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A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law

Janine Benedet

Allard School of Law at the University of British Columbia, benedet@allard.ubc.ca

Isabel Grant

Allard School of Law at the University of British Columbia, grant@allard.ubc.ca

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A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law

JANINE BENEDET & ISABEL GRANT*

Prosecutions for sexual assault most often focus on whether the Crown has proven that the complainant did not consent to the sexual activity in issue, based on her subjective state of mind at the time of the offence. However, Canadian criminal law also provides that no consent is obtained where the complainant is incapable of consenting. In cases where the complainant has a mental disability affecting cognition or decision-making, prosecutors in Canada have been reluctant to argue that the complainant was incapable of consenting. In this article, the authors agree that claims of incapacity should be used sparingly, but contend that the doctrine of incapacity may be applicable and useful in some cases where the accused has exploited the complainant's disability. They argue that capacity to consent to sexual activity should be defined situationally, rather than as an all-or-nothing measure. Since consent is given to a specific person in a specific circumstance, incapacity should be also assessed by reference to the particular context of the case. This approach to incapacity has been adopted in English and American cases, which provide examples of how it might be applied and understood in Canada. A situational definition of incapacity offers some legal recognition of the particular challenges faced by women with mental disabilities with respect to sexual abuse, without disqualifying them from any lawful sexual activity in other contexts.

En règle générale, les poursuites pour agressions sexuelles se concentrent sur la question de savoir si la Couronne a réussi à démontrer que la plaignante n'avait pas consenti à l'activité sexuelle reprochée, en se fondant sur son état d'esprit subjectif au moment de l'infraction. Selon le droit pénal canadien, toutefois, il est impossible d'obtenir un quelconque consentement valide lorsque la plaignante est incapable de consentir. On observe par ailleurs que, dans les cas où la plaignante souffre d'une incapacité mentale qui influence sa cognition ou sa prise de décision, les procureurs au Canada sont réticents à plaider l'incapacité de la plaignante à consentir. Dans cet article, les auteurs soutiennent qu'il convient d'invoquer l'incapacité avec prudence, tout en précisant que l'on peut appliquer avec succès la doctrine de l'incapacité dans les cas où l'accusé a exploité le handicap de la plaignante. Selon ces auteurs, la capacité à consentir à une activité sexuelle devrait être définie selon les circonstances plutôt que de se cantonner à être un recours du « tout ou rien ». Puisque le consentement est accordé à une personne donnée dans une situation spécifique, on devrait évaluer l'incapacité en fonction des circonstances particulières en l'espèce. On note que l'on a eu recours à cette approche de l'incapacité dans des causes en Angleterre et aux États-Unis, ce qui fournit des exemples sur la manière dont on pourrait l'appliquer et le comprendre au Canada. Une définition circonstancielle de l'incapacité permettrait de conférer une reconnaissance juridique aux défis propres aux femmes souffrant de handicap mental dans un contexte de violence sexuelle, sans pour autant les empêcher d'avoir des rapports sexuels licites dans d'autres circonstances.

* Associate Professor, Faculty of Law, University of British Columbia and Professor, Faculty of Law, University of British Columbia. The authors would like to thank Larissa Bazoian for her diligent research assistance on this paper. This research was supported in part through a grant from the Social Sciences and Humanities Research Council of Canada.

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A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law

JANINE BENEDET & ISABEL GRANT

I. INTRODUCTION

In criminal trials, convictions for sexual assault are often dependent on the testimony of the female complainant; in many cases, she is the only lay witness. Where sexual activity is acknowledged but consent is disputed, the complainant's evidence is usually necessary to prove non-consent. Where the complainant has an intellectual, cognitive or developmental disability, the challenges of proving non-consent are magnified. This group of women, whom we refer to as women with mental disabilities,¹ experiences rates of sexual assault even higher than women generally. For this reason, it is especially important that women with mental disabilities have access to justice in a substantive sense.²

We have written elsewhere of the challenges of applying the traditional doctrines of consent and honest belief in consent in some of these sexual assault cases and have argued that incapacity to consent needs to be

1 Although this term is problematic in its lack of precision, we use it as a general descriptor in part because it is the term used in s 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11.

2 See e.g. Sandra L Martin et al, "Physical and Sexual Assault of Women with Disabilities" (2006) 12 *Violence against Women* 823. The authors demonstrate, relying on data from the year 2000, that the incidence of sexual assault against women with intellectual disabilities is three times that for women without disabilities. It is difficult to find more current statistics on the incidence of sexual assault against women with mental disabilities because most of the more recent work refers back to some of the original studies done in the 1990s, and some studies do not distinguish between physical and mental disability or sexual assault and other forms of violence. For some of the earlier work, see generally Rocher Institute, *No More Victims: A Manual to Guide Counselors and Social Workers In Addressing the Sexual Abuse of People with a Mental Handicap* (North York: Rocher Institute, 1992); Rocher Institute, *Harm's Way: The Many Faces of Violence and Abuse Against Persons with Disabilities* (North York: Rocher Institute, 1995); Dick Sobsey, *Violence and Abuse in the Lives of People With Disabilities: The End of Silent Acceptance?* (Baltimore: Paul H Brookes, 1994); Dena Hassouneh-Phillips & Mary Ann Curry, "Abuse of Women with Disabilities: State of the Science" (2002) 45 *Rehabilitation Counseling Bulletin* 96.

reconceptualized.³ In this article, we consider in more detail whether reframing the doctrine of incapacity to consent in Canadian criminal law might be a useful development for some cases where women with mental disabilities complain of sexual assault. Particular attention will be directed to how that doctrine has been applied in recent decisions in England and the United States. While there is a considerable body of literature analyzing the meaning of non-consent in the law of sexual assault, comparatively little consideration has been given to the threshold for incapacity to consent. We examine how incapacity might be defined more consistently with women's equality and with the recent legal developments in the understanding of non-consent more generally.

Furthermore, we argue that incapacity to consent is invoked infrequently by prosecutors in Canadian courts in part because it is understood as a fixed status that disqualifies women from any consensual sexual activity. We suggest instead that incapacity can and should be defined situationally—in a functional manner that maximizes women's sexual self-determination while still recognizing when they are exploited in situations of power imbalance. Disability rights advocates have supported this approach to incapacity in other contexts.⁴

Finally, we consider the difficult question of whether expanding the use of incapacity is truly necessary, or whether it merely masks deficiencies in our understanding of the existing categories of non-consent and abuse of trust or authority. We conclude that a doctrine of situational incapacity could be useful in some cases by recognizing the exploitative context that exists in many sexual assault cases involving women with mental disabilities. We caution, however, that where there is no evidence that the complainant consented, these cases should be decided on the basis of non-consent before resorting to a doctrine that puts even partial limits on a woman's right to make decisions about sexual activity.

II. STATUTORY PROVISIONS ON INCAPACITY TO CONSENT

The sexual offence provisions of the *Criminal Code* (*Code*) remained largely unchanged from 1892 until the major reforms of the 1980s and 1990s. During this time, the *Code* contained an offence, less serious than rape, of unlawful carnal knowledge with “any female idiot or imbecile”⁵ later expanded to include women who were “feeble-minded”⁶ or “deaf and dumb.”⁷ The offence was premised on the incapacity of these

3 Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief” (2007) 52:2 McGill LJ 243 [Benedet & Grant, “Consent, Capacity and Mistaken Belief”]; Janine Benedet & Isabel Grant, “Sexual Assault of Women with Mental Disabilities: A Canadian Perspective” in Claire McGlynn & Vanessa Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (London: Routledge, 2010) 322.

4 *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* by Michael Bach & Lana Kerzner (Toronto: Law Reform Commission of Ontario, 2010) [Bach & Kerzner]; *Mentally Disabled Adults: Legal Arrangements for Managing their Welfare and Finances* (Scottish Law Commission, 1991) at 179.

5 *The Criminal Code*, SC 1892, c 29, s 189.

6 *An Act to amend the Criminal Code*, SC 1922, c 16, s 10(2).

7 *Criminal Code*, RSC 1906, c 146, s 219.

categories of women to engage in lawful sexual activity. Because non-consent was defined legally in terms of a victim's resistance, the carnal knowledge offence was notionally designed to account for the failure of women with mental disabilities to offer resistance to sexual advances. The assumption that these women would not resist was partly rooted in the stereotype that they were sexually indiscriminate and subject to base instincts. Moreover, women with disabilities were assumed to be unsuitable for procreation, which bolstered the conclusion that they ought not to engage in sexual activity.⁸ Nonetheless, the offence does not appear to have often been successfully prosecuted and any protection it might have offered was largely illusory.⁹

In the major 1982 amendments to the sexual offences in the *Code*, the old offences of rape and indecent assault were replaced with the gender-neutral offence of sexual assault, which requires proof of the application of force (any physical contact) in circumstances of a sexual nature and a lack of consent. The "carnal knowledge of the feeble-minded" offence was repealed.¹⁰ One of the major purposes of these changes was to create a single offence of sexual assault for all victims and for all non-consensual sexual acts, rather than have the patchwork of offences that were contained in the prior *Code*.

One of the problems with the new scheme, however, was that consent was not defined in the statute. Courts were left to interpret the meaning of consent and to identify the situations in which it might be vitiated. Further reforms in 1992 added a definition of consent as the voluntary agreement of the complainant to engage in the sexual activity in question, as well as a non-exhaustive list of factors that are deemed not to equal consent.¹¹ Included in these factors is the provision that "No consent is obtained ... where the complainant is incapable of consenting to the activity."¹² Incapacity, however, is not defined in the statute, and so its definition is once again left to judicial interpretation. Courts have considered this provision in a variety of contexts including incapacity from intoxication, unconsciousness and disability.¹³

8 Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1990-1975* (Toronto: Irwin Law for The Osgoode Society, 2008) at 157-60. See also *Muir v Alberta* (1996), 179 AR 321, 132 DLR (4th) 695; Winifred Kempton & Emily Kahn, "Sexuality and People with Intellectual Disabilities: A Historical Perspective" (1991) 9 *Sexuality and Disability* 93 at 96 [Kempton & Kahn].

9 Despite the fact that the offence makes no mention of consent, some cases seem to have permitted the accused to raise consent as a defence, perhaps because of the reference to "unlawful" carnal knowledge. See Marc E Schiffer, "Sex and the Single Defective" (1976) 34 *UT Fac L Rev* 143 which is useful not only for its collection of the case law under the former section 148, but also for revealing the discriminatory attitudes to women with mental disabilities that were current at the time of its drafting. For example, the article is replete with terms like "abnormal" and "defective," including in the title, which appears to be a flippant reference to Helen Gurley Brown, *Sex and the Single Girl*, (New York: Pocket Books, 1963).

10 *Criminal Code*, SC 1982, c 125.

11 *An Act to amend the Criminal Code (sexual assault)*, SC 1992, c 38, s 273.1(2)(b).

12 *Ibid.*

13 See Janine Benedet, "The Sexual Assault of Intoxicated Women" (2010) 22:2 *CJWL* 153; Janine Benedet & Isabel Grant, "R. v. A.(J.): Confusing Unconsciousness with Autonomy" (2010) 74 *CR* (6th) 80; Elizabeth Sheehy "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" in Elizabeth Sheehy, ed, *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2011).

These changes to the *Code* in the 1980s and 1990s occurred at a time when advocates for persons with mental disabilities were arguing that all adults ought to be able to develop their sexuality and to experience sexual relationships with others. These advocates argued that persons with mental disabilities ought not to be presumptively excluded from sexual activity as a matter of basic human rights. This led to the development of sexual health education and training for persons with mental disabilities, particularly those who were living in institutions or group homes.¹⁴

Michelle McCarthy has argued that little of the early sexual health education developed for persons with mental disabilities paid much attention to gender inequality or the effects of that inequality on sexual norms.¹⁵ In some settings, this may have led to an emphasis on sexual autonomy as an end in itself, rather than a sexual self-determination premised on freedom from sexual violence and abuse and on the equality of men and women.

Increasing attention to the sexual abuse of persons with disabilities, especially by caregivers, prompted disability rights activists to lobby for a specific offence for sexual assaults against persons with disabilities to be restored to the *Code*. This led Parliament, in 1998, to add the offence of sexual exploitation of a person with a disability in section 153.1.¹⁶ As we have discussed at some length in previous work, this offence failed to add anything helpful to the *Code*. The terms of the provision require proof of both sexual activity with a person in a position of authority or trust or a relationship of dependency, and proof of non-consent. The offence is more difficult to prove than the general sexual assault offence, and it carries a lower maximum penalty.¹⁷ As a result, the offence is rarely prosecuted on its own.

The addition of the non-consent element to this new offence suggests that Parliament was reluctant to declare any class of sexual relationships for persons with disabilities to be presumptively prohibited.¹⁸ The emphasis on the sexual autonomy of persons with disabilities is also reflected in the fact that in recent years, the Crown

14 Kempton & Kahn, *supra* note 8 at 101-02.

15 Michelle McCarthy, *Sexuality and Women with Learning Disabilities* (London: Jessica Kingsley Publishers, 1999) at 178. But see Kempton & Kahn, *supra* note 8 at 100 (in an otherwise thoughtful and detailed review of the history of social treatment of the sexuality of persons with mental disabilities, Kempton and Kahn assert uncritically that the widespread availability of pornography has been useful as a sex education tool, without noting the obvious problems with modeling sexual behaviour on presentations of women that can be degrading and dehumanizing).

16 *Criminal Code*, RSC 1985, c C-46, s 153.1, as amended by SC 1998, c 9, s 2.

17 See e.g. *R v Kiared*, 2008 ABQB, [2009] AWLD 749, 2008 CarswellAlta 2074, where the accused was convicted of sexual assault but acquitted of sexual exploitation of a person with a disability because the Crown failed to prove that he was in a position of authority. The accused was the complainant's adapted bus driver but he had only driven her on one occasion before he came to her apartment and sexually assaulted her. See also Benedet & Grant, "Consent, Capacity and Mistaken Belief," *supra* note 3 at 248-50.

18 Of course, the offence ostensibly applies to victims with physical disabilities as well as those with mental disabilities. In the former case, whether such individuals ought to be able to consent to persons in authority raises different considerations from cases where the victim has a mental disability.

has rarely raised the argument that the complainant is incapable of consenting to sexual activity because of mental disability. The remainder of this article considers whether the doctrine of incapacity could be usefully expanded, in light of some of the deficiencies of the non-consent standard for this group of complainants.

III. THE LIMITATIONS OF NON-CONSENT FOR WOMEN WITH MENTAL DISABILITIES

Canadian sexual assault law has expanded the definition of non-consent from physical resistance to verbal resistance (“no means no”), and then to subjectively unwanted sexual activity.¹⁹ The *Code* defines consent as “the voluntary agreement of the complainant to engage in the sexual activity in question.”²⁰ The *Code* does not, however, define non-consent, which is what the Crown has to prove as part of the *actus reus*. The Supreme Court of Canada has confirmed that non-consent is the absence of voluntary agreement, measured according to the subjective state of mind of the complainant. The Crown must prove that the complainant did not, in her own mind, want the sexual activity to take place in order to prove the element of non-consent.²¹

While non-consent is subjective, the credibility of the complainant’s claim as to her subjective state of mind will be measured against her words and actions at the time the alleged assault took place.²² Even though appellate courts have confirmed that silence and passivity are not to be equated with consent,²³ and that a total lack of participation is more consistent with non-consent than consent,²⁴ there is still ample room for problematic assumptions about what non-consent is supposed to look like as part of this credibility assessment. Ambiguous, compliant or acquiescent behaviour, or a lack of verbal objection may be relied on to raise a reasonable doubt as to the veracity of the complainant’s assertion of non-consent.

For example, in *R v Prince*,²⁵ the complainant had a mental disability and was said to function intellectually at the age of a 6 to 8-year-old, despite living on her own.²⁶ The accused lived in the same apartment building and they had casual conversations in the past. Under the guise of using her phone, he entered her apartment and kissed her. On another occasion he came into her apartment and, after kissing her, led her into the bedroom and had sex with her. While it was not clear

19 See *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193 [*Ewanchuk*]; *R v Letendre* (1991), 5 CR (4th) 159, 1991 CarswellBC 421 (BCSC); *R v M(ML)*, [1994] 2 SCR 3, 166 NR 241 [*M(ML)*].

20 *Supra* note 16, s 253.1(2).

21 *Ewanchuk*, *supra* note 19 at para 26-27.

22 *Ibid* at para 29.

23 *M(ML)*, *supra* note 19 at para 2.

24 *R v Cornejo* (2003), 68 OR (3d) 117, 181 CCC (3d) 206 (ONCA) at paras 15-16.

25 (2008) 232 Man R (2d) 281, 2008 CarswellMan 479 (MBQB) [*Prince*].

26 We are generally skeptical of the practice of reducing a woman’s abilities to a “mental age.” This tends to infantilize her and diminish her credibility without appearing to offer any real additional protection. Here the complainant lived independently, which is clearly beyond the abilities of a 7-year-old. We repeat the mental age here because it is the information provided in the case as to her disability.

that she explicitly said “no”, there was no evidence that she communicated consent. Her testimony had some inconsistencies, but she remained adamant that she did not want the sexual activity to take place.

The trial judge rejected the Crown’s argument that the complainant was incapable of consenting to sexual activity and then held that the Crown had failed to prove non-consent.²⁷ This latter finding was effectively dependent on the conclusion that the complainant’s behaviour cast doubt on the credibility of her claim of non-consent.²⁸ In our view, the court should have focused on the accused’s behaviour in considering the credibility of the complainant’s testimony. The accused admitted to police that he was just “using her”²⁹ and even that she may have said no.³⁰ The trial judge characterized this case as a woman who regretted her decision, not a sexual assault. She found a reasonable doubt about consent, despite the clear statement from *Ewanchuk* that compliance and passivity do not constitute implied consent.³¹

The recurring assumption by some courts that acquiescence is consent can pose particular problems for women with mental disabilities who may exhibit compliant behaviour and who may in fact be rewarded for that behaviour in other settings.³² If the complainant testifies that she was not consenting, this testimony may not be believed because her behaviour is seen as inconsistent with that claim.

It is not possible to generalize across all women with mental disabilities as to how disability might affect non-consent. Therefore, it is important to stress that the concerns we raise may or may not be present in different ways for different women. It is also important to emphasize that in many of the cases that we have reviewed, women with mental disabilities who are sexually assaulted show remarkable strength and initiative by trying to reject unwanted sexual activity, protecting themselves from further harm and reporting those assaults to people they believe can help them.³³

Nonetheless, there are concerns with the standard application of non-consent to this group of women. Simply put, the focus on the state of mind of the complainant may be difficult to apply to some women with mental disabilities who may not be able to recall, describe or assess their state of mind at the time of the sexual assault. This is particularly true for women who may not realize that they have the right to refuse sexual advances.³⁴

27 *Prince*, *supra* note 25 at paras 59-60.

28 *Ibid* at para 60.

29 *Ibid* at para 38.

30 *Ibid* at para 41.

31 *Ewanchuk*, *supra* note 19 at para 31.

32 David N Weisstub & Julio Arboleda-Flórez, “Ethical Research with the Developmentally Disabled” (1997) 42 *Canadian Journal of Psychiatry* 492 at 494-95.

33 See e.g. *R v Harper*, 2002YKSC 18, 2002 CarswellYukon 46; *R v Parsons* (1999), 170 Nfld & PEIR 319, 522 APR 319 (NLSCTD).

34 Marita P McCabe, Robert A Cummins & Shelley B Reid, “An Empirical Study of the Sexual Abuse of People with Intellectual Disability” (1994) 12 *Sexuality and Disability* 297 (“[p]erhaps the most disturbing finding of the study was that 36 percent of the people with an intellectual disability believed that someone other than themselves made the decision on what sexual experiences they would have” at 302).

More broadly, there is a clear concern among disability rights advocates that some people with mental disabilities may consider acquiescence in sexual demands to be the cost of social inclusion. This may include agreeing to sexual activity in the belief that the man will be their boyfriend or will take them on a “date” if they comply. This was the pattern in the highly publicized Glen Ridge rape trial in New Jersey, in which a young woman who was constantly rejected, taunted and humiliated by a group of young men was allowed to tag along with them to a basement. Once in the basement, she was pressured to engage in escalating and degrading sexual activity.³⁵ After the young woman left the basement, she spent half an hour waiting at the park for one of the young men to arrive for their promised “date.”³⁶

Stephen Greenspan has argued that vulnerability to social and physical risks ought to be used as the measure of when an adult is considered intellectually disabled, rather than an IQ assessment:

A more naturally grounded definition of [intellectual disability] in adulthood would, thus, read something like this: “the term [intellectual disability] refers to a disabling condition that makes one vulnerable to physical and social risk as a result mainly of inability to recognize and understand such risks. Adult services, protections, and supports of an ongoing nature are needed in order to minimize the realization and consequences of these social and physical risks.”³⁷

We would add that it is important to recognize that the risk in the case of sexual assault has a source, namely the perpetrator, who is responsible for creating the risk and who ought to be held accountable. Otherwise, as Sherene Razack has noted, we find ourselves in the tautological situation of concluding that women with disabilities are vulnerable because they are vulnerable.³⁸

Greenspan’s suggestion, however, is useful in its focus not on abstract measures of intellectual ability but instead on the inability to avoid harm. We are skeptical of the reliance on “intellectual ages” for women with mental disabilities because it both infantilizes them and is an unhelpful measure in this context. It is impossible to relate one’s inability to read novels or do fractions to one’s expected responses to sexual pressure or manipulation. It makes more sense to focus on the tendency of people with mental abilities to acquiesce to potentially harmful activities and on the actions of perpetrators that are designed to exploit that tendency.

35 See Bernard Lefkowitz, *Our Guys: The Glen Ridge Rape and the Secret Life of the Perfect Suburb* (New York: Vintage Books, 1998).

36 *Ibid* at 20-25.

37 Stephen H Greenspan, “Foolish Action in Adults with Intellectual Disabilities: The Forgotten Problem of Risk Unawareness” (2008) 36 *International Review of Research in Mental Retardation* 147 at 187.

38 Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 138.

Situations that are potentially sexually exploitative of women with mental disabilities take a number of forms in addition to the examples given above. Women with mental disabilities may be induced to engage in sexual activity through the promise of small monetary rewards or other items.³⁹ This scenario presents difficulties for prosecution because the provision of payment is not generally understood to vitiate consent. Yet, the perpetrator may be well aware of the complainant's disability and the offer of payment may be designed to exploit it. We have encountered cases in which the accused has offered drugs or alcohol, small sums of money, or a chance to see pet rabbits or garden vegetables.⁴⁰ In many of these cases the Crown is able to lead evidence of non-consent, but we note that it is clear in these cases that the accused is attempting to use inducements to help secure compliance from the complainant.

Women with mental disabilities may agree to engage in sexual activity because they are worried about the consequences of refusing, even if the accused has not made any explicit *quid pro quo*. Is the woman who agrees to engage in sexual activity with her bus driver, because she is afraid of losing access to adapted bus services if she declines, really voluntarily consenting to sexual activity?⁴¹ In a context in which women with disabilities are also sometimes disciplined by their caregivers for engaging in any sexual activity, how can we tell?⁴²

Cases where there is some evidence of "agreement" on the part of the complainant do not fit well into the standard understanding of non-consent in Canadian criminal law. The complainant may understand that she is engaging in sexual activity, and may even say "yes," but the sexual activity occurs in conditions of a serious imbalance of power in terms of mental ability and gender. These cases in particular lead us to re-examine the meaning of incapacity to consent.

IV. RECONSIDERING THE MEANING OF INCAPACITY TO CONSENT TO SEX

A. The Current Canadian Approach: Capacity as an All-or-Nothing Construct

Despite gains in the area of consent for women generally, women with mental disabilities still face overwhelming hurdles in having their stories of sexual assault heard and their claims of non-consent believed. We remain troubled by the gap between what the courts recognize as sexual assault and the kind of abusive or exploitative sexual experiences reported by women with mental disabilities.⁴³

39 UK, HC, "Protecting the Public: Strengthening Protection against Sexual Offenders and Reforming the Law of Sexual Offences," Cm 5668 in *Sessional Papers* (2002) 1 at 27.

40 See *State v Dighera*, 617 SW (2d) 524 (MO App Ct 1981); *R v RR* (2001), 159 CCC (3d) 11, 151 OAC 1 (ONCA) [RR].

41 See *R c Gagnon*, 2000 CanLII 14683 (QCCQ) [*Gagnon*].

42 See *R v Hundle*, 2002 ABQB 1084, 10 CR (6th) 37, 2002 CarswellAlta 1593 [*Hundle*].

43 We suspect that many of the cases of the kind described above are never prosecuted at all. The hurdles are substantial: the victim has to disclose the assault; she has to be taken seriously by the person to whom she discloses; it has to be understood as a criminal matter rather than a matter for counseling or institutional management; and the crown has to be convinced that the prospect of conviction is sufficient to merit prosecution.

Canadian criminal law fails to deal adequately with cases in which the woman's cognitive or intellectual challenges are exploited by a man who targets such a woman because of his discriminatory belief that she is sexually deprived, compliant, or eager to please. *Ewanchuk's* focus on what is going on in the complainant's mind, while positive for many women, may take the focus off exploitative circumstances existing at the time of the sexual assault. Can these cases be recognized as abuse without disqualifying the complainant from all sexual activity on the ground that she is incapable of consent?

In Canada, section 273.1(2)(b), added to the *Code* in 1992,⁴⁴ provides that no consent is obtained where "the complainant is incapable of consenting to the activity." Incapacity in this context includes unconsciousness, intoxication and mental disability. There are not many Canadian cases on incapacity to consent to sexual activity in the context of mental disability. Canadian courts tend to apply a low threshold for capacity and restrict cases of incapacity to those where the complainant has no appreciation of the activity in question.⁴⁵

Capacity to consent to sexual activity has thus far been understood as an all-or-nothing phenomenon in Canada. Either a woman is capable of consenting to sex with anyone at any time or she is never capable of consenting to sex with anyone. Incapacity tends to be relied upon in Canadian cases where the complainant has severe disabilities and the lack of capacity is not challenged by the defence, for example, where the complainant has advanced dementia⁴⁶ or no awareness of even the mechanics of sexual activity, let alone its social implications.⁴⁷ In such cases, the issue at trial is typically whether the sexual activity took place at all. Confining incapacity to rare cases may be a kind of recognition, however oblique, that women's sexual autonomy ought to be recognized.

This limited use of incapacity means that it is not unusual for the crown to concede the complainant's capacity to consent, even where her "mental age" is fixed by experts at a point below the statutory age of consent.⁴⁸ For example, in *R v Brown*,⁴⁹ the 18-year-old complainant was described as having the intellectual ability of an 8 or 9-year-old. The trial judge noted the agreement of the Crown and the defence that she was capable of consenting to sexual activity.⁵⁰ While we reject attempts to compare women with mental disabilities to children by using crude

44 *Criminal Code*, RSC 1985, c C-46, s 273.1(2)(b) as amended by *An Act to amend the Criminal Code (sexual assault)*, SC 1992, c 38, s 1.

45 But see *R v Aminian*, 1999 CanLII 4574 (ONCA) at para 5, [1999] OJ No 4240 (QL) (citing the trial judge, where the court seems to require an understanding of the sexual activity in question, its implications and the right to choose to engage or not to engage in it).

46 See *R v WL* (1994), 123 Nfld & PEIR 357, 382 APR 357 (Nfld Prov Ct (Youth Ct)) (assuming, with almost no discussion, that the complainant, a 59-year-old woman in the advanced stages of Alzheimer's disease, was incapable of consenting).

47 *R v Parrott*, 2001 SCC 3, [2001] 1 SCR 178. See also *R v McPherson*, 1999 CanLII 15134, [1999] BCJ No 518 (QL) (BCSC); *R c Duhamel*, 2002 CanLII 41275, [2002] JQ no 5070 (QL) (QCCA).

48 *Tackling Violent Crime Act*, SC 2008, c 6, ss 13, 54 (in 2008, the age was raised in most cases from 14 to 16).

49 *R v Brown*, [2003] OJ No 5341 (QL) at para 7 (Sup Ct).

50 See also *Hundle*, *supra* note 42 (complainant's mental age substantially under 16); *R v Duguay* (1990), 112 NBR (2d) 271, 11 WCB (2d) 282 (NBCA) (complainant had mental age of 11-year-old child).

assessments of mental age, it is notable that where mental age is measured, and that age is significantly below the age of consent, there is still no claim of incapacity.

The Crown may also be reluctant to raise incapacity because such an inquiry usually brings a complainant's credibility into question. Capacity inquiries typically examine the complainant's understanding of sex, including her sexual history, and may also delve into other private details of her life.⁵¹ The Crown may attempt to show that the complainant is child-like, unreliable or incapable of performing the most mundane tasks for herself, while the defence may respond with allegations that she is knowledgeable about sexual matters and is sexually active. Given the impact on the complainant's autonomy of a declaration of incapacity and the potential damage to the credibility of the Crown's central witness, raising incapacity is rarely the strategy of choice for the Crown.

B. American Approaches to Incapacity

In the United States, incapacity is invoked in cases involving complainants with mental disabilities more often than in Canada. American state penal codes typically contain a provision that makes it an offence to have sexual contact with a person who may be described as some variation of "mentally incapacitated." For example, the Maryland Code provides:

A person may not ... engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual.⁵²

The maximum penalty for this offence is 10 years imprisonment, lower than for the most serious category of sexual offence, which requires proof of force and/or non-consent.

The standard applied by courts to determine whether someone lacks the capacity to engage in sexual activity varies from state to state, but the approaches can be grouped into three categories. One state, New Jersey, requires only that the complainant understand the physical mechanics of sexual activity. A few others require that the complainant understand not only the physical dimensions of sexual activity, but also the moral and social dimensions. Most adopt a middle ground and

51 Where sexual history evidence is introduced by the Crown to show the complainant's limited understanding of sexual matters, it is not even subject to the balancing process normally applied to defence applications to admit such evidence, because section 276(2) of the *Code* only applies to evidence adduced by or on behalf of the accused.

52 Md Code Ann, Criminal Law, §3-307 (West, Westlaw through all chapters of the 2011 Reg Sess). Words such as "defective" and "helpless" are pejorative and unhelpful in this context.

try to determine if the complainant understands both the physical act and its possible consequences, such as pregnancy and sexually transmitted infections.⁵³

One of the risks of a broader approach to incapacity is that it tends to focus on the limitations of the complainant rather than on the exploitative behaviour of the accused. The result may be that once the complainant is found capable of consenting, the accused is acquitted even if there is evidence of force.⁵⁴ This is particularly likely where an offence specific to complainants with mental disabilities is created in which the element of non-consent is replaced by proof of mental incapacity.⁵⁵ As discussed in more detail below, we believe that the situational approach to incapacity can shift the focus from the limitations of the complainant to the factors creating the power imbalance between the complainant and the accused.

Overall, it appears that American courts are much more willing to find a complainant mentally incapacitated, and thus not capable of consenting to sexual activity, than are their Canadian counterparts. The label is frequently applied to persons who have some autonomy in the community, for example, those who have employment or attend special education classes at college.⁵⁶ On one level, this might be applauded as evidence of courts acting to protect vulnerable women from sexual violence. This is particularly true because in some of these cases it appears that courts focus not only on the woman's understanding of sexual matters in the abstract, but also whether she truly has the capacity to refuse the accused in the circumstances before the court. What is of concern, however, is that in many of these cases there is clear evidence of non-consent on the part of the complainant and little evidence of anything approaching affirmative or voluntary consent. In many cases, disability is only one factor, along with age, positions of trust or authority and threats or coercion, which could contribute to a finding of non-consent. Yet, because the "mentally incapacitated" offence removes non-consent as an element, this context is not acknowledged.

An example of this tendency is found in *People v Thompson*.⁵⁷ The complainant was an adult woman with Down syndrome who resided in a group home. It was the accused's first day of work as a caregiver. The complainant reported that the accused entered her room at 2:00 a.m. while she was "in a deep sleep"⁵⁸ and forcibly

53 Elizabeth J Reed, "Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity" (1997) 83 Va L Rev 779 at 813.

54 Susan Stefan, "Silencing the Different Voice: Competence, Feminist Theory and Law" (1993) 47 U Miami L Rev 763.

55 An analogy can be drawn to the application of age of consent laws in ways that erase evidence of force: see generally Michelle Oberman, "Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law" (1994) 85:1 J Crim L & Criminology 15; Michelle Oberman, "Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law" (2001) 50 DePaul L Rev 799.

56 See generally *State v Ash*, No A07-0761, 2008 WL 2965555 (Minn App Ct, Aug 5, 2008); *People v Mobley*, 72 Cal App (4th) 761, 85 Cal Rptr (2d) 474 (2000); *People v Beasley*, 314 Ill App (3d) 840, 732 NE (2d) 1122 (2000).

57 142 Cal App (4th) 1426, 48 Cal Rptr 3d 803 (2006) [*Thompson* cited to Cal App].

58 *Ibid* at 1429.

penetrated her vaginally and orally, ejaculating on to her bedcovers. He told her not to tell anyone; she reported the assault the next morning. The accused initially denied the contact but when confronted with DNA evidence, acknowledged that he entered the complainant's room while she was sleeping and claimed that he had digitally penetrated her and rubbed his penis on her vagina. He did not claim that the complainant did anything to invite or encourage this conduct. In fact, he acknowledged that he could not tell whether she was awake during the sexual activity and that she never said anything.

There was absolutely no evidence in either version of events to indicate the complainant's voluntary agreement. Indeed, the evidence pointed entirely in the opposite direction: the accused was in a position of trust by virtue of his employment and was a near stranger to the complainant. The accused also described the complainant as entirely passive and silent throughout, and possibly even asleep. Despite these uncontested facts, the state proceeded with a lesser charge of sexual activity where the other person is "incapable of giving legal consent," rather than a standard sexual assault offence.

The court reasoned that the prosecution did not proceed under the standard definition of unlawful sexual penetration, which requires proof of force and non-consent, because the complainant's detailed recall of events was hard to reconcile with her claim to have been in a "deep sleep" during the assault:

[R], who is trusting and docile, did not resist; instead, she dissociated—at trial, she was able to describe everything defendant did to her, yet she insisted that she had been "in a deep sleep." Thus, while the record leaves no doubt that she did not consent, there was some question as to whether defendant knew that she did not consent, and also as to whether he used force.⁵⁹

This reasoning is deeply problematic. The complainant's evidence was not inconsistent. Her description of what happened may be quite accurate to describe the experience of being woken from sound sleep by a sexual assault and freezing in a state of shock.

If the accused did not believe that the complainant was awake, he can, in no way, argue a belief in consent. Where the complainant does not consent, and the accused takes no steps to ascertain consent and can point to no affirmative indications of consent, proof of additional force should be unnecessary. Unfortunately, the definition of the offence in California requires, in addition to proof of non-consent, proof of force additional to what is inherent in the sexual act itself, although the force required is not great.⁶⁰ Nonetheless, proof of force can be substituted by proof

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Ibid.

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People v Mom, 80 Cal App (4th) 1217 at 1224-25, 96 Cal Rptr (2d) 172 (2000).

that the victim was asleep.⁶¹ There seems to be little doubt that, at a minimum, the complainant was asleep when the touching commenced. Surely the state should have made the effort to prove this as an alternate basis for conviction.

The prosecution's decision left the court with the argument that the complainant was incapable of consent. At the level of abstract principle, the court's description of capacity to consent is laudable. The court confirmed that the capacity to reject sexual activity is less complex than the capacity to give truly informed consent and that mere assent is not equivalent to consent. In addition, the court rejected the defence argument that finding the complainant lacked capacity in this case would mean that no one could ever lawfully engage in sexual activity with her.

At the outset of its reasons, the court noted: "Obviously, it is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people. Less obviously, however, in doing so, the state has restricted the ability of developmentally disabled people to have consensual sex."⁶² The court avoided this outcome by noting that:

We do not agree, however, that [R]'s incapacity to consent in this case necessarily debars her from all future consensual sexual activity. The relevant statutes require proof that the victim was "at the time incapable ... of giving legal consent" (Pen. Code, §§ 288a, subd. (g), 289, subd. (b), italics added.) "It is important to distinguish between a person's *general* ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation." (*State v. Ortega-Martinez* (1994) 124 Wn.2d 702, 716 [881 P.2d 231].)⁶³

The court noted that the accused's caregiving role created a situation of particular vulnerability that was relevant to the complainant's capacity to consent in this context.⁶⁴ This is no doubt true, but this was not even a case of compliance or purported agreement. Rather, this was a case in which the complainant was entirely unresponsive and uncommunicative prior to the sexual touching because she was asleep.

Rather than focus on the predatory and grossly unprofessional actions of the accused, the court's focus was then turned to the complainant's understanding of sexual matters and her sexual history, as part of the inquiry into her capacity. The court recited detailed evidence about the complainant's deficiencies in math, driving, using public transport, cooking and even remembering to wear underwear.

61 See Cal Penal Code §289 (West, Westlaw through Ch 5 of 2011 Reg Sess).

62 *Thompson*, *supra* note 57 at 1429.

63 *Ibid* at 1440.

64 See also *People v Whitten*, 269 Ill App (3d) 1037 at 1043, 647 NE (2d) 1062 (1995).

The complainant was examined in detail on her understanding of sexual matters and on a previous sexual relationship she had shared with a developmentally disabled man. This record was achieved through the testimony of her mother and others who were effectively encouraged to list every manifestation of the complainant's disabilities in order to protect her. This was demeaning to the complainant and should have been entirely unnecessary. We would hope that in Canada, where evidence of force is not required for conviction, a case like *Thompson* would be decided on the basis of non-consent and the demeaning inquiry into the complainant's abilities would not be undertaken.

If the concept of incapacity is to be expanded in Canada, it must not be in its present form, which precludes a woman labeled as incapable of consent from consenting to sex with anyone. However, we believe that a more situational understanding of capacity, as described in *Thompson*, might provide a means for dealing with some of the cases where there is clear exploitation of a woman's disability by the accused and thus no real possibility of meaningful consent. We would like to see a shift in focus in these cases towards the exploitative behaviour of the accused and away from the complainant's sexual history or her alleged deficiencies in driving or banking.

C. Learning from Two English Cases on Capacity to Consent

In 2005, the English Family Court took an all-or-nothing approach to the capacity of a woman with a mental disability to enter a marriage. In *Sheffield City Council v E and Another*,⁶⁵ the judge had to decide whether the capacity to marry was specific to the particular relationship in question. E was a 21-year-old woman with physical and mental disabilities who wanted to enter a marriage with S, a sex offender with a substantial history of sexually violent crimes. There was some suggestion that E was being abused by S, although the evidence was not clear on this point. The question before the court was whether the capacity to marry was an all-or-nothing phenomenon in the sense that either E could consent to enter into *any* marriage (or no marriage) or whether she had to have the capacity to understand the risks of this particular marriage. Munby J held that the central question was whether a person understood "the duties and responsibilities that normally attach to marriage."⁶⁶ He was concerned about denying persons with mental disabilities the chance to have their lives "immensely enriched by marriage"⁶⁷ and thus did not want to set the bar so high as to preclude the capacity to enter a marriage. He concluded that the capacity related to understanding the nature of marriage in general and was not specific to the particular relationship or to the history of violence in this case. If E did not have the capacity to marry S, she did not have the capacity to enter into any marriage. In other words:

65 (2004) EWHC 2808 (Fam), [2005] 2 WLR 953.

66 *Ibid* at para 68.

67 *Ibid* at para 144.

[T]he *nature of the contract of marriage* is necessarily something shared in common by all marriages. It is not something that differs as between different marriages or depending upon whether A marries B or C. The implications for A of choosing to marry B rather than C may be immense. B may be a loving pauper and C a wife-beating millionaire. But this has nothing to do with the nature of the contract of marriage into which A has chosen to enter. Whether A marries B or marries C, the contract is the same, its nature is the same, and its legal consequences are the same. The emotional, social, financial and other implications for A may be very different but the nature of the contract is precisely the same in both cases.⁶⁸

We would argue this is too narrow a view of capacity and one that ignores the important implications of “emotional, social, financial” and other circumstances of the particular relationship. The fact that S was a violent sex offender who may have been abusing E was entirely relevant to her capacity to enter this marriage. Nicola Barker and Marie Fox have written a hypothetical appellate judgment to develop a feminist approach to this case.⁶⁹ They stress that S’s violent background was essential to the capacity question. The question was whether E could understand the potential benefits and risks involved in a marriage to this particular individual, a decision that may have been more complex given his violent past. They assert that “[E had] to be capable of processing and understanding information about S’s sexually violent background, believing it and then evaluating and weighing the risks that would attach to marrying someone with a violent past.”⁷⁰ In addition, they go on to assert that:

Just as there are different types of medical treatment, there are varieties of marriage. Just as the level of risk involved in medical treatment depends on the type of treatment and who administers it, the level of risk within marriage depends on the spouses and other circumstances.⁷¹

To suggest, as Munby J had done, that if E did not have the capacity to marry S then she did not have the capacity to marry anyone, “is analogous to failing to distinguish between capacity to consent to the removal of a wart on her finger and to open-heart surgery in a medical context.”⁷²

68 *Ibid* at para 85 [emphasis in original].

69 Nicola Barker & Marie Fox, “*Sheffield City Council v E: Judgment*” in Rosemary Hunter, Clare McGlynn & Erika Rackley, eds, *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010) 351.

70 *Ibid* at 358.

71 *Ibid* at 355.

72 *Ibid* at 360.

In the sexual assault context, the all-or-nothing approach to capacity places all the focus on the complainant and none on the accused and his predatory behaviour. What bothers us about so many of these cases is the clear and purposeful exploitation by the defendant of the complainant where he is so obviously taking advantage of a position of power based on both sex and the victim's ability. That position of power may not be recognized as such by the law.⁷³ A more subtle capacity analysis that pays careful attention to context would allow such evidence of exploitation to be considered as part of the surrounding circumstances. Thus the focus is not just on the woman's abilities but also on the potentially exploitative context in which she exercises those abilities. For example, this means that a woman with a mental disability may be capable of giving consent to a man or woman with whom she has developed a friendship, but incapable of consenting to a paid caregiver in an institutional setting.

In 2009, in *R v C*,⁷⁴ the House of Lords recognized an approach to capacity that is situation and person-specific. In *C*, the complainant was a 28-year-old woman with the diagnosis of schizo-affective disorder and emotionally unstable personality disorder, and had an IQ of less than 75. The evidence indicated that the effects of schizo-affective disorder may come and go such that the complainant was not necessarily always experiencing symptoms of her condition.

The accused met the complainant in the parking lot outside a mental health resource centre. The complainant had previously been seen by a psychiatrist who was initiating compulsory hospital admission for her. She told the accused she had been in the hospital for 9 years and had just been released. She wanted to leave the area as she thought people were "after her."⁷⁵ The accused offered to help her and took her to his friend's house. He sold her phone and bicycle and gave her crack cocaine. She went into the bathroom and he entered the room asking her for a blow job. She testified she was panicking, saying to herself, "these crack heads they do worse to you."⁷⁶ She said she "did not want to die so she just stayed there and just took it all."⁷⁷ She then called emergency services and was found by the police running down the street screaming "they're going to kill me."⁷⁸ She was taken back to her hostel; the next day social workers found her distressed and withdrawn, lying in bed in a fetal position. She told them what had happened and they called the police. Her psychiatrist testified at trial that she would not have had the ability to consent to sexual contact at the time of the alleged offence.

73 See e.g. *Gagnon*, *supra* note 41 (the complainant had oral sex with her regular bus driver because he had allowed her to smoke on the bus on a number of occasions contrary to the rules, and she was afraid that she could be banned from the bus and unable to attend her educational programs. Thus, this bus driver exercised a significant amount of power over the complainant even though the court held that he was not in a position of authority in a legal sense).

74 [2009] UKHL 42, [2009] 1 WLR 1786 [C, cited to WLR].

75 *Ibid* at para 18.

76 *Ibid*.

77 *Ibid*.

78 *Ibid* at para 20.

The accused was charged under section 30(1) of the *Sexual Offences Act*,⁷⁹ which provides that:

- (1) A person (A) commits an offence if—
 - (a) he intentionally touches another person (B),
 - (b) the touching is sexual,
 - (c) B is unable to refuse because of or for a reason related to a mental disorder, and
 - (d) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse.

The complainant is unable to refuse if she “lacks the capacity to choose whether to agree to the touching (whether because [s]he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason)” or if she is unable to communicate the choice to the accused.⁸⁰

The accused was convicted at trial but the conviction was set aside by the Court of Appeal. The Court of Appeal held that capacity is an all-or-nothing measure—a woman either has the capacity to consent to sexual activity or she does not. It is not situation or person-specific. In other words, one is either capable of consenting to everyone, in any context, or to no one, ever.

The House of Lords, in reasons written by Baroness Hale, held that it was an error to conclude that capacity is not situation or person-specific:

[I]t is difficult to think of an activity which is more person and situation-specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention on Human Rights The object of the 2003 Act was to get away from the previous “status”-based approach which assumed that all “defectives” lacked capacity, and thus denied them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprived them of autonomy in other ways.⁸¹

79 *Sexual Offences Act 2003 (UK)*, c 42, s 30(1).

80 *Ibid*, s 30(2).

81 *C*, *supra* note 74 at para 27.

The House of Lords also described the potentially fluctuating nature of capacity, recognizing that a person may have sufficient understanding to consent on one day but not on another day because of variations in her mental state. On the facts of the present case:

The complainant here, even in her agitated and aroused state, might have been quite capable of deciding whether or not to have sexual intercourse with a person who had not put her in the vulnerable and terrifying situation in which she found herself The question is whether, in the state that she was in that day, she was capable of choosing whether to agree to the touching demanded of her by the defendant.⁸²

It is important to note that non-consent was not an element of the offence charged in *C*. Had the accused been charged with the standard offence of sexual assault, it is significant that there is no evidence in this case that the complainant gave consent to sexual activity. While we welcome this more nuanced analysis of capacity⁸³ and think that it has the potential to better recognize some of the power imbalances found in many cases of sexual assault against women with mental disabilities, we also believe that it is important and preferable to recognize non-consent where a woman is able to choose not to engage in sexual activity. It was clear on the facts of this case that, if the complainant's evidence was believed, she did not want the sexual activity to take place. Only if consent is falsely equated with compliance or submission does a consideration of capacity become necessary on these facts.

D. Applying the Situational Approach in the Canadian Context

What would a situational approach to incapacity look like? At the outset, we believe it is important to recognize that the threshold for the capacity to say “no” to sexual contact is lower than the threshold to say “yes.” A woman who may not understand fully the meaning of consenting to sexual activity in a particular context may nonetheless know that she does not want to be touched by this person in a sexual way. In other words, she may be capable of saying “no” but not capable of saying “yes” in a particular context. Thus it should be possible to conclude that a woman was incapable in a particular context of giving consent and yet did not consent to the sexual touching.⁸⁴

82 *Ibid* at para 26.

83 Scholarly comment on the decision has been favourable to this approach to incapacity. See e.g. Gerry Maher, “Rape and Other Things: Sexual Offences and People with Mental Disorder” (2010) 14 *Ed L Rev* 129 at 131; Dave Powell, “House of Lords: Sexual Offences and Mental Capacity” (2010) 74 *J Crim L* 104 at 106; Jonathan Herring, “Sex and Mental Disorder” (2010) 126 *Law Q Rev* 36 at 36. On the other hand, lower courts considering capacity assessments in adult protection cases have described these remarks in *C* as obiter and have continued to apply an all-or-nothing approach to capacity: *D Borough Council v AB* [2011] EWHC 101, [2011] 3 *All ER* 435 (Ct of Prot); *A Local Authority v H* [2012] EWHC 49, [2012] 1 *FCR* 590 (Ct of Prot).

84 *R v Jensen* (1996), 90 *OAC* 183, 47 *CR* (4th) 363.

Further, where there is no evidence that the complainant communicated through her words or actions a clear “yes” to the accused, the court should not consider incapacity and should find that the complainant in fact did not consent.

Yet an analysis based on incapacity may be important where the complainant appears to agree to sexual activity in circumstances where her disability is being exploited by the accused. An all-or-nothing approach to capacity means that where the complainant is found incapable, she is effectively unable to have any legal sex. On the other hand, if she is found capable, her disability may be treated as irrelevant to the analysis of non-consent. A situational approach to incapacity is consistent with how capacity is seen in other decision-making contexts:

[Mental] capacity is not considered from a global standpoint in that it is recognized that people may have abilities to make some types of decisions on their own and not others. For example, an individual may be able to understand medical information enough to decide to take a medicine for his/her cold, but not be able to understand information to decide whether to have a transplant. Additionally, an individual's level of decision-making ability may fluctuate over time. Someone who has dementia may have days when he/she is thinking particularly clearly and other days when he/she has a difficult time understanding even basic concepts.⁸⁵

Such an approach to decision-making maximizes the individual's decision-making ability. In the context of sexual activity, a situational approach recognizes that a woman should be able make decisions about her own sexuality when her disability is not being exploited by someone with whom there is a relative power imbalance.

A situational approach to capacity may enable prosecutors to bring cases to trial that would otherwise not have gone forward because the evidence suggested the possibility of consent or at least an absence of evidence of non-consent. We suspect that prosecutors have been reluctant to rely on incapacity, both because of its drastic consequences for women found incapable, but also because of the high threshold to establish incapacity in Canada. If a situational approach were used, it is possible that cases involving exploitation of a woman's disability, where there was apparent evidence of compliance, could still go to trial. The trial could proceed on the basis of incapacity without rendering the complainant incapable of consenting to sexual activity in other contexts. While this approach may result in an expansion of incapacity in some cases, it will also result in a narrowing of incapacity in others. In cases where women are currently being found incapable of consenting to any sexual activity, a more contextual approach will result in their capacity being limited only in the particular sexual encounter before the court and not more generally.

There are, however, potential problems with a situational capacity approach that the House of Lords did not address. It can be hard to distinguish between an assessment of the kinds of decisions that a woman can make and a judgment on the wisdom of those decisions. Other women are free to engage in sexual activity outside of long-term loving relationships and we must be cautious about denying the same freedom to women with mental disabilities. It is important to remember that capacity is about the ability to make a decision, not the ultimate decision reached.⁸⁶ A more contextual focus on capacity should not turn into a normative inquiry about whether we approve of a woman's sexual choices. The point of using such a doctrine is to recognize that some acts are so patently exploitative, because of the imbalance of power between the participants, that any apparent consent must be scrutinized carefully to assess whether the woman was capable of giving a meaningful consent while at the same time retaining her ability to consent in other more egalitarian contexts. Such an inquiry is not about whether a woman *should* have withheld consent in a particular situation.

However, while it may not be appropriate to protect women with mental disabilities from all "foolish" decisions, those involving potentially serious harm (including risk of pregnancy or sexually transmitted infection) may require less focus on autonomy and more on the freedom from coercion and abuse that are prerequisites to true autonomous decision-making.

In our view, incapacity should only be raised where there is some indication that the complainant said "yes" to sexual activity. It is only where there is evidence of apparent consent that the inquiry should be made into whether the complainant was capable of giving that consent. Where there is evidence of non-consent, that evidence should be looked at before considering capacity. This was the approach of the trial judge in *R v A(A)*,⁸⁷ who, on urging from the crown, told the jury that it did not have to consider capacity to consent if it found that there was no consent. Thus, where there is no evidence that a woman has said "yes" to sexual activity, a finding of non-consent should prevail and it should be unnecessary to examine her capacity to consent. It is only where there is evidence that the complainant did give positive indications that she wanted sexual activity to take place that incapacity might come into play.

This more nuanced approach to incapacity might be criticized as being too vague a standard on which to base criminal liability. An accused needs to be able to assess whether a complainant has the capacity to consent. However, all inquiries into consent are already context-specific and measured subjectively according to the complainant's state of mind. An accused will still have the potential argument

86 *Ibid* at 48 ("[t]he fact that an individual makes a decision that others perceive as foolish, socially deviant or risky does not indicate that the decision was incompetently made"). See also *Koch (Re)* (1997), 33 OR (3d) 485 at para 54, 1997 CarswellOnt 824 (ONCJ (Gen Div)) ("[t]he right to be foolish is an incident of living in a free and democratic society").

87 (2001), 144 OAC 382, 43 CR (5th) 272.

that he was mistaken about the complainant's capacity. If the accused believed, for example, that the complainant did not have a disability and that she consented, he will be able to raise a mistaken belief defence with respect to both the capacity to consent and to consent itself.⁸⁸ This argument has been accepted in cases where capacity is in issue because of the complainant's intoxication.⁸⁹

However, Canadian law requires the accused to take reasonable steps in the circumstances known to him to ascertain the presence of consent as part of the requirements for a mistake of fact claim. Where the complainant has a mental disability that is in any manner known to the accused, this ought to increase "exponentially" the steps that are required as "reasonable" in the circumstances.⁹⁰ An accused should not be able to argue mistaken belief in consent where he gave no thought whatsoever to the complainant's capacity to consent.⁹¹

To a limited extent, Canadian law already has a mechanism for recognizing that there may be certain situations that are so exploitative that consent is not possible. This question was recently considered in Ontario in *R v DT*,⁹² in which the complainant was a 33-year-old woman with significant physical as well as mental disabilities. She used a wheelchair and had hearing, vision and speech impairments. Her testimony was given through American Sign Language interpreters and she responded to questions through "hand gestures, head nods, facial expressions and audible sounds."⁹³ The accused was her 51-year-old "favorite" uncle who would come to her mother's house when the complainant was alone; there were a number of incidents of sexual activity over the years. She testified that she told him to stop the sexual activity on numerous occasions, that it hurt and that it made her crazy.

The defence took the position that the complainant and the accused were having a consensual affair. The complainant's mother testified that her daughter had completed a vocational high school program and that she was able to work stuffing envelopes twice a week. She testified that her daughter had been angry frequently over the past year, as demonstrated by her attacking her mother with her wheelchair. She estimated that her daughter functioned at about the level of a 16- or 17-year-old.

The trial judge in his reasons thought this estimate was too high, although he expressed concern that no expert witnesses had been called to shed light on the abilities of the complainant. The judge also expressed doubt that the complainant understood much of the sexual activity involved. He nonetheless found that non-consent had not been proven beyond a reasonable doubt because "[s]ome of the complainant's answers regarding whether she consented to the sexual activity on

88 *RR*, *supra* note 40.

89 *R v Millar*, (2008) 59 CR (6th) 39 (available on QL) (Ont Sup Ct).

90 *RR*, *supra* note 40 at para 57, *per* Abella JA (as she then was).

91 *Ibid* at para 59.

92 2011 ONCJ 213, 85 CR (6th) 195 [DT].

93 *Ibid* at para 1.

the date of the alleged offence and any sexual activity that occurred prior to that date are ambiguous.”⁹⁴

However, the trial judge went on to consider section 273.1(2)(c) which provides that there is no consent where “the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority,”⁹⁵ and section 265(3)(d) which provides that the exercise of authority can negate consent.⁹⁶ He gave a number of reasons for concluding the accused had abused a position of trust, including:

-the complainant was vulnerable (confined to a wheel chair because of the debilitating effects of cerebral palsy; vision, hearing and speech impaired since birth); the accused dominated and preyed on the complainant in that situation in order to use her solely for the purposes of appeasing his sexual appetite, with no other intention, on his own admission

-the accused described their sexual relationship as “their secret”; language that is eerily similar to that used [by] sexual predators and heard so often in trial courts.⁹⁷

The trial judge concluded that “the accused exploited an overwhelming inequality to his own advantage, abused a position of trust and authority to influence and manipulate the complainant, thereby vitiating any consent the complainant may have given.”⁹⁸ The abuse of this relationship was so exploitative, and the imbalance of power between the parties so great, that there could be no meaningful consent.

The approach of the trial judge is similar to our argument for a situational consideration of incapacity. Nevertheless, the fact that the trial judge could not enter a conviction on the basis of non-consent on these facts is troubling and shows our understanding of voluntary consent is still impoverished. It is also troubling that the summary conviction appeal court overturned the conviction in this case on the basis that the accused was not in a position of authority and that, while there may have been a position of trust, the trial judge failed to go on and consider whether that position of trust led the complainant to agree to the sexual activity.⁹⁹ Until we reach a point where we can recognize these exploitative situations as negating the possibility of voluntary consent, we suggest that a doctrine of situational capacity may be necessary to accomplish this result.

94 *Ibid* at para 41.

95 *Supra* note 16, s 273.1(c).

96 *Ibid*, s 265(3)(d).

97 *DT*, *supra* note 92 at para 47.

98 *Ibid* at para 48.

99 *R v DT*, 2012 ONSC 2166, [2012] OJ no 1720 (QL).

A recent British Columbia case demonstrates how a situational capacity analysis might have led to a conviction in a case involving a high degree of exploitation of a very vulnerable complainant. In *R v Alsadi*,¹⁰⁰ the complainant was a civilly committed patient in a hospital psychiatric ward and the accused a uniformed security guard in the hospital. The complainant had a severe psychiatric disability for almost 30 years and had been hospitalized more than 20 times. The accused was on duty at the time of the sexual encounter, and was aware that the complainant was a psychiatric patient.¹⁰¹ They met when the complainant was off the ward having a cigarette and he used his keys to access a locked room where they had oral sex. The crown conceded capacity to consent on the basis that the complainant had a boyfriend (thus assuming that capacity was an all-or-nothing assessment). The accused was acquitted because the trial judge found that the complainant had consented to the sexual activity, and that the accused was not in a position of authority over the complainant because he was on a routine patrol, did not have the authority to restrain the complainant at that time, and the whole encounter was over in 15 minutes.

In our view, a more nuanced analysis of capacity to consent might have led to the conclusion that the complainant's illness, combined with the profound imbalance of power between them, meant that the complainant lacked the capacity to give a meaningful voluntary consent to an on-duty security guard who used his access to the hospital to engage in sexual activity with her, regardless of whether she was capable of consenting to sex at other times with other people such as her boyfriend. Relevant factors would include the fact that the complainant was involuntarily detained and that the accused's job duties included dealing with unmanageable patients and contacting police if a committed patient left the hospital.

The BC Court of Appeal recently ordered a new trial in *Alsadi*, holding that the trial judge made a number of errors relating to whether the accused abused a position of trust or authority so as to vitiate consent pursuant to section 273.1(2)(c) of the *Code*.¹⁰² The Court of Appeal held that the fact that the accused could not have restrained the complainant, the lack of proof of coercion and the short duration of their encounter were not relevant to whether he abused a position of trust. Contrary to the trial judgment, the test is not whether the complainant misunderstood her right to refuse sexual contact; the question is whether the position of trust held by the accused should preclude the accused from engaging in sexual contact with the complainant given her vulnerability to exploitation. The court held that:

[O]n the evidence and the findings of the trial judge in this case, it would be open to the court to find that as a security guard, the respondent was in a position of trust, power or coercion. The evidence

100 (27 July 2011), Vancouver 213734-2-C (BC Prov Ct).

101 The accused was trained as a nurse but had lost his nursing job with a previous employer because of sexual contact with a visitor to the hospital.

102 *R v Alsadi*, 2012 BCCA 183, 2012 CarswellBC 1202 (BCCA).

also could support a finding that he incited or induced the complainant to participate in the sexual activity. If this were the case, the issue would be whether the respondent abused his position to obtain her participation.¹⁰³

The trial judge erred by failing to address these issues and, hence, a new trial was ordered.

The facts of these cases suggest contexts in which Canadian courts could make use of the doctrine of incapacity by applying a more nuanced approach that recognizes that the context in which sexual activity takes place, the person with whom the sex takes place, and his relative power over the complainant are all significant considerations in determining whether a woman with a mental disability is able to provide a meaningful consent. We are not suggesting a major shift away from non-consent towards incapacity. Rather, we would urge this approach to incapacity in cases where there is evidence of apparent compliance, but also evidence of clear exploitation of the complainant's disability and doubt about whether the complainant was able to exercise a meaningful choice about consenting.

V. CONCLUSION

In this article we have suggested that a more nuanced approach to incapacity might facilitate prosecution of some sexual assaults against women with mental disabilities that are at present under-prosecuted. We are not suggesting that incapacity become the mechanism of choice to prosecute all of these cases. Thus, it is worth repeating that evidence of non-consent should always be considered before any suggestion of incapacity is raised. Moreover, a finding that the complainant has the capacity to consent to sexual activity should not make her disability irrelevant. The disability should also form an important part of the context for assessing whether the complainant consented and/or whether the accused thought she was consenting.

We are concerned, however, by the number of cases in which we see clear exploitation of a woman's mental disability in the context of sexual activity. Our law of non-consent should be able to deal with these situations, but our reading of the cases suggests that the *Ewanchuk* focus on what was going on in the complainant's mind may obscure clear evidence of exploitation and abuse of power. We want such evidence recognized, whether through a doctrine of non-consent or a more situational approach to incapacity. This could be accomplished through an explicit amendment to section 273.1(2)(b), which would state that no consent exists where, considering all the circumstances, the complainant is incapable of consenting to the sexual activity in question with the accused at the time the sexual activity takes place. We do not think that such an amendment is required, however, and are of the

view that incapacity, like consent generally, should simply be treated by the courts as a time, place and person-specific inquiry. We want to utilize incapacity as one more tool where the doctrine of non-consent fails to recognize the kinds of ways in which apparent consent can be tricked and coerced. A situational approach to incapacity should shift the focus from the complainant's limitations to the circumstances in which the sexual contact took place, the imbalance of power between the accused and the complainant and any exploitative behaviour on the part of the accused.

We recognize that this has dangers, including the risk that we would be imposing normative judgments on the sexual choices made by women with disabilities. Further, we do not support opening the door to inquiries about a woman's sexual history—evidence that can be extremely destructive to the complainant¹⁰⁴ and perpetuate stereotypes that women with mental disabilities are sexually indiscriminate. Nonetheless, so long as the doctrine of incapacity to consent exists, we believe that it ought to be interpreted and applied in a manner consistent with the sex equality of women with mental disabilities and in a way that promotes access to justice for this group of complainants. The alternative is that these women who come forward will not see their cases prosecuted at all.

104 *Thompson, supra* note 57. In fact, we would argue that a situational approach to incapacity should reduce the focus on sexual history evidence because it shifts the focus from whether the complainant can consent to sex with anyone to the specific circumstances of the sexual activity in question. Thus, the fact that she has consented to sex with others in the past becomes even less relevant to whether, in these particular circumstances, she was able to consent.