Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest But Mistaken Judicial Beliefs

MELANIE RANDALL

I. INTRODUCTION: SEXUAL ASSAULT, INTIMATE RELATIONSHIPS AND THE LAW

> It is easy to say that equality rights must be taken into account, without actually letting them influence the judicial perceptions of relevance or consent.[1]

The issue of what "counts" as sexual assault in legal and definitional terms, and from whose perspective, has been at the heart of much legal analysis and controversy. What qualifies as sexual assault in marital and other intimate relationships has been even more legally fraught. Legal tests for consent have figured prominently in these legal and social debates.

Despite much advocacy, increased public awareness, and significant legal reform around sexual assault, many of the deeply held misapprehensions and stereotypical assumptions about sexual assault - what it actually looks like and especially what the absence of consent looks like- continue to thrive. These misapprehensions are perhaps most sharply observed in relation to sexual assaults in intimate relationships. Research has documented that the closer the relationship between the sexual aggressor and the victim, the less likely it is that a female victim will elect to report her experience of sexual violation or intrusion, and the less likely she will be to seek legal intervention.[2] Sexual assaults in

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1 John McInnis & Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 U.B.C. L. Rev. 341 [McInnes & Boyle, "Judging Sexual Assault"]. See also Christine Boyle & Marilyn MacCrimmon, "The Constitutionality of Bill C-49: Analyzing Sexual Assault if Equality Really Mattered" (1998) 41 *Crim. L. Quarterly* 198.

2 Holly Johnson, *Dangerous Domains: Violence Against Women in Canada* (Toronto: Nelson Canada, 1996) [Johnson, *Dangerous Domains*]; Janice Du Mont, Margaret McGregor, Terri Myhr, Karen-Lee Miller, "Predicting Legal Outcomes From MedicoLegal Findings: An Examination of Sexual assault in Two Jurisdictions" (2000) 1 *Journal of Women's Health and Law* 219.

intimate relationships then, especially spousal relationships, are therefore the least likely to come to the attention of the criminal justice system.

Of those incidents of sexual assault that do get processed criminally, the spousal cases appear to provide jurists with the greatest degree of difficulty. In particular, the difficulty seems to be in not letting popular misconceptions and traditional assumptions about what is "normal," typical and expected in the terrain of intimate sexual relationships, run interference with the rigorous legal analysis and application of the appropriate legal tests to the facts, which the law requires.

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, or, put differently, the assumption that the relational context is critical to assessing whether what happened constituted a sexual assault.

More specifically, these mistaken judicial beliefs are tied to the traditional assumption, only relatively recently repudiated legally with the 1983 amendments to the definition of sexual assault in the Criminal Code, that marriage confers upon men presumed rights of sexual access to their wives. Some judges appear to be using this assumption as part of the framework for analyzing a criminal sexual assault charge. 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. In fact, in some of the judgments, there is a quite astonishing assertion of a new legal test or burden for the Crown to meet in cases where the relational context of a sexual assault charge is a marital one. In legal terms, what seems to be at issue is, as Christine Boyle has aptly asked, whether the Supreme Court of Canada's analysis of sexual assault law in *R. v. Ewanchuk* applies to spouses.[3] The answer, in some judges' minds at least, appears to be that it does not.[4]

Furthermore, the case law examined below shows that in too many cases there is a judicial failure to acknowledge, let alone correctly apply, the reasonable steps provision of the "honest but mistaken belief in consent" defence. In fact, this provision is glossed over in some of the judgments, as if it simply does not

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3 Christine Boyle, "Sexual assault as Foreplay: Does Ewanchuk Apply to Spouses?" (2004) 20 C. R. (6th) 359 [Boyle, "Sexual Assault As Foreplay"].

4 See, in particular, *R. v. Went* (2004), 25 C.R. (6th) 350 (B.C.S.C.), especially at paragraph 22, for an explicit discussion of why "a history between the parties" changes the legal approach to consent and the defence of "honest but mistaken" belief in consent [*Went*].

exist in the Criminal Code. Finally, past sexual history seems to figure more prominently and slip in automatically in spousal sexual assault cases, insofar as some judges automatically read in the existence of an ongoing interpersonal relationship as creating a presumption of continuous consent.[5]

One of the most striking of the spousal sexual assault cases, *R. v. R.V.*,[6] first heard at the Ontario Court of Justice, and then appealed to the Ontario Superior Court and Court of Appeal, quite starkly exemplifies many of the fundamental difficulties some judges still have in recognizing and understanding the nature of sexual aggression, coercion and assault in the context of intimate relationships, and the seriously flawed legal analyses which flow from these difficulties. The Ontario Court of Appeal noted the "entirely inconsistent findings"[7] of the trial judge and summarily rebuked its lower courts in *R. v. R.V.* for decisions it characterized as containing "serious errors of law."[8] Yet, in spite of these glaring legal errors and inconsistencies, the Court of Appeal saw fit to deal with them in only four sentences of one pithy paragraph in an oral endorsement, dismissing the Crown's appeal from the accused's acquittal, whilst allowing the Crown's appeal regarding costs. In doing so, the Court of Appeal failed to provide any sustained legal guidance and direction to the lower courts.

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. In fact, as the judge in the trial of first instance in *R. v. R.V.* explained, the facts of the case required his legal assessment of where that dividing line lay:

> This case raises the questions of what limits Parliament has imposed upon a husband and wife within a marriage when engaging in sexual activity. It requires this court to consider at what point in a marriage, acceptable sexual interplay ends and criminal conduct begins.9 [Emphasis added.]

The problematic framing of this question is immediately evident, for the preoccupation with the significance of marriage in relation to the criminal threshold for sexual assault, foreshadows the deeply problematic legal analysis which follows in that case, as well as in the other cases discussed below.

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5 See, for example, the lower Court decision in *R. v. A.W.S.*, [1998] M.J. No. 26 (C.A.) [*A.W.S.*] for a particularly egregious example (discussed more fully below).

6 *R v. R.V.*, [2001] O.J. No. 5143 (Ct. J.); *R. v. R. V.*, [2004] O.J. No. 849 (Sup. Ct.);*R. v. R.V.*, [2004] O.J. No. 5136 (C.A.) [*R.V.*].

7 *Ibid.* (C.A.), para. 3.

8 *Ibid.* para. 1.

9 *R.V.*, *supra* note 8 (Ct. J.) para. 1 [emphasis added].

Consent is what delineates the dividing line between wanted sexual conduct and criminal sexual conduct. Yet, this is precisely the nub of the difficulties seen running through the case law examined here, including the misapplications of the "honest but mistaken belief in consent" defence, the presumption of continuous consent, and the use of sexual history evidence as the starting point and context for determining whether or not the line has been crossed.

The existence of a spousal or intimate relationship itself does not, as some judges seem to mistakenly believe, create a presumption of ongoing or continuous consent to sexual engagement. 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 below.

A. From Rape to Sexual Assault: Legal History and Relational Contexts

There is a relative under-attention paid to the issue of spousal sexual violence both in the areas of research and public education. While there has been an increased awareness of domestic violence in intimate relationships, meaning attention to the problem of physical violence between intimate partners, the existence of sexual violence, often a component of what is described as domestic violence, rarely receives the same levels of attention or legal intervention. Kersti Yllö, a well-known U.S. researcher, observed that at "the community level, as well as in the culture at large, efforts to challenge the taken-for-granted "right" of husbands to coerce their wives sexually lag at least two decades behind our work on physical violence."[10]

Stranger perpetrated sexual violence tends to be seen as more serious, more harmful, and definitely more criminal, than does sexual violence perpetrated in intimate relationships. Reviewing the research in the area and also conducting their own study, one set of researchers observed that "knowing that the perpetrator and victim are spouses was shown to alter beliefs about both parties involved in conflictual interactions."[11] These researchers went on to suggest that

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10 Kersti Yllö, "The silence surrounding sexual violence: The issue of marital rape and the challenge it poses for the Duluth model", in M. Shepard & E. Pence, eds., *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (Thousand Oaks, CA: Sage Publications, 1999) 223 at 225.

11 J. Langhinrichsen-Rohling *et al.*, "Attributions About Perpetrators and Victims of Interpersonal Abuse" (2004) 19 *Journal of Interpersonal Violence* 484 at 493.

"these findings imply that judges, jurors, and other individuals who hear reports of violence may also make different attributions about violence on the basis of the victim-perpetrator relationship."[12] This statement underlines the point that popular misconceptions about what sexual assault involves, what it looks like, and where it is most likely to happen, tend to distort the subtleties and intricacies that characterize the crime of spousal sexual assault and contribute to a context in which disclosures are often inhibited and adequate legal remedies are often not provided.

Early research on sexual assault and rape focused almost exclusively on "stranger" or "acquaintance" rape, leaving the issue of sexual assault in the context of intimate relationships virtually unexplored and unacknowledged.[13] Yet, research has repeatedly demonstrated that, contrary to the dominant myth of the stranger assailant, the vast majority of sexual assaults take place in the context of some kind of relationship, and a significant number take place in some kind of ongoing intimate relationship.[14] Furthermore, "[S]exual assault committed in familiar settings by assailants known to the victim, including spouses, occur at a greater frequency than those committed in high risk situations by unknown assailants."[15]

A body of research now documents just how extensive the problem of spousal sexual assault actually is. The World Health Organization, for example, reported that available data indicated that in some countries, nearly one in four women may experience sexual violence perpetrated against them by an intimate partner.[16] Other research suggests that approximately 40% of all assaulted women are forced

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12 *Ibid.* at 496.

13 In this paper, the term "intimate relationships" includes but is not limited only to (legal and common law) spousal relationships. It also includes dating relationships and ongoing intimate relationships which do not involve cohabitation.

14 See Statistics Canada, "Measuring Violence Against Women: Statistical Trends 2006", online: Statistics Canada <http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=85-570-XIE2006001> (analysis of statistics on sexual assault, including relationships between victims and perpetrators); See also L. Haskell and M. Randall, "Sexual Violence in Women's Lives: Findings from the Women's Safety Project, a Community based survey" (1995) 1 Violence Against Women 6; And also J. Brickman and J. Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population" (1984) 7 The International Journal of Women's Studies 195.

15 Lana Stermac, Giannetta Del Bove, & Mary Addison, "Violence, Injury, and Presentation Patterns in Spousal Sexual Assaults" (2001) 7 *Violence Against Women* 1218 at 1218.

16 Etienne Krug *et al.*, eds. *World Report on Violence and Health.* (Geneva: World Health Organization, 2002) at 149. See also Jacquelyn C. Campbell & Karen L. Soeken, "Forced Sex and Intimate Partner Violence: Effects on Women's Risk and Women's Health" (1999) 5 *Violence Against Women* 1017.

into sex at one time or another by their male partners.[17] In the most statistically large Canadian survey undertaken on the subject of violence against women, 39% of women randomly interviewed reported being sexually assaulted at some point in their lives since the age of 16.[18] Of those women who were sexually assaulted, a clear majority of them (69%), knew their assailant. In fact, in 38% of sexual assault cases, the assailant is someone in an intimate relationship with the victim (spouse, common-law partner, or boyfriend).[19]

It is only in the last few decades that there has been any significant legal understanding or recognition of sexual assault in the context of marriage, or other intimate heterosexual relationships.[20] Previously, the concept of rape in marriage was almost unheard of, and sexual access to a woman was historically understood to be part of a man's entitlement upon marriage. After much public education and social advocacy on this issue, legal recognition of the possibility of rape (and other kinds of sexual assaults) in marriage was adopted in Canada in 1983.[21]

The legal rule which had previously permitted "spousal immunity" in cases of sexual assault had been founded on the assumption that upon marriage, a man's rights included a right of sexual access to his wife. This assumption was based on traditional conceptions of wives as property of their husbands.[22] Prior to 1983, the Criminal Code stipulated that "a male person commits rape when he has sexual intercourse [without consent] with *a female person who is not his wife.*"[23] [emphasis added.] In 1983,the "spousal immunity" defence to sexual assault in the Criminal Code was abolished when the federal government adopted Bill C-

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17 J. C. Campbell & P. Alford, "The dark consequences of marital rape" (1989) 89 (7) *American Journal of Nursing* 946.

18 Johnson, *Dangerous Domains*, supra note 4.

19 *Facts to Consider About Sexual Assault*, Ontario Women's Directorate, 1995.

20 See Raquel Kennedy Bergen, "Marital Rape", *Violence Against Women Online Resources* (March 1999), National Online Resources Centre on Violence Against Women, online: http://new.vawnet.org/category/Main_Doc.php?docid=248 [Bergen, "Marital Rape"]; California Coalition Against Sexual Assault, Rape Prevention Resource Center, 2008 Report on Research on Rape and Violence, online: www.calcasa.org.

21 See Julian V. Roberts and Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change*, (Toronto: University of Toronto Press, 1994).

22 Mary Kay Kirkwood & Dawn K. Cecil, "Marital Rape: A Student Assessment of Rape Laws and the Marital Exemption" (2001) 7 *Violence Against Women* 1234 at 1235. See also, Rebecca M. Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption" (1995) 20 *Law & Social Inquiry* 941.

23 *Criminal Code*, R.S.C. 1970, c. C-34, s.143 [emphasis added].

127.[24] This was one of many significant law reform initiatives undertaken to make the criminal justice system more appropriately responsive to crimes of sexual violence. Other significant reforms, as discussed below, revolved around the law's definition of consent, and around the improper use of past sexual history in sexual assault criminal proceedings.

B. Key Legal Developments: Consent and Past Sexual History

> [An] understanding of s. 15 [of the Charter] can be seen as requiring that Parliament, having chosen to legislate in the area of sexual assault, set minimum standards of care in ensuring consent for those who undertake to have sex. [25]

Consent is defined in the Criminal Code both in terms of its absence and its presence: Section 265 of the Code defines the absence of consent:

> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
> (a) the application of force to the complainant or to a person other than the complainant;
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
> (c) fraud; or
> (d) the exercise of authority.

Section 273.1 of the Criminal Code defines consent in positive terms:

> (1) Subject to subsection (2) and subsection 265(3) [here noted above], "consent" means, for the purposes of [various sexual offences], the voluntary agreement of the complainant to engage in the sexual activity in question.
> (2) No consent is obtained, for the purposes of [various sexual offences], where
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
> (b) the complainant is incapable of consenting to the activity;
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Much of the reported sexual assault case law revolves around legal debates about the meaning of these provisions, in particular the idea of communicating consent "by words or conduct."

One of the important developments in Canadian criminal law surrounding sexual assault, was section 273.2 of the Criminal Code, which imposes limitations

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[24] Although various states in the United States began abolishing similar spousal immunity laws in the 1970s, it was not until 1993 that marital rape became a crime in all 50 states. See Bergen, "Marital Rape", *supra* note 23 at 2.

[25] McInnes & Boyle, "Judging Sexual Assault", *supra* note 2 para. 23.

on consent defences. This provision states that "belief in consent is not a defence," where the accused's belief arose from (i) self-induced intoxication, (ii) recklessness or willful blindness, or iii) if the accused did not take reasonable steps, in the circumstances known to the accused at the time to ascertain that the complainant was consenting.[26] The "reasonable steps" provision is particularly important for it places an onus on an accused who raises a consent defence to a sexual assault charge, to adduce evidence to demonstrate the reasonable steps taken by the accused to ascertain that the complainant was consenting to the conduct which is the subject of the criminal charge.

R. v. Ewanchuk[27] was a pivotal case in clarifying legal interpretations of consent in Canadian sexual assault law. In *Ewanchuk*, the Supreme Court of Canada rebuked the lower courts for allowing an acquittal based upon a defence of "implied consent," when no such defence exists in law. As Major J. instructed,

> [T]he trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option ... The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts, but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.[28]

The Supreme Court clarified that passivity, silence or ambiguity cannot be taken for consent, and stressed that an express lack of agreement - a "no" - to sexual activity cannot be taken as an invitation to further, more insistent, or more aggressive sexual contact: "An accused cannot say that he thought 'no meant yes'."[29]

The Supreme Court continued to elucidate that in terms of the "honest but mistaken belief in consent" defence, this mistaken belief must be grounded in some clear evidence offered in support of the defence, to suggest how this mistake might reasonably have arisen:

> If his belief is found to be mistaken, then honesty of that belief must be considered ... to be honest, the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated [in the sections of the Criminal Code that appear above]. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances.[30]

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26 *Criminal Code*, R.S.C. 1985, c. C-46, as am. by S.C. 1992, c. 38 s. 1.

27 *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 [*Ewanchuk*].

28 *Ibid.* para. 31.

29 *Ibid.* para. 51-52.

30 *Ibid.* para. 64-65.

In addition to the clarifications of the meaning of consent, and the contours of the "honest but mistaken belief in consent" defence offered in *Ewanchuk*, there has been important law reform surrounding the utilization of past sexual history in sexual assault trials. Both of these issues —honest but mistaken belief in consent, and consent as it relates to past sexual history — figure prominently in judicial reckonings in spousal sexual assault cases.

The inappropriate use of past sexual history in sexual assault trials is statutorily prohibited by the provisions of s. 276 of the Criminal Code of Canada, which were brought into force in 1992 and are more commonly known as the "rape shield provisions". Section 276.(1) specifies that evidence of a complainant's sexual history is not admissible to support an inference that the complainant is more likely to have consented or is less worthy of belief.[31] Evidence of past sexual activity can only be admitted if the judge determines that i) it relates to specific instances of sexual activity, ii) it is relevant to an issue at trial, and iii) it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[32]

S. 276 also outlines a set of procedures surrounding an application which must be made by the defence in order to seek a determination of the admissibility of the evidence. In *R. v. Darrach*,[33] the Supreme Court of Canada upheld the constitutionality of this provision.

What this means is that in some specific and relatively narrow instances, evidence of prior sexual activity between an accused and a complainant may be admissible in a sexual assault criminal trial, but not to support a general inference that the complainant is "more likely to have consented" in the instance which is the subject of the criminal charge. Despite this clear statutory language, the sexual assault decisions reviewed below indicate that some judges are allowing the defence to introduce past sexual history evidence in spousal sexual assault trials without any adherence to the proper procedures to determine admissibility. More importantly, however, the past sexual history evidence which so easily seeps in, seems to be absorbed by judges to support their inference that the very existence of a spousal or intimate relationship suggests a generalized and ongoing consent to sexual contact. These troubling judicial assumptions and the related misapplications of the law are traced through the cases analysed in the sections below.

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31 *Criminal Code*, R.S.C. 1985, c. C-46, as am. by S.C. 1992, c. 38 s. 2.

32 *Ibid.* s. 276(2).

33 *R. v. Darrach*, [2000] 2 S.C.R. 443 [*Darrach*].

II. *R. v. R.V.*: A Case Study in Judicial Honest but Mistaken Beliefs about the Law

The lower court decisions in *R. v. R.V.* reveal in microcosm the larger conceptual difficulties and legal errors which continue to arise in criminal cases involving sexual assault in intimate relationships. While the case involves what might be classified as a sexual assault at the more minor level of sexual intrusion, the facts disclose what certainly meets the legal definition of sexual assault. That is not, however, what is important about this case. Rather, its significance lies in the surprising and distorted legal reasoning evident in the two lower court judgments.

The offender, known by his initials R.V., was tried on two charges of sexual assault. The complainant, known by her initials T.V., was a woman who was his wife of 12 years. R.V. raised the defence of "honest but mistaken belief in consent" in relation to the sexual activity that was the subject of the criminal charges.

Relationship Background Provided by the Judge

The judge in the trial of first instance reported that the relationship between T.V. and R.V. had been strained for some time. T.V. was contemplating leaving her husband and had seen a counselor and family lawyer, but had not advised her husband of a specific plan to terminate the relationship. Although they continued to cohabit, and had a social relationship, they had slept in separate rooms for some time.

A. The Unwanted / Non-Consensual Sexual Contact: The Specific Incidents

As a surprise for her birthday, R.V. arranged to take his wife out to a local restaurant for dinner and entertainment. He put a birthday card with the information about the dinner arrangement in T.V.'s lunch box. T.V., however, had not opened the card during her lunch and was therefore not aware of the proposed dinner arrangement.

On that same night, T.V. came home before R.V. and went straight to bed because she was not feeling well. When R.V. came home from work, he expected his wife to be getting prepared to go out for dinner, and instead, found her in bed. When he questioned T.V. about why she was not ready to go to the restaurant, she indicated that she had not opened the card in her lunch box, and was not aware of the arrangement. Furthermore, she was not feeling well and told her husband that she did not want to go out. Describing the events that followed, Wolder J. stated,

> R.V. suggested that she take a shower to help make her feel better, whereupon T.V. responded that she didn't want to. R.V. then took his clothes off and got into bed with

> T.V. R.V. indicated that he wanted to celebrate T.V.'s birthday by having sex, whereupon, she again stated that she didn't want to because she was not feeling well and she was feeling cold. R.V. persisted and continued to come on [sic] to T.V. and T.V. resisted by pushing him away. R.V. tried to get on top of T.V. but T.V. continued to resist and threw him off. At the time, T.V.'s large dog was also in the bed and as a result of the commotion, came in between T.V. and R.V. Eventually, R.V. gave up trying to have sexual relations with his wife, got out of bed and left the room.[34] [Emphasis added.]

A review of R.V.'s reported behaviour during this first incident demonstrates that he verbally communicated his intention of having sexual relations with T.V., and that he ignored her explicit verbal rejection of his sexual advances. Furthermore, he persisted in his efforts by undressing, getting into bed with her and climbing on top of her while naked. This conduct is what the judge characterized as R.V. "coming on" to T.V.

T.V.'s reported behaviour during this first incident shows that she explicitly verbally refused his sexual advances, clearly indicating a lack of consent to sexual contact. Furthermore, she physically resisted R.V.'s sexual advances by forcefully pushing him away, and eventually throwing him off of her body.

Following this initial incident, R.V. later returned to the room and suggested that they go out for dinner, which they did eventually do. The Judge emphasized that they had a "pleasant evening" and that after dinner, they were feeling "quite mellow and positive towards each other."[35]

Apparently this social contact over dinner inspired R.V. to persist in his efforts to obtain sexual access to T.V. Justice Wolder explained what happened next:

> While T.V. was in the bathroom, R.V. came in and held her around the waist with his arms and pulled her towards him. He then suggested that they go to bed together, whereupon T.V. declined. T.V. got into bed and covered herself up with a sheet. [36] R.V., however, was not to be "deterred". In the face of her clear and unambiguous refusal of his sexual overtures, R.V. got into bed with T.V. and as noted by Wolder J.,[B]egan to fondle [sic] T.V.'s breasts and tried to pull down T.V.'s underwear. He then got on top of her. T.V. then said that she didn't want to have sex but R.V. continued to try to persuade her that they should. He continued to kiss and fondle T.V. while T.V. tried to push him away. T.V. became upset with R.V.'s persistence and started raising her voice, whereupon T.V.'s dog, who once again was in the room, jumped in between them. At that stage, R.V. was extremely frustrated and forcefully turned T.V. over and held her by the chin area. R.V. claims that he was frustrated and angry and turned T.V. over to talk to her. T.V. thought that R.V. was being unnecessarily aggressive. However, when the dog jumped in between T.V. and R.V., R.V. got out of bed and left the room stating to T.V., "If you want a divorce, you can have one".[37] [Emphasis added.]

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34 *R. V.*, *supra* note 8 (Ct. J.) para. 6 [emphasis added].

35 *Ibid.* para. 7.

36 *Ibid.*

37 *Ibid.* [emphasis added].

The judge concluded his description of this second incident with the observation that, "[o]nce again, the parties did not actually have any sexual relations."[38] Apparently, the absence of forced sexual intercourse in this episode, which is mentioned by the judge on more than one occasion, was of critical significance to the judicial determination of what happened and whether it met the legal definition of sexual assault.[39] T.V.'s resistance strategies in this second incident demonstrate that she verbally (and clearly) declared to R.V. that she did not want sex. Not only did she physically push him away from her, but she became visibly upset and raised her voice (presumably to shout out her lack of consent).

The judicial summary of R.V.'s behaviour in this second incident demonstrates that he ignored T.V.'s verbal refusal of his sexual touch, and fought her physical resistance. He touched her breasts and tried to remove her underpants. Additionally, he "forcefully" turned T.V.'s body around and held her pinned by the chin area because he was angry and frustrated by her non-compliance. "[40]

T.V. became so concerned about R.V.'s persistence and aggressiveness that she went to the police station and made a report. As a result, R.V. was charged with sexually assaulting T.V. and the case was processed criminally.

B. Crown and Defence Positions

The Crown in *R. v. R.V.* argued that "T.V.'s words were clear and that R.V.'s persistent sexual advances constituted unlawful touching for a sexual purpose."[41] Therefore, the Crown submitted that R.V. should be found guilty of sexually assaulting his wife.

The defence position was that in spite of R.V.'s acknowledgement that T.V., through her words, indicated that she was rejecting R.V.'s sexual advances, through her conduct and words he formed an "honest belief" that she was consenting, notwithstanding that such a belief may have been mistaken.[42]

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38 *Ibid.* [emphasis added].

39 Specifically, Wolder J. says that: "The fact that R.V. did not at anytime force actual sexual intercourse after T.V. continued to resist is evidence that R.V. understood the limits in their sexual relationship and that he did not exceed those limits." (*Ibid.* para. 14.) Apparently, then, this judge believes that pressuring a spouse to engage in sexual contact in the absence of consent is fine up until the point of reaching forced heterosexual sexual intercourse, where it is then recognized to be sexual assault.

40 *R.V. supra* note 8 (Ct. J) para. 7.

41 *Ibid.* para. 9.

42 *Ibid.*

C. The Judge's Legal Analysis: Marital "Viability" and the Seeping in of Past Sexual History

The judge's legal analysis at the trial of first instance is astonishing on a number of levels. He began it - under the heading "The Law" - with a discourse about the nature of marriage, essentially defining marriage as a sexual relationship.[43] After pointing out that unconsummated marriages can be annulled, he concluded,

> [W]hen parties get married, they, by the very nature of the relationship, are consenting to engaging in sexual intercourse and consummating the marriage. Even after consummation, a marriage continues to imply that parties have joined together for various purposes including that of retaining or continuing their sexual relationship. A husband and wife's sexual relationship is just one means through which they communicate in the marriage.[44]

Wolder J. continued to opine that

> [t]he manner in which husbands and wives communicate sexually in the marriage relationship may vary from couple to couple. Some couples may be very passive in the manner in which they relate sexually whereas others may be very aggressive. There is no evidence before this court as to the acceptable norms or parameters of sexual dialogue within the confines of a marriage.[45]

Then, applying this conceptual framework to the facts, he stated,

> I find that although T.V. and R.V.'s relationship was strained, and even though they may have been sharing separate bedrooms, their marriage was still a viable marriage and an ongoing marriage relationship.[46]

Here, the "viability" of the marriage has been foregrounded in the legal analysis, as if it is somehow essential to a determination of the legal culpability to the sexual assault charge. Like all communication can be, sexual communication in intimate relationships is complicated and varied, but that does not mean that consent is ever-present and not a process of negotiation, even in ongoing relationships. Despite this, the judge in this case expressed his normative assumption that a marriage includes an ongoing general right of sexual access and sexual intercourse.

More surprisingly still, the judge then proceeded to construct a new legal test to be met by the Crown in cases where sexual assault takes place in marital contexts. In his words,

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43 *Ibid.* para. 10.

44 *Ibid.*

45 *Ibid.* para. 11.

46 *Ibid.* para. 12.

> I am of the view that *w[h]ere a viable marital relationship exists*, then it is not enough for the Crown to simply prove that the sexual conduct took place without the stated consent of the other party in order to secure a conviction for sexual assault by one marital partner against the other.[47] [Emphasis added.]

Interestingly, the judge here referred to "stated" consent, a description of consent which appears to narrow the legal meaning of the term.[48] Apparently, then, the Criminal Code definition of sexual assault is modified when it pertains to offenders whose victims are their intimate partners. Essentially, Justice Wolder (erroneously) suggested that there is a higher burden of proof borne by the Crown in criminal prosecutions of sexual assault where the relational context is a marital one. When the "viability" (whatever that means) of the marriage can be established (or assumed), something more is required. As Wolder J. explained it,

> It is my view that, *within the confines of a viable marriage*, the Crown must prove beyond a reasonable doubt that the conduct of the accused was *subjectively outside the norms of tolerated sexual behaviour in that particular couple's sexual relationship within their marriage.* In other words, it is my view that the Crown *must establish* not that the complainant said "no" on that particular occasion, but *that in the context of the parties' entire marital relationship, and in the context of that particular situation, her saying "no" differed from the way they historically interacted for a sexual purpose and that the accused, thereby, should have known from such different behaviour that her "no" or her rejection of the accused's advances in fact was different from the way the parties interacted sexually in the past.*[49] [Emphasis added.]

On this view, in spousal relationships, saying "no" is simply not enough to communicate a lack of consent. Instead, courts are to inquire into the context of the parties' entire relationship to assess their typical patterns of sexual interaction. It is from this backdrop against which the sexual assault charge is to be assessed. As stated by Wolder J.,

> Therefore, within the confines of a viable marital relationship, when the accused claims that he had an honest, but mistaken belief that the complainant was consenting to the sexual activities notwithstanding the ordinary meaning of the complainant's words, *it is difficult for this court to reject that defence unless the Crown proves beyond a reasonable doubt that the way the parties were engaging sexually on November 10th and 12th, 2000 was different from the way the parties communicated for sexual purposes at other times throughout their marriage when consent was not withheld.* Therefore, the Crown must prove that the accused knew or should have known, that this occasion was different and when the complainant said "no", through words and gestures, she meant "no".[50] [Emphasis added.]

This is, of course, an entirely specious argument, and one which is utterly insupportable in Canadian law.

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47 *Ibid.* para. 14 [emphasis added].

48 Thanks to an anonymous reviewer for pointing out this nuance.

49 *R.V. supra* note 8 (Ct. J.) para. 14.

50 *Ibid.*

Moreover, even within this mistaken framework, Wolder J. did not apply his own specified approach because there is an absence of any evidentiary record of "the way the parties were engaging sexually" ... at other times throughout their marriage. It was therefore impossible for him to make the very determination he insisted was legally required.

More problematic still, it appeared to escape his notice that this kind of inquiry is tantamount to a past sexual history review, something which is governed by the statutory framework (the "rape shield" law) set out in Section 276 of the Criminal Code.[51] In fact, even beyond *R. v. R.V.*, the importation of past sexual history in sexual assault cases involving intimate partners appears to be creeping into the caselaw. It appears as though some judges are failing to heed to this statutory prohibition and failing to properly consider whether, when a s. 276 defence application is made, a complainant's past sexual history should be admissible in a sexual assault proceeding.

In *R. v. D.M.*,[52] for example, another sexual assault case involving intimate partners, the "honest but mistaken belief in consent" defence was successfully advanced. Tetley J. found that in the context of an intimate relationship, the accused was entitled to rely on past experiences with the complainant in judging her consent. In his words,

> While it may objectively be viewed as remote, the defendant was entitled to rely and I find did rely on previous sexual encounters with the applicant where consent to the continuation of a sexual act was given in spite of protestations to the contrary.[53]

Astonishingly, this judicial approach circumvents the need for a s. 276 application by the accused, as the judge has already done the work for the defence by simply asserting the relevance of the sexual history and, furthermore, by factoring it in to the "honest but mistaken belief in consent" defence. This represents another disturbing judicial failure to understand and apply the law governing sexual assault.

D. The (Mis)Application of this Defence in *R. v. R.V.*: Unreasonably Forgetting the "Reasonable Steps"

The defence of "honest but mistaken belief in consent" emerged as a common law doctrine, now codified in statute, and provides that in the absence of "willful blindness" or "recklessness" on the part of the accused, the "honest belief"–even if mistaken—is exculpatory in a sexual assault criminal proceeding. This defence

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51 This section was enacted in 1992 shortly after the Supreme Court's decision in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 [*Seaboyer*].

52 *R. v. D.M.*, [2004] O.J. No. 4376 (Ct. J.).

53 *Ibid.* para. 113.

was accepted by the Supreme Court of Canada in *R. v. Pappajohn*,[54] a case which generated much academic and community commentary and debate.

Pappajohn established the defence of "honest but mistaken belief in consent" to a sexual assault charge, such that a person who commits the *actus reus* of the offence, but had a flawed perception about the absence of consent, does not have the mens rea required for conviction. The heart of the controversy which swirled around the decision in *Pappajohn* was the view that an "honest belief" in consent could serve as a defence to a sexual assault criminal charge, regardless of how unreasonable that belief might be on the facts of the case (as, indeed, it arguably was on the facts of *Pappajohn*).[55] This was seen by some commentators as essentially immunizing men from sexual assault charges.[56] Elisabeth Shilton and Anne S. Derrick, for example, comment that, "[t]he *Pappajohn* case spelled out in legal doctrine the almost universal experience of women victims of sexual assault seeking redress from the criminal justice system: sexual assault is only sexual assault in the eyes of the law if the man who is doing it thinks it is."

Lucinda Vandervort, however, argued that "the interpretations of *Pappajohn* that caused widespread consternation in the 1980s, and continue to be influential, were based on a flawed appreciation of the legal significance of belief in consent for *mens rea* in sexual assault."[57] As she pointed out, the requirement that the accused be neither reckless nor willfully blind to the absence of consent, was already embedded in the common law defence of mistaken belief in consent.

With the enactment of section 273.2 of the Criminal Code in 1992, the defence of "honest but mistaken belief in consent"[58] was statutorily barred when

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54 *R. v. Pappajohn*, [1980] 2 S.C.R. 120.

55 See, L. Vandervort, "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault," (2004) 42 *Osgoode Hall L.J.* 625 [Vandervort, "Honest Beliefs"]. See also Toni Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980) 30 *U.T.L.J.* 415.

56 Elisabeth Shilton and Anne S. Derrick, "Sex Equally and Sexual assault: In the Aftermath of Seaboyer" (1991) 11 *Windsor Y.B. Access Just.* 107.

57 Vandervort, "Honest Beliefs", supra note 57 at 628.

58 Consent Provisions - Section 273

273.1

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

(*a*) the agreement is expressed by the words or conduct of a person other than the complainant;
b) the complainant is incapable of consenting to the activity;
(*c*) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
(*d*) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

the accused's claim of a belief in consent is shown to be reckless or willfully blind. Vandervort explained that when this defence is raised, the critical question is,

> Was the accused aware of any reason to believe or suspect that consent was not present or not voluntary, that the complainant lacked capacity, or that consent was tainted by any of the factors enumerated in section 273.1(2)?[59]

In *R. v. R.V.*, then, the judge was required to inquire into any facts of which the accused knew indicating to him the absence of consent, and would further have to inquire into whether or not his "honest but mistaken belief in consent" defence had an "air of reality". Wolder J., appearing to draw on a highly selective reading of L'Heureux-Dube's analysis of this defence in *R. v. Park*,[60] found that R.V.'s claim that he "honestly" believed T.V. was consenting to his advances did indeed have a "distinct air of reality."

How does this defence possibly succeed on the facts in *R. v. R.V.*? There is a single line in the judgment on which Wolder J. appeared to hinge his support for the applicability of this defence, finding that met the "air of reality" test. This support comes from "the fact that T.V. agreed to R.V. remaining in her bed to allow him to warm her up when she was feeling cold." This, according to Wolder J. "was taken by R.V. as consent in that it was a cue that T.V. was in fact being receptive to his sexual advances."[61]

In the face of T.V.'s express and repeated verbal and physical refusal to any sexual contact, how does her "allowing" his presence in bed slip into constituting legal consent to sexual touching? There is no factual or legal basis on which to

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(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

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

273.2

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

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

(i) self-induced intoxication, or
(ii) recklessness or wilful blindness; or

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

59 Lucinda Vandervort, "Sexual assault: Availability of the Defence of Belief in Consent" (2005) 84 *Canadian Bar Review* 89 [Vandervort, "Belief in Consent"], at 91 [emphasis removed].

60 *R. v. Park* (1995), 99 C.C.C. (3d) 1 (S.C.C.).

61 *R.V. supra* note 8 (Ct. J.) para. 14.

conclude that the fact that she let him remain in the bed can ground a reasonable belief in law that there was consent.

As explained by Lucinda Vandervort, "[F]ailure to appreciate the legal significance of known facts in forming a belief about consent is a mistake of law, not an excuse."[62] In the R.V. case, one of the unambiguously evident facts known by R.V. was the persistent verbal and physical refusal of his sexual advances, clearly expressing a lack of consent. On these facts, the defence should not have even been available.

In *R. v. Ewanchuk*, Major J., writing for the majority, clearly refuted the notion that what an accused might take to be ambiguity in the conduct of the complainant, can support a defence of consent. In Major J.'s words,

> [O]nce the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable.[63]

Most egregiously, the "reasonable steps" provision of the Criminal Code definition of what is required in relation to consent, is entirely ignored by the Wolder J. in his decision. This requirement relies on a quasi-objective standard and requires that the accused lead some evidence to support that he has taken "reasonable steps" to ascertain the presence of consent. Whereas s. 273.2 (b) requires that an accused demonstrate that he took "reasonable steps" to ascertain the presence of consent, the judge in the trial of first instance assumed that this legal requirement was nullified in the context of a spousal relationship. In Wolder J.'s exact words, "when parties get married, they, by the very nature of their relationship, are consenting to engaging in sexual intercourse and consummating the marriage." And, furthermore, Wolder J. asserts that, "marriage continues to imply that parties have joined together for various purposes including that of retaining or continuing their sexual relationship."[64]

As a result of this incorrect assumption, the Criminal Code requirement that when an accused asserts an "honest but mistaken belief in consent" defence, he must also demonstrate the "reasonable steps" taken to ascertain its existence, is entirely ignored by Wolder J. Furthermore, in *Ewanchuk*, Major J. stipulated that reliance on the "honest but mistaken belief in consent" defence means that an accused must have "believed that the complainant communicated consent to

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62 Vandervort, "Honest Beliefs", *supra* note 57 at 642.

63 *Ewanchuk*, *supra* note 29 para. 52.

64 *R.V.*, *supra* note 8 (Ct. J.) para. 10.

engage in the sexual activity in question."[65] Asking whether sexual assault in *R. v. R.V.* was really just (mis)represented as "foreplay", Christine Boyle noted that both of the lower courts appeared to believe that the *Ewanchuk* ratio did not apply to cases of sexual assault between spouses.[66] Instead of correcting the serious flaws in the legal analysis of the "honest but mistaken belief in consent" defence of the lower Court, the Ontario Superior Court in *R. v. R.V.* repeated and compounded them.

E. Ontario Superior Court of Justice Decision

At the Ontario Superior Court of Justice, Thomas J. upheld Wolder J.'s decision. The Crown's appeal revolved around the following errors in law made by the trial judge:

> (1) in finding that the parties had a viable marital relationship and that a viable marital relationship establishes some kind of implied consent to sexual touching or obviates the necessity for spouses to consent to sexual touching;
> (2)in distinguishing between consent in a marital situation and consent in a non-marital situation;
> (3) in finding that there was an air of reality to the defence of honest but mistaken belief in consent as there was no evidence upon which the Court could make that finding;
> (4) by taking into account inadmissible evidence regarding past sexual conduct of the complainant in circumstances where no s. 276 application had been brought by the respondent;
> (5) in holding that the Crown not only had the burden of establishing that the complainant did not consent to the sexual activity, but also had to prove that her conduct was different from past conduct exhibited in consensual situations;
> (6) by requiring the Crown to prove that the accused knew his conduct was objectively or subjectively outside the norms of tolerated sexual behaviour in the marriage relationship.[67]

In analyzing these legal arguments, Thomas J. appeared to be indignant in his attitude towards the Crown's claims, which he found to be "wrong in law." In his words,

> In essence, the position of the Crown is that a criminal assault occurs whenever there is physical sexual touching of one partner by another in an ongoing marital relationship without obtaining express consent in advance to the touching.[68]

Not only is this legally wrong, according to Thomas J., but to add insult to injury, it "is erroneous in principle and also offends ordinary common sense."[69]

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65 *Ewanchuk*, *supra* note 29 para. 46. Major J. continues to explain that: "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. The accused's speculation as to what was going on in the complainant's mind provides no defence." [emphasis removed].

66 Boyle, "Sexual Assault As Foreplay", *supra* note 5.

67 *R.V.*, *supra* note 8 (Sup. Ct.) para. 9.

68 *Ibid.* para. 10.

In support of his finding, Thomas J. provided a lengthy exposition of some of the additional "contextual" facts about the couple's relationship. Figuring prominently among this information is that T.V. was "obsessed" with a suspicion that her husband was having an affair, something the judge describes as a "baseless claim", but with which she nevertheless "continually accused her husband."[70] While it is never said explicitly, the attention paid to this background detail in Thomas J.'s decision, suggests that this might have provided a motive for T.V.'s sexual assault report to the police, a report which Thomas J. seemed to think was entirely unfounded.

Moreover, the neutralizing language invoked by Thomas J. to reframe R.V.'s conduct away from the legal language of sexual assault, and into a traditional, patriarchal script of marital romance is most revealing. Justice Thomas described the conduct of the accused in terms of "caressing [the complainant's] breasts and body," as touching her "gently" and as "desperately trying to convince his wife that he still loved her, [and] that he was not having and never did have an affair with her cousin."[71]

According to Thomas J., R.V. appeared to be a man who was simply trying to reassure his (unreasonably distressed and suspicious) wife. He only "wanted to resume sexual relations with his wife and restore warmth, affection and intimacy to their relationship."[72] The fact that T.V. unambiguously expressed her lack of consent to the resumption of sexual relations-through her clear words and conduct—is missing in Thomas J.'s narration of events. In fact, Thomas J. excises any mention of T.V.'s verbal and physical resistance to R.V.'s sexual advances in his account of what happened.

Thomas J.'s legal analysis-such as it is, because most of his reasons are devoted to his narrative about the nature of the relationship between the spouses—perpetuated the same errors found in the decision he reviewed. That is, he glossed over entirely the need for any substantiation of the defence of "honest but mistaken belief in consent" and its inapplicability on the facts. Furthermore, exactly like Wolder J., he ignored the legal requirement that the accused demonstrate what "reasonable steps" he took to provide some evidentiary support for this belief.

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69 *Ibid.* para. 11.

70 *Ibid.* para. 12.

71 *Ibid.* para. 19, 23.

72 *Ibid.* para. 23 [emphasis added].

F. The Judicial Reprimand: Intolerance of "Zero Tolerance"

Thomas J. went further still in his judgment, actually scolding the Crown for bringing an appeal, and stating that "[t]he Crown should have been more sensitive in these circumstances." He then continued his reprimand as follows:

> It is my opinion that launching this appeal against the acquittals on the facts of this case demonstrated a marked and unacceptable departure from the reasonable standards expected of the prosecution. Poor judgment was exercised by whoever promoted this appeal. I assume that before a Crown appeal can go forward, it must be approved by senior Crown counsel. If indeed that approval was obtained in this case, the judgment exercised was even worse.[73]

Finally, Thomas J. characterized this legal proceeding as both detrimental to the relationship between the parties, and an appalling example of the misapplication of the province's "zero tolerance" policy towards violence against women. He went so far, in fact, as to blame the criminal justice system's intervention (engaged at the request of T.V.) for the tragic demise of the relationship. To this end, he stated that "with mutual counseling this marriage might have survived." He then went on to comment,

> When these charges were laid, and the respondent was detained in custody for three days (he had no prior criminal record whatsoever), *that drove a fatal spike into the heart of the marriage.*[74] [Emphasis added.]

Thomas J. then suggested that a misguided and suspicious wife made a specious report to the police and engaged an overly aggressive "zero tolerance" policy to penalize her husband. The machinery of the criminal justice system, then, was inappropriately activated to investigate a claim without merit. In his words,

> This complaint by T.V. against her husband, R.V., was not adequately investigated by police. It was merely processed. We hear much about zero tolerance these days. However, zero tolerance was never intended to mean zero investigation.[75]

Finally, he awarded costs of $5,000 against the Crown, apparently as a punitive measure for the Crown's "poor judgment" in bringing the appeal forward.

G. Judgment of the Ontario Court of Appeal

What happened at the Court of Appeal is also, to say the least, perplexing. The Court of Appeal issued an extremely cursory judgment, finding that both "the trial judge and the summary conviction appeal judge made serious errors of law." Specifically, Rosenberg, Moldaver and MacPherson JJ.A. found that

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73 *Ibid.* para. 37.

74 *Ibid.* para. 36 [emphasis added].

75 *Ibid.* para. 31.

> [o]n 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.[76]

While not exactly a stinging rebuke, this judgment from the Court of Appeal clearly identified the significant misapprehensions of the law at play in both of the lower courts' judgments. It would have been beneficial, however, had the Court of Appeal elaborated more fully and specifically on the nature of the legal errors and how they affected the outcome of the case, in order to provide more specific guidance to lower court judges for future trials. Given the difficulties which have surrounded the application of the "honest but mistaken belief in consent" defence, as documented by Lucinda Vandervort in a series of academic commentaries, the Court of Appeal could have provided much needed direction to lower court judges about the proper application of this defence.[77]

The Court of Appeal also found that the trial judge made inconsistent findings, in that he appeared to accept the complainant's version of events, but then went on to find that the accused was credible. Although the trial judge did not consider the facts to be "greatly in dispute", the Court of Appeal found that "to the contrary, the material facts going to the core issue were very much in dispute."[78] Interestingly, nowhere on the face of the trial judgment is the dispute about the facts evident or apparent.

If there was a clear and significant conflict in the versions of the facts, this suggests that the accused's facts did not match those offered by the complainant. Yet, this apparent factual dispute did not surface until the Court of Appeal judgment. Surprisingly, nowhere in this appellate judgment are we privy to the nature of the material facts in dispute, and how they go to the core issue, presumably, relating to the issue of consent. For some reason, the Court of Appeal provided absolutely no information or analysis in support of this apparent dispute, further muddying the waters. If there was a factual discrepancy, surely it was incumbent upon the Court of Appeal to elucidate the nature of the conflict and explain its proper resolution in legal terms.

The Court of Appeal went on to uphold the acquittal from the charges and deny the appeal, on the basis that the trial judge found the accused to be credible.

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76 *R.V.*, *supra* note 8 (C.A.) para. 1.

77 Vandervort, "Belief in Consent", *supra* note 61 ; "Honest Beliefs", *supra* note 57; "Mistake of Law and Sexual assault: Consent and Mens Rea," (1987) 2 *Can. J. Wom. Law* 233.

78 *R.V.*, *supra* note 8 (C.A.) para. 2.

Relying on the rule articulated by the Supreme Court of Canada in *R. v. W.(D.)*,[79] the Court of Appeal stated,

> As the Crown fairly conceded before us, if the respondent's version of the events was accepted, then he had to be acquitted. This is so irrespective of any consideration of mistaken belief in consent. In those circumstances, proper application of the rule in I [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397 (S.C.C.), required that the respondent be acquitted.[80]

However, this too is an enigmatic finding by both the Court of Appeal and the summary conviction judge. It is entirely unclear on what basis the trial judge found the accused to be credible. At no point in the judgment does he say what the accused asserted to support this finding of credibility.

Moreover, why should the Court of Appeal accept the judicial finding of credibility given how profoundly wrong the trial judge was on the law? Surely, it is conceivable that the trial judge's errors of legal analysis influenced his view of the facts and how they were marshaled.

Finally, and most fundamentally, even the accused's own version of the facts supported the legal finding that a sexual assault occurred because the complainant was both verbally and physically unambiguous in communicating her lack of consent to sexual touching. It follows then, that the accused could only have been willfully blind or reckless in disregarding this communicated non-consent.

Arguably, at the very least, the case should have been sent back for a new trial. However, the Court of Appeal instead upheld the acquittal and perplexingly failed to engage any analysis of the deep flaws in legal reasoning so apparent in the judgments below. Fortunately, the Court of Appeal allowed the appeal on costs against the Crown, finding no evidentiary basis for this award. Disappointingly, however, the Court of Appeal shirked its obligation to provide guidance to the lower courts on the proper application of the law governing sexual assault, and in particular, the proper application of the defence of "honest but mistaken belief in consent".

Moreover, absent from both of the lower courts' judicial narratives describing "what happened," is any hint of an appreciation of the complainant's affect, of the emotional valence attached to her experiences of sexual aggression from her husband, or of the impact of those experiences upon her. Instead, both judges of the lower courts demonstrate an analytic framework which appears to be a deeply traditional and masculinist one, already sympathetic to the accused and uncritically assuming - as the accused himself seems to do - that persistent and physically intrusive badgering of his wife for sexual access to her body is a normal male entitlement within marriage.

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79 *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397 (S.C.C.).

80 *R.V. supra* note 8 (C.A.) para. 3.

In none of the three Ontario decisions was a satisfactory analysis of the factual record before the court engaged in, nor was there an adequate analysis of sexual assault law. Even more egregiously, however, is the fact that in none of the three decisions was the "honest but mistaken belief in consent" defence outlined in the Criminal Code properly applied. It is in this regard that the Ontario Court of Appeal should surely have shown leadership and guidance to the lower courts.

In *R. v. R.V.*, at both the trial of first instance and on appeal to the Ontario Superior Court of Justice, the legal analyses utilized starkly illustrate the difficulty many judges still have in grasping the complicated dynamics of sexual assault in intimate relationships. This case, and others analyzed below, also demonstrate the ways in which problematic and traditional assumptions about the existence of "continuous consent" in intimate relationships, lead to an inability to correctly apply the law.

III. Sex, Marriage and the Judicial Imputation of "Continuous Consent"

> "Consent is usually proven by the acted-upon's not saying no; it can however, even famously include saying no."[81]

A. Presumed Consent and the Missing Reasonable Steps Analysis: Examples from the Caselaw

Some judges appear to be preoccupied with the idea that marital and other spousal-like relationships imply ongoing rights of sexual access, or "continuous consent" to sexual activity. This judicial error is one of the more troubling themes evident in *R. v. R.V.*, and demonstrates a profoundly gendered idea, which along traditional lines, presupposes an ongoing male interest in sexual access to the female spouse, which she is presumed to have granted by virtue of her entry into the spousal relationship itself. Unfortunately, this mistaken idea about "continuous consent" in intimate relationships is not unique to the lower court decisions in *R. v. R.V.*, but is further echoed in the caselaw emanating from various trial levels.[82]

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81 Catharine MacKinnon, "Unequal Sex: A Sex Equality Approach to Sexual Assault" in Women's Lives, Men's Laws (Cambridge, Mass: Harvard University Press, 2005) 240 at 243.

82 Given law's filtering process, together with the fact that most legal decisions are never reported, it is impossible to get an accurate sense of the extent of the problem with judicial decision making in trial courts, but it is nevertheless safe to assume that it is larger than is represented in the reported decisions, some of which are referenced here.

A strikingly bald assertion of the centrality of sex in marriage, and its apparent relevance in determining whether or not a spousal sexual assault took place, is made by Zelinski J. in *R. v. D.T.*[83] In that case, the accused had been charged with multiple offenses of spousal abuse over a period of years, "consisting of one count of choking and attempting to suffocate the complainant with the intent to enable himself to commit assault, four counts of sexual assault, three counts of assault and two counts of uttering death threats."[84] . Although he was found guilty of some of the charges, he was acquitted of all four sexual assault charges.

The wife's testimony was that she verbally and physically indicated her lack of consent on each of the occasions that were the subject of the sexual assault charges. The accused's defence was that the alleged episodes never happened - he argued that when his wife said no, he acquiesced.

In the face of the conflicting evidence of the accused and the complainant, the fact that the complainant did not immediately report each of her accounts of marital rape to the authorities, seems to have factored in to the judge's assessment of her credibility and the authenticity of her accounts. Indeed, the judge went so far as to characterize her delayed disclosure as a "cover up":

> Criminal conduct, when it comes before the court, must be judged on the principles upon which our justice system is built. The accused is presumed innocent and remains so until proven otherwise. However real the allegations of the complainant may be, the offences must be proved beyond reasonable doubt on the whole of the evidence. When alleged victims do not report crimes when they occur but, instead, engage in what is, in essence, a cover-up, it is not unreasonable that acquittals may occur. In fact, if this occurs it is probably because the abused spouse has been just too good at projecting a normal and in this case, an intimate relationship. Indeed, the better the evidence is of normalcy, the more likely it is that there will be an acquittal.[85]

Although it is well documented and judicially noticed that many women do not report abuse experiences, especially sexual ones, at the time they occur, this judge used the delayed disclosure as evidence of this woman's lack of credibility.

In the course of the legal decision, Zelinski J. demonstrated his assumption that "continuous consent" to sex is fundamental to marriage. In discussing the circumstances surrounding the spousal sexual assault charge, the judge opined that"[*i*]*n marriage sex* is not only desirable and pleasurable, it *is essential to the relationship.*"[86] [Emphasis added.] He then continued to observe that "these spouses portrayed an ostensibly normal relationship. The complainant played an

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83 *R. v. D.T.*, [1997] O.J. No. 688 (Gen. Div.) [*D.T.*].

84 *Ibid.* para. 2.

85 *Ibid.* para. 134.

86 *Ibid.* para. 126 [emphasis added].

important part in the manner in which the marriage was portrayed." Zelinski J. then went on to further note:

> [T]hese spouses engaged in frequent, playful sexual exchanges which included touching, tickling, pillow fighting, grabbing, groping and by the admission of the accused, pinning, (a suggestion of dominance). Mr. Greenspan [the accused's defence counsel], having done the math himself, suggests that on the evidence, sex would have taken place on approximately 2,000 occasions. While his mathematics may be overstated, since sex was diminishing in frequency after the birth of the children, sex was important to this couple and frequent, customarily taking place on weekends and one or two times mid week.[87]

In this case, as mentioned above, the accused was acquitted of the four spousal sexual assault charges. The judge found that in spite of the complainant's testimony about enduring multiple incidents of sex without consent, about her vigorous verbal and physical resistance to communicate her lack of consent, and about her subsequent psychological dissociation as a coping mechanism, there was reasonable doubt "based upon the whole of the evidence."[88]

The idea that "continuous consent" to sexual activity can be imputed in a spousal relationship, as demonstrated in the decisions in *R. v. R.V.* and *R. v. D.M.*, is closely tied to the seeping in of past sexual history evidence, often without the proper s. 276 application and judicial review. This was clearly at play in a relatively recent British Columbia case, *R. v. Went*,[89] in which the provincial court's conviction of the accused for sexual assault in an ongoing intimate relationship, was overturned on appeal. The accused's successful defence was based on "honest but mistaken belief in consent". The problematic reasoning in this case again reveals judicial assumptions about the accused's reasonable inference of consent, however mistaken, based upon the nature of the relationship itself. As Koenisgsberg J. explained:

> Throughout the trial and during this appeal, the defence accepts that Ms. D. did not consent to the sexual activity being sought to be initiated or the sexual touching that occurred in Mr. Went's attempt to initiate sexual activity. It is the defence position however, that Mr. Went had an honest but mistaken belief in her consent, *based largely on the sexual history and pattern of behaviour between the couple.*[90] [Emphasis added.]

While Koenisgsberg J. was careful not to adopt this defence viewpoint expressly, it is nevertheless accepted implicitly in the decision.

Most significantly, Koenisgsberg J. distinguished *Ewanchuk* as a case involving sexual assault between "virtual strangers," and suggested that it "stands for the proposition that there is no implied or behavioral consent which can be inferred

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87 *Ibid.* para. 127.

88 *Ibid.* para. 144.

89 *Went*, *supra* note 4.

90 *Ibid.* para. 17 [emphasis added].

between such individuals" - that is, individuals who are strangers. Koenisgsberg J. took the position that *Ewanchuk* does not apply to an accused and a complainant who stand in a spousal, or intimate relationship with one another. Put differently, the judge seemed to suggest that "implied" or "behavioural" consent, can, in fact, be inferred in these spousal relationships. An interesting but revealing aside is that even though the Supreme Court of Canada was unambiguous in convicting Ewanchuk of sexual assault, Koenisgsberg J. referred to what happened in the *Ewanchuk* case, as only an "alleged" assault.[91]

Relying on the idea of "behavioral consent", Koenisgsberg J. elaborated upon the relevance of the relationship context to the determination of whether or not a sexual assault has occured:

> *Ewanchuk* does not stand for a broader proposition than that one cannot assume or imply behavioural consent as part of an honest but mistaken belief in consent when there is no history between the parties which would allow the accused to infer consent from anything other than express consent. Clearly, this was not the case before the learned trial judge nor is it on this appeal. This assault occurred between two people *who had a very active two year sexual relationship and were still having that relationship when this incident arose.*[92] [Emphasis added.]

This is a bald statement, indicating that the relational context is essential in determining whether or not a sexual assault has taken place. Not only does Koenisgsberg J. suggest that Ewanchuk does not apply to spouses, but he also failed to apply the reasonable steps provision of the consent defence. In fact, it is ignored entirely. Instead, Koenisgsberg J. stated,

> The question is, if the trial judge cannot discount that *the complainant may have given signals to the accused consistent with an honest belief in consent*, is this not evidence raising a reasonable doubt as to whether the accused had an honest but mistaken belief in consent?[93] [Emphasis added.]

In this case, Koenisgsberg J.'s assumptions and inferences starkly interfere with the proper legal analysis that the law of sexual assault requires.

In another case, *R. v. Latreille*, in a ruling on a *voir dire*,[94] the judge made a number of similar comments typifying the assumption that the status of an intimate relationship (in this case between common law spouses) is relevant to a viable assumption that "continuous consent" operates within the relationship. In this case, Heeney J. also drew on *Ewanchuk*, but did so in order to argue that the complainant's assertion that there was no consent must be assessed "in light of all

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91 *Ibid.* para. 22 [emphasis added].

92 *Ibid.* [emphasis added].

93 *Ibid.* para. 34 [emphasis added].

94 *R. v. Latreille* [2005] O.J. No. 4845 (Sup. Ct.) [*Latreille*].

the evidence of the case." Describing this requirement, and consistent with the reasoning adopted in *R. v. Went*, Heeney J. noted,

> [S]uch evidence might arguably include a pattern of repeatedly consenting to sex with the accused in similar circumstances. It is not the sexual nature of the activity that is relevant, *but rather the repetitive pattern of consenting.*[95] [Emphasis added.]

Even more surprisingly, although the judge paid lip service to the repudiation of the "twin myths" prohibited by s. 276, he found that within an ongoing spousal relationship, the idea of "continuous consent" was simply one of "common sense." In Heeney J.'s words:

> It is one thing to assert that females who are sexually active are "easy" and therefore readily consent to sex. It is another thing altogether to assert that a male and female in an intimate relationship of long standing readily have consensual sex. The first is a rightly discredited myth. The second is a matter of common sense. [96]

A final example is found in *R. v. T.V.*[97], a 2006 case involving assault, criminal harassment, and sexual assault allegations in the context of a deteriorating and ultimately terminated spousal relationship. Except for a single charge of assault on which he was convicted, the accused was acquitted on all counts, including the sexual assault.

It seems clear from the judge's description of the facts, that this was a relationship breakdown characterized by significant discord and acrimony. In fact, the accused attempted to destroy his wife's professional career by sending her private e-mail correspondence revealing her affair with her boss, to her corporate colleagues across North America. The incident giving rise to the criminal charge of sexual assault is of particular interest because it reveals the way the judge's assumptions about how the complainant should have acted in order to have indicated her resistance to the unwanted sexual intercourse shaped her legal analysis. The point is not to dispute the disposition of the sexual assault charge, which may or may not be the correct result. Instead, it is the problematic nature of the legal reasoning surrounding the sexual assault charge and defence that is relevant to this analysis.

A short time after the accused sent the e-mails to the corporation's email accounts across North America, ultimately causing the complainant to lose her job, the complainant told the accused that the marriage was over. They continued to reside together for a period of time, during which the complainant's parents were visiting from India and staying in the house. In what appears to be a pattern of hostility and aggression, followed by contrition and conciliatory

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95 *Ibid.* para. 19 [emphasis added].

96 *Ibid.* para. 22.

97 *R. v. T.V.*, [2006] O.J. No. 4089 (Ct. J.) [*T.V.*].

gestures, the accused sent the complainant flowers on March 23rd, 2005, the date of the incident giving rise to the sexual assault charge. This seems to be relevant to the judge's analysis of the events because the judicial assessment appears to be somewhat sympathetic to the accused's plight vis-à-vis the relationship:

> The accused was desperately trying to save the marriage. It was their engagement anniversary and he had sent his wife flowers at work which she gave away to the cleaning lady. He E-mailed her to come home so that they could have a special dinner. She did not come home for dinner. He was trying to engage his wife romantically throughout the day.[98]

The wife's lack of interest in the accused's gesture and his "romantic" intentions, was apparent by her acts of disposing of the flowers, and not returning to the house for dinner. The complainant had been sleeping in her daughter's room on previous nights, and when she did finally return home that night she went into the master bedroom to retrieve her things. Her husband was already there and she assented to his request to "come and sit down" so he could talk with her. Though she told him she did not want to talk, was starving and wanted to eat dinner, she "sat at the edge of the bed with her feet on the floor."[99]

When the accused asked the complainant to "spend the night" with him, the complainant declined. According to the undisputed evidence of the complainant, as reported by the judge,

> The accused started to kiss her on the mouth. *She did not respond to the kiss. She told him "no, let me go, I have to eat."* The accused said, "let me show you how much I love you." He was talking in a low voice so he would not awaken the children. *She said no.*
>
> The accused started kissing her. She moved back onto the bed. The accused "lightly" pinned her wrists to the side and slowly moved her PJ top up. He told her that he knew her body. He told her that [her boss] was still in her head and that it would go away.
>
> The accused lay on top of her and *she told him to get off.* She was afraid to be more forceful because she didn't want to 'make a scene'. She didn't think her parents would support her if she complained. They took the accused's side of things and thought she should be seeing a psychiatrist.
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> The accused continued to pull her shirt off and unhooked her bra. She did not put up a fight because she was tired and hoped that he would stop.
>
> The accused pulled her shirt off over her head and pulled her pants down with one hand. *She told him she did not want this and to let her go.* Her mind shut off. She was tired and became quiet.
>
> She testified that she was afraid of his temper and thought if she lay quietly it would finish quickly.
>
> The accused pulled his PJ pants down and touched and kissed her breasts. He told her that he knew her body and that it would respond to him. At some point he put his fingers into her vagina. He put his penis in her vagina and ejaculated after a few minutes. He told her

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98 *Ibid.* para. 153.

99 *Ibid.* para. 72-73.

> that he wanted to make love to her all night. She thought to herself, I cannot do this all night long.[100] [Emphasis added.]

The text emphasized by italics represents the four times that the complainant expressly said "no" and verbally refused consent to the proposed sexual conduct. Yet, this appears to be a classic *Ewanchuk* situation insofar as the facts, even as the judge recounted them, suggest that in the face of the complainant's express refusal, the accused blithely continued on with his sexual advances. It appeared from the judge's own account, that this accused did what Major J. warned against, when he wrote that "[c]ontinuing sexual contact after someone has said 'No' is, at a minimum, reckless conduct which is not excusable."[101]

Baldwin J. continued to report that after this incident,

> the complainant took her purse and quietly left the house. She drove around for a while, not knowing where to go. Then she decided to go the police station. At the police station, she reported that she had been "raped" by her husband. (Reference evidence of Constable Deborah Paul).[102]

Interestingly, the judge put the word "raped" in quotation marks. The constable's evidence was that the complainant was "in tears," and "appeared very shaken and upset."[103]

It is not uncommon for women to accommodate unwanted sex in intimate relationships, especially in relationships where there has been a history of physical aggression and violence. It is certainly open to argument and debate as to whether or not these kinds of incidents can and should be classified as criminal sexual assaults. However, when such an incident is the subject of a criminal sexual assault charge, what is not debatable is that a rigorous legal analysis is required to make such a determination, requiring a proper application of the various Criminal Code provisions.

It appears, however, that two major flaws characterize the judicial reasoning in this case, undermining the rigor of the legal analysis it required, regardless of its ultimate disposition. Interestingly, Baldwin J. expressly warned,

> These reasons are not to be interpreted in any way as saying that a husband can have sex with his wife when she says that she does not want to. The law in Canada as clarified in Ewanchuk is very clear that no means no' and nothing else. Specifically, it does not mean if you persist, I might change my mind.

Yet, it appears that Baldwin J.'s reasons, while certainly not reductively translatable into the idea that a husband can have sex with a wife when she says

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100 *Ibid.* para. 78-85 [emphasis added].

101 *Ewanchuk, supra* note 29 para. 52.

102 *T.V., supra* note 104. para. 90-91.

103 *Ibid.* para. 102-103.

no, do nevertheless suggest that the "implied consent" defence expressly refuted in *Ewanchuk* is alive and well in spousal relationships such as this one.

Baldwin J. found that there was an "air of reality" to the defence of "honest but mistaken belief in consent" in the circumstances of the case.[104] As she explained:

> 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. After having had the benefit of listening to the complainant testify for three days, I am satisfied that the complainant is an assertive and strong-willed woman. Her failure to simply leave the room was not credibly explained in her evidence.

This, in and of itself, demonstrates the judge's belief that the complainant failed to mount a resistance to the unwanted sexual contact, sufficient to convey a lack of consent (and this is in spite of her repeated verbal communication of non-consent).

In her judgment, Baldwin J. seemed to express the idea, as did the judge in *R. v. R.V.*, that the complainant's mere physical presence in the room, in the context of a spousal relationship (even though it was disintegrated) served to function as the equivalent of consent. Indeed, Baldwin J. asserted that,

> "when it became apparent to her, as she lay on the bed, that he wished to engage in sexual intimacy, *she said that she did not want to*, yet she continued to lay down on the bed."[105] [Emphasis added.]

Indeed, Baldwin J. blames the victim here, for in this judge's mind, the complainant's continued physical presence on the bed negated her express verbally communicated refusal to consent. Saying "no" was simply not enough for this judge.[106]

The second major flaw in the judicial reasoning in *R. v. T.V.*, is the failure to apply the "reasonable steps" provision outlined in section 276 of the Criminal Code. As seen in other cases, this provision simply vanished from the analysis. In *Ewanchuk*, Major J. explained that not only does the accused need to "make certain" that the complainant has truly changed her mind before initiating further sexual contact, but also that, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of

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104 *Ibid.* para. 163.

105 *Ibid.* para. 155. [emphasis added]

106 In the judgment Baldwin J. appears to have read selectively from *Ewanchuk* because the decision ignores Major J.'s express stipulation that: "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence . . . Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact." *Ewanchuk, supra* note 29 para. 51.

agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.[107]

Yet, it appears that no evidence was adduced by the accused in *R. v. T.V.* to demonstrate what steps he took to ascertain the complainant's consent. Baldwin J.'s judgment made no reference to the reasonable steps provision of the Criminal Code, it is again, simply as if the provision does not exist in law. Instead, the judge opined, "The evidence here paints the picture of a desperate man trying to romantically seduce his wife and save his marriage, to no avail."[108] The muddy legal reasoning surrounding the sexual assault in *R. v. T.V.* is another paradigmatic example of the kinds of erroneous judicial assumptions at play regarding the nature of consent to sexual contact in spousal relationships.

Reassuringly, most appellate courts are correcting many of those cases where trial level judges have failed to properly apply the law, making it all the more surprising that the Ontario Court of Appeal declined to provide substantive legal guidance in *R. v. R.V.* on the "serious errors of law" it identified. In *R. v. A.W.S.*,[109] for example, the Manitoba Court of Appeal vigorously corrected the trial judge's mistaken application of the "honest but mistaken belief in consent" defence, by stating the following:

> [I]t would be wrong to assume that because there is an ongoing sexual relationship between the parties all of the circumstances of the case need not be examined to determine whether the defence of reasonable belief in consent should be considered.[110]

In its decision, the Manitoba Court of Appeal specifically corrected the erroneous inference that continuous consent to sexual activity can be presumed in an intimate relationship:

> The law cannot allow a person to take refuge in an intimate relationship and be willfully blind to the condition of his or her sexual partner *simply because that relationship exists*. While an ongoing sexual relationship may be evidence which provides an "air of reality" to the defence of mistaken belief, the obligation remains with the trial judge, as a matter of law, to determine, in the circumstances of the case before him, whether that "air of reality" does exist.[111] [Emphasis added.]

The New Brunswick Court of Appeal similarly corrected a trial judge's erroneous application of the "honest but mistaken belief in consent" defence in a

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107 *Ewanchuk*, *supra* note 29 para. 65 [emphasis added].

108 *T.V.*, *supra* note 104 para. 173.

109 *A.W.S.*, *supra* note 2.

110 *Ibid.* para. 8.

111 *Ibid.* para. 14 [emphasis added].

marital relationship. In *R. v. D.I.A.*,[112] the trial judge made assumptions about the "normal" frequency of sexual relations between the accused and the complainant and found that, based on this frequency, the conduct which was the subject of the sexual assault charge, was "no different at that time than all of the other times." The trial judge further observed in relation to the circumstances of the sexual assault that "this was the normal way."[113] The New Brunswick Court of Appeal remitted the case back to trial, finding that the trial judge failed to demonstrate that the accused took "reasonable steps" to ensure consent and did not make any factual finding which could support a successful consent defence.

B. Can an "Honest But Mistaken" Belief in "Consent" Be Claimed by a Violent and Threatening Accused?

So entrenched is the idea of "continuous consent" in spousal relationships, that some judges have even managed to find support for an "honest but mistaken belief in consent" defence in cases where husbands have used or threatened extreme violence against their wives in the course of sexually assaulting them. Two cases make this point quite clearly.

In *R. v.* C.M.M., an astonishing decision, Crawford J. acquitted an accused of sexual assault against his spouse on the basis that he honestly but mistakenly believed there was consent.[114] The accused was separated from his wife, and broke into her home while she was at work. While awaiting her return, he found a handgun he owned, and when she returned to her house, she was confronted by him in the hallway. He was wearing latex gloves and holding a gun. According to the judge, the terrified woman

> remembered him saying words to the effect, "You thought you were smart in court yesterday. Did you actually think I couldn't get to you? I bought this gun for twenty dollars - it was that easy. I should shoot you ... I have three guys lined up ready to rape you - they know where you work." She said he motioned her into the bedroom, saying, "I have nothing to live for; I can't live without you."[115]

Whether or not the complainant was aware of it, the highest risk period for women of spousal homicide is post-separation.[116] It would appear that she

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[112] *R. v. D.I.A.*, [1999] N.B.J. No. 303 (C.A.) [*D.I.A.*].

[113] *Ibid.* para. 10 (citing the trial judge's reasons).

[114] *R. v.* C.M.M., [2002] N.S.J. No. 197 (rov. Ct.) [C.M.M.].

[115] *Ibid.* para. 11-12.

[116] See "Report on sentencing for manslaughter in cases involving intimate relationships" (March 2003), online: Department of Justice Canada <http://www.justice.gc.ca/en/dept/pub/smir/ms_int_rel_report_litrev.html>; See also, Douglas A. Brownridge, et al., "The Elevated Risk for Non-Lethal Post-Separation Violence in Canada"

correctly read the level of danger she was in and attempted to defuse the situation, de-escalate the threat and save her own life, by placating her estranged husband. The judge continued to describe the events as follows:

> N.J.M. was terrified; she knew her husband loved her and was despondent over the separation, but she had never seen him with a gun before and did not know that it had been in the house all along. She said she was determined to do whatever was necessary to stay alive. So she started telling him what she knew he wanted to hear: that she had made a mistake; she wanted him back. She had the phone number of her lawyer in her hand and told her husband she had been planning to call the lawyer that morning to give instructions to call everything off. C.M.M. wanted to believe what his wife was saying and asked her to "prove you still love me; let's make love."[117]

The terrified woman then went into the bedroom and had sexual intercourse, because, according to the complainant's testimony, "[She] was fighting to stay alive. [She] thought, 'Just do it and get it over - I still have a chance to get out of the house.'"[118] She then managed to escape from the house and contact the police.

On these facts, it is amazing that the judge was able to find, not that the accused was willfully and recklessly blind to the fact that his estranged wife submitted to sexual intercourse in fear for her life and under threat of death, but instead, that the accused's assertion of an ""honest but mistaken belief in consent" could possibly be justified! Interestingly, the judge's legal reasoning aligned with the distorted rationalizations of the violent, threatening husband. As Crawford J. explained,

> From his point of view her consenting to have sex with him was proof that what he so desperately wanted to believe was true: that she still loved him. The gun had been put away and was no longer a factor, as far as he was concerned, and he and his wife were reconciled. This was not a situation where, from his point of view, he was forcing himself on his wife, but rather where they were each reaffirming their commitment to each other after a sad estrangement.[119]

On this flimsy basis, the judge found that the accused had an "honest but mistaken belief in consent", and therefore acquitted him of the sexual assault charge. Not only was the "reasonable steps" provision, once again, overlooked, but the judge failed to point to any factual or evidentiary basis on which such an implausible consent defence could possibly hinge.

(2008) 23:1 Journal of Interpersonal Violence, 117-135; Martha R. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation," (1991) 90 Mich. L. Rev. 1.

117 C.M.M., *supra* note 116 paras. 13-14.

118 *Ibid.* para. 24.

119 *Ibid.* para. 62.

In another example, a trial judgment from Alberta, *R. v. MacFie*,[120] which was fortunately overturned on appeal, illustrated the kind of sloppy reasoning and distorted analyses which shape some judges' approaches to sexual assault in intimate relationships.[121] In this case, the perpetrator, who ultimately murdered his estranged wife after physically abusing her for years, had abducted her, taken her to an abandoned gravel pit, and raped her twice in the back of his van. At the trial for both the murder and the sexual assault, the "honest but mistaken belief in consent" defence was successfully raised and the accused was acquitted of the sexual assault charge (though convicted of first degree murder). The trial judge allowed the defence because

> [f]rom her [the dead victim's] statements to the peace officers one could not but come to the conclusion that not only was there an evidentiary basis for this defence, but that the accused truly and honestly believed that she was consenting to this activity.[122]

How the trial judge possibly came to this conclusion in the face of the evidence indicating that the sexual assaults were perpetrated by a violent man against his estranged wife in the context of a violent abduction, in which she was trapped and terrified in a van, remains a mystery.

Making just this point, McFadyen J.A., writing for the Alberta Court of Appeal, restated the appropriate legal question as follows:

> The simple question in this case is whether, and under what circumstances, a person who has violently abducted a victim can claim that he honestly but mistakenly believed that the victim consented to sexual activity while the abduction continued. We conclude, as a general principle, that 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.[123]

In concluding that an "honest but mistaken belief in consent" defence was impossible on these facts, the Alberta Court of Appeal effectively corrected the trial judge's serious errors. Nevertheless, the fact that the trial judge could have erred in this way, provides yet another example of the profoundly flawed judicial understanding of the law relating to sexual assault, the specific legal application of the defence of "honest but mistaken belief in consent", and finally, the dynamics of sexual assault in intimate relationships, particularly those characterized by years of violence and threats.

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120 *R. v. Macfie (B.S.)*, [2001] 277 A.R. 86 (C.A.), McFadyen J. [*Macfie*] (Allowing the Crown's appeal and substituting a conviction).

121 Lucinda Vandervort provides an excellent discussion of this case in "Honest Beliefs", *supra* note 57.

122 *Macfie*, *supra* note 123 para. 23.

123 *Ibid.* para. 2.

C. Conclusion: Consent, "Common Sense" and the Law in Relation to Spousal Sexual assaults

> Consent is both a single concept in law and a multitude of opposing and cross-cutting conceptions of which courts and commentators tend to be only dimly aware.[124]

While research suggests that the vast majority of sexual assaults committed in intimate relationships are never brought to the attention of the criminal justice system, the above review of some of the cases that are reported and processed criminally, reveals a number of areas of legal difficulty in judicial reasoning. This case-law analysis also indicates that there still exist too many judicial decisions which are animated by extra legal assumptions about sex and marriage, by an inaccurate grasp of Canadian sexual assault law, and, in particular by misapplications of the "honest but mistaken belief in consent" defence. There is, furthermore, an assumption that past sexual history and/or the existence of an ongoing intimate relationship, confers some sort of presumption of consent to sexual engagement, a presumption which requires complainants to make extreme gestures of resistance to negate it. Finally, the case law review reveals a disturbing failure to apply the "reasonable steps" requirement of the Criminal Code provision on consent.

Among, the most troubling of the errors in judicial reasoning in this spousal sexual assault case law, is the idea that the nature of the intimate relationship itself suggests, in some judges' minds at least, that the legal tests for determinations of consent differ from those legally required in other situations. The belief that consent is somehow generalized or can be assumed in the context of spousal, or other ongoing intimate relationships, seems to be present in the minds of some of the judges whose reasoning has been analyzed here. These judges have difficulty, as is evident in the larger society as well, understanding that the spousal relationship itself does not explicitly or implicitly give rise to a presumed "continuous consent" to sex. Consent to sexual engagement is expressed and negotiated in intimate relationships in a dynamic, and not a static way. It simply cannot be presumed, nor can it be inferred from consent to prior sexual activity. This latter inference is precisely what s. 276 of the Criminal Code sought to rebut.

Moreover, these judgments reveal the persistence of some judicial attitudes towards sexual assault in intimate relationships which are predicated on a view, which both takes for granted, and normalizes males' entitlement to access to their female partners. In some cases, judges actually recast sexual persistence and even intrusion, as indicating "romantic" gestures and intentions on the part of the accused. While there may be some ambiguity in the facts, and while, if there is a

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[124] Peter Westen, "Some Common Confusions About Consent in Rape Cases" (2004) 2 *Ohio St. J. Crim. L.* 333.

continuum of sexual assault experiences, some of the cases analysed here certainly fall towards the more "minor" end of sexual assault, the "severity" of the conduct is not determinative of whether or not a criminal sexual assault took place. Moreover, some of the cases where the judicial errors were most egregious, involved facts indicating the presence of overt violence and threats of violence from the accused.

Of particular interest in the decisions in *R. v. R.V.*, for example, is the way in which the lower court judges engaged in legal reasoning about sexual assault and intimate relationships, that was so obviously constructed around stereotypic thinking, which one judge (mis)characterized as "common sense." The trial judge, for example, reframed sexual intrusiveness, and criminal sexual misconduct, as acceptable "dialogue" between spouses.

The problems these cases exemplify, it is to be hoped, are remnants of outmoded ways of thinking about sexual assault in intimate relationships, since the legal response to sexual assault in Canada has undergone significant change over the past few decades. Many positive developments have been seen in criminal law responses to the problem of sexual assault - changes reflected both in revisions to the Criminal Code and in the case law. Many of the dominant "myths" about sexual assault have been effectively challenged, such as the doctrine of recent complaint. Additionally, inappropriate inferences introduced about the complainant's past sexual history are now prohibited. Critical Supreme Court of Canada decisions in cases such as *R v. Seaboyer*,[125] *R v. Park*,[126] *R v. Ewanchuk*,[127] and *R v. Darrach*[128] have significantly altered the legal landscape governing the criminal law's response to sexual assault in this country.

The decisions analysed here, however, appear to reassert an assumption about an entitlement to sexual access within marriage, or, put differently, an immunity to criminal culpability for those who sexually transgress in the context of a spousal relationship. This attitude is captured in comments issued by an Australian judge, who opined that:

> "[t]here is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing of the mind and consenting . . . " [129]

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125 *Seaboyer, supra* note 53.

126 *R. v. Park*, [1985] 2 S.C.R. 836 [*Park*].

127 *Ewanchuk, supra* note 29.

128 *Darrach, supra* note 35.

129 Justice Bollen of the South Australian Supreme Court in his judgment in the case of *R v. Johns*, a rape trial (1992). *R. v. Johns* (1992) Supreme Court, SA No. SCCRM/91/452, (26 August 1992).

This set of beliefs appears to have been at least in part shared by some of the judges whose decisions are analysed here. As Elizabeth Sheehy has observed, "[O]ne suspects that a powerful belief system remains deeply embedded beneath the rape law reforms,"[130] and these judgments certainly confirm the validity of that concern.

These judgments, at least in their legal reasoning, therefore, provide a documentation of how law reform sometimes fails to operate in practice, suggesting a disjuncture between these reforms and actual judicial interpretations. This discordance between legislative reform and statutory requirements regarding sexual assault and their misapplication, suggests the persistence of discriminatory and stereotypical assumptions, which fundamentally distort legal reasoning and reinscribe legally prohibited assumptions about what is permissible in heterosexual intimate relationships.

> Sexual violence by husbands [or other male intimate partners] has been among the most hidden of all crimes of violence against women."[131]

The problem of sexual assault in intimate relationships is one which is both more widespread than had previously been realized and yet-for a variety of reasons-one which remains largely privatized. As Holly Johnson noted, "[U]nlike battering, or sexual assault by strangers, or even date rape, sexual violence within marriage has not been publicly scrutinized to the same extent." Yet, studies in Canada and internationally have documented both that far too many women are subjected to sexual assault by their male intimates, and that sexual assault is very often a part of the experience of women who also experience ongoing domestic violence.

Recognizing and understanding the extent of and dynamics surrounding the problem of sexual violence in intimate relationships is necessary for the formulation of effective legal recognition of and responses to this same problem. Obviously, a correct application of the law governing sexual assault in Canada is a critical and necessary step in this direction.

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

[131] Johnson, Dangerous Domains, *supra* note 4 at 146..