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The Sexual Assault of Intoxicated Women

Janine Benedet¹

Introduction

“Candy is dandy. But Liquor is Quicker.”²

- Ogden Nash

Men have commonly used intoxicants as a way of increasing their sexual access to women. They have been encouraged to do so by the popular belief that alcohol and drugs increase sexual arousal,³ and that women who drink and take drugs are promiscuous and sexually available. While feminists have repeatedly argued against such stereotypes, they now do so in a social context in which women, and young women in particular, are increasingly encouraged to consume large quantities of alcohol as part of having a “good time.” At the same time that women are being warned about “date rape drugs” being surreptitiously slipped into their drinks, some women are taking these drugs recreationally. Young women are also encouraged to behave in sexualized ways while drunk.

This article considers how the law of sexual assault in Canada deals with cases of women who have been consuming intoxicants. In particular, it considers under what circumstances the doctrines of incapacity and involuntariness have been applied to cases in which the complainant was impaired by alcohol or drugs. It also reflects on problems of proof in such cases. Finally, it examines whether the treatment of this class of complaints tells us anything about the law’s understanding of consent, and capacity to consent, more generally, in the context of competing social understandings of women’s use of alcohol and other drugs.

Women, Drinking and Drug-Taking

I wish I could drink like a lady,
I can take one or two at the most.
After three I'm under the table,
after four I'm under my host.

¹ Associate Professor, Faculty of Law, University of British Columbia. This paper benefitted from the research assistance of law students Kaity Cooper, Jennifer Vallance and Thea Hoogstraten. This research was supported in part by a grant from the Social Sciences and Humanities Research Council of Canada.

² Ogden Nash, “Reflection on Ice-Breaking” in *Hard Lines* (New York: Simon and Schuster, 1931) at 83.

³ B.C. Centre for Social Responsibility, *Binge Drinking Among Post-Secondary Students in B.C.* by A. McCormick *et al.* (Abbotsford: BCCSR, 2007) at 25 [McCormick]. 70% of respondents agreed that alcohol made it easier for people to engage in sexual activities, although only 26% agreed that alcohol made it personally easier to do so).

- Dorothy Parker⁴

Before considering the legal treatment of the sexual assault of intoxicated women it is useful to review the current trends in women's consumption of alcohol or drugs. Those patterns can then be placed in their social context of competing attitudes to women and drinking. Research in Canada, the U.S. and the U.K. consistently confirms that "binge" drinking by young women is a serious concern. Younger women are much more likely to drink five or more drinks in a single sitting (a standard measurement of binge drinking) than older women. In England, a 2002 health survey showed that 23% of women aged 16-24 drank more than 21 drinks per week and just over half reported drinking at least six drinks on their heaviest drinking day of the week. A 2001 study by the Harvard School of Public Health indicated that 41% of college-aged women engaging in binge drinking either occasionally or frequently. While these numbers had not increased significantly since 1993, the study noted that a full 30% of women reported being drunk at least three times in the past 30 days, while 42% reported that getting drunk was an important goal of their drinking.⁵ In Canada, a 2004 national survey indicated that binge drinking rates were highest among women aged 18-19, of which 38.8% of women drinkers reported drinking five or more drinks on a typical drinking day.⁶ The figure for women 20-24 dropped to 21.6%.⁷ Another study of university-age students in British Columbia reported that more than half of students had engaged in binge drinking in the past month and 15% did so weekly.⁸ Given these statistics, and the high rates of sexual assault against younger women, this article focuses in particular on younger women⁹.

Studies of alcohol use among young women show a relationship between alcohol and sexual behaviour, although researchers seldom distinguished between unplanned sex and sexual assault. The Harvard study reported that 21% of respondents (male and female) indicated that they had unplanned sexual activities one or more times during the school year after they had been drinking; 27% reported alcohol-related memory loss.¹⁰ The study did not ask if the respondents had experienced sexual assault connected to alcohol consumption. Another study of patients at a Baltimore STD clinic showed that women who had engaged in binge drinking in the

⁴ The quote is usually attributed to Parker (1893-1967) although its source is unknown.

⁵ Henry Wechsler *et al.*, "Trends in College Binge Drinking During a Period of Increased Prevention Efforts" (2002) 50 J. Am. College Health 203 at 207-209 [Wechsler]

⁶ Health Canada, *Canadian Addiction Survey (CAS): A national survey of Canadians' use of alcohol and other drugs: Prevalence of use and related harms: Detailed report* by E.M. Adlaf, P. Begin, & E. Sawka, eds. (Ottawa: Canadian Centre on Substance Abuse, 2005) at 32 (table 3.5), online: CCSA <<http://www.ccsa.ca>>.

⁷ While these numbers are high, the numbers for men remain even higher, with 45.6% of men aged 18-19 reporting binge drinking on a typical drinking day, and 40.5% of men aged 20-24; *Ibid.*

⁸ McCormick, *supra* note 3 at ii.

⁹ Statistics Canada, *Sexual Assault in Canada: 2004 and 2007* by Shannon Brennan and Andrea Taylor-Butts, (Ottawa: Canadian Centre for Justice Statistics, 2008) at 12 (table 3), online: <<http://www.statcan.gc.ca/>>

¹⁰ Wechsler, *supra* note 5 at 210

past 30 days were significantly more likely to engage in sexual activity that put them at risk for disease, including anal sex.¹¹ They were also more likely to use other drugs such as heroin and cocaine.¹² The respondents were not asked if the sexual activity was consensual. The omission of this question from many studies on intoxication and sexual behaviour is odd given that researchers generally agree that drug and alcohol consumption is associated with an increase in sexual violence.¹³

There is also evidence that young women are increasingly using drugs recreationally, including “date rape” drugs such as GHB, rohypnol and ketamine, often in combination with alcohol.¹⁴ These drugs are often referred to, along with MDMA (ecstasy), as “club drugs” because they are consumed at dance clubs and raves. Canada’s National Addiction Survey does not measure the use of these drugs by women, but it appears generally accepted that their use has increased in the past decade, along with other drug use.¹⁵

Canadian data on the incidence of sexual assault after use of alcohol and drugs is scarce, particularly where their consumption is voluntary. One large U.S. study estimated that 3 million American women have experienced drug-facilitated rape in their lifetime, or 200,000 in the past year.¹⁶ Another 3 million had been raped while incapacitated from voluntary consumption of intoxicants (300,000 during the past year). These victims were even less likely to report their rapes to law enforcement than other victims.¹⁷ If the rate in Canada is similar, that would mean that approximately 50,000 women each year are sexually assaulted while incapacitated by drugs or alcohol, whether through voluntary or involuntary consumption.

All of this evidence indicates that significant numbers of young women render

¹¹ Heidi E. Hutton *et al.*, “The Relationship Between Recent Alcohol Use and Sexual Behaviors: Gender Differences Among Sexually Transmitted Disease Clinic Patients” (2008) 32 *Alcoholism* 2008 at 2010.

¹² *Ibid.*

¹³ The McCormick study of college students in British Columbia reported that 9.3% of males and 7.2% of females reported being sexually assaulted after consuming alcohol. This finding is puzzling in that in other contexts women tend to be much more likely to be sexually assaulted than men. The respondents were *not* asked, however, if they had been sexually assaulted, but rather whether they had been “taken advantage of sexually”, which may be interpreted quite differently. In addition, as is true with the other studies, respondents were not asked the sex of the person who sexually assaulted them. *Supra* note 3 at 32.

¹⁴ Gamma-Hydroxybutyric acid (GHB or “Grievous Bodily Harm”) is a central nervous system depressant developed for use as an anaesthetic. It is colourless and odorless but tastes salty. In higher doses, especially when combined with alcohol, it produces dizziness, hallucinations and coma. Rohypnol (“roofies”), properly known as flunitrazepam, is an odorless and tasteless anaesthetic that produces symptoms similar to alcohol intoxication and can lead to amnesia and coma. Ketamine (“Special K”) is another tranquilizer sometimes used in veterinary settings. These drugs take effect quickly, within 15 to 20 minutes, and are generally eliminated from the body within a few days. Erica Weir, “Drug-facilitated date rape” (2001) 165 *CMAJ* 80; Judith C. Barker, Shana L. Harris & Jo E. Dyer, “Experiences of GHB Ingestion: A Focus Group Study” (2007) 39 *J. Psychoactive Drugs* 115-129.

¹⁵ See e.g. *R. v. Humphrey*, [2001] O.J. No. 1263 (C.A.) where the complainant took alcohol, ecstasy and GHB [*Humphrey*]; *R. v. Goodliffe*, [2005] B.C.J. No. 901 (C.A.) where the complainant took GHB [*Goodliffe*].

¹⁶ U.S., National Crime Victims Research and Treatment Centre, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study* by Dean G. Kilpatrick *et al.* (Charleston: Medical University of South Carolina, 2007) at 2. The study measured only penetrative rape and not other forms of sexual assault.

¹⁷ *Ibid.* Overall, only about 16% of rapes were reported to police.

themselves voluntarily impaired and that this increases their vulnerability to sexual assault. Most of these sexual assaults are never reported to police. This problem appears to be increasing rather than diminishing.¹⁸

The contested social meaning of women's drinking is not a new concern for feminists. Constance Backhouse writes of the tensions in the 1920s between temperance feminists who drew a clear link between alcohol use and the male mistreatment of women, and the "flappers" who wanted women to be free to drink and to socialize with men without losing their standing in the eyes of the community.¹⁹ "Liberated women" of the decades between the world wars, with Dorothy Parker a prime example, were well aware of the link between drinking and sexual activity.

Like so many contexts in which women's sexuality is constructed, the social meaning of drinking and drug-taking continues to be contested and contradictory. Women have chafed at social conventions that would limit them to sobriety and chastity, but run into stereotypes that affect their credibility when they complain of sexual assault while drunk or high. Binge drinking and especially the idea of keeping up with men "drink for drink", are promoted today as a kind of female empowerment for young women²⁰, while women who complain of sexual assault occurring while they were intoxicated still face social reactions that hold them partly or completely to blame.

In a recent series of mock jury studies, Emily Finch and Vanessa Munro demonstrated that among mock jurors in England, attitudes toward the credibility of rape complainants were highly dependent on the degree of responsibility the jurors ascribed to the woman for her state of intoxication.²¹ The attitude that a woman who gets extremely intoxicated in mixed company opens herself up to a risk of sexual assault is one that is certainly present in this country as well,

¹⁸ Young women may be taking these drugs with the anticipation of getting impaired or even passing out, but they do not appear to be doing so with the intention of being sexually touched while unconscious. Rather, they hope that they or their friends have taken sufficient precautions to prevent such an assault. In one U.S. focus group study involving regular GHB users, some women noted that the drug increased their sexual desire and arousal, but all participants were adamant that it did not change their sexual practices. Many users expressed concern about date rape while impaired: Barker, Harris and Dyer, *supra* note 14.

¹⁹ Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada 1900-1975* (Toronto: Osgoode Society for Legal History, 2008) at 82-83. See also Judith Lewis Herman, "Considering Sex Offenders: A Model of Addiction" in Patricia Searles & Ronald Berger, eds., *Rape and Society: Readings on the Problem of Sexual Assault* (Boulder: Westview Press, 1995) at 93-94.

²⁰ See e.g. Jodie Morse, "Women on a Binge" *Time* (1 April 2002), online: Time.com <<http://www.time.com/time/2002/wdrinking/story.html>>; Barbara Ehrenreich, "Viewpoint: Libation as Liberation?" *Time* (1 April 2002), online: Time.com <<http://www.time.com/time/2002/wdrinking/viewpoint.html>>; Alex Morris, "Gender Bender" *New York Magazine* (7 December 2008), online: <<http://nymag.com/news/features/52758/>>; "Young women binge drinking in bid for equality put themselves at risk" *CanWest News Service* (1 August 2008), online: Canada.com <http://www.canada.com/story_print.html?id=7a57537c-f8cc-4a12-8be1-2c369095a333&sponsor=>>.

²¹ E. Finch & V.E. Munro, "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants" (2005) 45 *Brit. J. Criminology* 25; "The Demon Drink and the Demonized Woman: Socio-sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" (2007) 16 *Soc. & Leg. Stud.* 592.

and may be heightened where the source of the intoxication is drugs rather than alcohol.²²

Lise Gotell has written extensively of Canadian sexual assault law's construction of victimhood based on recognition of sexual risks and risk-averse behaviour. She argues that:

The prudent and responsabilized feminine sexual subject weaves through judicial discourses of affirmative consent. Concepts of risk are deployed to construct and demarcate revised boundaries of good and bad victimhood. While the idealized masculine sexual citizen, constituted in and through an affirmative consent standard, is he who rationally responds to the risks of criminalization through consent seeking, the idealized feminine sexual subject is she who actively manages her behaviour to avoid the ever-present risk of sexual violence.²³

While "intoxicated complainants can be constructed as defying standards of sexual safekeeping by placing themselves at risk," Gotell also notes that the shift to an affirmative consent standard in Canadian sexual assault law has led to increasing convictions in cases where complainants are highly intoxicated or passed out.²⁴

One recent case that supports Gotell's thesis is *R. v Saadatmandi*.²⁵ The complainant, age 18, met one of the two accused in an internet chat room. A number of sexually charged written exchanges occurred and the complainant agreed to meet with him. She lied to her parents about where she was going and got into the accused's car, even though another man was with him. She drank from a bottle of juice given to her by the men even though it was already open and there had been talk of them giving her drugs. The complainant became extremely intoxicated and was sexually assaulted by both men in a condominium swimming pool and in the basement of one of their homes. They dumped her in a public park without her purse, which they threw on the road several blocks away.

The complainant lied to police and told them she had been abducted by strangers. When her online messages were discovered, she admitted that she met the accused with the expectation that she would have sex with him and that they might consume alcohol or drugs, but that she had not consented to take the GHB later found in her system and had lacked the capacity to consent when the sexual acts took place.

The trial judge convicted both men. The complainant's credibility was buttressed by a DVD the men had recorded of the sexual assault in the basement, which showed the complainant to be nearly unconscious. The trial judge also made a finding that the complainant did not voluntarily take the drugs that were dissolved in the juice, even though it was open to him to find that she knew there was probably something added to the drink but drank it anyway. The trial judge did express concern at the complainant's behaviour, noting that:

J.M. freely communicated with a stranger who contacted her out of the blue on

²² April L. Girard and Charlene Y. Senn, "The Role of the New Date Rape Drugs in Attributions about Date Rape" (2008) 23 J. of Interpersonal Violence 3.

²³ Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law" (2008) 41 Akron L. Rev. 865 at 879 [Gotell].

²⁴ *Ibid.* at 886.

²⁵ [2008] B.C.J. No. 405 (S.C.) [*Saadatmandi*].

the internet. She flirted with him and foolishly agreed to meet, giving him her first name, address and telephone number. She knew he had mentioned bringing alcohol and drugs and she did contemplate the possibility of a sexual encounter with him. When he showed up near her residence with his friend, she voluntarily got into his car. It was my observation that J.M.'s continued attempts to minimize her provocative and foolish behaviour stemmed from her intense embarrassment that she allowed herself to get into the situation in the first place.²⁶

It is hard to deny that the complainant in this case made a series of decisions that increased the likelihood that she would be sexually assaulted. While this may be important from a practical perspective, from the view of the criminal law it should be irrelevant, as Justice Fisher ultimately recognizes in this case. No behaviour by the woman, other than voluntary consent itself, gives a man the green light to apply force of a sexual nature to her. Yet complainants who rely on this legal truth to shield themselves from sexual violence, it would appear, are frequently disappointed. Women who use GHB recreationally report awareness of the link between such drugs and sexual assault, but tend to think they have taken sufficient precautionary measures to avoid such assaults.²⁷

One can only speculate what the result in *Saadatmandi* might have been had the DVD not been found. Certainly, it would have made the Crown's case much more difficult, given the complainant's testimony that she had been open to drug taking and sexual activity with the accused when she agreed to meet with him. The complainant's lies to police show that she was concerned that her claim of sexual assault in such circumstances would not be believed and that she needed to present herself as the blameless victim of a kidnapping and stranger assault. Other victims in similar circumstances may simply not report the crime at all.

Intoxication and Incapacity in Canadian Sexual Assault Law

Looking more broadly, then, how does the criminal law deal with cases of sexual assault where the complainant is intoxicated? The common law of rape has always held that intercourse with a woman who is asleep or unconscious amounts to rape. The rule applies to unconsciousness from any source, including self-induced intoxication.²⁸

In Canada, the *Criminal Code* requires that the Crown prove non-consent as part of the *actus reus* of the offence. While the *Code* does not refer to the relevance of the complainant's intoxication specifically, the 1992 amendments define consent as "the voluntary agreement of the complainant" to engage in sexual activity. The *Code* also states that "no consent is obtained where the complainant. . . is incapable of consenting. . . ." ²⁹ Taken together, these provisions suggest that evidence of the effects of the consumption of alcohol and/or drugs may be relied on

²⁶ *Ibid.* at para. 86.

²⁷ Barker, Harris & Dyer, *supra* note 13.

²⁸ *R. v. Ladue*, [1965] 51 W.W.R. 175, 45 C.R. 287 (Y.T.C.A.). This is, of course, subject to any defences the accused might raise, including mistake of fact, mental disorder or possibly "sexsomnia" as a form of mental disorder or non-mental disorder automatism: see *R. v. Luedecke*, 2008 ONCA 716.

²⁹ R.S.C. 1985, c. C-46, ss. 273.1(1) and (2) (b) [*Criminal Code*].

by the Crown to prove non-consent through a lack of capacity to consent to sexual activity or a lack of voluntary agreement to engage in that activity.

Turning first to incapacity, there are numerous cases in which courts find a complainant incapable of consent due to intoxication, but in almost all of these cases the complainant is also asleep or unconscious when the sexual assault begins. Where the complainant is not unconscious, but merely drunk or high, courts have struggled to articulate a threshold for incapacity short of total non-responsiveness.

The Supreme Court of Canada considered this issue in *R. v. Daigle*³⁰. There the 15 year old complainant was drinking alcohol with her 20 year old half-brother and his friend. The men slipped the hallucinogen PCP into her drink and she began to feel out of control and confused.³¹ Eventually the two men engaged in sexual acts with her. The trial judge found that she was “responsible for her own actions” and acquitted the accused.³² The Quebec Court of Appeal overturned this acquittal and substituted a conviction, holding that consent is not valid where the complainant is so intoxicated that she is unable to control her actions. The Supreme Court of Canada affirmed this decision in brief reasons.

The Court of Appeal quoted the words of Fish J.A. (as he then was) in *R. v. St. Laurent*:

As a matter both of language and of law, consent implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in a sexual activity as a result of fraud, force, fear, or violence. Nor is the consent requirement satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation.

"Consent" is, thus, stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will. Putting the matter this way emphasizes the difficulty of distinguishing, otherwise than by reference to vitiating factors, between "consent" and "non-consent" in relation to the offence of assault.³³

While *Daigle* confirms that incapacity to consent may be established at a point short of unconsciousness, it also appears to rely on the fact that the complainant's consumption of PCP was involuntary and without her knowledge.³⁴ Thus it is unclear to what extent this fraud on the complainant was relevant to the outcome in the case. Would the same result have followed if the complainant had voluntarily ingested the drugs?

A survey of recent decisions on incapacity and intoxication shows that judges are

³⁰ (1997), 127 C.C.C. (3d) 130 (Que. C.A.); appeal dismissed, [1998] 1 S.C.R. 1220 [*Daigle*].

³¹ *Ibid.* at para. 9 (Que. C.A.)

³² *Ibid.* at para. 13.

³³ (1993), 90 C.C.C. (3d) 291 at 311 (Que.C.A.).

³⁴ *Daigle*, *supra* note 27 at para. 25.

generally willing to find incapacity to consent in the face of voluntary intoxication only where the complainant was unconscious or asleep during much of the sexual activity, and especially where she was intoxicated or asleep when it commenced.³⁵ In several of these cases, the accused was also the complainant's employer, heightening his power and her vulnerability.³⁶ In many others, the sexual assaults occurred at house parties where many people were present, which can provide important corroboration of the degree of intoxication experienced by the complainant.³⁷

Courts are also willing to find incapacity even where the victims are not completely unconscious where, as in *Daigle*, the intoxicants were not consumed voluntarily. For example, in *R. v. Bell*, the accused was convicted of drugging the male and female complainant without their knowledge, and then sexually assaulting them. The two complainants had voluntarily consumed both ecstasy and alcohol, but they claimed that the accused gave them a spiked drink.³⁸ The trial judge found that their intoxication was not caused by excess alcohol but rather by the drug administered by the accused. This fact seems to have been important to the judge's conclusion that the pair did not consent. In *R. v. Byer*, the accused was convicted of drugging and raping four young women on separate occasions over the past 15 years.³⁹ The judge found the women incapable of consenting even though they were conscious when the rapes occurred.

The degree to which the intoxication was voluntary should not affect the legal assessment of incapacity. Voluntary intoxication is not the same as voluntary consent. If the complainant is incapable of consent then there is no consent, and it does not matter how the incapacity came about. As a practical matter, however, courts appear to be more generous in their assessment of incapacity where the victim is tricked by the accused into consuming intoxicants unknowingly. This suggests that courts are influenced by the "fault" of the complainant and are, at some level, judging how blameless she is.

Overall, the cases in which courts are more likely to find incapacity due to intoxication are those in which the complainant is either entirely incapacitated or has become intoxicated through no fault of her own. Yet the vast majority of sexual assaults of intoxicated women occur where the complainant has become voluntarily intoxicated and is not totally unconscious. In such cases, courts have struggled to define a test or a threshold for incapacity.

³⁵ *R. v. Cedeno* (2005), 195 C.C.C. (3d) 468 (O.C.J.) (C passed out at house party after taking drugs and alcohol) [*Cedeno*]; *R. v. Cornejo* (2003), 68 O.R. (3d) 117 (C.A.) (C sleeping at home after consuming 9 beers at company party; coworker entered her apartment uninvited and sexually penetrated her); *R. v. G.J.D.*, [1995] P.E.I.J. No. 173 (S.C.T.D.) (C raped while drunk and sleeping by her friend's father); *Goodliffe*, *supra* note 14 (C drank and took GHB; accused had intercourse with her while she was passed out); *R. v. H.(S.L.)*, [2003] S.J. No. 645 (Sask. P.C.) (C blacked out from drinking and was placed in bed; accused raped her while she was passed out) [*H.(S.L.)*]; *R. v. Hernandez*, [1997] A.J. No. 955 (C.A.); *R. v. J.R.* [2006] O.J. No. 2698 (S.C.J.) [*J.R.*]; *R. v. Kennedy and J.G.F.* (1999), 29 C.R. (5th) 133 (Ont. C.A.).

³⁶ *R. c. Sauve*, [2000] J.Q. no. 1885 (C.Q.); *R. v. H.H.*, [2002] O.J. No. 1509 (C.A.); *R. v. J.M.*, [2004] O.J. No. 1295 (S.C.J.); *R. v. Pecoskie*, [2000] O.J. No. 1421 (S.C.J.), appeal dismissed 170 O.A.C. 396.

³⁷ *R. v. T.S.*, [1999] O.J. No. 268 (Gen Div); *Cedeno*, *supra* note 32; *H.(S.L.)*, *supra* note 32; *J.R.*, *supra* note 32; *R. v. Morningchild*, [2004] S.J. No. 126 (Prov. Ct.); *R. v. Smokeyday* [2002] S.J. No. 573 (C.A.).

³⁸ *R. v. Bell*, [2004] O.J. No. 5066 (S.C.J.).

³⁹ [2004] O.J. No. 5888 (S.C.J.).

A leading case that rejects a claim of incapacity due to voluntary consumption of alcohol and drugs is the 1996 decision of the Ontario Court of Appeal in *R. v. Jensen*.⁴⁰ There the 15 year old complainant willingly consumed quantities of alcohol and drugs at the home of an older man who was her drug supplier. She claimed that he sexually assaulted her while she was impaired, but not unconscious. She testified to saying “no” to the accused. The trial judge convicted on the basis that the complainant was either incapable of consent or had not consented. The Ontario Court of Appeal, in a 2:1 decision, overturned this result, holding that the trial judge had made inconsistent findings, because incapacity and non-consent were mutually exclusive. The majority of the Court of Appeal found that the complainant’s level of intoxication had not left her unconscious or unable to control her body, contrasting the facts before them with the earlier case of *R. v. Sarson* where the complainant fell down and hit her head as a result of the intoxication.⁴¹ In *Jensen*, the majority of the Court of Appeal defined capacity to consent as a “minimal” state.⁴²

This understanding of capacity as a minimal threshold is echoed in other jurisdictions. At one point, trial judges in British Columbia appeared to be applying the same threshold for incapacity to complainants as was applied to the accused who wanted to argue the common law defence of extreme intoxication as a defence to a charge of sexual assault.⁴³ This defence allowed the accused to prove on a balance of probabilities that he was so intoxicated as to lack the minimal intent or voluntariness required for the sexual contact.

In *R. v. L.C.*,⁴⁴ the complainant and the accused attended a house party where both consumed alcohol. The complainant was observed by other guests to be intoxicated to the point of being unable to speak. She testified that she had no memory of the sexual activity. The accused said that while the complainant was drunk, she was not staggering or falling, and that she led him to the bedroom and was seated straddling him at one point in the sexual activity. L.C. was convicted and appealed. Relying on the Supreme Court of Canada’s decision in *R. v. Daviault*,⁴⁵ which created a defence of extreme intoxication akin to involuntariness, Justice Rogers held that:

...because the evidence showed that Ms M. was not “passed out” i.e. asleep when the sexual activity took place, in order for the learned trial judge to have reached the conclusion that he did he had to have been satisfied beyond a reasonable doubt that alcohol had rendered Ms. M. an automaton. That is to say: her mind was disengaged from what her body was doing.⁴⁶

The summary conviction appeal judge found that the Crown had failed to prove incapacity on

⁴⁰ (1996), 90 O.A.C. 183, 47 C.R. (4th) 363 [*Jensen*].

⁴¹ (1992), 77 C.C.C.(3d) 233 (N.S.C.A.).

⁴² *Jensen*, *supra* note 39 at para. 13.

⁴³ *R. v. Daviault*, [1994] 3 S.C.R. 63; Such a defence is now precluded by statute: *Criminal Code*, s. 33.1.

⁴⁴ [2002] B.C.J. No. 2413 (S.C.) [*L.C.*].

⁴⁵ [1994] 3 S.C.R. 63.

⁴⁶ *L.C.*, *supra* note 43 at para. 6.

this standard and that the accused's evidence that the complainant had consented "by her conduct" had not been rejected by the trial judge.⁴⁷ He allowed the appeal and set aside the conviction. The court took a similar approach in *R. v. Mullaney*, noting that while the complainant was clearly intoxicated and unable to remember what happened, she was not "insensate" and so had the capacity to consent.⁴⁸

This test was considered by Justice Bennett of the same court in *R. v. Siddiqui*.⁴⁹ In that case the complainant was 17 years of age and struggling with problems at home. She went to an apartment with a male friend and played cards with a group of young men, including the accused, whom she had not met before. The complainant was drinking vodka, smoking marijuana and also snorting the drug Ritalin. She decided to leave the apartment to make a phone call and get food and more alcohol. The accused left around the same time and they walked together toward the Skytrain station.

The complainant testified that she had only fragmented memories of what happened after this point, but that she had rebuffed the accused's advances. She recalled having been in a small concrete area and having the accused tell her to get dressed, and of being on the Skytrain and realizing that her undergarments were gone, her pants were inside out and her shirt was open. Her underwear and sock were later found in an underground parkade.

The accused testified that the complainant looked like she was on drugs at the time she arrived at the apartment. She drank around one half of a bottle of vodka and he had seen her smoking pot and repeatedly inhaling crushed Ritalin, although she was not able to consume much of it. As they walked toward the Skytrain she was stumbling and fell. He testified that all of the sexual activity was at her initiation and that while she was stumbling and not focused he could understand what she was saying.

Justice Bennett rejected the prior case law equating incapacity to automatism. This line of cases confused the standard for an accused's defence to a criminal charge with the standard to be used for proof of the complainant's incapacity to consent.⁵⁰ Quoting *Jensen*, she defined capacity as a state in which the complainant "was sufficiently aware that she was able to make decisions and act upon them" and also quoted the definition of incapacity used in *Daigle*, as one that asks whether the complainant was intoxicated to the point where she could not understand the sexual nature of the act, its risks and consequences, or realize that she could choose to decline to participate. On this standard, Justice Bennett found that the complainant clearly had the capacity to consent. The evidence suggested that she was not so affected by the alcohol and drugs that she lacked capacity.

Justice Bennett was correct to reject the analogy between the extreme intoxication defence and incapacity to consent, because they are measuring two very different things. The extreme intoxication defence was based on the idea that one might be so intoxicated as to lack

⁴⁷ *Ibid.* at para. 20.

⁴⁸ [1998] B.C.J. No. 2188 (S.C.) at para. 16.

⁴⁹ 2004 BCSC 1717 [*Siddiqui*].

⁵⁰ The defence of extreme intoxication for sexual assault and related offences has since been abrogated by statute: *Criminal Code*, s. 33.1. The constitutionality of this limitation is unsettled: *R. v. Jensen* [2000] O.J. No. 4870 (S.C.J.).

the minimal intent to apply force and to be in a state of near-automatism. This can be also be expressed as a lack of voluntariness with respect to the *actus reus* of that application of force. Incapacity to consent measures what is a much more complex mental state, namely the ability to make a voluntary choice to engage in sexual activity. A person with intellectual disabilities that render her unable to understand the nature or consequences of sexual activity may lack the capacity to consent, for example, but she is not an automaton.

Yet in light of the more generous test for incapacity adopted by the court, her conclusion that the complainant did have capacity is puzzling and warrants further attention. The accused himself testified that the complainant appeared not normal, that she was stumbling and falling, mumbling her words and that she lacked focus. This hardly seems like a state in which a person could give voluntary consent to sexual activity in a public place with a bare acquaintance. The complainant testified that she could not remember the sexual activity but that she found the accused unattractive and that she would not have wanted to have sex with him. The trial judge held that this was not sufficient to prove non-consent at the time, given that alcohol was a disinhibitor and might have affected her conduct. The trial judge's reasons conclude with the following:

I wish to add, that at the end of her testimony M.S. told me that she was not lying. In acquitting Mr. Siddiqui I am not finding that M.S. lied. I conclude that M.S. believes that she was sexually assaulted and that she did not consent. However, on the whole of the evidence and for the reasons above, I cannot be satisfied beyond a reasonable doubt that the Crown has proved lack of consent.⁵¹

In this passage, Justice Bennett appears to be finding that the complainant had a mistaken belief in her own non-consent. Faced with the complainant's incomplete memory, and given that even the accused described the complainant as impaired and unfocused, it is worth asking how the Crown could have ever proved a lack of capacity short of demonstrating that the complainant was unconscious at the time the sexual activity took place. While Justice Bennett rejects the "automaton" standard, it is not clear that she is applying a significantly more relaxed threshold.

For some judges, not even proof of complete incapacity is enough, as they leave open the possibility of prior consent to future sexual activity while asleep or unconscious. The existence of such a doctrine in Canadian criminal law was raised by the decisions of the Alberta courts in *R. v. Ashlee*.⁵² In that case passers-by observed two men fondling the exposed breasts of an unconscious woman on a public street. The woman was taken to hospital, but signed herself out before making any police complaint and did not testify. The Crown's case consisted of evidence of other witnesses and the medical evidence of her extreme intoxication. The trial judge convicted, but the summary conviction appeal judge allowed the appeal, holding that the Crown had failed to negate the possibility that the woman had given consent before becoming unconscious and had therefore failed to prove non-consent.

On appeal to the Alberta Court of Appeal the court, by a 2:1 majority, allowed the appeal

⁵¹ *Siddiqui, supra* note 48 at para. 59.

⁵² (2005), 388 A.R. 280 (Q.B.), appeal allowed [2006] A.J. No. 1040 (C.A.) [*Ashlee*].

and restored the conviction. Lise Gotell has described the majority reasons as “stunning” and a “firm rejection of the defence of prior consent.”⁵³ But we should not ignore the fact that 2 of the 5 judges who heard this case were prepared to allow a defence of prior consent, or more particularly, to require the Crown to prove beyond a reasonable doubt in all cases where a complainant is unconscious that she did not earlier give consent to being touched if and when she lost consciousness. Madam Justice Conrad, dissenting in the Court of Appeal, supported this conclusion by reference to women’s autonomy and sexual freedom. In language reminiscent of those who have criticized the Canadian definition of consent as having a chilling effect on sexual relations between men and women, she wrote:

Just as everyone has the right to be free from unwanted sexual activity, everyone has the right to consent to sexual activity. An individual, while competent, can grant permission to another to touch his or her body in a sexual way, including the permission to touch while the individual is sleeping or unconscious. This legislation is not aimed at controlling the consensual, sexual choices of competent adults. This is an offence against the person - not the state. It is the Crown’s burden to prove the person did not want the sexual touching that occurred.⁵⁴

It is remarkable that any judge would want to preserve the “right” of individuals to consent to sexual touching while unconscious, at a time when they are entirely incapacitated and vulnerable and when they are not participating in any way in the activity. Not only is this a rather grim view of sexual activity, it also confuses the Crown’s necessary legal burden to prove non-consent with a factual presumption that the complainant is consenting. If the Crown adduces no evidence on the issue of non-consent, the accused must be acquitted, but that does not mean that the complainant is presumed to have consented. There is simply no evidence on that point, and the absence of evidence legally inures to the benefit of the accused. Non-consent ought to be judged as of the time of the sexual activity and the majority was right to reject the concept of “advance consent.”⁵⁵

Taken as a whole, the case law on incapacity to consent due to intoxication is contradictory and incomplete. In cases of involuntary intoxication, impaired judgment seems to suffice to render the complainant incapable of consent. In cases of voluntary intoxication, courts are not willing to be so generous and have been reluctant to apply a threshold other than near-unconsciousness. In one sense, this reluctance springs from a similar focus on “choice” to that animating the dissent in *Ashlee* endorsing a doctrine of advance consent. Prioritizing women’s choice or agency sounds like it promotes women’s sexual self-determination, but unconnected to any analysis of sex inequality, it leaves women to stand or fall by their “choices”, including their

⁵³ Gotell, *supra* note 22 at 895.

⁵⁴ *Ashlee* (Alta. C.A.), *supra* note 51 at para. 78.

⁵⁵ Unfortunately, a majority of the Ontario Court of Appeal has recently accepted the advance consent argument in a case where a woman was unconscious from choking, but was not intoxicated: *R. v. J.(A.)*, 2010 ONCA 226 (CanLII)

choice to get drunk or high in the company of predatory and violent men.⁵⁶

Mistake of Fact in Cases of Intoxication

In most of the cases I reviewed, the accused does not deny having sexual contact with the complainant. Such a denial would be implausible, because the accused is typically either identified by the complainant when she comes to, or identified by bystanders. In a few cases the accused is identified by DNA evidence recovered from the victim. Instead the accused typically argues consent, mistaken belief in consent, or both.

Obviously, the claim of consent cannot operate where the complainant is found incapable of consent. A mistake of fact argument, however, can be advanced where the accused argues that he honestly believed both that the complainant did have the capacity to consent and that she in fact consented. The accused can rarely claim a mistaken belief in the complainant's complete sobriety, but rather that he thought that she was not so intoxicated as to be incapable of giving voluntary consent.

This point was confirmed by a majority of the Supreme Court of Canada in *R. v. Esau*.⁵⁷ There the complainant and accused were at a house party; both were drinking. The complainant testified that she awoke the next morning to find that she had been sexually assaulted. She testified that she had no memory of what occurred, but that she would not have had voluntary sexual relations with the accused because he was her second cousin. The accused testified that the complainant invited him into the bedroom and was a capable and willing participant. Defence counsel did not request an instruction on mistake of fact, asserting that it was a case of consent or no consent. Esau was convicted, but the Yukon Territory Court of Appeal allowed his appeal. On further appeal to the Supreme Court of Canada, the majority held, in reasons written by Justice Major, that the trial judge had erred in failing to leave mistake of fact with the jury.⁵⁸ There was evidence on which a jury might have found that the complainant, though lacking the capacity to consent, appeared to be consenting.

Justice McLachlin dissented.⁵⁹ She noted that on the complainant's evidence she either lacked the capacity to consent or did not do so. The defence evidence was that the complainant did consent. There was no air of reality to the defence of mistake. The majority had also failed to apply the reasonable steps provision in s. 273.2(b) of the *Code*, which requires that the accused have taken reasonable steps to ascertain the presence of consent before a claim of mistake can be made.

The reasoning of the majority in *Esau* was echoed in the majority decision of the Ontario Court of Appeal in *R. v. Osvath*, where the complainant also alleged that she was sexually

⁵⁶ A similar argument is made by in the context of reproduction and childcare in Rebecca Johnson, *Taxing Choices: the intersection of class, gender, parenthood and the law* (Vancouver: UBC Press, 2002).

⁵⁷ [1997] 2 S.C.R. 777 [*Esau*].

⁵⁸ Lamer C.J. and Sopinka, Gonthier and Iacobucci JJ. concurring.

⁵⁹ L'Heureux-Dube J. concurring.

assaulted while intoxicated and asleep on a sofa at a house party.⁶⁰ She awoke to find her pants lowered and someone having intercourse with her from behind. When she realized it was not her boyfriend and she was in a public space, she turned around and saw the accused. She then got up and left the house. The trial judge convicted on the ground that Osvath had, at a minimum, been willfully blind as to lack of consent.

Osvath appealed his conviction and a majority of the Court of Appeal allowed the appeal. The majority, citing no cases, found an air of reality to the defence of mistake of fact. The appellant did not know how much the complainant had drunk. It was possible that she awoke thinking she was having intercourse with her boyfriend and that Osvath had believed the complainant had consented. The trial judge had erred in finding willful blindness on the facts, because:

[the trial judge] says nothing of the complainant's alleged participation in the act. If the trier of fact believed the complainant initiated the sexual activity, or even participated in it, whether or not she realized what she was doing at the time, it would be too onerous a test of wilful blindness to require an accused to stop the activity and in effect say, "Wait a minute; do you know who I am?" after having already obtained her consent.⁶¹

Justice Abella dissented, noting that it was evident from the trial judge's findings he did not believe that the accused had asked for the complainant's consent and that his state of mind could properly be characterized as willful blindness.

The majority in this case appears to find evidence of both mistaken belief in capacity and mistaken belief in consent. In light of the finding that the complainant was in a deep sleep at a party where everyone was drinking, and that she did not know the accused, these conclusions are surprising. The Court of Appeal never considers what might amount to reasonable steps in these circumstances. Of course *Osvath* precedes the Supreme Court of Canada's 1999 decision in *R. v. Ewanchuk*, in which the Court confirmed that for the defence of mistake to operate the accused must honestly believe that the complainant have communicated a "yes" through words or conduct before the sexual contact occurs and that the accused have taken reasonable steps to find out if the complainant did want the sexual touching.

Osvath can be contrasted with the more recent Ontario Court of Appeal decision in *R. v. Cornejo*, where Justice Abella (as she then was) writes for the unanimous court and overturns a jury acquittal, ordering a new trial.⁶² There the complainant was heavily intoxicated after an office party. She returned home and went to sleep. She awoke to find the accused, a co-worker, sexually penetrating her. The accused testified that he had telephoned the complainant to ask if he could come over and she made an affirmative sound. He testified that when he kissed her she

⁶⁰ [1996] O.J. No. 193 (C.A.).

⁶¹ *Ibid.* at para. 22.

⁶² *Cornejo*, *supra* note 34.

said “not on the mouth . . . because I don’t love you” and that her eyes remained closed, but that she had lifted her hips when he removed her pants.⁶³ The accused argued mistake of fact and the jury acquitted.

In overturning this jury verdict, Justice Abella notes:

The facts do not provide an evidentiary foundation for the assertion that when Mr. Cornejo commenced sexual activity with the complainant, he believed she was consenting. After entering a person’s home, late at night without permission, an individual cannot commence sexual activity with a person who has been drinking and was asleep, and then rely on the mistake defence solely on the basis that at one point late in the encounter, the woman moved her body. The trial judge failed to make reference to any facts other than the movement of the complainant’s body after the sexual activity had begun. In these circumstances, the movement of the complainant’s pelvis was simply an insufficient basis to allow the defence to go to the jury.

These circumstances called for Mr. Cornejo to take reasonable steps to ascertain consent, and as he took no steps, s. 273.2(b) statutorily bars the defence.⁶⁴

The appellate decision in *Cornejo* does not rely on the complainant’s lack of capacity due to intoxication, but rather on a simple absence of consent. The Court of Appeal makes clear that even where incapacity is not proved, the duty to take reasonable steps is heightened where the complainant is known to be intoxicated.

Cornejo was distinguished, and the defence successful, in the 2008 case of *R. v. Millar*.⁶⁵ There the complainant and her friend met the accused and his friend at a bar and the foursome retired to the house of the complainant’s friend to continue drinking. The complainant had consumed more than a pitcher of beer, a glass and a half of red wine, and two shots of tequila. The tequila was purchased by the accused. The accused had consumed three or four pints of beer, plus two or three shots. The complainant told her friend that she was feeling intoxicated and unwell and went to sleep. Some time later she was joined by the accused, who initiated sexual activity. The complainant later ran from the room in distress and attacked the accused with a corkscrew.

The trial judge accepted the evidence that the complainant was incapable of consent and that she had no interest in sexual activity with the accused when she went to bed. However, he accepted the accused’s evidence that the complainant was awake and receptive until she objected to intercourse, and that the accused’s actions satisfied the reasonable steps requirement because they were gradual and progressive. He found that the accused was unaware of the degree of the complainant’s intoxication, and distinguished *Cornejo* on the basis that the two had spent a

⁶³ *Ibid.* at paras. 6-8.

⁶⁴ *Ibid.* at paras. 19-20.

⁶⁵ [2008] O.J. No. 2330 (S.C.J.).

friendly evening at the bar and she invited him to continue socializing.

The result in *Millar* was likely influenced by the complainant's reluctance to testify and her "contemptuous" demeanour in court. Nonetheless, it is troubling that a trial judge would be so quick to conclude that the accused was unaware of the complainant's intoxication, when they had been drinking at the same bar for four hours, followed up by more drinking at home, and when the complainant had gone to sleep alone with a garbage basket next to her head. He had also been told that she had a boyfriend. The only explanation the judge can offer for why the complainant later reacted with such anger is that she felt "guilty" about cheating on her boyfriend, an explanation that calls on discredited stereotypes about women's propensity to make false complaints of sexual assault.

Thus while the application of the reasonable steps provision has restricted the application of the defence of mistaken belief in cases involving intoxicated complainants, courts remain willing to apply the defence. What amounts to reasonable steps to ascertain capacity is not clear, especially in light of the courts' unwillingness to demarcate a clear test for incapacity.

Problems of Proof

One of the greatest practical problems for prosecuting cases of sexual assault where the victim is intoxicated is that the victim may have no memory of the assault. The presence of sexual activity can be proven in some cases by physical evidence, and the identity of the defendant through DNA analysis of that evidence. However, it remains difficult for the prosecution to prove non-consent where the complainant is unable to testify as to what took place. Sometimes non-consent can be proved through the testimony of bystanders. Many of these cases take place at house parties where the sexual activity is observed or discovered by other guests. This does not guarantee that such evidence will be found credible, however, since many of these guests will have been intoxicated as well.⁶⁶

Some courts have been willing to assume that where the level of intoxication is so high that the complainant has no memory of events, she must have been incapable of consent.⁶⁷ The majority of the Supreme Court of Canada rejected such an approach in *R. v. Esau*, where Justice Major for the majority noted that the Crown could not discharge its burden of proving non-consent with a complete absence of evidence on the part of the complainant as to what took place, due to a lack of memory.⁶⁸ The majority held that the defence of mistaken belief in consent should have been left with the jury, leaving it open to them to find that the complainant was incapable of consent but appeared capable and consenting to the accused. Justice McLachlin in dissent noted the distinct disadvantage this poses for complainants, remarking that:

⁶⁶ *Humphrey*, *supra* note 15.

⁶⁷ *R. v. Basra*, [2008] B.C.J. No. 1319 (S.C.) (blackout is some circumstantial evidence of incapacity); *Cedeno*, *supra* note 32 (only aware of events in brief snapshots; incapacity proven); *R. v. Chahal* 2002 BCPC 98 (lack of recollection is evidence of incapacity).

⁶⁸ *Esau*, *supra* note 56 at para. 23.

Nor does lack of memory of what happened in the bedroom coupled with drunkenness constitute [evidence of mistake of fact]. To say the complainant may have appeared to consent because she has no memory of the events is simply to speculate. It is, moreover, to speculate contrary to the evidence of both complainant and respondent. The respondent describes a situation of capacity and active participation, inconsistent with the ambiguous state where the complainant does not have capacity or does not consent but nonetheless appears to. The complainant says that she would have rejected the respondent because they were related, again evidence inconsistent with an apparent but unreal consent. Thus the assertion that the complainant's drunkenness and lack of memory raise the defence of honest but mistaken belief depends not on the evidence but on speculation. It depends, moreover, on dangerous speculation, based on stereotypical notions of how drunken, forgetful women are likely to behave. The law as established by this Court in *Pappajohn* does not permit such speculation. It demands specific evidence of a state of affairs which could give rise to an honest misapprehension of consent when no consent existed. No such evidence was presented in the case at bar.⁶⁹

Some courts have overcome this obstacle by accepting evidence that the complainant *would* not have consented to sexual activity with the defendant, so she must have been incapable of consent on the occasion leading to the charge. For example, in *R. v. J.R.* the complainant attended a party in a Toronto hotel room, where she became extremely intoxicated. She awoke on the floor of the bathroom and realized that she had been sexually penetrated. Forensic evidence indicated two men had sexual intercourse with her. The trial judge accepted her evidence that she would not have had sexual activity that night with anyone because she had just had an abortion and had received medical advice to abstain from intercourse for two weeks. He also accepted her evidence that she would never have consented to sex with one of the two defendants because she did not sleep with black men.⁷⁰ In other cases trial judges have accepted similar evidence on the basis that the accused was too old; the complainant's boss; not well-known to the complainant; married; or a member of the same sex.⁷¹ This kind of reasoning is interesting because it resists the argument favoured in some cases that while the complainant might have had these preferences or boundaries while sober, she would not have been so discriminating while drunk or stoned.⁷²

The Role of Pornography

It is worth paying attention to the role that pornography plays in these sexual assaults,

⁶⁹ *Ibid.* at para. 95.

⁷⁰ *J.R.*, *supra* note 34 at para. 38.

⁷¹ *R. v. Bell*, [2007] O.J. No. 1725 (C.A.); *R. v. Borkowsky*, 2006 MBQB 109; see also *supra* note 35.

⁷² *Siddiqui*, *supra* note 48. Of course, all of this testimony came at a personal cost to the complainant, who was required to divulge personal information about her medical and sexual history.

and the way in which it can serve as evidence for the Crown. In a number of the cases I reviewed, the accused made pornography of the victim by filming or photographing his sexual assault. This pornography can come to light in different ways. In *R. v. Niebergall*, the accused used his cell phone to photograph himself “tea-bagging” the unconscious intoxicated teenaged complainant.⁷³ He was reported to police by coworkers after he showed the photographs at work.⁷⁴ In *Saadatmandi*, discussed above, the two accused filmed themselves sexually assaulting the teenaged complainant who was highly intoxicated on alcohol and drugs and drifting in and out of consciousness. The DVD came to light when the accused turned it over to police, arguing that it would prove that the complainant had consented.⁷⁵

These cases, while small in number, suggest a number of things about the relationship between pornography and sexual assault that merit further and fuller consideration. First, they indicate that pornography is sufficiently valuable to these men that they are willing to make an evidentiary record of their behaviour. Second, they reveal the deliberate nature of these assaults. It is reasonable to assume that the men in question will be sexually aroused in the future by reliving their actions, not to mention socially validated by showing their conquests to others. Third, cases where the men show the pornography to others suggest that the men may have a mistaken belief in consent that is based on an incorrect understanding of consent in law (for example a belief that in the absence of resistance, there is consent, or that voluntary intoxication equals consent to sex). Or they may simply indicate a sense of invincibility and complete indifference to the complainant as an autonomous person whose interest in the sexual activity matters.⁷⁶

The influence of pornography on sexual assault can be seen in other ways, even where pornography is not made of the victim. In *R. v. Wobbles*, the complainant realized she had been sexually assaulted while unconscious, when she awoke to find her public hair partially shaved off.⁷⁷ According to bystanders, she had been sexually assaulted by more than one man, and penetrated by a bottle as well as the accused’s penis. This kind of activity is commonly presented in pornography and it is likely that the accused was mimicking actions he had viewed there.⁷⁸

⁷³ Teabagging is when a man presses his scrotum against another person’s face.

⁷⁴ Kevin Martin, “Drunken Teen Sex Ruled No Crime” *The Calgary Sun* (15 July 2008), online: <http://calsun.canoe.ca/News/Alberta/2008/07/15/6159941-sun.html>.

⁷⁵ See also *R. v. Gazzola*, [1991] O.J. No. 3508 (Gen. Div.), appeal from conviction dismissed [1992] O.J. No. 3451 (C.A.).

⁷⁶ See *R. v. D.I.D.B.*, [2006] Q.J. No. 2958 (C.A.) where the accused sent the photos he had taken of the complainant nude and passed out to her employer when the complainant refused to resume their relationship.

⁷⁷ (2008), 60 C.R. (6th) 31 (Ont.C.A.).

⁷⁸ See also *R. v. Barseghian*, [1996] O.J. No. 2316 (Gen. Div.) where the intoxicated complainant was taken to a university residence and used sexually by multiple men who shaved her public hair and penetrated her with shampoo and beer bottles; the trial judge directed an acquittal because the Crown had failed to prove non-consent; *R. v. Jobb*, 2006 SKPC 20 (ejaculation on the face; accused convicted); *R. v. Jesse*, [[2007] B.C.J. No. 1991 (B.C.S.C.), appeal from conviction dismissed [2010] B.C.J. No. 381 (C.A.) (accused inserted a wine cork into the vagina of the complainant while she was unconscious due to intoxication; accused convicted); *R. v. M.D.T.* (4 December 2003), Vancouver 22135 (B.C.S.C.) (accused encouraged minors to consume intoxicants to the point of unconsciousness, at

The pornography industry has worked to normalize the making of pornography of intoxicated young women through products like the “Girls Gone Wild” video series. Jeff Francis, the creator of the “Girls Gone Wild” franchise, has built a reported 100-million dollar business out of presenting drunk young women engaging in sexual displays on film.⁷⁹ “Girls Gone Wild” film crews troll beaches, bars, and parties looking for intoxicated young women. The crew encourages the women they find to expose themselves and, sometimes, to engage in sex acts on camera. The fact that the videos show “real” young women seems to be a major selling point. “Real” young women are transformed into objects on display for male consumption. Alcohol is a key ingredient in this transformation; the women agreeing to bare their breasts and kiss their female friends in the videos always appear intoxicated. The message being sent to male viewers seems to be that, given enough alcohol, any ordinary women can be turned into pornography.

Through such videos, the pornography industry is appropriating assertions of freedom by young women to manufacture a product. By convincing women that being naked and having sex on camera is edgy, transgressive and liberating, the makers of these videos are using “female empowerment” to sell a manufactured sexuality of male dominance. In her book *Feminist Chauvinist Pigs*, Ariel Levy examines the way in which enthusiasm for “raunch culture” has become a necessary trait for the modern liberated woman.⁸⁰ Levy writes: “GGW’s founder, Joe Francis, has likened the flashing girls he captures on the videos to seventies feminists burning their bras. His product, he says, is sexy for men, liberating for women, good for the goose, and good for the gander”.⁸¹ However, Levy goes on to identify the problem with this perspective: “Raunch culture is not essentially progressive, it is essentially commercial... [r]aunch culture isn’t about opening our minds to the possibilities and mysteries of sexuality. It’s about endlessly reiterating one particular – and particularly commercial – shorthand for sexiness.”⁸² The danger is that it also conditions male sexual arousal to respond to the myth that women want to have sex indiscriminately with any man, but just need to be loosened up first with alcohol.

A full treatment of the connections between intoxication, sexual assault and pornography

which point he videotaped himself sexually assaulting them).

⁷⁹ Kenneth C.W. Kammeyer, *A Hypersexual Society: Sexual Discourse, Erotica, and Pornography in America Today* (New York: Palgrave Macmillan, 2008) at 154.

⁸⁰ Ariel Levy, *Feminist Chauvinist Pigs: Women and the Rise of Raunch Culture* (New York: Free Press, 2005).

⁸¹ *Ibid.* at 12.

⁸² *Ibid.* at 29-30. For a different perspective on the relationship between raunch culture and feminism, see Deborah Siegel, *Sisterhood, Interrupted: From Radical Women to Grrls Gone Wild* (New York: Palgrave MacMillan, 2007). Unlike Levy, who seems to view women who embrace raunch culture as dupes, Siegel displays more sympathy for young women who buy into the “new sexual bravado”. Siegel writes: “They are a generation wedged between old definitions of feminism that no longer work and new ones that have been yet to be fully lived out. But it would be indeed a failure of feminism if younger women failed to recognize that the sexual arena is not the only platform on which women must stage their feminist rebellion. And it will be a failure of feminism if veteran feminists cannot find a way to understand that these very conversations are offshoots of their own”.

is beyond the scope of this article, and in many cases no one but the accused himself may know about the pornography. In my view, however, the connections raise serious concerns worthy of consideration in future research on sexual violence.

Intersecting Inequalities

While not all of the victims in these cases of intoxicated sexual assault are young, most of them are adolescents and young women. This is not surprising, since in most of these cases the intoxication is voluntary, and it is young women who are more likely to use drugs and binge drink. In this way, age intersects with sex to produce a particular locus of vulnerability for sexual assault. There are a number of cases in which accused men were acquitted of sexual assault on girls as young as 12 on the basis of mistake of age and/or failure to prove non-consent.⁸³

The role of race and Aboriginal status in these cases is harder to capture. In many of the cases, one can only guess the race of the parties based on the fact that the incident happened on a reserve, or through other similar surrounding details. Others have detailed the repeated tendency of the legal system to minimize sexual violence against Aboriginal women and girls.⁸⁴ In the cases I reviewed, I did not see any identifiable differences in the law's treatment of *capacity* to consent on this basis, but there is certainly a lengthy and tragic history of the rape and sometimes the murder of aboriginal women and girls by white men, typically after those men have given them alcohol or drugs.

One example of this history is found in *R. v. Jordan*.⁸⁵ Gilbert Jordan, known as the "Boozing Barber", had a pattern of picking up Aboriginal women in the poorest part of Vancouver, taking them to a hotel room for sex, and then paying them to drink until they died of alcohol poisoning. Between 1980 and 1987, Jordan was linked to the alcohol-related deaths of six Aboriginal women.⁸⁶ In 1988, Jordan was convicted of manslaughter in relation to the death of Vanessa Buckner (a white woman), who was found dead in the Niagara Hotel after drinking with Jordan.⁸⁷ Jordan was sentenced to 15 years imprisonment, which was subsequently reduced to 9 years by the British Columbia Court of Appeal.⁸⁸ A few years after his release, Jordan was convicted of breaching a recognizance after luring an Aboriginal woman to his hotel room and

⁸³ *R. v. J.E.G.*, [2005] A.J. No. 187 (Q.B.) (complainant 15 and accused 33; acquittal overturned and new trial ordered); *R. v. Quintanilla* (1999), 251 A.R. 59 (Q.B.) (complainants 12 and 15; accused a bartender who served them drinks) [*Quintanilla*]; *R. v. Dennison* (2002), 208 N.S.R.(2d) 230 (S.C.) (complainant 14; accused an adult male neighbour of kids she was babysitting; accused acquitted).

⁸⁴ See e.g. Gotell, *supra* note 22 at 882-884.

⁸⁵ [2003] B.C.J. No. 237 [*Jordan*].

⁸⁶ [1988] B.C.J. No. 3011.

⁸⁷ *Ibid.*

⁸⁸ [1991] B.C.J. No. 3490 (C.A.). The Court of Appeal held that the sentencing judge placed undue weight on similar fact evidence presented by the Crown. Toy J.A., writing for the Court, noted that while Jordan had been linked to the deaths of other women in similar circumstances, his role in those deaths had not been the subject of any criminal charges.

attempting to pay her to drink.⁸⁹

A more recent example is the sexual assault of a 12-year-old Aboriginal girl that took place in Saskatchewan in 2001. Three adult men, Jeffrey Brown, Dean Edmonson, and Jeffrey Kindrat, were accused of picking up the girl, giving her alcohol, and then taking turns having sex with her. Edmonson was convicted at trial and given a two-year conditional sentence.⁹⁰ Brown and Kindrat were acquitted at trial, but their acquittals were overturned on appeal.⁹¹ Kindrat was acquitted again by the jury at his second trial, while Brown's jury deadlocked and a mistrial was declared.⁹²

While these cases fail to acknowledge a pattern of racist and misogynist sexual violence against Aboriginal women, cases that pay attention to the role of race and culture also pose problems. Supposed cultural norms may be used simultaneously to frame the harm to the victim from the sexual assault and also to criticize her for her non-conforming behaviour in consuming intoxicants. In *R. v. Thurairajah*,⁹³ a fourteen year old girl was sexually assaulted by a 19 year old acquaintance. She had gone drinking in a wooded area with a group of young people. She became unconscious from intoxication and the accused raped her in a car and then dumped her partly naked in a snow bank. He called the victim's brother to pick her up, lied about why she was there and tried to dissuade him from seeking medical attention for his sister. The victim was eventually taken to hospital nearly comatose and suffering from hypothermia. Her cervix was badly bruised.

In allowing a Crown appeal from the conditional sentence imposed at trial, Doherty J.A. said for the court:

S.T. candidly acknowledges that she made some poor choices that day.

Like the respondent, [the victim] is of Tamil descent. In the Tamil culture, female victims of sexual assault are sometimes stigmatized as unclean and unworthy of marriage in the Tamil community. The respondent appreciated how this community could react to the female victim of a sexual assault. [The victim] has suffered some degree of stigmatization within her community.⁹⁴

The Court considered this risk of ostracism an aggravating factor in sentencing. While the Court of Appeal could be commended for its sensitivity to the complainant's place in her ethnic community, it does nothing to repudiate these stereotypes as misogynist. Juxtaposed against the

⁸⁹ [2002] B.C.J. No. 1175 (C.A.), aff'd [2003] B.C.J. No. 237 (C.A.).

⁹⁰ [2005] S.J. No. 256 (C.A.). Edmonson's appeal from conviction and sentence were dismissed by the Saskatchewan Court of Appeal.

⁹¹ [2005] S.J. No. 43 (C.A.).

⁹² "Jury finds Kindrat not guilty of sex assault" *CBC News* (26 March 2007), online: [CBCNews.ca <http://www.cbc.ca/canada/saskatchewan/story/2007/03/26/kindrat.html>](http://www.cbc.ca/canada/saskatchewan/story/2007/03/26/kindrat.html); "No verdict in Brown sexual assault case", *CBC News* (29 May 2008), online: [CBCNews.ca <http://www.cbc.ca/canada/saskatchewan/story/2008/05/29/no-verdict.html>](http://www.cbc.ca/canada/saskatchewan/story/2008/05/29/no-verdict.html).

⁹³ 2008 ONCA 91.

⁹⁴ *Ibid.* at paras. 11-12.

conclusion that she made “poor choices”, it comes closer to inadvertently endorsing them.

The Limits of Consent

Arguing incapacity as a result of intoxication raises a similar problem to what Isabel Grant and I noted in the context of incapacity arguments where the complainant has a mental disability. The focus on incapacity can obscure other evidence of non-consent, or of coercive circumstances that should call consent into question, such as differences in age, physical size, employment status, family authority or other factors.⁹⁵ Thus when the court decides capacity is present, intoxication as a factor falls away and is treated as no longer relevant. This is not correct in law because even where the complainant has the capacity to consent, her intoxication is still relevant to the voluntariness of that consent. For example, evidence of intoxication may explain behaviour that appears contradictory to the complainant’s claim that she did not want the sexual activity to take place.

The focus on incapacity also risks placing all the attention on the complainant and her behaviour, and failing to focus on the actions of the accused. In many of these cases the accused deliberately places himself in a particular position of trust with respect to the complainant, for example by taking charge of escorting her home safely. Emphasizing precise measurements of capacity risks ignoring the accused’s openly predatory behaviour.

Findings of non-consent and incapacity to consent should not be seen as mutually exclusive if it is kept in mind that non-consent is a state of mind of the complainant, rather than an active refusal to participate. Consent, on the other hand, is a voluntary agreement to participate. There is a gap between these two definitions, in that a person may both be competent to know that she does not want to participate in sexual activity and also lack the more advanced capacity for truly voluntary agreement. Thus the court needs to consider whether any agreement given by the complainant was voluntary, and not merely whether she knew she had the right to refuse, before concluding that the complainant had the capacity to consent.⁹⁶

The legal standard for incapacity appears to be both unarticulated and hard to reach. While some courts speak of the inability to understand the consequences of the sexual activity and to know one can decline to participate, in practice the standard appears to be one of near unconsciousness. This of course creates problems of proof because women may not remember what has happened when they are in an advanced state of intoxication. The scenario most capable of proof is where the accused’s sexual activity rouses the complainant from unconsciousness. Failing that, courts appear more generous in their assessment of incapacity where the complainant has consumed the intoxicant involuntarily, even though this should be irrelevant.

It may be that in cases where the complainant consumes the intoxicants unwillingly, the

⁹⁵ Janine Benedet & Isabel Grant, “The Sexual Assault of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief” (2007) 52 McGill L.J. 243. The same phenomenon can be observed in cases focusing on a mistake defence where the complainant is under the age of consent: see. e.g. *Quintanilla*, *supra* note 79;

⁹⁶ For a helpful discussion of voluntariness of consent in the context of extortionate threats see *R. v. D.S.*, [2004] O.J. 3440 (C.A.) at paras. 43-54.

court is really considering her consent to be involuntary rather than lacking in capacity to consent. The danger, of course, is that if involuntary intoxication is equated with involuntary consent, voluntary intoxication will be equated with voluntary consent, endorsing the stereotype that getting drunk or high is an invitation to sexual activity. If intoxication makes consent involuntary, it should not matter whether the woman chose to get drunk or high.

Making a finding of incapacity in cases of intoxication is of less concern to the complainant's sexual agency than in the context of mental disability because intoxication is a transient state. Thus a declaration of incapacity is not permanent for intoxicated women. Relying on incapacity in this context also does not usually open the door to the introduction of sexual history evidence in the same way as an incapacity inquiry in the context of a complainant with a disability, which tends to focus on her past knowledge of sexual matters. There is therefore little danger for complainants in expanding the definition of incapacity as it relates to intoxication.

Presumably the objection to a broader category of incapacity rests on the question of notice to the accused. In other words, can the accused be expected to know that the complainant lacks capacity? More recent cases have limited the availability of the defence of mistake of fact in cases of sexual assault where the complainant is intoxicated. Reasonable steps to ascertain consent must take intoxication into account, and the accused must have an honest belief in capacity as well as consent.

Sharon Cowan has argued that where the complainant is vomiting, stumbling or incoherent, these are signs that the man needs to have a clear "yes" before proceeding.⁹⁷ Canadian courts, with some notable exceptions, appear to be adopting a similar approach in the context of mistaken belief claims, but are reluctant to conclude that evidence of this level of intoxication is sufficient to prove consent is not voluntary. Rejection of mistake claims is not helpful to women if the court will not find non-consent as part of the *actus reus* has been proven.

A standard of incapacity less extreme than near-unconsciousness is not unfair; little of value is lost in a legal requirement that people desist from sexual activity until their visibly intoxicated prospective partner sobers up. Placed in its social context, it is hard to see why we would place a particularly high value on drunken or stoned sexual activity. One might take Cowan's point further and find that where the complainant is incoherent, ill or not fully in control of her body, there is no capacity to consent and so even a clear "yes" is not valid. This is no more unfair to accused persons than it was to change the law to make clear that silence or passivity is not consent. At a minimum, we should be willing to apply the same test of incapacity to voluntary intoxication that we do to involuntary intoxication.

But so long as the incapacity threshold remains high, courts need to consider how intoxication affects the voluntariness of consent and the balance of power between the parties. In most of these cases, the accused man is much less intoxicated than the complainant. Indeed, advertising and social pressure for young women to keep up with men drink for drink ignore the fact that women are usually smaller than men and that their bodies metabolize alcohol at

⁹⁷ Sharon Cowan, "The Trouble with Drink: Intoxication (In)Capacity and the Evaporation of Consent to Sex" (2008) 41 Akron L. Rev. 899 at 917.

different rates. Where there is a considerable disparity in the level of intoxication of the parties, this augments the imbalance of power between them. The man has more power in a very real physical sense, as well as through the subsequent evidentiary imbalance when he claims to remember what happened and she does not.

The affirmative consent standard used in the Canadian criminal law of sexual assault is an important advance, but it does not avert the danger that comes with judging the complainant's credibility. Our focus may be on what she wanted, but we still have to believe her when she claims she didn't want it. That becomes much harder when her own recollections are imperfect and she follows new social conventions of heavy drinking and sexualized displays, conventions that may be at odds with established attitudes about alcohol and sex.

A legal standard that permitted the Crown to prove coercion by the accused and to focus on his predatory behaviour, as an alternative to proving non-consent, might better capture the exploitation in such situations. In the absence of such a provision, courts could recognize that intoxication may diminish the capacity of the complainant to consent even where it does not eliminate that capacity entirely. In such cases, courts should be open to the conclusion that any apparent consent was not voluntary and that the complainant did not, in her own mind, want the sexual activity to take place. This approach would have the effect of shifting the focus of the inquiry back to the accused and to the presence or absence of reasonable steps to ascertain consent.