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Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities

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Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities

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Abstract The sexual assault of persons with mental disabilities (also described as cognitive, intellectual and developmental disabilities) occurs at alarmingly high rates worldwide. These assaults are a form of gender-based violence intersecting with discrimination based on disability. Our research on the treatment of such cases in the Canadian criminal justice system demonstrates the systemic barriers these victims face at the level of both substantive legal doctrine and trial procedure. Relying on feminist legal theory and disability theory, we argue in this paper that abuses of trust and power underlie most sexual assaults of women with mental disabilities. We argue that existing Criminal Code provisions in Canada are inadequate to address this type of exploitation because courts have consistently failed to recognize that such abuses of power and trust are fundamentally inconsistent with any notion of voluntary consent.

Keywords Sexual assault · Violence against women · Mental disability

Introduction

The sexual assaults of women with mental disabilities do not always fit neatly into the criminal justice system's limited idea of what a sexual assault is supposed to look like: an articulate, active female subject making clear to the accused by words or conduct her aversion to sexual activity. Instead, women with mental disabilities may feel powerless to reject the sexual demands of their caregivers, or be unaware that they can say no to someone who expects and enforces compliance in other contexts. They may comply with demands for sexual activity without understanding

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what sexual acts are to be engaged in. They may be induced by offers of compensation, companionship or simply social acceptance. We are not suggesting that these factors never play a part in sexual assault of women who are not labelled with a mental disability but rather that they are especially prevalent for these socially marginalized complainants, who are significantly more likely to be sexually assaulted than other women (Benedet and Grant 2012, 6; Martin et al. 2006, 829; Brownridge 2006, 812).

Our previous work in this area has considered the role that the criminal law and criminal trial process plays in addressing sexual violence against these women. The role of the law and the legal system is important because the failure to provide an effective response to such assaults has the potential to reify the status of women with mental disabilities as targets for abuse. Our research has explored many specific legal issues, both substantive and procedural/evidentiary, that pose problems or concerns for women with mental disabilities who complain of sexual assault (2007a, b, 2010, 2012, 2013a, b).

In this article, we bring these concerns together to examine them against the broad themes that have emerged from our research. We focus in particular on the ways, both overt and subtle, that male power and authority is deployed in this context, and consider how to evaluate the exploitative influence of such power in a legal framework predicated on individual consent to sexual activity. The power that is being exercised is typically both male power in a patriarchal society but also the power that comes from being considered mentally "typical" and thus not labelled as mentally disabled, in a society that is ableist. These sources of systemic power may be augmented by the power that comes from occupying a position of trust or authority, formally or informally, in the lives of women with mental disabilities.

We begin this article by examining insights from feminist theory and disability theory and what they tell us about this type of sexual violence. We then briefly review some of the barriers faced by sexual assault complainants with mental disabilities in the areas of consent and capacity. Our earlier work has led us to believe that, particularly when dealing with consent and capacity, the concept of power, or the relative lack thereof, is a key factor in much of the sexual violence against this group of women. We move on to examine in more detail the interaction between relationships of trust, power and authority and the formation of voluntary consent.

While the Canadian Criminal Code has several specific provisions dealing with such relationships, their interpretation by courts has thus far largely failed to recognize the subtle ways in which power operates and how relationships of inequality can be exploited. We will argue that the existing Criminal Code provisions, and the judicial interpretation of them, reveal two significant problems. First, where a woman does not actively resist sexual activity, courts tend to find that consent existed and only then examine whether there was an abuse of trust, power or authority that could negate that consent, rather than recognizing that there can be no real consent where such an abuse exists. Second, we argue that too much responsibility is put on the Crown, through the testimony of the complainant, to establish that it was her vulnerability and powerlessness that led to any apparent agreement to engage in sexual activity. We argue that it is unrealistic to expect

someone who is the victim of an abuse of trust, power or authority to establish its causal role on her behaviour and that, in many cases, a sufficient causal connection should be inferred from the nature of the relationship and circumstances surrounding the abuse of trust, power or authority.

Definitions

Before turning to these topics, some definitional clarity is required. We have chosen to use the term "mental disability" in our work despite the recognition that this term is not used as a descriptor of choice by the individuals and groups working with the population of women whose cases we consider. There are two reasons for this. First, we sought an umbrella term that could describe, in a shorthand way, women whose disabilities affect cognition, perception, intellectual ability or decision-making, but who are otherwise a heterogeneous group. The terms "developmental disability" and "intellectual disability" are more commonly used, but describe only a subset of the women whose experiences of sexual violence are at issue in our work. In England "learning disability" seems to be used interchangeably with these terms, while in North America that label tends to refer to individuals with specific academic challenges, such as dyslexia (McCarthy 1999). Some of the cases we consider involve women whose mental disability is the result of a psychiatric or mental illness, although not all mental health diagnoses would produce the kinds of disabilities that are relevant to this project. In addition, old terms like "mental retardation" still appear in the cases, as do colloquial references like "mentally challenged", "mentally handicapped" and "special needs".

Second, the term mental disability seemed an apt choice because it is the term used in s. 15(1) of the Canadian Charter of Rights and Freedoms, which guarantees the right to equality without discrimination on the basis of, among other grounds, physical and mental disability. Our work is grounded in the conviction that the equality rights of women with mental disabilities are violated when the criminal law and the criminal trial process fail to adequately respond to the pervasiveness of sexual violence against them. It is important that this equality right be given content in the analysis by recognizing the ways that male and ableist privilege operate and by rethinking legal concepts that were developed without regard to this group of victims.

Our work has focused on sexual assault against *women* with mental disabilities. There is no question that men with mental disabilities are also targeted for sexual violence and our focus on women with mental disabilities is in no way meant to diminish that reality.[1] Where relevant, we have included cases that deal with male complainants. However we believe that sexual assault against persons with disabilities, like sexual assault generally, is highly gendered and that the intersection of inequality based on gender and on disability justifies looking at women with

[1] It has been estimated that between sixteen and thirty per cent of men with mental disabilities will have been sexually assaulted before they reach the age of eighteen. See Roeher Institute (1992) at 25.

mental disabilities as a group particularly vulnerable to sexual violence (Doyle 2010, 113; McCarthy and Thompson 1997).

Theoretical Insights

Disability Theory on Social Construction

Understanding the sexual assault of women with mental disabilities requires an appreciation of the social context in which both sex and mental disability operate. There are multiple theoretical frameworks that can contribute to this understanding. Turning first to disability theory, social models of disability have proven particularly influential in the context of physical disability as a framework for resisting the conventional assumption that disabilities are inherent impairments subject to scientific diagnosis. Social disability theorists argue that the disabilities that people confront are often the product of unexamined barriers and discriminatory attitudes, rather than any deficiency inherent to the individual, as the medical model tends to assume (Neath 1997, 196–198).

The social construction approach to disability is useful, we believe, for understanding certain aspects of the situation of sexual abuse of women with mental disabilities. In particular, a social construction approach avoids the trap of locating the particular vulnerability of women with mental disabilities to sexual abuse in something inherent to the victims themselves. As Sherene Razack (1994, 902) has noted, this amounts to saying that people with mental disabilities are vulnerable because they are vulnerable. Instead, we can see the social forces that come together to make persons with mental disabilities, both male and female, targets for sexual violence. These include the large influence that "helping professionals" play in ordering and directing the lives of persons with developmental disabilities in institutional and quasi-institutional settings, and the construction of persons with mental disabilities as compliant to or acquiescent in the demands of others.[2]

For example, women with mental disabilities are often reliant on others to bring complaints of sexual abuse to the attention of authorities. This can be problematic because the person receiving the initial complaint may not see the activity as criminal (especially if the person committing the assault also has a mental disability), may blame the woman for engaging in inappropriate behaviour, or may believe that the woman will be unable to participate in or withstand a criminal investigation (Chenoweth 1996, 401–402). All of these attitudes contribute to underreporting and erect barriers for women seeking a response to their assaults within the criminal justice system.

In addition, it appears that some offenders target women with mental disabilities on the assumption that they are less likely to complain (especially if told not to) and

[2] Other factors that construct the lived experience of mental disability in the context of sexual violence include a history of inadequate education on sexuality and sexual self-determination (sometimes referred to as the "forever child syndrome").

less likely to be believed when they do complain. A recent Australian study of police responses to sexual assault victims, for example, found that cases involving a complainant with a psychiatric or mental health issue were least likely to result in a charge being laid and twice as likely to be determined to be false (Murray and Heenan 2012, 360–361). Women with psychiatric disabilities were even less likely to be believed than women with intellectual disabilities.

The belief that mental disability is a scientific, objectively determined diagnosis leads to certain characteristics being applied to persons with a mental disability without any consideration of the degree to which social construction determines those characteristics. For example, the common assertion that people with mental disabilities are compliant may overlook the fact that this compliance is reinforced and rewarded by support systems that provide few opportunities for dissent (Finlay and Lyons 2002, 18). Legally, it may cause us to miss the multifaceted ways in which people with mental disabilities resist or object to sexual assault and also to assume that compliance represents consent rather than acquiescence in the face of coercion or exploitative inducements (Chenoweth 1996, 404).

While the social model is important in shifting the focus away from the assumed limitations of the individual to the larger context, it is inadequate on its own as a theoretical framework for understanding sexual abuse of women with mental disabilities. It is not helpful to simply treat mental disability as a label that is the product of social attitudes, and conclude that the impairments experienced by persons labelled mentally disabled would disappear if only the discriminatory nature of those attitudes was acknowledged and rejected (Doyle 2010, 114).

The social model is inadequate not merely because it may minimize the reality of impairment as a contributing element of disability, but also because it tends to privilege individual choice as the ultimate goal of human existence. Applied uncritically, the social model of disability endorses the idea of the liberal individual subject who needs only to be free from external barriers to be able to make his or her own decisions about how he or she wishes to live life.

We believe that truncating the analysis at the point of "choice" is deeply problematic in the context of sexual violence against women with mental disabilities, and can obscure the ways in which hierarchies operate along well-established axes of oppression. As Richard Devlin and Dianne Pothier note, issues of disability are "… issues of social values, institutional priorities, and political will. They are questions of power: of who and what gets valued, and who and what gets marginalized" (Devlin and Pothier 2006, 9). It is important to think not only about the ways in which disability is socially constructed but also why those constructions take a particular shape, particularly when they intersect with discriminatory practices on other grounds, such as sex. For this reason, we take the view that the social model of disability stands to be enriched by feminist theorizing around the exercise of power, both patriarchal and ableist, especially in the context of sexual violence.

Feminist Theories of Autonomy and Male Power

Feminist theory has the potential to enlarge our understanding of how power operates to shape choices in the context of sexual violence against women with

mental disabilities. Feminism offers both a cogent critique of the limitations of "choice" and also an understanding of the ways in which male power is sexualized. In particular, relational feminist scholars argue that our understanding of autonomy must recognize the web of relationships of which the individual decision-maker is a part (Ho 2008, 194).

Martha Fineman has argued that inequality should be reimagined by focusing on vulnerability as both an inherent aspect of the human condition and a feature of human relationships in the family and more broadly in society (Fineman 2008, 2). Vulnerabilities are most often dynamic, changing over the human lifespan and varying according to the particular relationship at issue. Fineman notes that the liberal subject is usually perceived as an adult at midlife, focusing only on the least vulnerable stage that human beings pass through in their lives, and failing to recognize that "individuals are anchored at each end of our lives by dependency and the absence of capacity" and that, for some, loss of capacity, temporary or permanent, may also occur during the lifespan (Fineman 2008, 12). Fineman describes this as the "persistent susceptibility to misfortune and catastrophe" (ibid.). If mental disability is to be included in this analysis we prefer language that is less pathologizing of disability, and would add the observation that incapacity is a question of degree and no less "normal" when it occurs during or across a person's entire life than when it occurs in infancy or old age. Nonetheless, Fineman's work offers important insights for understanding disability beyond exceptionalism.

Feminist reassessments of autonomy may allow us to move beyond feminist debates that have treated protection from violence and the promotion of women's sexual autonomy as being in tension with each other. This tension is illustrated when feminists who seek stronger state responses to sexual violence are warned against a paternalism that would limit women's sexual freedom (Richardson 1996; McCarthy 1999, 29–30; Razack 1994, 902). We find this supposed tension generally unconvincing and believe that the circumstances of women with mental disabilities should cause us to re-evaluate it for all women. Our research into the legal system's treatment of cases where women with mental disabilities complain of sexual violence makes clear to us that these women are often denied both real sexual autonomy and protection from violence in their lives and are not gaining one at the expense of the other. In addition, we consider prevention of and redress for sexual violence to be a precondition to meaningful sexual self-determination for all women, and for women with mental disabilities in particular.

Feminist theory also offers an important understanding of the male power exercised by those who commit acts of sexual violence. Such acts are more than the individual decisions of abnormal men. Rape, as a relatively common practice, is rooted in, and reinforces, sex inequality. Lisa Price has noted that sexual violence is so common, and so normalized, that we cannot seek explanations based on what is abnormal but rather must focus on what is shared (Price 2005, 24). Using Andrea Dworkin's tenets of male power (1981, quoted in ibid.), Price points out that for male power to operate, male supremacy as a system must be accepted not only by men but also by women (Price 2005, 27).

In our view, there are parallels to be drawn between this analysis and the power relationships that exist in relation to mental disability, which also encourage

acceptance by persons with mental disabilities that the inequalities they experience are natural and beneficial. For women with mental disabilities, this power intersects with male power in ways that may shape their expectations of what a sexual relationship is supposed to look like.

Criminal law, by necessity, is focused on wrongs committed by individuals, not on redressing systemic discrimination. However, the recognition that rape is a product of a sexist culture led to calls for feminist-inspired rape laws focusing on the actions of the perpetrator rather than on the responses of the complainant. It was argued that such laws should consider whether the sexual activity was accompanied by force or coercion, not whether the complainant displayed non-consent by resisting (Clark and Lewis 1977, 163).

Speaking of the U.S. context, Catharine MacKinnon has noted that regardless of whether rape laws are drafted to require proof of force or proof of non-consent, they ultimately fail to account for the inequalities that define sexual assault as a practice:

> Sex is relational; so is sexual assault. In unequal societies, what makes sexual assault sexual as well as possible is the hierarchy of relation between the parties. Rape is thus a crime of sexualized dominance on the basis of sex (which often includes sex and age, sex and race, sex and class variously combined and pyramided) that is legally unrecognized as such. Inequality, its central dynamic, is flat-out ignored by the criminal law. Far from promoting equality between women and men, the criminal law tacitly assumes that such equality already exists. More accurately still, it shows total lack of interest in whether it exists or not. In other words, what this crime *is*, the law has refused to make criminal about it (Mackinnon 2003, 269).

This lack of attention to inequality remains a persistent failure of sexual assault laws in Canada as well. Disability is a key locus for inequality in sexual relations that is also not often captured by the criminal law except in rare cases where incapacity to consent to sexual activity is proven (Kelly 2010; Rumney 2006).

The sexism of rape law intersects with other grounds of discrimination in ways particular to those grounds. For example, racialized and Aboriginal women confront particular stereotypes and attitudes that racialize the sexism and sexualize the racism they experience (Demas 2009). This means, among other things, that they are less likely to qualify as respectable victims and more likely to be seen as consenting to the sexual activity and then falsely complaining of sexual assault after the fact. For women with mental disabilities, particular gendered stereotypes about mental disability contribute to their characterization as sexually deviant.

Feminist theory does provide insights into the power dynamic involved in sexual violence against women but has been less helpful in understanding the gendered dimension of sexual assault against women with mental disabilities. While sexual assault against these women is a practice of sex inequality, it is also reflective of the devaluation of persons (and especially women) with mental disabilities and these two elements intersect in ways with which feminist critiques of sexual violence have not always engaged. Reference is often made to the fact that women with disabilities are particularly targeted for sexual violence but they are not always seen as paradigmatic sexual subjects. Locating women with mental disabilities as women

within the framework of feminist analyses is often left to disability scholars (Chenoweth 1996, 393).

Our work has attempted to keep in the forefront the fact that women with mental disabilities are women, subject to the same systemic violence as other women, albeit at a higher rate because of the intersection of disability and gendered inequalities. It is important to remember as Sherene Razack points out "disability does not cancel out gender" (Razack 1994, 892) and that many of the problems faced by this group of complainants are similar but perhaps more extreme than those faced by other women who complain of sexual assault. Their allegations of sexual assault are disbelieved, their expressions of consent judged inadequate and their credibility challenged at every step of the legal process.

The Gendered Perils of Infantilization

To understand the ways in which women with mental disabilities are denied both sexual self-determination and protection from violence, it is important to be aware of the extent to which people with mental disabilities are infantilized and equated, implicitly or explicitly, with children. Lawyers and judges, relying on expert testimony, often resort to the device of "mental age" as a way of equating an adult woman with a mental disability with a child.[3] This occurs even where the woman lives mostly independently in the community and where her capacity to consent to sexual activity is not challenged. This practice is a problem for women with mental disabilities not only because it confuses discrete academic skills (reading, writing, mathematics) with the range of abilities and life experiences that make up a person's mental ability, but also because we know that, unlike for women with mental disabilities, sexual activity with children is always abusive and harmful to the child.

One might expect that infantilization of an adult complainant would work in her favour in that she would be seen as an ideal victim, cloaked in child-like innocence. Leaving aside the fact that it still remains difficult to prosecute sexual assaults involving actual child victims, infantilization does not "help" women with mental disabilities because they are also stereotyped as sexually inappropriate and indiscriminate in their sexual appetites (Benedet and Grant 2007a; Chenoweth 1996, 393–94, 405). At its core, this characterization is rooted in an equation of people with mental disabilities not with children but with animals, acting on instinct rather than reason.

Much of the focus of the eugenics movement was an obsession with the sexual habits of people with disabilities, in an attempt to control those instincts and prevent them from procreating and passing on their mental defects.[4] The identification of the "mentally defective" was presented as a scientific endeavour, but in fact the construction of who fell into that category was not objective. Immigrants, the poor

[3] See *e.g.*: *R v DAI*, 2012 SCC 5, [2012] 1 SCR 149; *R v Parrott*, 2001 SCC 3, [2001] 1 SCR 178.

[4] See *e.g.*: *Buck v Bell*, 274 US 200, 47 S Ct 584; *Muir v Alberta* (1996), 132 DLR (4th) 695, [1996] AJ no 37 (QL), (ABQB). In some Canadian provinces, sterilization of those with mental disabilities persisted until the 1970s. The Supreme Court of Canada rejected the practice of non-therapeutic sterilization in *E (Mrs) v Eve,* [1986] 2 SCR 388, [1986] SCJ no 60 (QL).

and Aboriginal peoples were typically assumed to be substandard specimens who should be discouraged from reproducing and were thus much more likely to be classified as "mentally retarded" (Kempton and Kahn 1991, 95–96; Grekul et al. 2004; Stote 2012). These attitudes were gendered, with women's sexuality marked as especially dangerous and also hereditary, such that immorality could be passed from mother to daughter. An appropriate female sexuality was to be confined to marriage and procreation, neither of which was authorized for these women.

The remnants of these beliefs still affect our attitudes toward the sexuality of women with mental disabilities. For example, people may label a woman's behaviour as sexually inappropriate or oversexed in circumstances where similar behaviour on the part of a non-disabled person would be considered unremarkable (Benedet and Grant 2013b, 53–54). This group of women is simultaneously labelled as asexual and childlike, on the one hand, and hypersexual and sexually indiscriminate on the other, stereotypes which permeate our treatment of legal issues like consent and sexual history (Benedet and Grant 2007b). Offenders may also believe that complainants with mental disabilities are unlikely to have sexual relationships and thus they are lucky to get any male attention, including coerced and nonconsensual sex. Any sex, however coercive, is construed as better than no sex (Chenoweth 1996, 405). If the offender presents himself as a friend or boyfriend, this view may be shared by the complainant's family members (Chenoweth 1996, 404–405). Having a boyfriend may be seen as a highly desired status by women who have often been systematically excluded from typical social relationships, yet the contours of a non-exploitative intimate relationship may be largely unfamiliar to many women with mental disabilities.

In addition, while sexual activity between adults is usually considered a matter deserving of considerable privacy, people with mental disabilities often lead very public lives with medical and social service personnel, family members and other caregivers, and educators having access to all aspects of their lives. This tends to make it seem like their sexual activity is an open book, and may mean that the rules limiting the introduction of sexual history evidence are not invoked or applied.[5] It may also lead to applications for production of various records in the hands of third parties, most of which the complainant will never have seen or had an opportunity to correct.[6]

We believe that this process of infantilization, while present for both male and female complainants, operates differently with women as a result of the intersection of gender and disability. It is an inherently disempowering practice, meant to remove agency from the woman involved. But because it intersects with negative stereotypes about women's hypersexuality, it leads to the contradictions we see in the case law that treat these women as simultaneously asexual and hypersexual. We do not see the same tendency in cases about male complainants. While they may be infantilized through the label of a mental age, this infantilization is not directly linked to their sexuality. Male complainants are more often seen as having agency as they try to resist the assaults of other men.[7]

[5] Criminal Code, ss. 276–277.

[6] Criminal Code, ss. 278.1–278.91.

[7] See *e.g.*: *R v Farley* (1995), 23 OR (3d) 445, 99 CCC (3d) 76 (CA). Given that male complainants are generally assaulted by men, this difference may reflect in part underlying homophobia.

Current sexual assault law, grounded in an assessment of individual consent, is clearly modeled on the individual autonomous subject. Unless the very low threshold for capacity to consent to sexual activity is not met, or the competence of the witness to testify is challenged, disability is seen as having no relevance to the legal inquiry. However, the relevance of mental disability, intersecting with gender, should be understood as extending well beyond the confines of incapacity or incompetence to testify. Women with mental disabilities are subjected to a culture of extreme imbalances of power on the basis of both sex and disability in a setting in which they and their abuse are largely silenced. In the following section, we examine some of the barriers faced by women with mental disabilities in the context of our current understanding of consent and capacity to consent.

Legal Doctrines as Potential Barriers

There are a number of specific issues that arise in applying substantive sexual assault laws and the criminal trial process to sexual assault complaints brought by women with mental disabilities that we have developed in our work on this topic. A brief review of some of the deficiencies in substantive doctrine is outlined here. First, the affirmative consent standard developed in Canadian criminal law has not always been extended to women with mental disabilities. Affirmative consent refers to a definition of consent that is based on the subjective state of mind of the complainant. According to *R. v. Ewanchuk*, where the state proves that the complainant did not in her own mind want the sexual touching to take place, the *actus reus* of the offence is proven. Where the accused knew or was reckless to the fact that the complainant did not communicate her agreement, the *mens rea* is proven.[8] Thus a belief that the complainant wanted the sexual activity is not a defence unless that belief is based on words or actions that affirmatively communicated consent. In addition, s. 273.2(b) of the Criminal Code requires that the accused have taken reasonable steps to ascertain that consent was present as a precondition of a mistaken belief in consent defence.

A body of feminist scholarship on sexual assault has demonstrated that this affirmative consent standard is not always applied to women complainants by courts (Ruparelia 2006, 167; Craig 2009; Randall 2010; Gotell 2002). Our research indicates that this is also true for women with mental disabilities as a subset of this larger group. Some courts continue to equate inadequate resistance, compliance or submission with consent (Benedet and Grant 2010, 2013a). This raises the concern that some courts are assuming that women with mental disabilities are generally consenting to sexual activity unless they demonstrate otherwise.

More fundamentally, in some cases where the complainant has a mental disability, we question the utility of an inquiry into whether the complainant, in her own mind, wanted the sexual touching to take place. Even if the complainant knows she has the right not to consent to sexual touching, has turned her mind to this question and can articulate what she was thinking at the time, the accused may be

[8] [1999] 1 SCR 330 at paras 26-28 and 46-47.

exploiting a considerable imbalance of power between himself and the complainant on multiple grounds. We return to this problem in more detail below in considering the exercise of authority provisions of the Criminal Code.

One way to deal with this concern within existing legal doctrines is to find that the complainant is incapable of consenting to sexual activity. A finding of incapacity has the advantage of not requiring that the complainant recall her state of mind. It also could provide a route for dealing with cases in which apparent consent is really the product of exploitation or where the complainant does not understand the nature and consequences of sexual activity. However, the way that incapacity is currently applied in Canada may deny to women the ability to engage in non-coercive sexual activity without it being labelled as criminal. Capacity is treated as an all-or-nothing assessment that would mean that all sexual activity with that complainant would be sexual assault. As a result, Canadian courts have used incapacity sparingly, generally only in cases where the complainant has no awareness of the sexual activity at all.[9]

We have argued that this can be avoided by treating incapacity situationally, and deciding only whether the complainant had the capacity to consent to this activity with this person at this time (Benedet and Grant 2013a). Such an approach, which has been endorsed by UK and some American courts,[10] recognizes both that capacity can change over time but also that consent is person and situation-specific. Nonetheless, it is important that non-consent be considered first, and that even a situational approach to incapacity cede to evidence that the complainant did not in fact consent. We also argue that the capacity to say "no" to sexual activity requires a lower threshold of understanding than the capacity to say "yes." Even if a woman does not understand the implications of saying yes to sexual activity, it is quite possible that she knows that she does not want it to take place.

While these problems play out in ways specific to the intersection of gender and disability, we are skeptical of the value of "special" sexual offences that apply only to complainants with disabilities. In our view, it is much better to focus on how the general provisions on sexual assault and the criminal trial process can be applied equally to women with mental disabilities. If our general sexual assault law does not adequately protect this group of highly targeted women, it needs to be rethought. Whatever legal doctrine is at issue—consent, capacity, etc., we believe that exploitation of power over complainants with mental disabilities permeates these cases and that the law's attempt to address these abuses must be subject to careful scrutiny. In the next section of this article, we consider the consent provisions of the Canadian Criminal Code and look specifically to the circumstances in which a relationship of trust, power or authority between the accused and the complainant can negate consent.

[9] See *e.g.*: *R v WL* (1994), 123 Nfld & PEIR 357, 382 APR 357 (Nfld Prov Ct (Youth Ct)) where the court assumed that the complainant, a 59-year-old woman in the advanced stages of Alzheimer's disease, was incapable of consenting.

[10] *R v C* [2009] UKHL 42, [2009] 1 WLR 1786; *People v Thompson*, 142 Cal App 4th 1426, 48 Cal Rptr 3d 803 (2006).

The Role of Relationships of Trust, Power and Authority

We believe that many of the problems relating to our understanding of consent and lack of consent for women with mental disabilities relate to our failure to recognize the abuses of trust, power and authority that permeate the lives of many women with mental disabilities. While it might be argued that all women lack power in the context of sexual violence and sexual assault trials, the problems are magnified for this group of women because of their intersecting vulnerabilities. When seeking to identify sexual assaults that are suitable for the purposes of criminal prosecution we look for paradigmatic sexual assaults where the complainant clearly says no, preferably with active resistance, but the accused persists with sexual activity nonetheless. Most of the analytical work is focused on the question of consent as we have come to understand that doctrine, assuming that a clear line can be drawn between cases where a woman "voluntarily agreed" to sexual activity and those where she did not. As Razack points out, viewing sexual assault through the lens of consent and force makes it difficult "to examine the norms against which we measure what is coercive" (Razack 1994, 895).

This focus on consent may not get at the picture of sexual assault for women with mental disabilities. The complainant may be in an institution and may be coerced by a caregiver against whom she feels powerless to say no, even if she understands that she is entitled to say no. She may be lured into sexual activity through the promise of small rewards or an opportunity to engage in some activity in which she would otherwise be denied participation.[11] Or she may have learned through experience that acquiescence to sexual activity is the price of social inclusion and desired "friendships" from which she is often excluded.[12] Once a case gets past the threshold of charges being laid, we look for the ideal victim (Randall 2010, 397) whose sexual history does not taint her credibility and who can clearly remember and articulate all the details of her victimization without hesitation on the witness stand even under a gruelling cross-examination (Benedet and Grant 2012).

As Lesley Chenoweth has pointed out, our overprotection of women with disabilities has also made them more vulnerable targets of sexual violence:

> In both structured and implicit ways, the experiences of violence for women with disabilities have been neither voiced nor heard. The ways in which this has happened are extremely complex but rest on the control and oppression of such women into places in our society where they may not be known by persons other than human service staff members. They may have all aspects of their lives controlled by others, and they may miss out on experiences of ordinary relationships – good and bad. There are inherent social practices shaping and silencing these experiences. These practices are paradoxical in that they actually increase vulnerability rather than protect women (Chenoweth 1996, 403).

[11] See e.g.: *R v KET*, [1990] OJ no 2674 (QL) (Dist Ct).

[12] *R v BM*, [1994] OJ no 2242 (Prov Div) (QL).

This "containment of women with disabilities as eternal children" (Chenoweth 1996, 404) may make them targets for exploitative male violence.

A large number of sexual assaults against women with mental disabilities are committed by "caregivers", broadly understood to include those who provide services and assistance to persons with disabilities. Most of these people occupy positions of trust or authority toward the women they assault. These might include, for example, group home workers, adapted bus drivers, or health care workers.[13] Some men in caregiving roles use the power they have to exploit women with mental disabilities who they see as easy targets for sexual abuse—unlikely to complain and unlikely to be believed where complaints are made. The criminal justice system then furthers the exploitation by failing to take seriously complaints of sexual assault that are made or by failing to accommodate the needs of this group of complainants within the trial process so that their complaints of sexual violence can be addressed.

The power imbalance is magnified exponentially for women with mental disabilities who live in institutions and are dependent on caregivers for every aspect of their daily lives (Chenoweth 1995, 41). This power reinforces compliance and makes it even more difficult for women to speak out when they have been abused (Crossmaker 1991, 208). There may also be a culture of silence within the institution that protects employees and other patients from the detection of sexual violence or its reporting to authorities (Chenoweth 1995, 41).

In Canada, s. 273.1(2)(c) of the Criminal Code does acknowledge that no consent to sexual activity is obtained where "the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority". In *R v Lutoslawski* the Ontario Court of Appeal describes this section as addressing:

> … the kinds of relationships in which an apparent consent to sexual activity is rendered illusory by the dynamics of the relationship between the accused and the complainant, and by the misuse of the influence vested in the accused by virtue of that relationship. … An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity.[14]

Our examination of the case law under s. 273.1(2)(c) leads us to conclude that courts are giving an overly rigid interpretation to this section for all complainants, but particularly for complainants with mental disabilities, and, as such, it has not been an effective tool with which to address abuses of trust, power and authority.

We examined all of the cases in which s. 273.1(2)(c) was considered with complainants above the age of consent. We found a total of 54 cases and in 14 of

[13] See *e.g.*: *R v Hundle*, 2002 ABQB 1084, 10 CR (6th) 37, and 2003 ABQB 618 and *R v Kiared,* 2008 ABQB 767, [2008] AJ no 1459 (QL) [*Kiared*], both involved accuseds who worked for transportation services for dependent and disabled adults; *R v Ashley-Pryce,* 2004 BCCA 531, [2004] BCJ no 2093 (QL) and *R v Brown,* 2013 ONCJ 203, [2013] OJ no 1791 (QL) both involved sexual assaults on elderly women in care homes where the offenders worked.

[14] 2010 ONCA 207, [2010] OJ no 1094 (QL) at para 12 [*Lutoslawski*].

those cases the section was invoked successfully to vitiate consent.[15] A large percentage of the cases where the use of s. 273.1(2)(c) was successful involved teenage complainants where there were multiple charges, including the offence of sexual exploitation of a young person (s. 153), which does not require proof of non-consent, as well as sexual assault.[16]

Only four of the 54 cases applying s. 273.1(2)(c) involved complainants with mental disabilities and in only two of those cases was consent ultimately found to be vitiated on the basis of an abuse of trust, power or authority. Both of these cases involved young women and neither case analyzed the section in any detail. In *R v Bergen*, an 18-year-old complainant was a patient in a mental health unit and the accused was a 50-year-old licensed social worker working in the unit. In *R v Mianskum* the complainant was 17 years old with a history of mental health issues and suicide attempts. She attended the home of the accused for the purposes of native healing for a medical problem during which he sexually assaulted her. In both of the successful cases, a clear therapeutic role was combined with a young complainant and a significantly older accused. We found no cases involving a complainant with a mental disability who was over 18 years of age where the argument of trust, power or authority negating consent was ultimately successful although, as discussed below, in one of the unsuccessful cases a new trial was ordered.

The unsuccessful s. 273.1(2)(c) cases reveal the problems in applying the section as it is currently construed. In one of these cases, *R v T(D)* the accused was convicted at trial but this decision was reversed on a summary conviction appeal.[17] The accused was a "favourite uncle" of the complainant who would visit her when no one else was home. The 32-year-old complainant had various physical and developmental disabilities. The accused engaged in sexual activity with her over a number of years despite her requests for him to stop and to go away. The complainant communicated through gestures and sounds, and testified with the assistance of an interpreter. Because there was some ambiguity in the complainant's testimony around one incident, the trial judge had a reasonable doubt as to consent despite his conclusion that the complainant probably did not understand the nature of the sexual activity involved. However, the trial judge went on to find that consent was vitiated by an abuse of trust and authority on the part of the accused. The judge relied on, among other things, the complainant's low intellectual age, the accused's

[15] *R v Wood*, [2012] OJ no 3370 (QL) (SC); *R v Howell*, 2012 ONSC 846; *R v Bergen*, 2011 ONCA 210; *R v FL*, 2009 ONCA 813, [2009] OJ no 4839 (QL); *R v Lawrence*, [2008] OJ no 1341 (QL) (SC); *R v Borkowsky*, 2006 MBQB 109, aff'd 2008 MBCA 2; *R v Roberds*, 2006 BCCA 415; *R v Makayak*, 2004 NUCJ 5, [2004] NuJ no 3 (QL) [*Makayak*]; *R v LRL*, 2000 NSCA 94; *R v Mianskum*, [2000] OJ no 5802 (QL) (SC),aff'd [2002] OJ no 3955 (QL) (CA); *R v DM*, 136 CCC (3d) 412 (Ont CA); *R v Fast* (1996), 113 Man R (2d) 52 (CA); *R v Audet*, [1996] 2 SCR 171; *R v TR*, [1996] OJ no 4945 (QL) (Ct J (Gen Div)).

[16] See e.g *Lutoslawski*, *supra* n 12; *R v RM*, [2004] OJ no 5869 (QL) aff'd 2007 ONCA 872, [2007] OJ no 4856 (QL) (conviction under s. 153); *R v LVR*, 2011 BCSC 1152, [2011] BCJ no 1620 (QL); *R v JC*, [2000] OJ no 5805 (QL) (SC) (conviction under s. 151); *R v Morasse*, 2012 QCCQ 363, [2012] QJ no 366 (QL) (convictions under ss. 151 and 152).

[17] 2011 ONCJ 213, [2011] OJ no 1874 (QL) [*DT*, trial judgment], appeal allowed 2012 ONSC 2166, [2012] OJ no 1720 (QL) [*DT*, appeal judgment].

superior physical, intellectual and social skills, his role as her favourite uncle and the degree to which he dominated and preyed on the complainant's vulnerability and insisted she keep their relationship "secret," as a sexual predator would do. The trial judge concluded that the evidence showed:

> … [T]he 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. It is abundantly clear that there was such a disparity in the relative situations of the parties that the weaker party (the complainant) was unable to choose freely.[18]

This decision was overturned on appeal. The appeal court applied a rigorous standard for s. 273.1(2)(c) concluding that the Crown must prove both the existence of the relationship of trust, power or authority and "that the complainant's free will was effectively overborne by the impact and abuse of that position".[19] This approach misses the subtle nature of abuses of trust, which may develop over time and are unlikely to involve explicit threats of violence or harm if consent is not forthcoming. (Grant 2012) As the Court noted in *Lutoslawski*, the accused may use "personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity".[20]

The appeal court held there was no evidence that the accused was in a position of authority over the complainant. In his consideration of the relationship of trust, the appeal judge quoted extensively from a case involving a young person and indicated that it would be very difficult to conceive of a trust relationship between two adults unless the accused was in a professional or employment capacity. He went on to find that the Crown had failed to prove that an abuse of the position of trust *induced* consent on the part of the complainant. Because the case had been prosecuted on the basis that the complainant did not consent, there was an absence of evidence that she consented *because* of an abuse of trust. In other words, where the complainant asserts non-consent, it is going to be very difficult for the Crown to argue in the alternative that consent was vitiated by an abuse of trust. The approach of the appeal court in *DT* requires the complainant to concede that she agreed to sexual activity even where in her mind she did not.

In the final case in which s. 273.1(2)(c) was considered in the context of mental disability, *R v Alsadi*, the allegation of a breach of trust, power or authority was rejected at trial.[21] While the Court of Appeal found errors in the trial judge's assessment, it declined to enter a conviction and instead sent the case back for a retrial.[22] The complainant, who was involuntarily committed in a psychiatric ward, engaged in oral sex with a uniformed security guard in the hospital while she was

[18] *DT*, trial judgment, ibid at para 48.

[19] *DT*, appeal judgment, supra n 15 at para 25.

[20] *Lutoslawski*, supra n 12 at para 12.

[21] (27 July 2011), Vancouver 213734-2-C (QL) at para 52 (PC) [*Alsadi*, trial judgment].

[22] 2012 BCCA 183, [2012] BCJ no 826 (QL) [*Alsadi*, appeal judgment]. A bench warrant has been issued for the accused but, as of the time of writing, he has not been apprehended.

off the ward having a cigarette. As in *DT*, the complainant testified vehemently that she did not consent to sexual activity and, as in *DT*, she was disbelieved. Instead she was portrayed as hypersexual and as the initiator of all sexual activity. She was depicted as a woman who would never say no to sex and the accused was painted as the victim of her aggression.

In deciding that the security guard was not in a position of authority over the complainant, the trial judge made a number of troubling findings. He held that accused was just conducting a routine patrol of the hospital grounds at the time of the sexual activity and thus would not have had the authority to restrain the complainant *at that particular time*, even though on other occasions security guards are involved in the restraint of patients.[23] He focused on the fact that the complainant was older than the accused and thus there was no imbalance of power due to their age differences and that, because the whole incident lasted less than 15 min, it was "improbable for any sort of trust, authority or relationship of dependency to be developed between the parties".[24] The fact that the complainant was detained in the hospital involuntarily is not mentioned in the trial decision, nor is there any consideration of whether she was medicated (forcibly or otherwise) at the time of the alleged assault. The judge gave a narrow interpretation to s. 273.1(2)(c), stating that it only applies where the complainant's free will is overridden, or where she fears reprisal if she refuses sexual activity, or does not understand she is allowed to say no.

The Court of Appeal did find errors in the trial judge's analysis and rejected virtually all of the factors the trial judge considered in denying the accused's authority over the complainant. The Court held that the trial judge should have focused on whether the accused abused a position of trust, power or authority to *induce* consent rather than on whether the complainant misapprehended her right to refuse his advances. The Court of Appeal shifted the focus back to the causal impact of any authority relationship, noting that the issue was *why* the complainant entered the sexual relationship. The Court of Appeal ordered a new trial on the basis that it had not been determined whether the complainant participated in sexual activity because of Alsadi's abuse of the position of authority.

In both of these cases, the complainants claimed that they did not consent. As a result, the Crown did not frame the facts in terms of apparent but vitiated consent. The case law outside of the context of disability also demonstrates that a complainant who appears to "willingly participate" in sexual activity will have a difficult time invoking s. 273.1(2)(c) even though the section was enacted to respond to exactly this situation. For example, in the recent decision of *R v DJD*,[25] the accused was a religious pastor who was charged with sexually assaulting two young women who lived with his family, one in 2000, the other in 2006. The accused met both complainants in his capacity as pastor when each woman was a teenager and in need of counseling or support.

[23] The complainant had been hospitalized 20 times in the past and it is likely she had witnessed security guards restraining patients.

[24] *Alsadi*, trial judgment, supra n 19 at para 54.

[25] 2012 SKQB 519, [2012] SJ no 797 (QL).

The first complainant moved in with the accused when her mother and new stepfather told her she could not live with them. The relationship progressed from hugging to extensive sexual touching. It continued even after she was married and had children. The second complainant had had a difficult childhood, having been placed in foster care at the age of six. Both her parents were dead and she began living with the accused after spending a year in college. She met him at a friend's memorial service when she was 17 years old and sitting in the lobby of the church crying. He brought her into his office to counsel her. After she moved in with his family, the accused introduced her to people as his adopted daughter. The sexual relationship evolved in the same way as with the first complainant. With both women, he told them they were free to say no and that if they were unsure they should pray about whether to continue their sexual relationship with him.

The trial judge characterized each complainant as a "willing participant" in the sexual activity.[26] This conclusion permeated the rest of the judgment, which repeatedly referred to the fact that they consented and that the accused believed in that consent. In fact, consent was the very question at issue under s. 273.1(2)(c). The trial judge concluded that the accused was not in a position of trust over either complainant in large part because the complainants knew they could say no and did not.

As with *DT* and *Alsadi,* these women were expected to recognize the nature of the exploitation when they were caught in the midst of it. The initial finding of consent leads to a conclusion that there was no violation of trust, power or authority when s. 273.1(2)(c) is intended precisely for cases where a complainant has apparently agreed to engage in sexual activity. The section is meant to provide the tools to look behind any apparent agreement and to unpack the unequal and exploitative relationships that may have led to the agreement.

These cases demonstrate an impoverished understanding of the nature of abuse of trust for women with mental disabilities and a failure to recognize the relationship between those abuses and consent. We see two central problems with the courts' analyses. First, a significant part of the problem stems from the two-step approach to consent that is applied in these cases. The question is asked in the abstract "did the complainant consent" and it is only after the finding of consent is made that the court moves on to consider the relationship of trust, power or authority. The appeal court judge in *DT*, for example, held that it was only necessary to consider s. 273.1(2)(c) "if the trial judge has decided there was true consent or has a reasonable doubt as to true consent after all considerations mentioned above".[27] The trial judge in *Alsadi* found consent and then examined trust, power and authority, an approach that was implicitly approved by the Court of Appeal. The Court of Appeal referred to the complainant as a "willing participant" aside from the violation of trust, power or authority, and went on to quote a passage saying that sexual activity in the context of a relationship of trust is criminalized notwithstanding the fact that the complainant consented.[28]

[26] Ibid at paras 53, 63.

[27] *DT*, appeal judgment, supra n 15 at para 22.

[28] *Alsadi*, appeal judgment, supra n 20 at para 29, citing *R v PS* (1993), WCB (2d) 256, [1993] OJ no 70419 (QL) (Ct J (Gen Div)), aff'd [1994] OJ no 3775 (QL) (CA) and *R v L(DB)* (1995), 25 OR (3d) 649, 101 CCC (3d) 406 (CA).

We reject the idea that a court can declare the existence of consent in fact and only then negate it through a violation of trust, power or authority. *True* consent can only be established by looking at the full context of the trust, power or authority relationship and assessing the impact of that relationship. The focus should be on whether the Crown has established the complainant did not consent either because she did not want the sexual activity to take place or because, although the sexual activity was not unwanted at the time, it was the product of an abuse of trust, power or authority. The complainant should not have to choose between these different conceptions of non-consent. Furthermore, a two-step approach biases the outcome on the power, trust or authority determination. If it has already been decided that the complainant consented in the abstract, apart from the context of the relationship, then it is less likely that it will be concluded that she only consented because of an abuse of trust, power or authority.

Courts tend to forget in these cases that the law requires that the complainant have communicated her consent to the accused and that there is no doctrine of implied consent in Canadian law. Lack of resistance or passivity is not consent. In other words, the doctrine of affirmative consent is not applied rigorously in these cases. We are left with the impression that judges are reluctant to convict in circumstances where the accused is faced with an apparently willing complainant and that it almost seems unreasonable for the accused to be expected to be aware of the imbalance of power between himself and the complainant, and to refrain from proceeding.

The second problem stems from the wording of the legislation itself and the requirement that the Crown prove that it was the abuse of trust, power or authority which *induced* agreement to engage in sexual activity. There is not a lot of case law on what the "inducement" element adds to s. 273.1(2)(c). In *Makayak*, a case involving a prison guard who sexually assaulted a woman he was guarding in a jail cell, the judge suggests that the word inducement "introduces a more subtle form of pressure that can be inferred from the circumstances of the exercise of the power or authority".[29] The trial judge did not set out what this requires other than to cite evidence showing that the accused was aware that he should not be having sexual contact with the complainant.

Imposing a requirement that the Crown prove that the abuse of trust *caused* the complainant's agreement is problematic. It is difficult for a complainant in these situations to be able to articulate why she submitted to the accused's sexual advances. It is unrealistic to expect her to be able to fully understand and articulate the nature of the trust relationship and how the accused exploited her vulnerability as a result of that trust relationship. Differing levels of intellectual ability may make it particularly difficult to communicate these subtle factors on the witness stand.

The word "induces" should be interpreted in such a way that it captures the subtle and insidious nature of the violations of trust, power and authority that are involved in these cases. As was recognized in *Makayak* inducement can often be inferred from the exercise of power in question. In particular kinds of relationships, for example, the nature of the relationship and the abuse of trust inherent in any

[29] *Makayak*, supra n 13 at para 70.

form of sexual activity within that relationship may make it difficult to imagine how a woman could ever give meaningful consent in the circumstances. This is particularly true in institutional settings, where the accused is an employee of the institution, and where the imbalance of power between the parties is so significant that the notion of voluntary consent seems virtually impossible.

While Canada has not adopted an approach based on the type of relationship *per se*, the courts are free to consider the nature of the relationship as a relevant factor in determining whether the inducement requirement has been met. In other words, it should be relatively simple for the Crown to satisfy this element in contexts that are inherently exploitative, such as in the context of an institutional caregiver and institutionalized complainant. Inducement can be inferred from the nature of the relationship and the imbalance of power between the complainant and the accused, absent some other unusual evidence tending to suggest that the relationship was not a factor. In our view, *Alsadi* illustrates a scenario where the inducement requirement should not have been a barrier to conviction. The complainant was an involuntarily committed psychiatric patient and the accused an on-duty employee of the hospital with authority over patient security.

Many American state penal codes set out specific relationships in which sexual activity is prohibited and criminalize sex within those relationships (Lentz and Chaires 2011). Some states, for example, prohibit sexual activity between someone who is civilly committed in a psychiatric facility and an employee of the facility (Ibid table 3 at 42). There are some advantages to this approach as it provides clarity in situations like *Alsadi* where sexual activity is prohibited because of the imbalance of power inherent in the relationship itself. As with age of consent rules, the other party is on notice that sexual activity in this context is prohibited.

There are also disadvantages to a blunt relationship-based approach. It may fail to take into account intersecting vulnerabilities that heighten power imbalances in unexpected contexts (Ibid 36–37). A relationship approach may also shift the focus away from the nature of the exploitation to the formal characteristics of the relationship. Thus the assumption may be that relationships not listed are not exploitative and that no imbalance of power exists.

In our view, some relationships are so inherently exploitative, or reveal such an imbalance of power, that courts should be able to infer the inducement from the existence of sexual activity within that particular relationship. This is not to read a strict relationship approach into s. 273.1(2)(c) but rather to suggest that courts should focus on the presence of exploitation and not on whether the complainant recognized that exploitation. In our view, the wording of the Criminal Code does not preclude a conclusion that some relationships—such as an institutional caregiver and a resident—involve such an imbalance of power that the practical burden will shift to the defence to demonstrate that agreement was not induced through the abuse of trust, power or authority.

Courts should also look to evidence of the hallmarks of exploitation in the relationship to infer inducement. For example, signs that the accused groomed the complainant for sexual activity or that he warned her to keep the relationship a secret are both clear signs of exploitation. The offering of rewards, or false promises of social inclusion, are also hallmarks of exploitation.

A relationship of trust will not always lead to the conclusion that sex was exploitative. For example, a spouse or boyfriend may also be a caregiver to a person with a disability and this caregiving role does not necessarily make sex exploitative. Nor is this to suggest that a woman with a mental disability can never engage in a casual sexual encounter without that sexual activity constituting sexual assault. Rather, we are suggesting that where that casual partner is in a role of trust, power or authority over her, and she complains of sexual assault, the unequal nature of the relationship must lead to a high level of scrutiny.

To the contrary, judges tend to see trust, power or authority relationships as being premised on age, and are most willing to apply the section where the complainant is a teenager, although, as *DJD* reveals, its success is not inevitable even then. The provision is not necessary in many of these cases because charges under s. 153, sexual exploitation of a young person, do not require proof of inducement once the necessary dependency or trust/authority relationship has been established. Courts are very reluctant to find relationships of trust or authority with adult women except in extreme cases such as psychologist/patient[30] or prison guard/prisoner.[31] We find this somewhat ironic in the context of complainants with mental disabilities given the courts' general willingness to infantilize adult women with mental disabilities. That infantilization does not work to their benefit when non-consent is being considered.

The Offence of "Sexual Exploitation of a Person with a Disability"

The paucity of case law dealing with mental disability under s. 273.1(2)(c) led us to wonder whether cases involving complainants with mental disabilities were instead being prosecuted under s. 153.1—the offence of "sexual exploitation of a person with a disability". The section was added to the Criminal Code in 1998.[32] It requires proof that the accused is in a position of trust or authority towards the complainant with a disability and yet that finding does not negate consent. Rather the Crown must prove the additional element of non-consent, apparently on the same standard as for sexual assault generally. Thus this offence will always include all the elements of sexual assault plus additional requirements related to the exploitation of a trust relationship. Yet the maximum penalty of 5 years imprisonment for sexual exploitation of a person with a disability is lower than the maximum 10 years imprisonment for the lowest form of sexual assault, a fact that flies in the face of the idea that the exploitation of a particularly vulnerable complainant should be an aggravating factor rather than a mitigating one.

We found only 15 cases under s. 153.1. Convictions were obtained in approximately one third of these cases although it was sometimes difficult to determine the ultimate outcome because some of the reported decisions were

[30] *R v Matheson* (1999), 44 OR (3d) 557, 134 CCC (3d) 289 (CA).

[31] *Makayak*, supra n 13.

[32] Bill S-5, *An Act to Amend the Canada Evidence Act, The Criminal Code, and the Canadian Human Rights Act,* 1st Sess, 36th Parl, 1998 (as passed by the House of Commons 30 April 1998).

interim motions on other issues. Often when the section is charged, it is in addition to sexual assault charges and if convictions are appropriate under both sections, it is likely that charges under s. 153.1 will be stayed and only the more "serious" sexual assault conviction entered. Section 153.1 does not appear to be filling the gap left by the weaknesses of s. 273.1(2)(c).

As with s. 273.1(2)(c), the trust component of s. 153.1 can be problematic. Trust relationships can arise in nontraditional ways in the context of disability. For example, in *R v Kiared*,[33] the accused was a driver for a company that provided transportation services for persons with disabilities, a service on which many persons with disabilities depend for access to the community. Three days after driving the complainant, he appeared at her condo in uniform, where he sexually assaulted her. He was convicted of sexual assault causing bodily harm but was acquitted under s. 153.1. The Court was not persuaded that there was a sufficient relationship of trust, despite recognizing that the accused met the complainant, learned of her address and gained access to information about her disability through his role as a driver. The trial judge acknowledged the age difference between the two, the immaturity of the complainant, her expectation of safety in her home and his exploitation of her vulnerability. While he conceded that a DATS driver could be in a position of trust, he declined to find one in this case because the assault took place outside of the driver/passenger relationship and was only a single encounter.

The incoherence of s. 153.1 is demonstrated by the fact that it has its own abuse of trust, power and authority provision analogous to s. 273.1(2)(c),[34] which can be applied to negate consent in the context of a s. 153.1 prosecution. Thus the Crown would have to prove a relationship of *trust or authority* to get into s. 153.1 and then go on and show an *abuse* of a position of *trust, power or authority* in order to negate the consent requirement of s. 153.1. Not surprisingly, we have found no cases where this latter provision was applied to vitiate consent.

In our view, s. 153.1 should be repealed. The section adds nothing in the way of deterrence or denunciation for the sexual exploitation of people with mental disabilities by persons in positions of trust or authority. Rather it sets this group of complainants apart from other victims of sexual assault, requiring proof of additional elements to obtain a conviction, and then provides a sentencing discount for those convicted. It is difficult to conceive of any fact situation where a conviction could be obtained under s. 153.1 but not under the general sexual assault provision, whereas there are cases such as *Kiared* where sexual assault charges are successful but the sexual exploitation count cannot be made out. These cases should be dealt with as sexual assaults and the violation of relationships of trust dealt with through an expanded interpretation of s. 273.1(2)(c), which focuses on the exploitative behaviour of the accused, rather than on the impact of that behaviour on the complainant.

[33] *Kiared*, supra n 11.

[34] The wording of the section is slightly different than s. 273.1(2)(c) in that s. 153.1(3)(c) requires the Crown to prove the complainant was *counseled or incited* to engage in the sexual activity, not "induced." None of the cases considering both sections addressed this difference.

Conclusion

Canada has made significant gains over the past two decades in recognizing that an absence of consent to sexual contact is not invariably accompanied by physical resistance, and that non-consent is to be measured by whether the complainant wanted the sexual activity to take place. Section 273.1(2)(c) of the Criminal Code was intended to recognize that power and inequality must be scrutinized in assessing non-consent. However, the courts have interpreted this section so narrowly that it would appear the only hierarchy recognized is that of age, which is already taken into account explicitly through a range of offences applying to young victims. Our courts must do a better job of understanding how adult relationships of trust and power operate to secure acquiescence in sexual activity and thus negate consent. This shortcoming is particularly problematic for women with mental disabilities who often find themselves in dependent living situations and heavily reliant on social services for access to the community.

The tendency to infantilize persons with mental disabilities by consigning them to the status of eternal children may spring from a well-meaning protective impulse. Unfortunately, it also may make them particularly ill-equipped to recognize when they are being targeted for abuse. In the criminal justice system, infantilization is a source of disempowerment and discrimination rather than a mechanism of protection. Classifying women with mental disabilities according to their IQ or mental age tends to undermine their credibility, rather than according to them the special protections otherwise reserved for children.

Women with mental disabilities experience inequality in ways that intersect forms of ableist privilege with male power. They are rewarded socially for passing as "normal" which, for women, means being an object of male sexual interest. Yet they are also considered hypersexual and sexually deviant whenever they engage in sexual activity. Too often, the assumption is that they wanted it and are lucky to get it. This makes it extremely difficult to prove non-consent, especially in situations where the coercion resides in the inequalities of the relationship rather than overt pressures by the accused.

The ideal victim of sexual assault is a fiction. No woman can meet this impossible standard, whose requirements seem only to increase in number in response to reforms designed to make cases easier to prosecute and provide justice for greater numbers of women. By definition, women with mental disabilities cannot even aspire to be ideal victims because of sexist and ableist constructions of victimhood. Canadian sexual assault law fails to grasp these inequalities that preclude voluntary consent and thus fails to deploy provisions designed to address the effects of relationships of power, trust, authority and dependency.

The current legislative regime and the accompanying judicial response in Canada fail to respond to the barriers faced by sexual assault complainants with mental disabilities. Some other jurisdictions have examined pieces of this problem. For example, the Law Reform Commission of Ireland has recently released an important report on sexual offences and the capacity to consent.[35] This report recommends

[35] Ireland Law Reform Commission (2011) *Sexual offences and capacity to consent*. Dublin: Law Reform Commission. [*Sexual offences and capacity to consent*]. The focus of this report is on persons with intellectual disabilities but much of its analysis would have broader application; see also Edwards et al. (2012).

that reforms be carried out with the dual goals of continuing "the protective function of the criminal law in this area for adults who do not have the capacity to consent while ensuring that persons with limited decision-making ability are not unfairly precluded from relationships of a sexual nature where they have the requisite understanding of what a sexual relationship entails".[36] It is time for Canada to address in a comprehensive manner what steps can be taken both to reduce the incidence of sexual violence against women with mental disabilities and to ensure that the criminal justice system responds fully to their complaints of sexual assault.

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[36] *Sexual Offences and Capacity to Consent,* supra n 33 at para 6.26.

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