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Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?

Emma Cunliffe*

I. INTRODUCTION

This paper forms part of a 30-year retrospective on the *Canadian Charter of Rights and Freedoms*,¹ its successes and challenges. In particular, I have been invited to consider the contemporary role of the Charter value of equality in protecting women against crimes of violence. This paper argues that section 15 of the Charter has prompted reforms that protect women as complainants in sexual assault cases and considers the effectiveness of these reforms.

Part II supplies a history of the relationships between consent, trial procedure, and substantive equality in sexual assault law. I argue that substantive equality has had a significant effect on both substance and procedure. Part III examines the impact of these reforms by considering the extent to which substantive equality has infused judicial reasoning and fact determination in contested sexual assault cases. Specifically, I focus on the three sexual assault cases decided by the Supreme Court of Canada in 2011.² By examining these cases from trial to final appeal, it is possible to trace the development, refinement and adoption of equality-based reasoning about particular complainants. Analyzing Supreme Court

* Assistant Professor, University of British Columbia Faculty of Law. This article is written in honour of my colleague Professor Christine Boyle QC on the occasion of her retirement from UBC. Her contribution to legal understandings of violence against women has been enormous. Thank you to Susan Boyd and the anonymous reviewers of this manuscript for helpful comments on an earlier version, and to James Stribopoulos and Benjamin Berger for including me in the 2011 Osgoode Constitutional Cases Review Conference. I am also grateful for the support of the Centre for Feminist Legal Studies at UBC.

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² *R. v. A. (J.A.)*, [2011] S.C.J. No. 17, [2011] 1 S.C.R. 628 (S.C.C.) [hereinafter “*A. (J.A.)*”]; *R. v. A. (J.)*, [2011] S.C.J. No. 28, [2011] 2 S.C.R. 440 (S.C.C.) [hereinafter “*A. (J.)*”]; *R. v. H. (J.M.)*, [2011] S.C.J. No. 45, [2011] 3 S.C.R. 197 (S.C.C.) [hereinafter “*H. (J.M.)*”].

of Canada cases allows a consideration of reasoning that is more fully argued than is often possible in trial courts, and also focuses on reasoning that is most likely to provide a model for future cases. My analysis shows that substantive equality reasoning has not yet infused judicial approaches to fact determination in sexual assault cases, and that individual complainants are not yet fully protected against the operation of myths and stereotypes when consent or credibility are at stake. I suggest in conclusion that the Supreme Court of Canada has a leading role to play in moving judicial reasoning towards a more egalitarian approach to fact determination.

II. CONSENT, PROCEDURE AND SUBSTANTIVE EQUALITY

While the legal questions varied, consent was the factual question at the heart of each of the three cases decided by the Supreme Court of Canada in 2011. This commonality speaks to the continued challenges of proof at the trial level in sexual assault. The variation in the legal questions brought forward to the Court demonstrates that consent raises both substantive questions — for example, what are the limits of consent? — and procedural challenges — for example, how can the court focus the trier of fact on the specific question of consent in this instance, rather than judging sexual assault by the reputation or history of the complainant?³ Before turning to the specific arguments made in *A. (J.A.)*,⁴ *A. (J.)*⁵ and *H. (J.M.)*,⁶ it may be helpful to introduce the substantive law of consent and some of the most relevant procedural aspects of sexual assault law, and to note the influence of section 15 of the Charter on both of these dimensions.

On the substantive side, the contemporary statutory definition of consent was introduced into the *Criminal Code*⁷ in 1992 after broad consultation.⁸ Consent is now defined in section 273.1(1) of the *Criminal Code* to mean “the voluntary agreement of the complainant to engage in

³ On the interconnectedness of substantive and procedural law, see Christine Boyle & Marilyn MacCrimmon, “The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered” (1998) 41 *Crim. L.Q.* 198, at 198-200 [hereinafter “Boyle & MacCrimmon”].

⁴ *Supra*, note 2.

⁵ *Supra*, note 2.

⁶ *Supra*, note 2.

⁷ R.S.C. 1985, c. C-46.

⁸ Boyle & MacCrimmon, *supra*, note 3; Lise Gotell, “Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women” (2008) 41 *Akron L. Rev.* 865 [hereinafter “Gotell, ‘Rethinking Affirmative Consent’”].

the sexual activity in question”. Subsection 273.1(2) sets out a variety of circumstances in which valid consent is not obtained, including, for example: incapacity to consent; expressed lack of consent; and an expressed desire to discontinue the activity. Section 273.2 provides that it is not a defence that the accused believed the complainant was consenting, if the accused failed to take reasonable steps to ascertain consent or if his belief arose from self-induced intoxication, recklessness or wilful blindness.

Feminist commentators hailed the 1992 definition of consent as enlivening the potential for “a contextual analysis of the power relations within which sexual interactions unfold”.⁹ Specifically, the definition imagines an exchange in which the participants take steps to ascertain and abide by the wishes of their partner, and the grey area between “yes” and “no” is correspondingly diminished. Where charges are laid, the *Criminal Code* directs the trier of fact to look for agreement rather than relying upon acquiescence, and particularly to consider the circumstances in which mere acquiescence might be more likely to have occurred.¹⁰ Feminists felt that the amendments responded to their criticisms of sexual assault law as “reflecting a pervasive distrust of women and children, and as facilitating male sexual access to them regardless of their wishes”.¹¹ This mistrust, and the corresponding inadequacies in the criminal justice response to sexual violence, were regarded by many commentators as failures to make good on the section 15 Charter promise that all individuals have the right to equal benefit and protection of the law.¹² The preamble to the 1992 amendments specifically cited grave concern about the incidence of violence against women and children and Parliament’s intention “to promote and help to ensure the full protection of the rights guaranteed under section 7 and 15 of the [Charter]”.¹³

The leading case on consent in sexual assault law is *R. v. Ewan-chuk*.¹⁴ In *Ewan-chuk*, the Supreme Court of Canada held that absence of

⁹ *Id.*, at 868.

¹⁰ *R. v. Ewan-chuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330 (S.C.C.) [hereinafter “*Ewan-chuk*”]. See also s. 265(3), which defines the circumstances in which consent is vitiated for all assaults.

¹¹ Boyle & MacCrimmon, *supra*, note 3, at 199.

¹² *Id.*, at 200; see also Sheilah Martin, “Some Constitutional Considerations on Sexual Violence Against Women” (1994) 32 *Alta. L. Rev.* 535, at 547-51.

¹³ Canada, House of Commons, Legislative Committee on Bill C-49, *An Act to Amend the Criminal Code (Sexual Assault)*, 34th Parl., 3rd Sess., 1992 Preamble (passed by House of Commons June 15, 1992), cited in *A. (J.)*, *supra*, note 2 (Appellant’s Factum, at para. 26).

¹⁴ *Supra*, note 10.

consent “is subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred”.¹⁵ Where an individual has said no to sexual contact:

[t]he 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”.¹⁶

Furthermore, a clear assertion of “no” is not required and the trier of fact should focus on whether “yes” was communicated to the accused. Collectively, the section 273.1 definition of consent and Supreme Court of Canada precedent provide a strong consent standard. Consent is determined solely by the complainant’s state of mind; and the accused’s capacity to argue mistaken belief in consent is conditioned by a requirement to make reasonable efforts to ascertain consent. Parliament and some judges expressly link these standards to women and children’s equality rights and to the related principles of universal dignity and autonomy.

A strong substantive definition of consent is most effective when accompanied by procedural rules that focus the court’s attention on the specific question of whether this complainant consented to the sexual activity that forms the subject of this charge. Parliament has developed procedural rules that are designed to protect the trial process from the operation of prejudicial generalizations about rape complainants.¹⁷ Reforms were also implemented to balance complainants’ privacy and equality interests with the right of the accused to make full answer and defence.¹⁸ While early legislative efforts were ruled unconstitutional by the Supreme Court,¹⁹ a jurisprudence of equality gradually emerged from the reasoning in several cases and was explicitly adopted by a majority in *R. v. Mills*.²⁰ For present purposes, the key aspect of this procedural law

¹⁵ *Id.*, at para. 26.

¹⁶ *Id.*, at para. 52.

¹⁷ Sections 276 and 277 *Criminal Code*.

¹⁸ This legislative history has been well canvassed elsewhere. For example, Boyle and MacCrimmon, *supra*, note 3; Margaret Denike, “Myths of Women and the Rights of Man” [hereinafter “Denike”] in James Frederick Hodgson & Debra S. Kelley, eds., *Sexual Violence: Policies, Practices and Challenges in the United States and Canada* (Westport, CT: Praeger, 2002), at 101.

¹⁹ *R. v. Seaboyer*; *R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.) [hereinafter “*Seaboyer*”].

²⁰ [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.) [hereinafter “*Mills*”]. In *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595, at para. 166 (S.C.C.), Cory J. identified the potential

is its focus on expelling certain unfair stereotypes about sexual assault complainants from the trial process. Before turning to particular stereotypes, it is useful to consider the relationship between equality and stereotyping.

Section 15 of the Charter protects substantive equality and envisages that all individuals should receive the equal protection and benefit of the law. In *Law Society of British Columbia v. Andrews*,²¹ a majority of the Court explained:

Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.²²

This desire to ensure an equal allocation of burdens and protection is threatened by the operation of unfair stereotypes. Sophia Moreau describes stereotyping as a process by which one group of people treats another (the stereotyped group) as though certain generalizations or classifications capture essential features of all individuals who belong to the stereotyped group. Decisions made on the basis of such generalizations overlook the particular circumstances or attributes of individual members of the group. Such decisions violate the principle of substantive equality by denying individuals protection based on irrelevant considerations and by denying individuals the capacity to be judged on their own circumstances and experience.²³ The Court has emphasized “the role of s. 15(1) in overcoming prejudicial stereotypes in society”.²⁴

Turning to sexual assault, the Supreme Court first recognized the dangers of myths and stereotypes in *R. v. Seaboyer*.²⁵ Specifically, the

relevance of s. 15 to limiting cross-examination while stressing that it was “not determinative”; see also *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.), and *R. v. Darrach*, [2000] S.C.J. No. 46, [2000] 2 S.C.R. 443 (S.C.C.). For further information about the pre-*Mills* case law, see: Denike, *supra*, note 18; Elizabeth Sheehy, “Feminist Argumentation Before the Supreme Court in *R. v. Seaboyer*; *R. v. Gayme*: The Sound of One Hand Clapping” (1991) 18 *Melbourne U. L. Rev.* 450 [hereinafter “Sheehy”]; and John McInnes & Christine Boyle, “Judging Sexual Assault Law Against a Standard of Equality” (1995) 29 *U.B.C. L. Rev.* 341 [hereinafter “McInnes & Boyle”].

²¹ [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

²² *Id.*, at para. 26, *per* McIntyre J.

²³ Sophia Moreau, “The Wrongs of Unequal Treatment” in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real*, 2d ed. (Toronto: Irwin Law, 2009) 31, at 36-37.

²⁴ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 64 (S.C.C.).

²⁵ *Supra*, note 19.

Court identified that sexual history evidence was often admitted without regard to relevance, and used by triers of fact to infer consent based on the myths “that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief”.²⁶ The majority struck down a provision that was designed to protect sexual assault complainants from such generalizations as a breach of the right to make full answer and defence, because it was over-inclusive.²⁷ Nonetheless, they accepted that trial judges should exclude sexual history evidence if it is irrelevant or its prejudicial potential substantially outweighs its probative value.²⁸ This reasoning was confirmed, and additional myths identified in *R. v. Osolin*.²⁹ In both cases, the Court identified concerns about the possibility that a rape victim’s credibility might be unfairly demeaned based on inaccurate generalizations about the behaviour, truthfulness or character of sexual assault complainants, while upholding the relevance of cross-examination on sexual history in the instant cases.

Although concerns about rape myths resonate with the substantive equality focus on stereotyping, the Court did not explicitly connect the concept of rape myths with the Charter right to equality until *Mills*.³⁰ Justices McLachlin and Iacobucci held on behalf of a majority that:

Equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play. In this respect, an appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence. ... [T]he right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process.³¹

After *Mills*, the connection between substantive equality and excluding stereotyping from sexual assault cases is clear. Banishing unfair stereotyping from sexual assault cases is characterized as protecting both women’s equality and the truth-seeking functions of the trial.³² This dual benefit becomes apparent when one focuses on the distorting effects that arise when a trier of fact substitutes an unfair generalization about human

²⁶ *Id.*, at para. 23.

²⁷ The majority’s failure to have regard to complainants’ equality rights was widely criticized. See, for example, Sheehy, *supra*, note 20; McInnes & Boyle, *supra*, note 20, at 365-66.

²⁸ *Seaboyer*, *supra*, note 19.

²⁹ *Supra*, note 20.

³⁰ *Supra*, note 20.

³¹ *Id.*, at 727 S.C.R., para. 90.

³² *Id.*; see also *R. v. B. (W.)*, [2000] O.J. No. 2184, 145 C.C.C. (3d) 449, at para. 146 (Ont. C.A.).

behaviour for a careful consideration of what happened on this occasion. Concerns about unjust acquittals are front and centre in this regard.

Far less clear is how best to identify and avoid reasoning which is based on stereotype. Christine Boyle and Marilyn MacCrimmon explain that the risk of stereotyping arises when a trier of fact moves from proven fact to an inference about consent or credibility by way of a generalization. Before inferences are drawn, “the question should be whether the underlying generalization is misleading, discriminatory, and one that should be eliminated from the fact determination process.”³³ However, a close analysis of the Supreme Court’s 2011 decisions demonstrates that trial and appellate courts continue to find it difficult to avoid stereotyped reasoning in sexual assault cases. While equality has informed the substantive definition of consent, and legislative reforms have improved aspects of trial procedure, attention to equality has not yet thoroughly infused trial practice or appellate reasoning. Interestingly, this failure is not caused by an absence of legal tools, or a lack of helpful precedent. Rather, the equality reasoning that characterized legislative reforms and judicial decisions during the 1990s seems to have been marginalized within more recent trial practice and judicial decisions. In the next section, I examine the three sexual assault decisions rendered by the Court in 2011, and identify the persistent influence of prejudicial generalizations about sexual assault complainants.

III. LOOKING FOR SUBSTANTIVE EQUALITY IN THE SEXUAL ASSAULT CASES DECIDED BY THE SUPREME COURT IN 2011

The three sexual assault cases decided by the Supreme Court of Canada in 2011 share some common features. Each alleged sexual assault took place in the context of a pre-existing family relationship. Each trial turned on the question of consent. Each case was tried by judge alone, and a written decision rendered, and so it is possible to investigate the factual reasoning that led to the verdict. The cases also differ legally and factually. I have already noted that various questions were brought to the Court on appeal. In two cases, the alleged violence occurred between spouses, and in one of these the relationship was in the course of being dissolved. In one case, the complainant alleged that she was sexually assaulted by her cousin. In this section, I address the cases in the order in

³³ Boyle & MacCrimmon, *supra*, note 3, at 232. This article was cited with approval in *R. v. Darrach*, *supra*, note 20, at paras. 33-34.

which they were decided by the Court and identify some of the key themes in each.

1. *R. v. A. (J.A.)*

JAA and the complainant were married, but in the process of separating. The complainant alleged that JAA sexually assaulted her one morning when the children were at school and she was due at work. JAA admitted to the sexual activity, but testified that it was consensual. The complainant testified that, when the assault commenced, she bit JAA on his middle finger “as hard as I could”. A police officer testified at trial that, although he was not an expert in bite mark analysis, he had identified and photographed a possible tooth mark on the accused’s index finger. The trial judge relied on this and other evidence in convicting JAA.

After conviction, the defence obtained expert evidence from a forensic odontologist that the relevant mark could not have been made by a tooth. This evidence formed the basis of a fresh evidence application which was rejected by the Ontario Court of Appeal but accepted by the Supreme Court of Canada. At trial and on appeal, JAA argued that the complainant had a motive to fabricate her allegations because she was facing the loss of her marital home and the obligation to pay an equalization settlement to the accused.³⁴ The accused also relied upon the complainant’s failure to try to escape the alleged sexual assault or call for help and on the absence of physical injuries to the complainant.³⁵ The Crown framed this appeal as one that engaged squarely with the challenges of prosecuting sexual assault: “This case revolves around a perennially-vexing area of law – the paucity of corroborating evidence that often exists in the ‘she said, he said’ arena of sexualized violence.”³⁶

The Court upheld JAA’s appeal on the basis that the fresh evidence could reasonably have affected the outcome at trial. Characterizing the case as “a close one”, Charron J. held on behalf of the majority that the bite mark evidence was important to the trial judge, and that it was proper to look for corroboration given that the accused’s testimony

³⁴ *A. (J.A.)*, *supra*, note 2 (Appellant’s Factum, at paras. 7, 29).

³⁵ *Id.*, at paras. 18, 22.

³⁶ *Id.* (Respondent’s Factum, at para. 1).

appeared plausible.³⁷ Justice Charron suggested that the complainant's version of the events suffered from identifiable weaknesses:

It also seems implausible that the appellant, who had never been depressed, violent, or aggressive in the 19 years the parties spent together, suddenly turned into the suicidal, violent rapist described by the complainant.³⁸

A strong dissent was issued by Rothstein J. (Deschamps J. concurring). Justice Rothstein considered that, even if the fresh evidence were believed, it could not have affected the outcome at trial. He suggested that fresh evidence must be considered in the context of other evidence adduced at the original trial, and concluded that the trial judge's finding that the accused was not capable of belief was supported by considerable evidence. Justice Rothstein engaged directly with a number of the propositions relied upon by the defence and by Charron J. to cast doubt on the complainant's version of events. The defence suggested that the complainant's decision to leave the house without showering or changing her clothes in order to preserve evidence but taking time to get her shoes and sunglasses "jarred somewhat" with her reportedly hysterical demeanour soon afterwards. Justice Rothstein observed in response to this argument:

The fact that she fled the scene of the sexual assault and the accused without taking time to clean herself up is entirely consistent with the conclusion that she had just been sexually assaulted and wanted to escape from her attacker.³⁹

Engaging directly with Charron J.'s observation that the complainant's version of events was improbable, Rothstein J. wrote

I cannot agree. In addition to the findings of the trial judge I would add the following. The undisputed evidence is that for some years this couple had sexual relations twice a year, once on the accused's birthday and once in the summer; hardly suggestive of a spontaneous, passionate advance by the complainant on June 8, 2007.⁴⁰

Countering Charron J.'s suggestion that the alleged suicide threats were out of character, Rothstein J. pointed out that the complainant testified in

³⁷ *Id.*, at paras. 10, 12, *per* Charron J.

³⁸ *Id.*, at para. 14.

³⁹ *Id.*, at para. 39, *per* Rothstein J.

⁴⁰ *Id.*, at para. 54. Paragraph 55 lists further reasons for finding the accused's account implausible.

detail to similar threats made by the accused from the time that separation was first raised. Justice Rothstein concluded these threats “were made to intimidate and cause distress to the complainant”.⁴¹ Accordingly, Rothstein J. would have upheld the accused’s conviction.

Justice Rothstein’s dissent demonstrates the potential for a context-driven analysis to facilitate substantive equality. It is implicit within his reasoning that the majority was too quick to move from the fact that JAA did not have a bite mark on his finger to the conclusion that the complainant’s credibility was thereby impugned to the extent of requiring a new trial. Instead, Rothstein J. conducted a close analysis of the remaining evidence and the trial judge’s findings. Unlike the majority, Rothstein J. provided a thorough analysis of the context of the alleged assault: the breakdown of marriage and the complainant’s alleged motive to remove the accused from the house. He explained why these circumstances supported the complainant’s account rather than undermining it.⁴² Such attention to context in the application of universal legal rules about consent, credibility and reasonable doubt affords a potential corrective to the prejudicial generalizations that threaten sexual assault trials.

Justice Charron made no reference to JAA’s arguments that the complainant had a motive to fabricate her allegations, but focused on the difficulties of deciding guilt in the face of two conflicting accounts. However, neither judgment engaged in detail with how *W. (D.)* directions on reasonable doubt should be applied in a he said/she said case.⁴³ Justice Charron approved of the trial judge’s efforts to resolve the credibility contest with physical corroborating evidence. This reasoning may be misunderstood as a suggestion that it is (at best) risky to convict an accused who testifies to consensual sexual activity in the absence of corroborating evidence supporting non-consent. If such a principle were re-enlivened, it would perpetuate the ideas that particular skepticism should be reserved for sexual assault complainants, and that real rape involves physical injury, and would be inconsistent with efforts to secure substantive equality.⁴⁴ However, such myths may prove resilient because,

⁴¹ *Id.*, at para. 57.

⁴² Neither judgment refers to research that shows that intimate violence frequently occurs for the first time or escalates during a relationship breakdown. See, for example, Douglas A. Brownridge, “The Elevated Risk for Non-Lethal Post-Separation Violence in Canada” (2008) 23:1 *J.I.V.* 117.

⁴³ Although Rothstein J. approved the trial judge’s approach in this case. See further Christine Boyle, “Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality” (2009) 13:4 *I.J.E.P.* 269.

⁴⁴ This reasoning is also expressly disapproved by s. 274 of the *Criminal Code*.

as Charron J. identified, they provide an attractive way to resolve credibility battles about consent in these most difficult cases. The longing for a straightforward rule by which to determine consent and credibility is echoed in *A. (J.)*.

2. *R. v. A. (J.)*

In *A. (J.)*, a majority of the Supreme Court of Canada concluded that a person cannot validly consent to sexual activity that is expected to occur while he or she is unconscious. *A. (J.)* has received considerable attention, in part because of its interpretation of consent and perhaps also because it has been recast as being concerned with the acceptable limits of “kinky sex” within a consensual adult relationship. However, while the Supreme Court of Canada’s reasoning extends to any sexual touching that occurs when one party is unconscious, the factual context of *A. (J.)* offers considerable reason to doubt the aptness of the kinky sex frame.

The complainant and accused were cohabiting, and had a young son. The complainant provided a statement to police that the accused had strangled her into unconsciousness before penetrating her anus with a dildo. She told police that she had not consented to the strangulation or the anal penetration. At trial, the complainant testified that she consented to the strangulation and that she and the accused had discussed anal sex and expressed an interest in it. She also testified that when she regained consciousness, she went along with the anal penetration “in the spirit of experimentation”. On cross-examination, she agreed that she and the accused had once previously had consensual anal sex.

Justice Nicholas convicted the accused on the basis that she was satisfied that the complainant did not consent to the anal penetration. She also held that the complainant could not, in any event, validly consent to sexual touching expected to occur while she was unconscious. Justice Nicholas described the cross-examination of the complainant as follows:

She was a most compliant witness and agreed to virtually each defence suggestion put to her. Few of her answers were unprompted. To that extent this was a typical cross-examination of a recanting complainant in a domestic matter.⁴⁵

Justice Nicholas’s concerns about the complainant’s testimony become clearer when one reads the sentencing judgment. JA had a lengthy and

⁴⁵ *R. v. A. (J.)*, [2008] O.J. No. 1583, 2008 ONCJ 195, at para. 8 (Ont. C.J.).

violent criminal record. He had committed three prior assaults on this complainant, as well as other threatening behaviour towards her. Justice Nicholas expressed concern that the complainant's behaviour "fit well with the profile of a battered woman".⁴⁶ JA appealed against his conviction, arguing that it was not open to Nicholas J. to find that the complainant did not consent, and that valid consent could be given to sexual activity expected to occur while a complainant was unconscious.

The Ontario Court of Appeal held unanimously that the evidence at trial was not capable of supporting a finding beyond a reasonable doubt that the complainant did not consent.⁴⁷ Justice Simmons (Juriansz J.A. concurring) held that the trial judge erred in holding that a person cannot consent in advance to sexual activity expected to occur when unconscious. Confining *Ewanchuk* to the circumstance in which a complainant is conscious,⁴⁸ Simmons J.A. held that permitting advanced consent is consistent with the goals of protecting bodily integrity and autonomy in sexual relationships.⁴⁹ Justice LaForme dissented on this point, holding that *Ewanchuk* requires a conscious complainant because it measures consent by the state of mind of the complainant at the time of the sexual activity.⁵⁰

The Crown appealed as of right on the question of whether advanced consent could be given to sexual activity that occurs when one party is unconscious. The Crown argued for a nuanced approach to the concept of autonomy within sexual assault:

In the context of sexual activity the concept of consent ought not to be informed by a narrow liberal interpretation of autonomy, referenced primarily by freedom from state interference in the expression of sexuality. Rather the concept of consent ought to be given content that is consistent with Charter values of dignity and equality, as well as autonomy, and a recognition of the social reality in which choice is constructed in specific types of human interaction.⁵¹

The Crown sought to draw on equality reasoning in delineating autonomy. It pressed the proposition that one must have regard to social context in order to understand the complex interplay between choice,

⁴⁶ [2008] O.J. No. 4814, 2008 ONCJ 624, at para. 12 (Ont. C.J.).

⁴⁷ *R. v. A. (J.)*, [2010] O.J. No. 1202, 253 C.C.C. (3d) 153, at paras. 55-60 and 114 (Ont. C.A.), *per* Simmons J.A. (Juriansz J.A. concurring) and LaForme J.A., respectively.

⁴⁸ *Id.*, at paras. 74-76.

⁴⁹ *Id.*, at para. 66.

⁵⁰ *Id.*, at paras. 116-117, *per* LaForme J.A.

⁵¹ *A. (J.)*, *supra*, note 2 (Appellant's Factum, at para. 4).

constraint and consent in intimate relationships. More particularly, the Crown identified concerns about sexual and physical abuse and disparities of economic and emotional power as factors that render liberal conceptions of autonomy problematic.⁵²

The Crown's approach was echoed and elaborated by the Women's Legal Education and Action Fund ("LEAF") in its intervener's factum. Unlike the Crown, LEAF relied on the factual context of this case to strengthen the argument against recognizing advanced consent.⁵³ LEAF questioned whether the complainant in this case did, in fact, consent.⁵⁴ LEAF also identified that some women — particularly Aboriginals and disabled women — are disproportionately likely to be subjected to sexual assault, including assaults that occur when the complainant is unconscious. LEAF suggested that this social reality should inform the Court's approach to defining the limits of consent. A second intervener, the federal Attorney General, set out its preferred approach to the statutory interpretation of section 273.1 and argued that the value of protecting individuals who are incapacitated or abused outweighs the freedom of a small number who may choose to engage in dangerous activity.⁵⁵

The respondent, JA, characterized this complainant as having agreed to the charged activity, and this case as being "about real, communicated, actual consent".⁵⁶ JA suggested that it would be "heavy handed" to criminalize all unconscious sexual touching, including mundane contact between loving couples, in order to protect against "some rare theoretical case" of sexual abuse.⁵⁷ Reading the four factums filed in this case, one is struck by the profoundly different framings given to the facts. While the Crown did not challenge the Court of Appeal's ruling on factual consent, its factum is haunted by the spectre of domestic violence. In LEAF's factum, this spectre becomes more substantial by the reintroduction of key facts from trial and through references to the empirical realities of domestic violence and sexual assault. Concerns about protecting women from abuse thereby became a very present dynamic in this case. In stark contrast, according to the respondent's factum, the complainant was an enthusiastic and equal participant in sexual experi-

⁵² *Id.*, at para. 6.

⁵³ *Id.* (Intervener's Factum (Women's Legal Education and Action Fund), at para. 3).

⁵⁴ *Id.*, at para. 21. I will return to this question below.

⁵⁵ *Id.* (Intervener's Factum (Attorney General of Canada), at para. 1).

⁵⁶ *Id.* (Respondent's Factum, at para. 6).

⁵⁷ *Id.*, at para. 62.

mentation who is at risk of being denied “the right to make free choices”.⁵⁸

A majority of the Supreme Court of Canada held that advanced consent to sexual touching cannot remain valid after unconsciousness. Chief Justice McLachlin’s reasoning was grounded in statutory interpretation of section 273.1 of the Code: “Parliament defined consent in a way that requires the complainant to be conscious throughout the sexual activity in question.”⁵⁹ Chief Justice McLachlin identified a number of practical difficulties inherent in permitting advanced consent and emphasized the unique factors that differentiate consent in sexual assault from the rules that shape the limits of consent in other areas of the law.

Justice Fish wrote in dissent, Binnie and LeBel JJ. concurring. Adopting a formal liberal account of autonomy, Fish J. framed the case as one in which the Court was invited to find that “*yes in fact means no in law*.”⁶⁰ He criticized the Crown and implicitly the majority reasoning for limiting women’s autonomy by removing the choice to engage in consensual sexual activity.⁶¹ Relying on the proposition that the complainant was “a willing and enthusiastic participant”, Fish J. considered that JA should be acquitted.⁶²

Comparing the factums filed in *A. (J.)* with the reasoning in the majority and dissenting judgments, it becomes apparent that the Court took a relatively narrow view of the case, and that the dissent in particular perpetuates some of the myths associated with sexual assault. I have already noted that the trial judge disbelieved much of the complainant’s testimony on cross-examination, including her assent that she had previously engaged in consensual anal sex. Taking this view was, of course, within Nicholas J.’s preserve as trial judge and primary finder of fact. The Court of Appeal’s holding that it was not open to the trial judge to be satisfied beyond a reasonable doubt about non-consent does not disturb Nicholas J.’s conclusion about the credibility of the complainant’s testimony on cross-examination. Justice Fish’s strong assertions about the facts of *A. (J.)* sit uneasily with this trial record. According to Fish J., “the complainant in this case said yes, not no,”⁶³ the complainant “freely

⁵⁸ *Id.*, at paras. 6-7.

⁵⁹ *A. (J.)*, *supra*, note 2, at para. 33, *per* McLachlin C.J.C.

⁶⁰ *Id.*, at para. 71, *per* Fish J. (emphasis in original).

⁶¹ *Id.*, at para. 116.

⁶² *Id.*, at paras. 112-114.

⁶³ *Id.*, at para. 69.

consented”,⁶⁴ she “agreed in advance”,⁶⁵ “[t]his is not a case about a woman who said no — at any time.”⁶⁶ While Fish J. elsewhere discusses the importance of the Crown’s burden of proof, it is not apparent from the context of the passages from which these quotes are drawn that the record in this case is ambiguous, and that the benefit of doubt regarding consent was therefore given to JA. Underlying Fish J.’s emphatic characterization of the complainant as a willing partner lies the logic that if the Crown does not prove beyond a reasonable doubt that the complainant withheld consent, she must in fact have consented. This simplification perpetuates the misconception that when an accused is acquitted of sexual assault, it is necessarily because the complainant lied.

Justice Fish’s decision also reproduces a liberal account of the privacy of sexual choices, and reasserts the proposition that the key dynamic of concern in a case such as *A. (J.)* is between the accused and the State. In advancing this point, Fish J. adopted a paraphrased version of Pierre Trudeau’s famous remark that “there’s no place for the state in the bedrooms of the nation.”⁶⁷ Within Fish J.’s articulation, potential complainants are allied with accused: they are the loving spouse who requests a goodbye kiss in the morning, or the woman whose autonomy is perfected by freely agreeing to unconventional sexual practices.⁶⁸ This reasoning denies the recognition in *Mills* that sexual assault complainant’s equality, privacy and dignity may often be in tension with the accused person’s Charter rights.⁶⁹ It similarly overlooks feminist observations that norms regarding the privacy of the marital home often operate to conceal gendered violence from official notice.⁷⁰

Chief Justice McLachlin’s decision is also less concerned with facts other than the finding that JA was briefly unconscious. While a nuanced conception of autonomy is implicit within the finding that an unconscious complainant cannot withdraw consent and therefore cannot give

⁶⁴ *Id.*, at para. 81.

⁶⁵ *Id.*, at para. 89.

⁶⁶ *Id.*, at para. 112 (emphasis in original).

⁶⁷ The Honourable Pierre Trudeau, Justice Minister (as he then was), quoted in “Trudeau’s Omnibus Bill: Challenging Canadian Taboos” CBC TV clip (December 21, 1967), online: CBC <http://archives.cbc.ca/politics/rights_freedoms/topics/538/>. See *id.*, at para. 116.

⁶⁸ See further Lise Gotell, “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R. v. J.A.*” 24 C.J.W.L. (forthcoming in 2012) [hereinafter “Gotell, ‘Governing Heterosexuality’”].

⁶⁹ *Mills*, *supra*, note 20.

⁷⁰ See, for example, Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997); Regina Graycar & Jenny Morgan, *The Hidden Gender of Law*, 2d ed. (Sydney: Federation Press, 2002).

valid consent, the majority's reasoning is predicated on the statutory language. However, as Fish J. showed, the majority interpretation of sections 273.1 and 273.2 is not unassailable. By emphasizing the indefeasibility of conscious, continuous and willing consent, McLachlin C.J.C.'s decision is consistent with the outcome that would be indicated by the principles of substantive equality as it protects women's capacity to choose when to say yes and when to withdraw their agreement to sexual activity, and prevents behaviour that has been closely linked with domestic violence. Nonetheless, the majority reasoning does not draw explicitly on these substantive equality principles as do the arguments advanced by the Crown and LEAF in their respective factums. Substantive equality seems to be relegated to a second-order principle that comes into play when the more conventional tools of statutory interpretation and *stare decisis* have failed to resolve a legal question. It would be a shame if this implicit prioritization reflects the approach that the Court is now taking to substantive equality in sexual assault.⁷¹

The *Seaboyer/Osolin/Mills* focus on myths and stereotypes went beyond defining the limits of the substantive law and into the messier questions of proof and fact determination. In a case such as *A. (J.)*, substantive equality seems to demand a contextual inquiry into the power differentials and difficulties of proof that justify a strong definition of consent.⁷² Unfortunately, the Crown did not seek leave to appeal the Court of Appeal's decision regarding factual consent. It is strongly arguable that no consent was given, according to the statutory standard. The complainant's evidence was that she consented to being choked into unconsciousness, that she and JA had discussed anal penetration and tried it on one prior occasion, and that she went along with the penetration when she regained consciousness. They had not talked about what would occur this time. Taking this evidence at its highest, it seems to fall short of the requirement that the complainant subjectively consent to "the sexual activity in question". The only relevance of prior anal intercourse

⁷¹ Chief Justice McLachlin's decision in *R. v. I. (D.A.)*, [2012] S.C.J. No. 5, 280 C.C.C. (3d) 127 (S.C.C.) offers another example of a judgment that accords with substantive equality outcomes without using substantive equality reasoning. In *I. (D.A.)*, the Court held that the statutory requirements for testimonial competence of an intellectually disabled adult witness focus on the witness's practical understanding of the difference between truth and lies, and not on an abstract understanding of the concept of truth. While advertent to the policy considerations in favour of facilitating prosecution of sexual assaults committed on intellectually disabled victims, the Court predicated its decision on statutory interpretation and did not discuss the equality rights of these victims nor their particular vulnerability to stereotyping.

⁷² The only (indirect) allusion to this proposition may be found in *A. (J.)*, *supra*, note 2, at para. 65, *per* McLachlin C.J.C.

is the prohibited inference that she was therefore more likely to have consented on this occasion. The complainant's decision to go along with the penetration cannot retroactively alter the terms of her consent prior to that time. Given the very real concerns about domestic violence in this case, there is all the more reason to subject this evidence to a careful contextual analysis and to make a self-conscious effort to avoid prejudicial generalizations when reasoning through consent.

All of this evidence became irrelevant, of course, once McLachlin C.J.C. concluded that advanced consent was not possible. Nonetheless, the Court of Appeal's reasoning on factual consent seems to me to depart from the high standard established in the *Criminal Code*. This departure may indicate how difficult it can be to retain one's focus on the particular charged sexual activity, and to avoid reasoning according to prejudicial generalizations about sexual relationships. The very human tendency to substitute the answer to an easier question (she was seemingly willing to try anal sex and had once done so) for detailed engagement with a harder question (had she consented to this activity on this occasion?) may help to explain the persistence of myths and stereotypes in this field.⁷³ Furthermore, incorporating the difficulties associated with consent on these facts may have strengthened McLachlin C.J.C.'s reasoning regarding the policy basis for limiting consent to a conscious complainant by demonstrating the risks of domestic violence and coercion that accompany asphyxiation, in particular.⁷⁴

3. *R. v. H. (J.M.)*

The complainant and accused in this case were cousins. At the time of the alleged sexual assault, the complainant was 17 years old and the accused five years older. On this occasion, a number of friends were present at the accused's house, and the complainant became somewhat drunk. The complainant went to sleep in JMH's bed. The complainant testified that over her protests, JMH had sexual intercourse with her. She washed, stayed awake until early the next morning, then woke her sister and went home. The complainant wrote a poem about the incident, which she posted on a website, and which was reproduced in the trial judgment.

⁷³ See Daniel Kahneman, *Thinking, Fast and Slow* (Toronto: Doubleday Canada, 2011), at ch. 9.

⁷⁴ See further, Gotell, "Governing Heterosexuality", *supra*, note 68.

A second alleged assault occurred some months later. She did not report the alleged assaults for some time.

The accused testified. He denied both incidents, and denied all sexual contact with the complainant. The complainant's sister also testified. Her account of the morning after the first alleged assault was inconsistent with that given by the complainant. The trial judge observed about this inconsistency: "That evidence ... makes me wonder how many times S. was at this home. How many times did she end up in Mr. H.'s bed?"⁷⁵ While disbelieving the accused's testimony, the trial judge had further concerns about the poem written by the complainant. He analyzed several passages from the poem, concluding that it was in some respects inconsistent with the experience and emotions of a rape victim. Given its centrality to the appeal, the relevant passage of the trial reasons is worth quoting at length:

She describes the incident on February 11th as:

First taste

So bittersweet

Why?

First taste

So bittersweet

Hardly the words that describe a rape. Hardly the words that describe an incident that is so damaging to her that she cannot cope with it. But she doesn't end there. She says,

Evil invading

Her body.

It's too late

Regret

"Regret"? "Regret" conjures an image of someone who has made a decision and wishes she had not made it. "Regret". Why should she regret if she has been raped? Why should she regret if she has been violated? And why did she insist in going back to the same bed that she had been violated in? She may be young, but she is 17.

⁷⁵ *R. v. H. (J.M.)*, [2009] O.J. No. 6377, at para. 25 (Ont. S.C.J.).

I suspect very strongly, when I read her poem, “First taste So bittersweet”, that she was confused, that she wrestled with going into that room. She said she went to the bed on her own and it wasn’t even discussed. Why?⁷⁶

The trial judge held that he was not satisfied beyond a reasonable doubt that the complainant did not consent to the sexual activity. The Crown appealed, arguing that the trial judge misapprehended the evidence, including by interpreting some passages from the poem in isolation from the rest of the evidence. Justice Watt held for a unanimous Court that it is an error of law to take an incorrect approach to the evidence and that, in this case, the reasons suggest that the trial judge determined consent on a “partial evidentiary predicate”.⁷⁷ As consent must be determined subjectively, the poem should have been considered as a whole and in light of the complainant’s testimony. Justice Watt would have sent the case back to be retried. JMH obtained leave to appeal.

Before the Supreme Court of Canada, JMH argued that any error in interpreting the poem was not an error in law and that the trial judgment did not support the conclusion that the trial judge disregarded the complainant’s testimony or the balance of the poem. The Crown argued that the trial judge failed to consider the extracts from the poem in their entire context, including the complainant’s testimony. The Crown suggested that, had the trial judge considered this context, he would have considered the possibility that the emotions described in the poem “were consistent not only with experimentation, but also with being the victim of a sexual assault by a trusted member of one’s family”.⁷⁸

The Supreme Court unanimously upheld the appeal and reinstated JMH’s acquittal. Justice Cromwell held that a failure to apprehend the evidence would constitute an error of law if it resulted from a piecemeal approach, but concluded that the reasons given in this case did not disclose such an error. He suggested that Watt J.A.’s conclusion that the trial judge’s decision was based on two brief extracts from the poem was not based on a fair reading of the trial judge’s reasons.⁷⁹

The decision in *H. (J.M.)* is very brief. To the extent that it supports the need for a complete analysis of the evidence, it certainly leaves room for a substantive equality analysis to inform a trial judge’s reasoning. However, the Court’s reasoning does not suggest that a trier of fact

⁷⁶ *Id.*, at paras. 31-36.

⁷⁷ *R. v. H. (J.M.)*, [2009] O.J. No. 4963, 249 C.C.C. (3d) 140, at para. 58 (Ont. C.A.).

⁷⁸ *H. (J.M.)*, *supra*, note 2 (Respondent’s Factum, at para. 43).

⁷⁹ *H. (J.M.)*, *supra*, note 2.

should follow any specific logic in reaching a verdict or reiterate that inferences must be tested against the risk of engaging myths and stereotypes. Returning to the facts of *H. (J.M.)*, this feels like a missed opportunity. As the Crown asserted, the question of what inferences may be drawn from a poem or other evidence is conditioned by context. In this case, the Crown suggested a plausible alternative interpretation of the complainant's poem but it too failed to make direct reference to the requirements of substantive equality.

What could attention to substantive equality have added to *H. (J.M.)*? First, it might have shed light on the importance of the trial judge's conclusion that the complainant had slept in JMH's bedroom on other occasions. If this were so, it does not speak to whether JMH and the complainant had ever engaged in consensual sexual activity. Even less can it tell us whether the complainant consented on the charged occasions. The trial judge's reasoning implies that a teenaged girl who sleeps in her male cousin's bed must know and accept the risk that he will make sexual overtures. Or, more bluntly, that by entering JMH's bedroom, the complainant consented to intercourse. Lise Gotell has argued that Canadian judicial discourses posit an ideal rape victim who takes active steps, but fails, to protect herself against sexual assault. Women and girls who do not take such steps are at risk of being denied the law's protection, regardless of whether they were capable of protecting themselves in the expected manner.⁸⁰ Unfortunately, the Crown did not argue this line in *H. (J.M.)*, and neither appeal decision critically considers the trial judge's reasoning on this point.

Second, sustained attention to substantive equality may have supplied the context within which it might make sense for a rape victim to feel regret about a sexual assault, and to use the word "bittersweet" to describe a non-consensual encounter. The Crown argued this proposition in its factum.⁸¹ Justice Cromwell did not engage with it, except to observe that the trial reasons disclose that the trial judge considered all of the relevant evidence before finding a reasonable doubt. If the judicial expulsion of myths and stereotypes from sexual assault trials is to be effective, however, appeal courts must be willing to engage with the factual reasoning of trial judges. In *H. (J.M.)*, before concluding that the poem's words and the complainant's behaviour were capable of raising a reasonable doubt, the Court should have considered whether the infer-

⁸⁰ Gotell, "Rethinking Affirmative Consent", *supra*, note 8, at 878-82.

⁸¹ *H. (J.M.)*, *supra*, note 2 (Respondent's Factum, at paras. 39-45).

ences necessary to sustain that doubt were based solely, or primarily, on myths about how an ideal victim avoids sexual assault and responds to the experience of being assaulted.

IV. CONCLUSION

There has been a considerable evolution in the law and trial process of sexual assault, and the effects of this evolution can be seen in the Supreme Court's 2011 caseload. We have moved beyond the rule that there can be no rape in marriage, Crown prosecutors are willing to lay charges in this context, and delay in disclosure is no longer as high a bar to prosecution. Feminist-influenced reforms have helped to protect complainants from some of the worst excesses of cross-examination. The *Mills* proposition that equality and privacy rights must be balanced against the accused's fair trial rights instantiates a paradigm shift in traditional conceptions of the criminal trial as a battle between an individual accused and the powerful mechanisms of the State. Nonetheless, trial and appeal judges have found it difficult to fulfil the potential of equality reasoning, particularly when considering consent and credibility.

Close analysis of the cases decided by the Supreme Court of Canada in 2011 demonstrates the resilience of prejudicial reasoning about sexual assault complainants. In *A. (J.)* and *H. (J.M.)*, the (contested) sexual history between the accused and complainant was recruited to discredit the complainant's assertion that she did not consent. In *A. (J.A.)* and *A. (J.)*, the notion that women fabricate sexual assault complaints to gain a strategic advantage on separation underpinned defence arguments and some judges' reasoning. In *A. (J.A.)* and *H. (J.M.)*, a reasonable doubt was seemingly founded in part on the lack of corroboration of the complainant's story. In *H. (J.M.)*, that doubt was strengthened by reasoning about how women and girls react to sexual assault, and how they should protect themselves against it. All of these cases rely to some extent on the proposition that women consent to sexual activity before being prompted by regret or vengeance to fabricate allegations of sexual assault. Closer attention to substantive equality in each of these cases might help contest some or many of these stereotypes.

As we might expect, the Supreme Court cases are also unrepresentative of sexual assault in some ways. For example, none of these complainants is identified as Aboriginal — and yet there is considerable reason to believe that Aboriginal women are disproportionately vulner-

able to sexual assault. No generalizations can be drawn from these cases about the cultural sensitivity of police investigation or the exercise of prosecutorial discretion, both of which have been subject to criticism elsewhere.⁸² The cases do not allow me to investigate the possibility that women who are multiply marginalized may face an even more difficult time establishing their credibility at trial. In short, while these cases provide a glimpse of the continued threat that gendered stereotypes present to the contemporary practice of sexual assault law, they say nothing about the compounding effect of race.

Twenty-seven years of equality have brought considerable positive advances in sexual assault law and practice. The tools to support equality-based reasoning are already largely present in the *Criminal Code* and case law. Reviewing contemporary cases suggests that the next challenge is to weave attention to substantive equality more fully into the fact determination and reasoning practices of lawyers, trial judges and appellate courts.⁸³ The Supreme Court has an important role to play in modelling equality reasoning given the importance and impact of its decisions and the extent to which its cases can be fully argued. Moving beyond the notion of equality as a second-order principle requires the Court to develop and exercise a habit of reasoning in accordance with its equality jurisprudence.

⁸² For example, Arielle Dylan *et al.*, “And Justice for All? Aboriginal Victims of Sexual Violence” (2008) 14:6 V.A.W. 678. This is also a major focus of the Missing Women Commission of Inquiry presently being conducted in Vancouver.

⁸³ See also Christine Boyle & Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 Windsor Y.B Access Just. 55.