kiss on the cheek, wearing only her bathrobe. The complainant claims that, a few minutes later, he drew her to him and pushed her onto the bed. She resisted actively but he was stronger. Feeling his weight atop her, she had a flashback to a previous traumatic experience and went into "shock". The next thing she remembered, he was pulling his penis out of her and ejaculating on her stomach. By contrast, the accused testified that she actively participated in the sexual activity and, when things began to get "hot", he prematurely ejaculated on her stomach. No intercourse took place. A medical report from the examination of the complainant indicated the presence of redness on the inner labia which could be consistent with either consensual or non-consensual intercourse. At trial, the accused's defence was that the complainant consented to the sexual activity or, in the alternative, that he had an honest but mistaken belief that she was consenting. The trial judge refused to put the mistaken belief defence to the jury, finding there to be no air of reality to it, and concluding that the issue was simply one of "consent or no consent". The accused was convicted. On appeal, the majority of the Court of Appeal set aside the conviction and ordered a new trial, holding that the trial judge erred in not putting the mistaken belief defence to the jury.

Held: The appeal should be allowed and the conviction restored.

Per L'Heureux-Dubé J.: In sexual assault cases, where the accused asserts that the complainant actually consented, it is artificial to inquire further into whether he also expressed a belief that she was consenting. The absence or presence of an actual statement indicating a belief in consent is of no consequence in all but the most unusual of cases. Presuming that the accused is de facto asserting such a belief, the more fundamental question is whether that belief is an honest one, capable of supporting the defence of honest but mistaken belief in consent. Essentially, for there to be an "air of reality" to the defence of honest but mistaken belief in consent, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence.

What is relevant to a possible defence of honest but mistaken belief is the account of the events that took place at the time of the sexual assault, as well as any additional relevant and admissible information explaining why the accused might have honestly interpreted those events at that time to be consistent with consent. In certain cases, evidence of prior sexual activity between the two parties may be relevant in this respect. An honest belief that the complainant would consent is, by itself, not a defence to sexual assault where the accused is aware of, or wilfully blind or reckless as to, lack of consent at the time of the

sexual activity. When the complainant and the accused give similar versions of the facts, and the only material contradiction is in their interpretation of what happened, then the defence of honest but mistaken belief in consent should generally be put to the jury, except in cases where the accused's conduct demonstrates recklessness or wilful blindness to the absence of consent. When the complainant's and the accused's versions conflict materially or are diametrically opposed on this point, then the defence can be left with the jury if it is realistically possible for a properly instructed jury, acting judiciously, to splice some of each person's evidence with respect to the encounter, and settle upon a reasonably coherent set of facts, supported by the evidence, that is capable of sustaining the defence of mistaken belief in consent.

The actus reus of sexual assault requires that the Crown demonstrate a touching of a sexual nature, combined with a lack of actual consent to that touching, while the mens rea is established by showing that the accused intended to touch the complainant in a manner that is sexual, and knew of, or was reckless or wilfully blind to, the fact that the complainant was not consenting to that touching. However, in reinforcing the view that sexual activity is consensual in the absence of communicated non-consent, the current common law approach to the mens rea of sexual assault may perpetuate social stereotypes that have historically victimized women and undermined their equal right to bodily integrity and human dignity. The primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in. The criminal law must be responsive to women's realities, rather than a vehicle for the perpetuation of historic repression and disadvantage. The common law governing the mens rea of sexual assault should be approached having regard to s. 15 of the Canadian Charter of Rights and Freedoms, and it should be accepted that the mens rea for sexual assault is also established by showing that the accused was aware of, or reckless or wilfully blind to, the fact that consent was not communicated. Although consent may exist in the mind of the woman without being communicated in any form, it cannot be accepted by a reasonable finder of fact as having been honestly perceived by the accused without first identifying the behaviour that led the accused ostensibly to believe that the complainant was consenting. If the accused is unable to point to evidence tending to show that the complainant's consent was communicated, then he risks a jury concluding that he was aware of, or reckless or wilfully blind to, the complainant's absence of consent.

The trial judge was correct in not putting the defence of mistake of fact to the jury.

R. v. Esau. [1997] 2 S.C.R. 777.

Facts: The accused, a second cousin of the complainant, had sexual intercourse with her after a party at her home. The accused was later charged with sexual assault and tried before a jury. At trial, the accused testified that, in his view, the complainant was in a condition to be "able to control what she was doing". He said that they kissed each other and then she invited him to come to her bedroom, where they had consensual sexual intercourse. The complainant testified that she was drunk and denied kissing the accused and inviting him to her bedroom. She testified that she had no memory of anything from the time she went to her bedroom until the next morning when she awoke and realized that she had engaged in sexual intercourse. Although she could not remember what

occurred, the complainant testified that she would not have consented to intercourse with the accused because they were related.

Trial: The trial judge charged the jury on the issue of consent, but not on the defence of honest but mistaken belief in consent. Defence counsel did not object. The accused was convicted of sexual assault.

Court of Appeal: By majority, allowed the appeal, quashed the conviction and ordered a new trial. The court concluded that there was an 'air of reality' to the defence of honest but mistaken belief and that, notwithstanding the failure of defence counsel to raise the issue, the trial judge was obliged to put that defence to the jury.

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Gonthier, Iacobucci and Major JJ.: Before a court should consider the defence of honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence. Here, the plausible evidence comes from the testimony of the complainant and the accused and the surrounding circumstances of the alleged sexual assault. The accused's evidence amounted to more than a bare assertion of belief in consent. He described specific words and actions on the part of the complainant that led him to believe that she was consenting. This alone may be enough to raise the defence, but there was more. The complainant's evidence did not contradict that of the accused, as she cannot remember what occurred after she went to her bedroom. In addition there was no evidence of violence, struggle or force. The absence of resistance or violence alone could not raise the defence as it is only one factor that must be considered. The complainant did not testify that she did not in fact consent, but was only able to say that because she was related to the accused, she would not have consented. The accused's evidence of the complainant's participatory actions, if believed, might lead a jury to conclude that he honestly believed she was consenting despite his being mistaken about her ability to legally consent because of intoxication. A court cannot make an a priori determination that honest but mistaken belief is impossible when the complainant is intoxicated. Lastly, while passivity by the complainant may not be consent, her absence of memory has to be considered with the evidence of the accused that the complainant seemed to participate willingly.

Per McLachlin J. (dissenting): Section 273.2 of the Criminal Code provides that, in a case of sexual assault, an accused cannot raise the defence of mistaken belief in consent if he did not take "reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". In this case, where the complainant was on any view of the evidence quite drunk, the absence of any evidence of steps taken by the accused to ascertain consent precludes him from raising the defence.

In any event, an application of the common law principles governing the defence leads to the same result. To put the defence of honest but mistaken belief to the jury, there must be sufficient evidence to give the defence an "air of reality". Mere assertion of belief in consent by the accused will not suffice to give the defence an air of reality. Consent for purposes of sexual assault is found in the communication by a person with the requisite capacity by verbal or non-verbal behaviour to another of permission to perform the sexual act. The issue of mistake as to consent must be assessed on the basis of the particular accused person before the court, but the accused cannot have been wilfully blind or reckless. An accused is not entitled to presume consent in the absence of

communicative ability and thus cannot raise the defence in the case of an unconscious or incoherent complainant. Passivity without more is also insufficient to provide a basis for the defence. Since the defence of honest but mistaken belief is designed to meet the situation where there has been an honest miscommunication of non-consent, it may arise only where the evidence indicates a situation of ambiguity resulting from the complainant's conduct or external circumstances which the accused, not being wilfully blind or reckless and acting honestly, misinterpreted as consent. The requirements of the defence are thus: (1) evidence that the accused believed the complainant was consenting; (2) evidence that the complainant in fact refused consent, did not consent, or was incapable of consenting; and (3) evidence of ambiguity or equivocality showing how the accused could honestly, and without wilful blindness or recklessness, have mistaken the complainant's lack of consent for consent.

Here, the trial judge did not err in failing to put the defence of honest but mistaken belief to the jury, since it did not realistically arise on the evidence. The complainant and the accused presented divergent and incompatible versions of the events. Drunkenness cannot constitute evidence of a situation in which the complainant might appear to be consenting when in fact she was not. The law, however, does not permit speculation based on stereotypes but rather demands specific evidence of a state of affairs which could give rise to an honest misapprehension of consent when no consent existed.

Per L'Heureux-Dubé J. (dissenting): The traditional common law understanding of "lack of consent" as it relates to the mens rea in the offence of sexual assault should be changed. The customary focus on the complainant's communication of refusal or rejection of the sexual touching in question should be rejected in favour of an assessment of whether and how the accused ascertained that the complainant was consenting to such activity. The mens rea of the offence should be established where the accused is shown to have been aware of or reckless or wilfully blind as to the fact that the complainant has not communicated consent to the activity in question. In determining whether an accused had the requisite culpable state of mind, it is necessary for the trier of fact objectively to examine not only the verbal and behavioural indicators in the evidence of the complainant's subjective state, but also the accused's subjective perception thereof, in light of any relevant circumstances known to him at the time. Where an accused has demonstrated that he honestly, with some basis in the circumstances, misperceived these indicators, and therefore lacked the necessary "culpable mind", the defence of honest but mistaken belief may arise. Here, there was no evidentiary basis for ambiguous communication on the part of the complainant or external circumstances which could have influenced the perceptions of the accused. The trial judge was thus correct in not putting the defence to the jury.

R. v. A.W.S. [1998] M.J. No. 26 (Manitoba Court of Appeal)

Facts: This was a Crown appeal from acquittal of the accused on a charge of sexual assault against his common-law wife. The accused and the complainant had lived together on and off since 1982, and had four children. In January, 1997, the complainant had surgery involving an abdominal incision, and was picked up and driven home by the accused upon her release from hospital. The complainant testified that she complained she was sore upon arriving home, and retired to bed. The accused asked if she would

have sexual relations, but she replied no. Without any resistance or cooperation from her, the accused removed her clothing and had sexual intercourse with her. She testified that she did not physically resist because she was afraid of the accused. The accused denied having had sexual relations with the complainant on the day in question. At trial, the accused did not attest to his belief in the complainant's consent to sexual intercourse as an alternate defence. The trial judge rejected the accused's evidence, finding it unbelievable, and concluded that the evidence as a whole did not raise a reasonable doubt as to the accused's guilt. However, the trial judge had a reasonable doubt on the issue of whether the complainant had adequately communicated her lack of consent to the accused, so acquitted him. On this appeal, the Crown submitted that the trial judge had erred in law in considering the mistaken belief defence.

HELD: The appeal was allowed. On the trial judge's factual findings, the accused stood guilty of the offence of sexual assault. A conviction was entered. The fact that the accused and the complainant were involved in an ongoing intimate relationship was evidence which may have provided an air of reality to the defence of mistaken belief, but the trial judge still had an obligation, as a matter of law, to determine whether that air of reality existed in the case before him. The law could not allow a person to take refuge in an intimate relationship and be wilfully blind to the condition of his or her sexual partner simply because that relationship existed. In this case, there was little evidence which could support the defence of mistaken belief in consent. That evidence, when considered in the context of the complainant's express rejection of the accused's invitation for sexual relations, her surgery and resulting physical discomfort, the accused's knowledge that the complainant had undergone surgery, the complainant's repeatedly informing the accused that she was sore, and her explanation for remaining passive, did not give an air of reality to the defence of mistaken belief. The evidence was not reasonably or realistically capable of supporting that defence.

R. v. Ewanchuk. [1999] 1 S.C.R. 330

No defence of implied consent to sexual assault exists in Canadian law.

Facts: The complainant, a 17-year-old woman, was interviewed by the accused for a job in his van. She left the van door open as she was hesitant about discussing the job offer in his vehicle. The interview was conducted in a polite, business-like fashion. After the interview, the accused invited the complainant to see some of his work which was in the trailer behind the van. The complainant purposely left the trailer door open but the accused closed it in a way which made the complainant think that he had locked it. There was no evidence whether the door was actually locked. The complainant stated that she became frightened at this point. The accused initiated a number of incidents involving touching, each progressively more intimate than the previous, notwithstanding the fact that the complainant plainly said "no" on each occasion. He stopped his advances on each occasion when she said "no" but persisted shortly after with an even more serious advance. Any compliance by the complainant was done out of fear and the conversation that occurred between them clearly indicated that the accused knew that the complainant was afraid and certainly not a willing participant.

Trial: The trial judge acquitted the accused of sexual assault relying on the defence of implied consent.

Appeal: Court of Appeal upheld that acquittal.

SCC Held: The appeal should be allowed.

Per Lamer C.J. and Cory, Iacobucci, Major, Bastarache and Binnie JJ.: At issue here are whether the trial judge erred in his understanding of consent in sexual assault and whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

The actus reus of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The Crown need not prove that the accused had any mens rea with respect to the sexual nature of his behaviour. The absence of consent, however, is purely subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred. While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trier of fact in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. The accused's perception of the complainant's state of mind is not relevant and only becomes so when a defence of honest but mistaken belief in consent is raised in the mens rea stage of the inquiry.

The trier of fact may only come to one of two conclusions: the complainant either consented or did not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the actus reus of sexual assault is proven. *No defence of implied consent to sexual assault exists in Canadian law.* Here, the trial judge accepted the complainant's testimony that she did not want the accused to touch her, but then treated her conduct as raising a reasonable doubt about consent, described by him as "implied consent". This conclusion was an error.

To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. Section 265(3) of the Criminal Code enumerates a series of conditions -- including submission by reason of force, fear, threats, fraud or the exercise of authority -- under which the law will deem an absence of consent in assault cases, notwithstanding the complainant's ostensible consent or participation.

The mens rea of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. The accused may challenge the Crown's evidence of mens rea by asserting an honest but mistaken belief in consent. The defence of mistake is simply a denial of mens rea. It does not impose any burden of proof upon the accused. The accused need not testify in order to raise the issue. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. Not all beliefs upon which an accused might rely will exculpate him. Consent in relation to the mens rea of the accused is limited by both the common law and the provisions of ss. 273.1(2) and 273.2 of the Criminal Code.

Here, the accused knew that the complainant was not consenting before each encounter.

The trial judge ought to have considered whether anything occurred between the communication of non-consent and the subsequent sexual touching which the accused could honestly have believed constituted consent.

Per L'Heureux-Dubé and Gonthier JJ.:

Canada is a party to the Convention on the Elimination of All Forms of Discrimination against Women, which requires respect for and observance of the human rights of women. Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. These human rights are protected by ss. 7 and 15 of the Canadian Charter of Rights and Freedoms and their violation constitutes an offence under the assault provisions of s. 265 and under the more specific sexual assault provisions of ss. 271, 272 and 273 of the Criminal Code.

This case is not about consent, since none was given. It is about myths and stereotypes. The trial judge believed the complainant and accepted her testimony that she was afraid and he acknowledged her unwillingness to engage in any sexual activity. However, he gave no legal effect to his conclusion that the complainant submitted to sexual activity out of fear that the accused would apply force to her. The application of s. 265(3) requires an entirely subjective test. As irrational as a complainant's motive might be, if she subjectively felt fear, it must lead to a legal finding of absence of consent.

The question of implied consent should not have arisen. The trial judge's conclusion that the complainant implicitly consented and that the Crown failed to prove lack of consent was a fundamental error given that he found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid. This error does not derive from the findings of fact but from mythical assumptions. It denies women's sexual autonomy and implies that women are in a state of constant consent to sexual activity. The majority of the Court of Appeal also relied on inappropriate myths and stereotypes. Complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The findings necessary to support a verdict of guilty on the charge of sexual assault were made. In particular, there was no evidence that would give an air of reality to a defence of honest but mistaken belief in consent for any of the sexual activity which took place in this case. Section 273.2(b) precludes an accused from raising that defence if he did not take reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting. The position that the nature of the defence of honest but mistaken belief does not need to be based on reasonable grounds as long as it is honestly held has been modified by the enactment of s. 273.2(b), which introduced the "reasonable steps" requirement.

R. v. Davis. [1999] 3 S.C.R. 759.

Facts: Accused, holding himself out as a photographer with connections to a modelling agency, invited the complainants, who ranged in age from 15 to 20, to pose for a portfolio of photographs with a view to initiating a modelling career. He persuaded all of them to pose nude or semi-nude, and some of them were photographed in bondage. The accused allegedly sexually assaulted the complainants D., K., S. and R. while they were posing in various stages of undress or were tied up and completely vulnerable. In the cases of B. and D., it was alleged that the accused threatened to send revealing photographs to either

their parents or to a pornographic magazine if they did not agree to perform sexual favours for him. While D. ignored the accused's threats, B. acceded to them and performed sexual favours over the course of a two- to three-month period in exchange for the negatives. In her testimony, B. indicated that during that period there were at least two incidents in which the accused persisted in sexual activity after she had communicated her lack of consent. The accused testified that any sexual activity between B. and himself was consensual and that the photography sessions began after they had already been involved in a sexual relationship. He thus had no reason to threaten to expose the complainant, and never did so. In the case of D., the accused admitted taking her photos, but denied that any semi-nude photos were taken or that any sexual impropriety had occurred. He also denied trying to extort sexual favours from her, as there were no photographs with which to threaten her. With respect to K., S. and R., the accused claimed that any sexual contact was consensual.

Trial: The trial judge convicted the accused of two counts of extortion against B. and D. and of five counts of sexual assault against the five complainants.

Appeal: The Court of Appeal upheld the convictions.

SCC Held: Appeal dismissed

Reasons: It is unnecessary in this case to decide whether there is consent to sexual activity if it is obtained by threatened exposure of nude photographs. The accused's conviction of sexually assaulting B. may be affirmed on the basis of an independent sexual assault, wholly apart from his extortionate conduct. B. testified that, during the two- to three-month period in which she went to the accused's apartment and had sexual intercourse with him in exchange for the negatives, there were at least two incidents in which the accused persisted in sexual activity after she had unambiguously communicated her lack of consent. The trial judge found B. to be a credible witness and this Court is satisfied that the events unfolded as the complainant described them. This evidence supports a conviction of sexual assault. In the case of K., assuming, without deciding, that the trial judge failed to consider the defence of honest but mistaken belief in consent, a review of the evidence leads to the conclusion that there was no air of reality to the defence. Even if the testimony of the accused is completely accepted, it discloses that, at a minimum, he was wilfully blind as to whether K. consented to the fondling of her breasts and vagina. There is no suggestion by the accused that K. posed nude for any reason other than to further her modelling career. Nor was there any evidence that she invited him to touch her prior to his fondling of her breasts and vagina.

R. v. D.I.A [1999] N.B.J. No. 303 (New Brunswick Court of Appeal)

Facts: This was an appeal by the Crown from the acquittal of DIA on one charge of sexual assault and one charge of anal intercourse. DIA had been married for four years, and had had sexual relations with his wife two to three times every day. On the day of the offence, DIA believed that, as they had only had sex twice that day, his wife still wanted to have sex. The trial judge held that DIA could not be found guilty, as he had a mistaken belief in consent. The Crown appealed on the ground that the trial judge misdirected himself in the interpretation of DIA's defence of mistaken belief in consent.

HELD: Appeal allowed and new trial directed. The trial judge misdirected himself in the interpretation and application of DIA's honest but mistaken belief in consent. The trial judge did not make any findings of fact in regard to the actus reus element of the sexual

assault. He did not expressly conclude that there was an act of unwanted sexual touching. As the evidence was contradictory, the trial judge was required to make the necessary findings of fact. The trial judge also did not make any findings of credibility with respect to DIA's wife. Since the presence or absence of consent turned on the complainant's state of mind at the time of the touching, and not on DIA's perception, a credibility finding with respect to DIA's wife was required. The trial judge did not make the findings necessary to support a finding of not guilty. His failure to give adequate reasons as to why the defence should apply raised doubt as to whether the trial judge had understood the defence of mistaken belief in consent.

R. v. MacFie. [2001] 277 A.R. 86 (C.A.).

Facts: MacFie's wife left him, following a long history of physical and emotional abuse. Following many unsuccessful attempts to persuade her to see him, he abducted her and drove to a gravel pit south of Calgary. He parked, entered the back of his van, and had intercourse with her two times. The wife reluctantly provided the police with a written statement where she said she feared her husband would kill her but that she had not "consented" but had "agreed" to have sexual intercourse because she feared bodily harm. She was later found murdered.

Trial Court: Held that although MacFie violently abducted his estranged wife and had sexual intercourse with her without her consent, he was not liable to be convicted of sexual assault because he "truly and honestly believed that she was consenting to the activity".

Decision (Court of Appeal): Crown's Appeal allowed.

Held that the trial judge erred in law in finding "air of reality" for the defence of belief in consent without considering the evidence of circumstances relevant to the issues of recklessness and wilful blindness. "While the abduction continues, the perpetrator of the abduction cannot assert an honest belief in consent. Honest belief cannot exist in circumstances of wilful blindness or recklessness and the perpetrator of a violent kidnapping or abduction can have no illusions about the voluntariness of any expression of consent"

R. v. C.M.M. 2002 NSPC 13, (Nova Scotia Provincial Court)

Facts: Trial of CMM for carrying a restricted weapon for the purpose of committing an offence, use of a firearm in committing a sexual assault, and threatening. CMM entered his estranged wife's home after he saw her lover leaving the house with CMM's children. She was at work. CMM went through some boxes of his possessions and found a long-forgotten handgun. When his wife returned home, she found CMM standing in a hallway wearing latex gloves and holding the gun at his side. She testified that he then threatened to kill her lover and have three other men rape her. She then led CMM to believe that she was going to reconcile with him. During a conversation in the bedroom, while they were seated on the bed, he was holding the gun pointing down toward her knee. She brushed the gun aside, and it went off, frightening both of them. He put the gun away and they had sexual intercourse without any physical force. She later managed to get away from him in a bank and called the police. He made a statement admitting most of the allegations, except that he denied the threats. He pleaded guilty during the trial to break and enter, careless use of a firearm, and breach of a peace bond. A kidnapping charge

was dismissed on a motion for a directed verdict at the end of the Crown's case. CMM argued that he did not possess the gun for the purpose of committing an offence, that he did not use the firearm in committing a sexual assault, and that he did not threaten to kill his wife's lover or cause bodily harm to his wife.

HELD: Accused acquitted. CMM did not possess the firearm with the intention to commit an offence. He entered the house intending only to let his wife know how he felt, he found the gun after he arrived, and he intended only to scare her with it. The gun went off accidentally and he laid it aside immediately. In his mind, it was not a factor in the sexual assault. CMM's wife led CMM to believe, by her words and conduct, that she was consenting to the sexual intercourse. There had been no prior incidents to put CMM on notice that that his wife was submitting out of fear. He had an honest but mistaken belief in consent. CMM's denial of the threats raised a reasonable doubt for several reasons. His wife's testimony in several important details differed from what she had initially told police. Some of what she said he had said was obviously false. The trial judge accepted the events as CMM had described them to the police immediately after the incident.

R. v. Went [2004] B.C.J. No. 1900.

Facts: Appeal by Went from a provincial court conviction for sexual assault. Went and the complainant began a sexual relationship in 1999 and lived together until she asked him to move out in 2001. They continued a social and sexual relationship until the alleged sexual assault. The complainant testified that they had a healthy sexual relationship that included at her request, an element of forcefulness, including insincere verbal exhortations to stop. The complainant also testified that such activity was usually preceded by subtle indicators such as a hug or flirtatious behaviour. On the night in question, the couple watched a movie which depicted a couple making love while a plastic bag was placed over the woman's head. The couple disagreed, and no finding was made, over whether the complainant commented favourably on the movie's depiction. Shortly thereafter, Went covered the complainant's mouth and she pushed away his hand. He then attempted to initiate oral sex and was rebuffed. Went removed the complainant's clothes and she curled into a ball in a final effort to rebuff his attempts at intercourse. Went threw her clothes at her and ceased his advances. The parties disagreed on whether the complainant assisted in the removal of her clothes and the trial judge made no finding on this point. Went argued that he had an honest but mistaken belief in her consent, based largely on the sexual history and pattern of behaviour between the couple. The trial judge held that there was an air of reality to the defence of honest but mistaken belief in consent, but that the defence could not succeed. He found that Went had been reckless in failing to inquire as to whether the complainant had consented and had been wilfully blind to her protests and body language indicating that he should stop.

HELD: The appeal was allowed and an acquittal was entered. The trial judge failed to appreciate that he was unable to decide whom to believe in respect of relevant and essential evidence as to whether Went's belief in consent was reckless or wilful, or whether he could honestly hold such a belief. If the trial judge could not discount that the complainant may have given signals to Went that were consistent with an honest belief in consent, then it could not be said that the Crown had proven beyond a reasonable doubt that Went's defence could not succeed.

R. v. R.V. [2004] O.J. No. 5136 (Ontario CA); O.J. No. 849 (Sup. Ct.); [2001] O.J. No. 5143 (Ct. J)

Facts: Trial of RV on two charges of sexual assault against his wife of 12 years. RV raised the defence of honest but mistaken belief in consent of his wife to the sexual activity. RV and his wife were having marital difficulties but were still living in the same house and had not formed an intention to separate. At the time of the alleged assaults they were sleeping in different rooms but otherwise carried on a relatively normal marital relationship. On the night of the first incident RV undressed, got into bed with TV and initiated sexual conduct. TV pushed him away and told him no. They went out for dinner and had a pleasant evening and upon their return were feeling quite positive towards each other. RV again made sexual advances. TV again said no but RV continued to kiss and fondle her. Eventually he gave up and left the bed. The next day they visited TV's mother. When they returned home RV invited TV into his bed but she declined. When TV awoke the next morning RV was in bed with her. She agreed to let him hold her. RV started caressing TV and attempted to pull down her pyjama pants. She pulled them back up. RV continued to try to persuade her and tried to get on top of her. He eventually gave up without having sex. TV made a complaint to the police and RV was charged. He argued that although TV was rejecting his advances through words, her conduct led him to an honest belief that she was consenting.

HELD (Trial Judge): RV was found not guilty on both counts. When parties get married, they, by the very nature of the relationship, are consenting to engaging in sexual intercourse. Although TV and RV's relationship was strained, it was still a viable and ongoing marriage. It was not enough for the Crown to simply prove that the sexual conduct took place without TV's consent. The Crown failed to prove beyond a reasonable doubt that RV's conduct was subjectively outside the norms of tolerated sexual behaviour in their marriage. It was not proven that RV knew or ought to have known that this occasion was different and when TV said no through words and gestures, she meant no. RV did not at any time force actual sexual intercourse. He understood the limits in their sexual relationship and did not exceed those limits. Within the confines of a viable marriage it was difficult to reject RV's defence of honest but mistaken belief that TV was consenting. There was a distinct air of reality to RV's interpretation of his wife's behaviour. RV was entitled to be acquitted of the charges.

HELD (Summary Conviction Appeal): Appeal dismissed. The Crown's contention, which would indicate that express consent must be present for sexual relations in the marriage context, was contrary to legal principle and common sense. Here, the trial judge had made specific findings of fact that V had an honest belief that the complainant was consenting. He found that, V's conduct must be examined in the context of a viable marriage. The evidence supported this finding. As well, because there had been no realistic hope of success, the Crown should not have brought the appeal and would pay V's costs in the amount of \$5,000.

Held (Court of Appeal): Acquittal upheld but held that lower court judges made serious error of law.

T he trial judge and the summary conviction appeal judge made serious errors of law. On the complainant's story, the defence of mistaken belief in consent was not available. Merely because there was a viable marriage does not itself give rise to a defence of mistaken belief in consent in the face of the complainant's unequivocal statements to the

respondent that she was not consenting to further sexual relations. There was no burden on the Crown to disprove the defence merely because the parties were married. Nor could it be said that there could be any implied consent in those circumstances.

R. v. D.M. [2004] O.J. No. 4376 (Ontario Court of Justice)

The complainant, J.R., then aged 18 and the defendant, D.M., who was 21 at the time the allegation arose, were involved in an intimate relationship of some two years duration. They had known each other for a total time period of some four years at the time of this incident. Incident- JR consented to DM entering her room (even though he was upset because she had just revealed she was sleeping with his best friend) and did not voice exception when he placed his hand on her stomach. Then DM inserted fingers in JR's vagina despite her saying no. After a lot of resistance and scuffling, she is able to push him away. Neighbours call 911. DM claims he was only cuddling and he took his hands away when she said stop the second time (which supposedly was more forceful).

Held: Not guilty. Honest, mistaken belief found. While the defendant is not permitted to continue a disapproved sexual act in order to continue to "test the waters" previously referenced episodes of sexual contact are capable of providing a basis to believe consent existed before he resumed his advances.

Reasons: There was a mistaken belief because of previous incidents of sexual intimacy which continued despite a "no". Mistaken belief was honest because 1) The complainant and defendant were involved in a long-term relationship involving previous incidents of sexual intimacy. The complainant proposed to sleep in the defendant's bed as was her usual pattern of conduct when visiting the applicant's home. 2) Accused was upset but not very angry when she revealed her other affair 3) Complainant did not object to his initial advances of a sexual nature 4) She did not attempt to leave the room after first "no". 5) The defendant's immediate post incident responses seem to undermine the complainant's assertion that the acts of sexual touching were carried out in anger. He attempted to kiss and hug the complainant while he spoke to her in a calm manner immediately after the alleged incidents had occurred.

R. v. Latreille [2005] O.J. No. 4845, (Ontario Superior Court of Justice).

Facts: Complainant, former common-law wife of accused, went to accused's home to break off relationship. Complainant claimed accused forced her to have intercourse. Accused claimed intercourse was consensual. Accused claimed he and complainant had consensual sex on several occasions in similar circumstances. Physical evidence not conclusive on issue of consent.

Held: Evidence of pattern of consensual sex between complainant and accused admissible. Evidence not adduced to show complainant was easy, but to assert complainant and accused in long-standing relationship involving consensual sex. Crown applied to adduce evidence of assault where accused grabbed complainant's arm and would not let go. Assault occurred three-and-one-half years ago. Only incident of physical assault during nine-year relationship. Crown's application dismissed. Evidence of assault had tenuous probative value. Was isolated incident not characteristic of relationship between accused and complainant. Accused would be prejudiced if assault evidence introduced.

R. v. T.V. 2006 ONCJ 338, (Ontario Court of Justice).

Facts: Couple married since 1991 and relationship was estranged since 2004. At the end, complainant wanted to separate and wanted accused to move out of the house. The accused was charged with four domestic violence offences, including assault with a weapon, common assault, harassment, and sexual assault. Facts concerning the sexual assault- happened in bedroom, despite wife saying no. But she was afraid of his temper and she just lay quietly till he ejaculated. She left bedroom on the pretext to eat something and then left the house and filed a police complaint.

HELD: The accused was convicted of common assault, but acquitted of the other three charges.

Reasons: With regard to the alleged sexual assault, there was an air of reality to the defence of honest belief in consent in these circumstances, and no air of reality to the wife's claim that he would physically hurt her if she did not comply as her parents were right outside the doorway. It is reasonable to infer that he thought she was consenting when she lay down on the bed after he had made it known that he wanted to make love to her. She made no attempt to sit up or leave the room. Complainant is an assertive and strong-willed woman. Her failure to simply leave the room was not credibly explained in her evidence. She was the author of her own misfortune. She was not honest about her affair with L.L., she refused to stop working at the corporation as the accused asked. She refused to stop seeing L.L. as the accused asked. All of these actions were inconsistent with her testimony that "she didn't know what else to do" to keep the accused from being angry with her. Judge concluded that the complainant dramatized the act in question to suit her own purposes. The evidence here paints the picture of a desperate man trying to romantically seduce his wife and save his marriage, to no avail. She had left him emotionally many months before and had given him conflicted signals. The findings in this case are based on the uniquely intimate and troubled relationship that existed between the parties in question.