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# The Meaning of Capacity and Consent in Sexual Assault: *R. v. G.F.*

Isabel Grant and Janine Benedet\*

## 1. Introduction

The *Criminal Code* provisions dealing with sexual assault have been amended in a piecemeal fashion several times since the major reforms of 1982, which replaced the offences of rape and indecent assault with a three-tiered sexual assault offence.<sup>1</sup> Many of these reforms were brought forward in response to particular judicial decisions that provoked controversy and concern.<sup>2</sup> In most cases,

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1. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 246.1 [*Criminal Code* 1970], as amended by *An Act to Amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s. 19 [1982 Amendments].
2. In the 1982 Amendments, *ibid.*, s. 265(4) was a response to *R. v. Pappajohn*, [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481, 14 C.R. (3d) 243 (Eng.) (S.C.C.) [*Pappajohn* cited to SCR]. The 1992 reforms were instigated by the Supreme Court of British Columbia's decision in *R. v. Letendre* (1991), 5 C.R. (4th) 159, 1991 CarswellBC 421, 14 W.C.B. (2d) 281 (B.C. S.C.) (where Hood J. found the accused not guilty of sexual assault, noting that "[t]he mating practice, if I may call it that, is a less than precise relationship. At times no may mean maybe, or wait awhile" at para. 64). At the same time, the s. 276 provisions were amended to respond to *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 7 C.R. (4th) 117 (S.C.C.). See *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38 [1992 Amendments]. The third party records provisions were enacted in response to *R. v. O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1, 44 C.R. (4th) 1 (S.C.C.). See *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30. The 2018 reforms were in response to *R. v. Ghomeshi* (2016), 27 C.R. (7th) 17, 2016 CarswellOnt 4246, [2016] O.J. No. 1487 (Ont. C.J.) and the trial decision in *R. v. Al-Rawi* (2018), 359 C.C.C. (3d) 237, 44 C.R. (7th) 148, 2018 CarswellNS 60 (N.S. C.A.) [*Al-Rawi*]. See *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29 [2018

new provisions were added without removing or amending related provisions already in place. What remains is a set of provisions that do not work together as a coherent whole.

The Supreme Court of Canada's recent decision in *R. v. G.F.*,<sup>3</sup> a case involving the sexual assault of a highly intoxicated teenage girl by an adult common-law couple, is the latest in a series of decisions from the Supreme Court of Canada attempting to explain how the various provisions regarding consent, non-consent and incapacity fit together. It is also the most recent in a series of decisions that reveal how sexual assault law generally has been distorted by the court's determination that HIV nondisclosure be prosecuted as a form of sexual assault.<sup>4</sup> In this comment on *GF*, we examine the latest attempt by the Supreme Court to synthesize the piecemeal amendments to the *Criminal Code* in the context of consent and capacity to consent to sexual activity. We argue that the line of cases following the leading case of *R. v. Ewanchuk*<sup>5</sup> – from *R. v. Cuerrier*,<sup>6</sup> to *R. v. Hutchinson*<sup>7</sup> to *GF* – while purporting to uphold the robust definition of consent endorsed in *Ewanchuk*, have in fact considerably weakened the meaning of consent and correspondingly limited the doctrine of incapacity to consent as well. The Supreme Court has moved away from its focus on the subjective state of mind of the complainant required in *Ewanchuk*, to treating participation or even acquiescence as consent, and then looking to see if that supposed consent should be vitiated for one of a number of recognized reasons. This approach limits the scope of non-consent and ignores the statutory requirement that, for consent to exist at all, it must be truly voluntary.

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Amendments]. The exception to this pattern is the 1987/88 reforms to the provisions involving children, which flowed from the *Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa: Supply and Services Canada, 1984) (Chair: Robin F. Badgley). See *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24.

3. *R. v. G.F.* (2021), 404 C.C.C. (3d) 1, 71 C.R. (7th) 1, 459 D.L.R. (4th) 375 (S.C.C.) [*GF* SCC].
4. For further discussion on this topic, see generally Isabel Grant, “The Complex Legacy of *R. v. Cuerrier*: HIV Nondisclosure Prosecutions and Their Impact on Sexual Assault Law” (2020), 58:1 *Alta L Rev* 45 [Grant, “Complex Legacy”]; Lise Gotell & Isabel Grant, “Non-Consensual Condom Removal in Canadian Law Before and After *R. v. Hutchinson*” (2021), 44:2 *Dal LJ* 439.
5. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 131 C.C.C. (3d) 481, 22 C.R. (5th) 1 (S.C.C.) [*Ewanchuk* cited to SCR].
6. *R. v. Cuerrier*, [1998] 2 S.C.R. 371, 127 C.C.C. (3d) 1, 18 C.R. (5th) 1 (S.C.C.) [*Cuerrier* cited to SCR].
7. *R. v. Hutchinson*, [2014] 1 S.C.R. 346, 308 C.C.C. (3d) 413, 8 C.R. (7th) 255 (S.C.C.) [*Hutchinson*].

We begin with an introduction to the current structure of the *Criminal Code* provisions and the cases that have led to so much confusion. We move to examine the court's analysis of capacity to consent and then of consent in *GF*, demonstrating how these analyses are a significant departure from *Ewanchuk*. Finally, we conclude with a discussion of the strongest part of the majority's reasons in *GF*—its analysis of the proper scope of appellate review of assessments of credibility.

## 2. The Statutory Background

The *Criminal Code* is now a hodgepodge of provisions dealing with consent to sexual contact enacted at different times. In 1982, when the old offences of rape and indecent assault were repealed and replaced with the offence of sexual assault,<sup>8</sup> escalating in severity depending on the degree of additional violence or injury, no definition of consent or non-consent was included in the *Criminal Code*. Just as with the old offences that had been in force for the first 90 years of the *Code*'s existence,<sup>9</sup> Parliament seemed content to leave the definition of the element of non-consent to the courts. At the time of the 1982 reforms, courts typically defined a lack of consent in terms of the expected physical or verbal resistance by the complainant, placing the onus on her to make her lack of willingness evident to the accused.<sup>10</sup>

The only exception to the absence of a legislative definition was s. 265(3) of the *Criminal Code*,<sup>11</sup> which added a number of ways in which no consent is obtained, for the purposes of all assault-based offences, not just sexual assault.

265.(3) No consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.<sup>12</sup>

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8. See *Criminal Code* 1970, *supra* note 1, s. 246.1 (added pursuant to the 1982 Amendments, *supra* note 1, s. 19).

9. See generally *The Criminal Code, 1892*, S.C. 1892, c. 29; *Criminal Code* 1970, *supra* note 1.

10. See *Pappajohn*, *supra* note 2 (affirming that a "firm oral protest" is "sufficient to deny any reasonable grounds for belief in consent" at 154).

11. See *Criminal Code*, R.S.C. 1985, c. C-46, s. 745 [*Criminal Code*] (previously *Criminal Code* 1970, *supra* note 1, s. 244(3), added pursuant to the 1982 Amendments, *supra* note 1, s. 19).

In most respects, this list simply codified the common law. Even under the old offence of rape, the *Code* provided that rape was proven by sexual intercourse with a woman not the wife of the accused, if committed without her consent or “with her consent if the consent is extorted by threats or fear of bodily harm.”<sup>13</sup> The shift in language between these two formulations is interesting. The offence of rape spoke of a situation in which the complainant consents in fact, but the consent is legally invalidated by the threats. In the 1982 revisions, the language of “no consent is obtained” in s. 265(3) suggests that a lack of resistance that is the product of threats should not be considered consent at all. This shift reflects a change in attitudes as to what consent requires – that it is not a mere act of acquiescence or even participation, but rather a mental state that requires genuine agreement. Indeed, even some rape cases decided in the final years of that offence reflected this evolution in understanding. For example, in *R. v. Anderson*,<sup>14</sup> decided in 1981, the Nova Scotia Court of Appeal approved of the following passage from the trial judge’s jury charge:

Now, what do we mean by consent? Consent involves knowing what is being proposed and voluntarily permitting it to be done. Now, mere submission does not necessarily imply consent, for a woman may consent to intercourse because of threats or fear of bodily harm and a consent extorted in that way is no consent, at all.<sup>15</sup>

Although non-consent was an element of all of the sexual assault offences added to the *Code* in 1982, there was no statutory definition of consent until 1992. In 1992, Parliament passed s. 273.1, which defines consent and sets out a number of factors that are relevant to a consent determination.<sup>16</sup> Section 273.1(1) begins by telling us that consent is “the voluntary agreement of the complainant to engage in the sexual activity in question”. There is no definition of non-consent, which is the actual element of the *actus reus* for most sexual offences. The current version of s. 273.1(2), which applies only to sexual

12. *Criminal Code*, *supra* note 11, s. 265(3).

13. *Criminal Code* 1970, *supra* note 1, s. 143(b)(i).

14. *R. v. Anderson* (1981), 92 A.P.R. 623, 48 N.S.R. (2d) 623, 1981 CarswellNS 275 (N.S. C.A.) [cited to APR].

15. *Ibid.*, at 628.

16. Also in 1992, the reasonable steps provision was added to s. 273.2, limiting the circumstances in which an accused could raise a mistaken belief in consent. See 1992 Amendments, *supra* note 2, s. 1. In 2018, Parliament reinforced the affirmative consent standard in the context of an honest mistaken belief, allowing the defence only where voluntary agreement has been affirmatively expressed through words or actively by conduct. See 2018 Amendments, *supra* note 2, s. 19.

offences and not to the assault offences, sets out ways in which “for the purpose of subsection (1), no consent is obtained”:

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (a.1) the complainant is unconscious;
- (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.<sup>17</sup>

Subsections (a.1) and (b) were added in 2018, replacing the previous s-s. (b), which simply referred to incapacity to consent, without singling out unconsciousness.<sup>18</sup> As with s. 265(3), this list is not meant to be exhaustive of the circumstances in which no consent is obtained.<sup>19</sup> The 2018 amendments also added a provision that consent must be present at the time the sexual activity takes place, effectively codifying part of the Supreme Court’s decision in *R. v. A. (J.)*.<sup>20</sup>

We are left with a patchwork of provisions that have been added at different times that differ in scope – some applying to all assault-based offences and others applying only to sexual assault offences. Some of the provisions appear to overlap. For example, s. 265(3) includes “the exercise of authority”, while s. 273.1(2) refers to “abusing a position of trust, power or authority”.

The 1992 definition of consent as “voluntary agreement” sits uneasily with the implication in s. 265(3) that submission or lack of resistance could be equated with consent in some circumstances. Despite clear statements in later case law, most notably in *R. v. Ewanchuk*,<sup>21</sup> rejecting the equating of mere submission with consent

17. *Criminal Code*, *supra* note 11, s. 273.1(2).

18. See 2018 Amendments, *supra* note 2, s. 19. See also Grant, “Complex Legacy”, *supra* note 4 at 73-74 (for a discussion of the feminist debate over these amendments. It was already clearly established in law that an unconscious complainant was incapable of consent, but what was not clear was where the line was for a conscious but impaired complainant).

19. See *Criminal Code*, *supra* note 11, s. 273.1(3) (where it is stated that “[n]othing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.”).

20. *R. v. A. (J.)*, [2011] 2 S.C.R. 440, 271 C.C.C. (3d) 1, (*sub nom.* *R. v. J.A.*) 84 C.R. (6th) 1 (S.C.C.) [JA].

in any circumstances, the *Code* was never updated to remove these references from the introductory words of s. 265(3). In recent cases, the Supreme Court has tended to approach these provisions as if they were enacted at one time as one coherent code, rather than acknowledging that our sexual assault law is the product of accretion and reflects a disinclination on the part of Parliament to consider how proposed changes fit within the overall framework and whether evolving case law may mean that some existing provisions need to be rewritten or removed entirely.

### 3. The Jurisprudential Background

To complicate matters further, there are two lines of case law that have been operating in parallel that have recently come more directly in conflict. First, we have a body of case law – starting from *Ewanchuk*, to *JA*,<sup>22</sup> *R. v. Barton*<sup>23</sup> and *R. v. Goldfinch*<sup>24</sup> – asserting a robust standard of affirmative consent and rejecting any notion of implied consent or advance consent. Most notably, *Ewanchuk* required the Crown to prove only that the complainant did not subjectively want the sexual activity to take place in order to establish the actus reus of non-consent.<sup>25</sup> The complainant is not required, as a matter of law, to do or say anything to indicate a lack of agreement. In other words, the starting point is no longer that a woman consents unless she expressly says otherwise.

Simultaneously, however, we have a line of cases dealing with HIV nondisclosure in the context of sexual assault – beginning with *R. v. Cuerrier*, which was decided months after *Ewanchuk*, and culminating in *R. v. Mabior*<sup>26</sup> – that focus on the circumstances in which a deception will be recognized as invalidating consent. These two lines of cases intersected in *R. v. Hutchinson* where the doctrine of fraud, as developed in relation to HIV nondisclosure, leaked into sexual assault law in a different context. *GF*, the subject of this comment, is the court’s attempt to reconcile these lines of authority, which sit uneasily with one another.

Subsection 265(3)(c) deals with fraud negating consent and has

21. *Supra* note 5 at 356.

22. *Supra* note 20.

23. *R. v. Barton*, [2019] 2 S.C.R. 579, 376 C.C.C. (3d) 1, 54 C.R. (7th) 231 (S.C.C.) [*Barton*].

24. *R. v. Goldfinch* (2019), 380 C.C.C. (3d) 1, 55 C.R. (7th) 215, 435 D.L.R. (4th) 1 (S.C.C.).

25. See *Ewanchuk*, *supra* note 5 at 348.

26. *R. v. Mabior*, [2012] 2 S.C.R. 584, 290 C.C.C. (3d) 32, 96 C.R. (6th) 1 (S.C.C.) [*Mabior*].

been the site of much debate over the criminalization of people who do not disclose their HIV-positive status to their sexual partners. In *R. v. Cuerrier*,<sup>27</sup> the court held that a fraudulently induced consent under s. 265(3)(c) *vitiates* an otherwise valid consent. The court went beyond the common law definition of fraud as limited to the identity of one's sexual partner or the sexual nature of the activity and extended the statutory definition to cases where the deception poses a "significant risk of serious bodily harm" to the complainant.<sup>28</sup>

The three sets of reasons in *Cuerrier* do not actually consider whether to understand fraud as operating to prevent any real consent, because the complainant's agreement was not truly voluntary, or whether to think of fraud as vitiating an otherwise valid consent for policy reasons. Vitiating is not a term that appears in either s. 273.1, s. 265(3) or anywhere else in the sexual assault provisions of the *Criminal Code*; it is a judicial construct first introduced to sexual assault law (but not explained) by the Supreme Court of Canada in *Cuerrier*.<sup>29</sup> To the contrary, the *Criminal Code* uses the language "no consent is obtained".

The distinction between vitiating consent and finding no consent existed is important for several reasons. Saying that a deception vitiates consent means that the complainant did consent, but we are deciding her consent was invalid as a matter of law. This tells us important information about what consent includes. The more situations considered to be vitiating, the lower the threshold for consent, which in turn makes proving non-consent more challenging. There is also a danger that vitiated consent will be seen as a less serious violation of the complainant's bodily integrity than a situation where no consent exists at all. This may impact the approach to sentencing, creating a hierarchy of sexual offences that is not reflected in the structure of the *Code*. It also invites Parliament and the courts to narrowly circumscribe the vitiating circumstances, as the Supreme Court has done with fraud, so as not to detract from the complainant's ostensible autonomy. The law may tell the

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27. While *Cuerrier*, *supra* note 6 involved a charge of aggravated assault, the majority made clear the accused could also have been convicted of aggravated sexual assault. See Grant, "Complex Legacy", *supra* note 4 at 49, note 25.

28. *Cuerrier*, *supra* note 6 at 434, cited in *Hutchinson*, *supra* note 7 at para. 34.

29. Vitiating of consent for reasons of public policy was discussed in the context of physical assault in *R. v. Jobidon*, [1991] 2 S.C.R. 714, 66 C.C.C. (3d) 454, 7 C.R. (4th) 233 (S.C.C.), where it was held that consent to serious hurt or non-trivial bodily harm intentionally inflicted in the context of a fist fight was not legally valid.

complainant that she consented even where she subjectively did not want the sexual activity to take place.

*Hutchinson* was the high point of shifting the analysis away from the absence of consent by leaving more room for factors that could vitiate consent. *Hutchinson* dealt with a man who had poked holes in a condom for the explicit purpose of impregnating his unknowing girlfriend.<sup>30</sup> The court had to decide whether this deception negated the complainant's consent to *the sexual activity in question* from the outset, or whether instead it operated like HIV nondisclosure to vitiate an otherwise valid consent. Apparently driven by the principle of restraint, the majority chose the latter approach, one of fraud vitiating consent,<sup>31</sup> whereas the minority held that the complainant had never consented to sex with a sabotaged condom.<sup>32</sup> The majority set out a very narrow two-step approach to the content of consent. To satisfy the first step, which *GF* refers to as "subjective consent",<sup>33</sup> the complainant need only agree to the specific physical act, knowing of its sexual nature and the specific identity of her partner. That is all subjective consent requires. The second step is to consider whether any factors vitiate that consent on public policy grounds.

If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation. . . . Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)).<sup>34</sup>

In this passage, the majority treats the factors in s. 265(3) as vitiating factors, incorrectly describing the provision as speaking to situations of "ostensible consent or participation". In fact, s. 265(3) is broader in that it applies to a submission or lack of resistance caused by one or more of the four listed factors – this does not require any participation by the complainant and does not speak to her mental state at all, which is, according to *Ewanchuk*, what determines consent.

The limits on fraud developed in the HIV nondisclosure context meant that deliberately sabotaging a condom would only be

30. See *Hutchinson*, *supra* note 7 at para. 2.

31. See *ibid.*, at para. 6.

32. See *ibid.*, at para. 79.

33. *GF SCC*, *supra* note 3 at para. 4.

34. *Hutchinson*, *supra* note 7, at para. 4 [citation omitted].

criminalized where there was a significant risk of serious bodily harm to the complainant. The *Hutchinson* majority held that one consents to a sex act and not to how that sex act is performed. In other words, one consents to sexual intercourse but not to sexual intercourse with (or without) a condom.<sup>35</sup>

The temptation to utilize fraud in *Hutchinson* may have been based on the unusual fact situation, which was a clear example of a deception that caused bodily harm to the complainant. However, there are a growing number of cases on condom refusal. These cases do not involve bodily harm to the complainant, but rather harm to her autonomy, in the sense of her choice about the kind of sexual activity in which she will participate. Nonconsensual condom refusal refers to the situations where men ignore their sexual partners' insistence on a condom.<sup>36</sup> The logical extension of *Hutchinson* is that a man who openly disregards his partner's insistence on a condom, without a deception, is not guilty of sexual assault because condom use does not go to consent. The conclusion in *Hutchinson* that how the sexual activity takes place is not part of "the sexual activity in question" has also led to arguments that the amount of force used in sexual activity is also not part of consent. In *R. v. Barton*, the Criminal Lawyers' Association of Ontario tried to extend this logic to its absurd extreme by arguing that one only consents to the narrowly defined sexual activity and not to the amount of force with which it is perpetrated, an argument that has dangerous implications, especially for the most marginalized women.<sup>37</sup> Thus we emerged from *Hutchinson* with the possibility that all the factors in ss. 265(3) and 273.1(2) do not negate the presence of consent but rather vitiate it after the fact, substantially narrowing the definition of non-consent.

The reason all of this background is necessary to understand *GF* is because incapacity is one of those factors listed in s. 273.1(2). *Hutchinson* opened up the possibility of an argument that incapacity also vitiates an otherwise valid consent rather than preventing the complainant from ever forming consent. If incapacity only vitiates an otherwise valid consent, a complainant who is incapable of consenting may be found to have given subjective consent nonetheless. That was the central issue addressed by the Supreme Court in *GF*, although the decision goes further, and elaborates on

35. See *ibid.*, at para. 55.

36. See Gotell & Grant, *supra* note 4 at 5-12 (for a discussion of the social science literature on nonconsensual condom refusal).

37. See *Barton*, *supra* note 23 (Factum of the Criminal Lawyers' Association of Ontario) at para. 13. See also Grant, "Complex Legacy", *supra* note 4 at 54; Gotell & Grant, *supra* note 4 at 18, note 91.

how the limits on consent set out in ss. 265(3) and 273.1(2) operate together.

#### 4. *R. v. G.F.*

##### (a) The Factual Background

The complainant, CR, was a 16-year-old girl who went on a camping trip with her family and her mother's coworkers. The accused, GF and RB, were two of those coworkers, a common-law couple who were more than twice the complainant's age.<sup>38</sup> The complainant testified that GF, the male accused, provided her with large quantities of alcohol over the course of the evening. The alcohol made her sick, she vomited repeatedly, and she eventually went to lie down in the accused's trailer and fell asleep. She testified that she awoke to GF pulling her pants off and telling RB to perform oral sex on her. CR testified that she "kept blacking out and going in and out of it."<sup>39</sup> She was crying and groaning and said "stop" a number of times.<sup>40</sup> Justice Karakatsanis described what happened from the complainant's testimony as follows:

The complainant testified that she felt dizzy, intoxicated, scared, and repeatedly told the respondents to stop. G.F. told her to "be quiet". She did not call for help because she was sick, confused, and felt out of control. She testified that she did not feel able to make a choice of whether or not to participate. She tried to push away for a bit but got tired and then "just went along with it". Eventually, she passed out again. She disclosed the assault to her aunt the next day.<sup>41</sup>

One of the accused, GF, testified that he had found the complainant and RB in the trailer engaging in sexual activity and that the complainant had invited him to join them.<sup>42</sup> He testified that the complainant was not as intoxicated as she claimed and that she was an active and enthusiastic participant in the sexual activity.<sup>43</sup> He testified that he received assurances from the complainant at least seven times that she was consenting.<sup>44</sup> The other accused, RB, did not testify.

38. See *R. v. G.F.* (2019), 378 C.C.C. (3d) 518, 55 C.R. (7th) 437, 146 O.R. (3d) 289 (Ont. C.A.) at para. 14 [*GF ONCA*], reversed (2021), 404 C.C.C. (3d) 1, 71 C.R. (7th) 1, 459 D.L.R. (4th) 375 (S.C.C.).

39. *Ibid.*, at para. 6.

40. *Ibid.*, at para. 7.

41. *GF SCC*, *supra* note 3 at para. 9.

42. See *GF ONCA*, *supra* note 38 at para. 12.

43. See *GF SCC*, *supra* note 3 at para. 11.

The testimony of the complainant provided evidence of incapacity, but it also provided evidence that the complainant did not consent. She testified that she was highly intoxicated to the point of illness, going in and out of awareness, and unable to choose whether to participate, all of which supported the claim of incapacity. She also testified that she did not want to engage in sexual activity with her mother's coworkers; she wanted to sleep and recover from her intoxication. Although non-consent is measured subjectively and does not require resistance or objection, she testified that she did say stop and tried to push them away. This case therefore raised the relationship between incapacity and non-consent. However, the Crown at trial argued this case solely on the basis of incapacity.<sup>45</sup>

The trial judge accepted the complainant's testimony and concluded that she was incapable of consenting. He also held that GF's testimony was "unbelievable"<sup>46</sup> and "riddled with inconsistencies."<sup>47</sup> The trial judge's reasons did blur incapacity and non-consent on occasion, but in ways that were largely inconsequential given his findings of fact and credibility. The accused appealed their convictions on the basis that the finding of incapacity was unreasonable because the fact that the complainant remembered the sexual activity meant she was capable of consenting.<sup>48</sup>

The Court of Appeal for Ontario rejected the argument that a finding of incapacity was unreasonable.<sup>49</sup> However, the court went on to hold that the trial judge had erred in not first dealing with non-consent, and only moving to capacity if there was at least a reasonable doubt that the complainant did consent, in a manner akin to the approach endorsed in *Hutchinson*. Thus, the Court of Appeal conceptualized incapacity as a vitiating factor that need only be considered where there is at least a reasonable doubt that the complainant subjectively consented. In considering how a trial judge should address evidence where both capacity and consent are at issue, the Court of Appeal stated:

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44. See *ibid.*, at para. 10.

45. See generally *R. v. Foster*, 2016 CarswellOnt 12943, [2016] O.J. No. 4256, 2016 ONSC 3465 (Ont. S.C.J.).

46. *Ibid.*, at para. 71.

47. *Ibid.*, at para. 73.

48. See *GF ONCA*, *supra* note 38 at para. 23.

49. See *ibid.*, at para. 53.

He or she should first consider whether the Crown has proven beyond a reasonable doubt that the complainant did not consent to sexual contact. If the complainant did not consent, then there is no *ostensible consent which is vitiated* by lack of capacity.<sup>50</sup>

Following the Court of Appeal's approach, a finding that the complainant was incapable of giving consent could coexist with a finding that she did in fact consent.

The Court of Appeal also relied on our earlier research that considered incapacity and non-consent in the context of sexual assaults against women with intellectual disabilities.<sup>51</sup> In that work, we argued that if the complainant was asserting that she did not want the sexual activity to take place, the court should focus first on that claim of non-consent, and in doing so, potentially avoid an inquiry into the complainant's capacity to consent to sexual activity with the accused. When the basis for a capacity inquiry is the complainant's disability, there is a real risk, demonstrated in our research, that the focus will be on the complainant's perceived limitations rather than the violence she says was done to her.<sup>52</sup> This order of analysis is not based on the idea that incapacity vitiates consent; it is designed to avoid declaring a woman with a disability "incapable" where that is not necessary for conviction.

We argued in our previous work that incapacity could coexist with non-consent – as the evidence in this case demonstrates.<sup>53</sup> A complainant may be both aware that she does not want to be touched and incapable of appreciating who is touching her or what acts are being carried out on her body. However, the Court of Appeal effectively held the reverse, holding that incapacity could coexist with subjective consent – a position we had flatly rejected.

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50. *Ibid.*, at para. 41 [emphasis added].

51. See 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"], cited in *ibid.*, at para. 47.

52. See Benedet & Grant, "Consent, Capacity, and Mistaken Belief", *ibid.*, at 272. As will be discussed below, a finding of incapacity based on mental disability is very different and potentially much more far-reaching than a finding of incapacity based on intoxication.

53. This conclusion was contrary to the interpretation given to an earlier Court of Appeal for Ontario case, *R. v. Jensen* (1996), 106 C.C.C. (3d) 430, 47 C.R. (4th) 363, 90 O.A.C. 183 (Ont. C.A.), affirmed [1997] 1 S.C.R. 304, 112 C.C.C. (3d) 384, 5 C.R. (5th) 378 (S.C.C.), which was read by the Court of Appeal in *GF* to say that a finding of incapacity and a finding of non-consent were mutually exclusive. See *GF ONCA*, *supra* note 38 at para. 48, note 2.

**(b) The Majority Decision in *GF****(i) Capacity*

The majority decision of Justice Karakatsanis in *GF*,<sup>54</sup> supported by the minority of Justices Brown and Rowe, rejected the interpretation of incapacity as a vitiating factor that negates an otherwise valid consent. Rather, capacity is a precondition to the complainant being able to form that consent. A finding of incapacity should rule out the possibility of finding that the complainant voluntarily agreed to the sexual activity in question:

where the complainant is incapable of consenting, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question. In other words, the capacity to consent is a necessary – but not sufficient – precondition to the complainant’s subjective consent. As I shall explain, this is distinct from circumstances where a person may provide subjective consent that is not legally effective, due to, for example, duress or fraud.<sup>55</sup>

Even though capacity is a precondition to consent, the majority held that capacity need not necessarily be dealt with first, before non-consent, as there may be circumstances where non-consent can be demonstrated even where the complainant is incapable of consenting:

when a trial engages both the issues of whether the complainant was capable of consenting and whether the complainant did agree to the sexual activity in question, the trial judge is not necessarily required to address them separately or in any particular order as they both go to the complainant’s subjective consent to sexual activity.<sup>56</sup>

Thus, while a finding that a complainant was incapable of consent cannot coexist with a finding that she consented, it can coexist with a finding that she did not consent. This is because the capacity to consent is a higher threshold than the capacity to withhold consent. A complainant may be capable of saying no to sexual activity even though she is incapable of saying yes. As Justice Karakatsanis put it,

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54. *Supra* note 3, concurred in by Wagner C.J. and Abella, Moldaver, Martin and Kasirer J.J. Justices Brown and Rowe wrote a concurring decision that found that the reasons given by the trial judge were inadequate, but they applied the curative proviso because of the abundance of evidence of non-consent. See *ibid.*, at para. 107. Justice Côté dissented, holding that capacity is a vitiating factor that will only be considered if there is a reasonable doubt about consent and that the reasons given were insufficient to support a conviction. See *ibid.*, at paras. 139, 146.

55. *Ibid.*, at para. 24.

56. *Ibid.*

the capacity to consent requires a higher level of understanding than the capacity to withhold consent. As discussed, the capacity to consent is a cumulative assessment, requiring the degree of understanding necessary to appreciate *all* the conditions of subjective consent. If a complainant is incapable of understanding any one of those conditions, then they are incapable of consenting. Conversely, the capacity to withhold consent inherently requires a lesser degree of understanding because that capacity is established by a complainant's capacity to understand *any* of the necessary factors. For example, if a complainant is incapable of understanding the sexual nature of proposed touching but knows they do not want to be touched, then they are capable of withholding consent despite being incapable of consenting.<sup>57</sup>

Courts have often looked to evidence of minimal physical or motor capacity to indicate that a complainant has capacity to consent. In *R. v. Chen*,<sup>58</sup> for example, the fact that the complainant was able to remember her cell phone password and was able to say that she did not want her mother to be called was seen as evidence of capacity to consent to sex.<sup>59</sup> Where complainants have no memory of the sexual assault, it can be particularly challenging for the Crown to prove incapacity, because the complainant cannot counter the accused's evidence. In *GF*, the defence turned this around and argued that because the complainant did remember the sexual assault, that was evidence that she was in fact capable of consenting. Justice Karakatsanis made clear that memory is not determinative as to whether the complainant had capacity. Nor should evidence of minimal motor skills necessarily rule out a finding of incapacity.

Whether the complainant has a memory of events or not does not answer the incapacity question one way or another. The ultimate question of capacity must remain rooted in the subjective nature of consent. The question is not whether the complainant remembered the assault, retained her motor skills, or was able to walk or talk. The question is whether the complainant understood the sexual activity in question and that she could refuse to participate.<sup>60</sup>

The test for capacity was not strictly speaking an issue in *GF*, but nonetheless the court adopted the low threshold from the Nova Scotia Court of Appeal in *R. v. Al-Rawi*:<sup>61</sup>

57. *Ibid.*, at para. 62 [emphasis in original].

58. *R. v. Chen* (2016), 34 C.R. (7th) 352, 2016 CarswellAlta 2373, 2016 ABQB 644 (Alta. Q.B.).

59. See *ibid.*, at paras 104-05.

60. *GF SCC*, *supra* note 3 at para. 65.

61. *Supra* note 2.

In sum, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:

1. the physical act;
2. that the act is sexual in nature;
3. the specific identity of the complainant's partner or partners; and
4. that they have the choice to refuse to participate in the sexual activity.<sup>62</sup>

The *inability to understand* any of these components would negate capacity and thus there could be no subjective consent.<sup>63</sup> The fourth of these components is worded in a manner that is inconsistent with the understanding of non-consent in *Ewanchuk*. The focus should not be on the complainant's understanding of her right of refusal, since legally she is not required to refuse. What matters is whether she wants the sexual activity to take place. The final factor is really about the capacity to make a decision about whether one wishes to engage in the particular sexual act with the accused.

We have argued elsewhere that capacity should include the ability to understand the risks and consequences of sexual activity.<sup>64</sup> This is *not* to suggest that capacity requires that a complainant actually weigh those risks and consequences in any particular case, or that she reach a particular conclusion about them, but rather that she have the ability to do so if she chooses. How can one say that if the complainant is unable to understand, for example, that unprotected vaginal intercourse can lead to a pregnancy or an STI, that she is capable of meaningfully saying yes to that activity? Capacity, as explained in *GF*, does not offer the law's protection to women who don't understand what they are saying yes to.

The analysis presented in *GF* allows no room to recognize that different types of sexual activity are more risky and have more serious potential consequences, and so it might take a higher level of capacity for one to make a decision to participate in those activities. For example, saying yes to unprotected intercourse may require a higher level of capacity than saying yes to a kiss. In *R. v. Barton*,<sup>65</sup> the Supreme Court stated that, in the context of the reasonable steps

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62. *GF* SCC, *supra* note 3 at para. 57.

63. Isabel Grant has argued elsewhere that the Nova Scotia Court of Appeal in *Al-Rawi*, *supra* note 2 blurred the distinction between being capable of making a decision from actually making it. See Grant, "Complex Legacy", *supra* note 4 at 73-74.

64. See generally Isabel Grant and Janine Benedet, "Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions" (2017), 37 CR (7th) 375 [Grant & Benedet, "Capacity to Consent"].

65. *Supra* note 23.

provision that is part of the defence of mistaken belief in consent, what steps are reasonable in the circumstances might be more stringent where the activity carries greater risk.<sup>66</sup> The same should apply to incapacity. But in *GF*, the majority doubled down on an all-or-nothing approach to capacity. A person is either fully capable of saying yes to any sexual activity, however risky, or incapable of saying yes to any sexual activity. This approach inevitably leads to the search for the point at which the degree of intoxication or disability (or both) puts the complainant over some fixed but elusive line of incapacity, rather than recognizing capacity as a matter that is highly context-dependent.

We agree with the majority that the linkage between incapacity and non-consent is conceptually sound; it is incorrect to say that incapacity vitiates an otherwise valid consent, as the dissent of Justice Côté would have held. The complainant who is incapable of consenting is just that – not able to formulate consent at all because of her impaired mental state.

However, the majority blurred capacity and consent in its analysis of the complainant's ability to understand that she has a choice to refuse to participate. Justice Karakatsanis stated that “a complainant... who believes they have no choice in the matter, is not capable of formulating subjective consent”.<sup>67</sup> She made the same point in her analysis of the facts:

As [the sexual activity] continued, the complainant struggled and told the respondents to stop – evidence that she expressly refused to engage in the sexual activity. When those struggles and demands were ignored by the respondents, the complainant, in her confused and intoxicated state, acquiesced, believing she had no choice in the matter – again, evidence of incapacity.<sup>68</sup>

In our view, a complainant who is *unable to understand* that she has a choice not to participate is incapable of giving consent, but a complainant who concludes she has no choice but to participate is not consenting. There may be a number of reasons why a complainant might think she has no choice – for example, direct or indirect threats; the fact that the accused is much bigger, stronger or older than her; or the fact that the complainant has been sexually assaulted by the accused in the past. In fact, a belief that one has no choice but to submit is often a realistic assessment of the circumstances. Equating a determination that one has no choice but to submit with incapacity

66. See *ibid.*, at para. 108.

67. *GF SCC*, *supra* note 3 at para. 56.

68. *Ibid.*, at para. 63.

wrongly suggests that the complainant always does in fact have a choice or can always say no. It also blurs non-consent as a state of mind, which is what the offence is supposed to consider, with the old common law definition of non-consent as a decision or choice that needs to be expressed by words or action.

A complainant who submits because she believes she has no choice is not consenting; she is acquiescing, just as the complainant testified she did in the end in *GF*. Acquiescence or submission is not consent.<sup>69</sup> It is possible that a complainant could be incapable and also believe she has no choice but to submit, but these two findings need not necessarily coexist.

We have argued elsewhere that the threshold for capacity to say yes should be higher than the threshold for capacity to say no, and the *GF* majority's adoption of this position is an important development.<sup>70</sup> This conclusion is particularly important because the case law demonstrates that where the Crown asserts incapacity on the part of the complainant, it is common for judges to disregard clear evidence that the complainant actually told the accused to stop or communicated her wish not to participate in some other way. In *GF*, for example, the complainant testified that she said no repeatedly. Where the trial judge believes such evidence beyond a reasonable doubt, that should be sufficient without the necessity of a capacity inquiry. It is also common to see evidence of incapacity significantly undermine the credibility of the complainant such that her assertions of non-consent are disbelieved because the evidence of her level of intoxication, needed to support the incapacity argument, renders her testimony lacking in credibility or unreliable.<sup>71</sup>

It is important to recognize that capacity to consent, although most commonly at issue in the context of a complainant who is intoxicated, also arises in the context of a complainant who has a disability that might affect her capacity to consent to sexual activity.<sup>72</sup> The capacity test developed in *GF* is clearly focused on

69. See *Ewanchuk*, *supra* note 5 at 356.

70. See Grant & Benedet, "Capacity to Consent", *supra* note 64 at 377.

71. See e.g. *R v. Kishayinew* (2019), 382 C.C.C. (3d) 560, 60 C.R. (7th) 51, 451 D.L.R. (4th) 430 (Sask. C.A.), reversed (2020), 396 C.C.C. (3d) 417, 67 C.R. (7th) 1, 451 D.L.R. (4th) 426 (S.C.C.). See also *R. v. L. (T.W.)*, 2017 CarswellNWT 23, 2017 NWTSC 19, 138 W.C.B. (2d) 410 (N.W.T. S.C.) (where the trial judge found the complainant "to be a credible but utterly unreliable witness. Her level of intoxication was such that I am unable to make any firm conclusions based on her recollection of events" at para. 13).

72. See generally Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007), 52 McGill LJ 515; Janine Benedet & Isabel Grant, "A

intoxicated complainants. We wonder how useful this capacity test is for complainants with intellectual or other disabilities that might impair the ability to consent. For example, is it likely that a woman with an intellectual disability targeted by the driver of her accessible bus service will be incapable of understanding who her sexual partner is? What does it mean to say that she needs to understand that the activity in question is sexual? What does she need to understand about the sexual nature of the activity? Does she have to understand the role of sex in reproduction? What about in the transmission of STIs? Presumably not, given the rejection of “risks and consequences” in the capacity analysis. But then what makes activity “sexual” if that understanding is completely divorced from its risks? The conflation of incapacity with a belief that one cannot refuse is also problematic for this group of complainants. If a complainant with an intellectual disability believes she has no choice but to comply with a demand for sex – because otherwise she will lose access to her accessible bus service which may be her only access to the community – she does not want the sexual activity to take place as required by *Ewanchuk*. She simply believes she has no other choice, which is not necessarily evidence of incapacity but rather of non-consent.

Canadian courts have so far shown little interest in recognizing the differences in the contexts in which incapacity arises. Courts have mostly treated incapacity as an all-or-nothing line which, when crossed, means that a complainant can consent to nothing in any circumstances. Courts have focused on the abilities of the complainant in the moment and not on the circumstances in which she finds herself; she is either capable of consenting to even the riskiest sexual activity in the most dangerous circumstances or incapable of consenting to anything, even to a kiss by a boyfriend.

Allowing a trier of fact to examine non-consent before determining capacity is particularly important for women and girls with intellectual disabilities because of the serious impact of a finding of incapacity. People with intellectual disabilities have long had their sexuality controlled and limited by the state and caregivers.<sup>73</sup> The law needs to evolve in a way that recognizes that adults with intellectual disabilities are fully sexual human beings, while also protecting them from the disproportionate rates of sexual violence and exploitation to

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Situational Approach to Incapacity and Mental Disability in Sexual Assault Law” (2013), 43:1 Ottawa L Rev 1 [Benedet & Grant, “A Situational Approach”].

73. See e.g. Benedet & Grant, “Consent, Capacity, and Mistaken Belief”, *supra* note 51 at 251, 289.

which they are subjected. As complainants in sexual assault prosecutions, they may endure intense scrutiny of their abilities and understanding of sex at trial in order to establish whether they are capable of giving consent.<sup>74</sup> The Crown is often put in a position of undermining the credibility and reliability of its own main witness by leading evidence of her incapacity. Defence counsel are quick to jump on this opportunity to undermine the credibility of the complainant. Findings of incapacity are more drastic for women and girls with intellectual disabilities than for intoxicated complainants precisely because intoxication is transient and a finding about capacity in one moment does not impact capacity in other moments. Such is not the case for most complainants with intellectual disabilities. While we have argued elsewhere that incapacity for complainants with intellectual disabilities should be viewed situationally,<sup>75</sup> most cases still treat it as an all-or-nothing status. Thus, the conclusion that non-consent can be addressed first is particularly important for this group of complainants.

Until courts recognize the need for a situational approach to incapacity, the clarification in *GF* that a court may consider capacity and non-consent in any order – and can make a finding of non-consent even where the complainant may have been incapable of consenting – gives Crown counsel and judges the flexibility to avoid capacity inquiries where there is evidence that the complainant did not want the sexual activity to take place. It also prevents these complainants from being exposed to extensive and potentially humiliating direct and cross-examination at trial about their understanding of sex, hygiene and other intimate matters.<sup>76</sup> Capacity inquiries can also subject women with disabilities to invasive cross-examination about their past sexual history in an attempt to demonstrate that they have had capacity in the past, even if that past sexual activity was itself exploitative, which is a reflection of the failure to recognize that capacity is highly context-dependent.

Thinking about capacity beyond intoxication also requires consideration of how the age of the complainant should operate

74. See e.g. *R. v. Slatter* (2020), 396 C.C.C. (3d) 415, 67 C.R. (7th) 5, 452 D.L.R. (4th) 1 (S.C.C.) [*Slatter SCC*], reversing (2019), 382 C.C.C. (3d) 245, 58 C.R. (7th) 18, 452 D.L.R. (4th) 4 (Ont. C.A.) [*Slatter ONCA*]; *R. v. Prince* (2008), 232 Man. R. (2d) 281, 2008 CarswellMan 479, 2008 MBQB 241 (Man. Q.B.); *R. v. D. (N.J.)* (1990), 281 A.P.R. 271, 112 N.B.R. (2d) 271, 1990 CarswellNB 206 (N.B. C.A.).

75. See generally Benedet & Grant, “A Situational Approach”, *supra* note 72. See also Benedet & Grant, “Consent, Capacity, and Mistaken Belief”, *supra* note 51 at 269-70.

76. See Benedet & Grant, “A Situational Approach”, *supra* note 72 at 12.

within this framework. In our view, courts should approach age as going to capacity. A child who is under the age of consent is incapable of consenting to an adult who is not within the close in age exceptions. Age is not one more vitiating factor that negates an otherwise valid consent; age is a prerequisite to consent. Relying on *GF*, this does not mean that an underage child cannot withhold consent: a child may know that she does not want to be touched sexually by the accused without being capable of consenting to sex with someone who is considerably older than her.

For many years, courts tended to treat cases involving adolescent complainants who are below the age of consent, and who allege sexual assault by adult men, as technical “statutory rapes” that are less serious than real sexual assaults. Only in recent years have courts rejected the language of *de facto* consent and recognized that the damage to children and teenagers from sexual activity with adults is no less profound than the harm done to adult victims. As the Alberta Court of Appeal acknowledged in a sentencing case, *R. v. Hajar*,<sup>77</sup> using “*de facto* consent” as a mitigating factor would fail to recognize that children under 16 are simply incapable of consenting to sex with adults:

In raising the age of consent, Parliament determined that children in the protected category are incapable of consenting to sexual activity with older persons outside the close in age exceptions. That is because of the power imbalance inherent in the relationships between children and those older persons coupled with the particular vulnerability of children. *Put simply, children in the protected category are not capable of making such an important, personal and potentially life-altering decision.*<sup>78</sup>

The suggestion that children can give subjective consent to adults who are often decades older than them will only undermine efforts to take child sexual abuse seriously and lead to a possible backsliding into seeing these crimes as mere “statutory” rapes. Age must be viewed as an essential component of capacity.

(ii) *Consent*

While *GF* clarified the relationship between capacity and consent in a helpful way, albeit with a low threshold for capacity and a blurring of non-consent and incapacity, the judgment is more problematic on consent. Particularly concerning are the majority’s

77. *R. v. Hajar* (2016), 338 C.C.C. (3d) 477, 31 C.R. (7th) 1, [2016] 12 W.W.R. 435 (Alta. C.A.).

78. *Ibid.*, at para. 88 [emphasis added].

efforts to justify the deeply flawed logic from *R. v. Hutchinson*<sup>79</sup> in interpreting how consent interacts with factors that preclude or vitiate it, such as those listed in ss. 273.1(2) and 265(3). *Hutchinson* had suggested that all the factors in those sections were vitiating factors – i.e., factors that would negate an otherwise valid consent. The Court of Appeal and the dissent in *GF* agreed.

The majority in *GF* rightly took capacity out of the list of vitiating factors and made it a precondition to consent, not a vitiating factor. It was unnecessary for the court to go any further by looking at factors other than capacity, which were not at issue. In choosing to do so anyway, the court gave too much weight to the vitiating stage of consent, which has a number of consequences. First, the focus on vitiating undermines the requirement in s. 273.1(1) that consent means the *voluntary agreement* to the sexual activity in question. Second, and connected to the first, *GF* demonstrates a subtle shift away from *Ewanchuk* and the requirement that “[f]or the purposes of the *actus reus*, ‘consent’ means that the complainant in her mind wanted the sexual touching to take place.”<sup>80</sup> Finally, the majority over-complicated the doctrine of fraud, adding a new requirement without clarifying where it fits into the existing framework. None of this was necessary on the facts of *GF*.

#### (A) Vitiating and Voluntariness

In *GF*, the majority held that there are two components to the concept of “subjective consent”. The first inquiry is whether the complainant subjectively and voluntarily agreed to the sexual activity in question, and the second inquiry is whether that subjective consent should be legally invalidated – or vitiated – for public policy reasons.<sup>81</sup> By placing too many situations in the vitiating category, the court has effectively weakened what it means to say consent must be voluntary. In other words, by separating out the subjective consent inquiry from most of the statutory factors that negate subjective consent, the majority has left very little content to the concept of voluntary agreement and instead held that the effective limits on consent are based on policy, not the definition of consent itself. This can be demonstrated through the court’s analysis of ss. 265(3) and 273.1(2).

First, we are told that all of the factors listed s. 265(3) vitiate an otherwise valid consent, and then the court added that the elements

79. *Supra* note 7.

80. *Ewanchuk*, *supra* note 5 at 355.

81. See *GF* SCC, *supra* note 3 at paras. 31-33.

set out in s. 273.1(2) operate in different ways, some precluding consent, others vitiating it:

Section 265(3) sets out four factors that will vitiate subjective consent to sexual activity. Subjective consent will not be given legal effect where it is the product of force, threats or fear of force, certain types of fraud, or the exercise of authority: s. 265(3)(a) to (d). Section 273.1(2)(c) also vitiates subjective consent where the complainant is induced into sexual activity by the accused abusing a position of trust, power, or authority. . . .When subjective consent is the product of these factors, the complainant has been deprived of control over who touches their body, and how, and there is no consent in law. . .

However, these factors do not *prevent* subjective consent. Rather, they recognize that even if the complainant has permitted the sexual activity in question, there are circumstances in which that subjective consent will be vitiated – deemed of no force or effect. The distinction between preventing subjective consent and rendering it ineffective may be subtle, but it is important. A factor that prevents subjective consent must logically be linked to what subjective consent requires. Conversely, a factor that vitiates subjective consent is not tethered to the conditions of subjective consent and must find footing and justification in broader policy considerations.<sup>82</sup>

Thus, the Court described s. 273.1(2) as multifaceted with its primary function being to clarify the broad definition of consent in s. 273.1(1). Only s. 273.1(2)(c), dealing with the abuse of trust, power or authority, vitiates consent as a matter of public policy.<sup>83</sup>

On first blush, this may not seem problematic – why does it matter whether consent was never there or is vitiated after the fact, so long as the outcome is the same? The problem is evident when we think about how these factors operate in practice. Section 265(3)(a) provides that no consent is obtained where the submission or lack of resistance is caused by force to the complainant or to some other person.<sup>84</sup> Section 265(3)(b) provides that no consent is obtained where lack of resistance is based on “threats or fear of the application of force to the complainant or to a person other than the complainant”.<sup>85</sup> The majority in *GF* said that both of these are vitiating factors. What that means is that when a complainant submits to sexual activity because of the application of force or the threat of force, she is “voluntarily agreeing to the sexual activity in question” and we are just vitiating her consent after the fact as a matter of policy. This undoes decades of

82. *Ibid.*, at paras. 35-36 [emphasis in original; citations omitted].

83. *Ibid.*, at para. 44 [citations omitted].

84. See *Criminal Code*, *supra* note 11, s. 265(3)(a).

85. *Ibid.*, s. 265(3)(b).

law reform and judicial decisions designed to eliminate the resistance requirement and to give consent real content, and simply must be wrong. A complainant who goes along with sexual activity to save herself or her child is not giving subjective consent. If the Supreme Court is correct, consent has been reduced to bare agreement or acquiescence. Central to the decision in *Ewanchuk* was that consent “means that the complainant in her mind wanted the sexual touching to take place.”<sup>86</sup> A woman who submits because of threats or fear does not in her mind want the sexual activity to take place. She has not given consent in her own mind. She has submitted to sexual activity because she is afraid of what the accused might do to her. By calling this factor vitiating, we are saying that submission out of fear is voluntary agreement, thus reducing voluntary agreement to a bare “ok, but only to protect my life or safety.”

Justice Karakatsanis also decided that consent that is induced by an abuse of trust, power or authority meets the test of subjective consent that is then vitiated for public policy reasons. If the complainant has agreed to sexual activity because of the abuse of trust, power or authority, that agreement may well not be voluntary but rather induced through the exploitative behaviour on the part of the accused. Justice Hoegg, in her concurring minority at the Newfoundland Court of Appeal in *R. v. Snelgrove*,<sup>87</sup> made this point clearly:

As well, I am concerned about the use of the phrase “vitiation of consent” to describe the possible effect of section 273.1(2)(c). I would not describe section 273.1(2)(c) as providing for the vitiation of consent section 273.1(2)(c) provides that there is no consent to sexual activity if it has been induced by an accused’s abuse of a position of trust, power or authority. In other words, it is not a question of vitiating or nullifying consent, because there was no consent at law in the first place.<sup>88</sup>

The reason that there was no consent in the first place was because the agreement to participate was not truly voluntary.

Consent is the *voluntary* agreement to participate in the sexual activity in question. The Supreme Court of Canada has given very little attention to what the voluntariness requirement adds to s. 273.1, but it did uphold, from the bench, reasons from the Court of Appeal for Ontario which gave broad scope to the voluntariness requirement. In *R. v. Stender*,<sup>89</sup> the complainant had gone to the

86. *Ewanchuk*, *supra* note 5 at 355.

87. *R. v. Snelgrove* (2018), 366 C.C.C. (3d) 164, 50 C.R. (7th) 133, 437 D.L.R. (4th) 484 (N.L. C.A.), affirmed [2019] 2 S.C.R. 98, 53 C.R. (7th) 45, 437 D.L.R. (4th) 480 (S.C.C.) [*Snelgrove* SCC].

88. *Ibid.*, at para. 52.

accused's house to retrieve nude photographs of her he was keeping on his computer. She agreed to have sex with the accused only because he threatened to disseminate those photographs of her to her family and her employer if she refused.<sup>90</sup> The Court of Appeal held that there was no need to consider whether consent was vitiated by an abuse of trust because there was no voluntary agreement in the first place.

M.O. advanced a version of events in which she vehemently denied that she freely consented to the sexual acts in question. Throughout her testimony, she repeatedly stated her belief that she had no choice but to submit to intercourse with the respondent; that her purpose in going to the respondent's apartment (on both occasions) was to secure the deletion of the respondent's computer files containing the nude photographs so as to avoid their dissemination and the reputational injury that would follow; that she told the respondent during both attendances at his apartment that she did not want to have sex with him; that the respondent knew that she "fought him off"; and that he pressured her to engage in sex as a condition for the deletion of the computer files. On M.O.'s evidence, therefore, she did not wish the sexual touching to occur, and no actual consent to the touching was ever given.<sup>91</sup>

One of the clearest articulations of the role of voluntariness can be found in the Quebec Court of Appeal decision in *St. Laurent*, which was cited at length by the Court of Appeal in *DS*:

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

*"Consent" is, thus, stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.*<sup>92</sup>

89. *R. v. Stender* (2004), 188 C.C.C. (3d) 514, 24 C.R. (6th) 91, (*sub nom.* *R. v. S. (D.G.)*) 72 O.R. (3d) 223 (Ont. C.A.) [*DS* cited to OJ], affirmed [2005] 1 S.C.R. 914, 201 C.C.C. (3d) 319, 258 D.L.R. (4th) 577 (S.C.C.) [*Stender*].

90. See *DS*, *ibid.*, at para. 27.

91. *Ibid.*, at para 49.

92. *Ibid.*, at para. 50 [emphasis in original], quoting *St-Laurent c. Québec (Juge de la Cour du Québec)* (1993), (*sub nom.* *R. v. Saint-Laurent*) 90 C.C.C. (3d) 291, (*sub nom.* *St. Laurent c. Héту*) [1994] R.J.Q. 69, 1993 CarswellQue 990 (C.A. Que.) at 311, leave to appeal refused (1994), (*sub nom.* *Saint-Laurent v. Héту (Juge)*) 175 N.R. 240 (note), (*sub nom.* *Saint-Laurent c. Héту (Juge)*) 66 Q.A.C. 160 (note), [1994] S.C.C.A. No. 55 (S.C.C.).

Someone who is coerced into agreeing to participate in sexual activity because she is afraid of being harmed in some way is not voluntarily agreeing to the sexual activity. Subsections 265(3)(a) and (b) were wrongly characterized as vitiating consent by the majority in *GF*. Characterizing s. 273.1(2)(c) (dealing with abuses of trust, power or authority) as always vitiating is also problematic. Where a complainant wanted the sexual activity to take place, vitiation may have a role to play. However, a complainant who submits to sexual activity with someone who is abusing a position of trust, power or authority may well not have voluntarily agreed to the sexual activity in question but rather may have acquiesced based on that abuse by the accused. It is important that courts not jump straight to vitiation without examining whether in fact the complainant wanted the sexual activity to take place. A robust definition of voluntariness should reduce the reliance on this provision and focus courts' attention on subjective consent. A complainant who submits because of an abuse of trust, power or authority – even if she does not appreciate the influence being exerted on her at the time – does not voluntarily agree. It was entirely unnecessary to conclude that all abuses of trust, power or authority are vitiating in a case that did not raise this issue. Limiting the reliance on vitiation is important for situations that are not included expressly in the *Criminal Code*. If voluntariness is not given any real role to play in the definition of consent, courts may be unwilling to give it content in other contexts not covered explicitly by ss. 265(3) and 273.1(2).

The vitiation approach also has potential implications for sentencing. A finding of vitiated consent includes by definition the conclusion that the complainant has given subjective consent. We worry that this finding could be used to argue that these sexual assaults are somehow less serious than others where the complainant did not give subjective consent, thus creating a hierarchy of sexual assaults. Consider a case where “the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority” under s. 273.1(2). For example, a complainant may engage in sexual activity with her therapist because she is afraid of losing access to his therapeutic care.<sup>93</sup> The Supreme Court in *GF* said that subjective consent in this situation is present, but it is vitiated for public policy reasons. One can also imagine defence counsel trying to argue at sentencing that the presence of subjective consent makes the sexual assault less serious. If the courts are increasingly relying on the concept of vitiation, they need to make a strong statement that there is

93. See e.g. *R. v. Kilian*, 2018 CarswellAlta 868, 2018 ABQB 273, 147 W.C.B. (2d) 543 (Alta. Q.B.) at paras. 95-99.

no hierarchy based on whether consent is vitiated or never present at all.

**(B) Is Agreeing to Sex the Same Thing as Wanting it to Take Place?**

This evisceration of the voluntariness requirement is closely connected to another subtle change in the law that we saw in *GF*. One of the landmark aspects of *Ewanchuk* was the requirement that “[f]or the purposes of the *actus reus*, ‘consent’ means that the complainant in her mind wanted the sexual touching to take place.”<sup>94</sup> The majority does not explicitly define the *actus reus* this way. It does acknowledge that a complainant may be incapable and still know that she does not want to be touched, but Justice Karakatsanis repeatedly refers to the complainant agreeing to the sexual activity rather than wanting it to take place.

It is difficult to know what this shift is intended to signal, but we note that there may well be circumstances where a complainant agrees to participate in sex but does not want the sexual activity in question to take place. Threats of harm, as discussed above, provide a clear example of this distinction. There are numerous reasons why a complainant submits to sexual activity that she does not want to happen: the victim of domestic assault who wants to calm down her partner so that he will stop hurting her; the drug user who wants access to her supply that the accused controls; or the low-wage worker concerned for her continued employment if she does not go along with her employer’s advances. The voluntariness requirement helps clarify the line between consent and submission. Consent requires a complainant who wants the sexual activity to take place. If you take all substance out of the requirement for *voluntary* agreement, agreement comes dangerously close to compliance or submission, which *Ewanchuk* established was not equivalent to consent. This is particularly true for complainants who face a significant imbalance in power vis-à-vis their sexual partner.

A recent decision from the Court of Appeal for Ontario applies the approach we have suggested, giving meaning to the voluntariness required for consent. The complainant in *R. v. P.D.C.*,<sup>95</sup> who had been an intimate relationship with the appellant, testified that she did not want to have sex with the appellant but that she had no choice because if she didn’t submit “(t)here would have been more fighting,

94. *Ewanchuk*, *supra* note 5 at 355.

95. *R. v. P.D.C.* (2021), 401 C.C.C. (3d) 406, 2021 CarswellOnt 2831, 2021 ONCA 134 (Ont. C.A.) [*PDC*].

more—I'd be a prisoner, [and] wouldn't be allowed to go home.”<sup>96</sup> The Court of Appeal rejected the argument that the trial judge should have first looked to subjective consent and only then considered whether her agreement was vitiated under s. 265(3) or s. 273.1(2). Relying on *Ewanchuk* and *Stender*,<sup>97</sup> the court held that where agreement to participate is not voluntary, there is no need to get to s. 265(3):

Where a person does not actually choose to participate in the sexual activity, there is no voluntary agreement. The absence of this subjective mental state – voluntary agreement to participate in sexual activity – establishes the requisite *actus reus* of the offence, and makes it unnecessary to enter into an inquiry as to whether ss. 265(3) or 273.1(2) applies to vitiate that consent.<sup>98</sup>

Not only does this approach maintain a significant role for voluntary agreement, it also confirms that believing you have no choice but to submit goes directly to proof of non-consent. While *PDC* was decided after *GF*, the court did not cite *GF* in this part of its judgment.

### (C) Three Levels of Fraud

*GF* also attempted to clarify the doctrine of fraud, even though no issue of fraud was raised in the case. Instead, the Court has muddied the waters by over complicating fraud and not being clear about what *GF* adds or takes away from previous case law. The majority described three levels of fraud.<sup>99</sup> First, fraud relating to any of the elements of subjective consent negates that consent. For these cases, there is no requirement that the Crown prove a significant risk of serious bodily harm – the fraud instead goes directly to the definitional elements of consent. Fraud relating to the identity of a sexual partner or the sexual nature of the activity will negate consent in all circumstances. For example, a woman who agrees to have sex with someone she believes to be her husband when he is in fact the husband's identical twin brother impersonating the husband, is not consenting.

Second, fraud that goes to aspects of the sexual activity *other* than the elements of subjective consent, does not directly negate consent but rather vitiates it under s. 265(3). The Crown is held to a higher standard when demonstrating this second kind of fraud vitiating

96. *Ibid.*, at para. 11.

97. *Supra* note 89.

98. *PDC*, *supra* note 95 at para. 77 [citations omitted].

99. See *GF SCC*, *supra* note 3 at para. 37.

consent and must also prove that the deception had the “reprehensible character of criminal acts.”<sup>100</sup>

Third, fraud that is neither linked to the conditions of subjective consent nor has the “reprehensible character of criminal acts” is irrelevant to consent. Thus, for example, a deception about marital status or wealth is presumably in this third category.<sup>101</sup>

It is the second category of fraud that has caused so much difficulty for the courts. The law has evolved primarily in the context of persons who fail to disclose their HIV-positive status to their sexual partners. However, in *Hutchinson*, the HIV case law crossed into the consent case law. After *Hutchinson*, a woman who believes she is only consenting to sex if a condom is used is told otherwise by the courts.

The *GF* majority indicated that the Crown must prove the “reprehensible character of criminal acts” for the second level of fraud. This phrase originated in *R. v. Cuerrier*<sup>102</sup> and was resurrected by the slim majority in *Hutchinson*.<sup>103</sup> It is completely absent from other HIV nondisclosure cases, including the Supreme Court’s own leading post-*Cuerrier* decision in *R. v. Mabior*.<sup>104</sup> The *GF* majority makes no mention of the very significant limit the court has consistently put on fraud in s. 265(3)(c) since *Cuerrier*. Such fraud is only criminalized where it creates a significant risk of serious bodily harm. There is no mention of this requirement in *GF*, and so it is not clear if the “reprehensible character” test is another way of expressing this requirement. Whether the majority was simply reflecting on fraud in a context that did not raise fraud and felt there was no need to discuss this limitation, or whether it was intending to revise the fraud framework, is unclear. In the context of HIV nondisclosure prosecutions, the limit serves an important public policy function.

100. *GF* SCC, *supra* note 3 at para. 39, citing *Cuerrier*, *supra* note 6 at para. 133.

101. There is a tendency to trivialize the harm to women’s autonomy caused by these other deceptions that are outside the scope of criminal law and to catastrophize the overcriminalization that could result should such deceptions be recognized in law. For example, in *Cuerrier*, *supra* note 6 at para. 403, then Justice McLachlin stated in the context of criminalizing deceptions: “Will alluring make-up or a false moustache suffice to render the casual social act criminal?”. The same tendency was evident in the hearing of *Kirkpatrick* at the Supreme Court of Canada where Justice Rowe used the example of deceptions about eye colour. See *R. v. Kirkpatrick* (2020), 388 C.C.C. (3d) 60, 63 C.R. (7th) 338, 2020 CarswellBC 1201 (B.C. C.A.), leave to appeal allowed *Ross McKenzie Kirkpatrick v. Her Majesty the Queen*, 2021 CarswellBC 189, 2021 CarswellBC 190 (S.C.C.) [*Kirkpatrick* SCC] (Oral argument).

102. *Supra* note 6.

103. See *Hutchinson*, *supra* note 7 at para. 42.

104. *Supra* note 26.

The court should not be taken as removing this requirement for the HIV context in a case that had nothing to do with HIV nondisclosure or fraud.

However, that same limitation of a significant risk of serious bodily harm that has reduced the criminalization of people with HIV has caused problems for sexual assault prosecutions outside of the HIV nondisclosure context.<sup>105</sup> *Hutchinson*, and a number of cases involving nonconsensual condom removal, provide an example of this problem. Because *Hutchinson* defined the essential features of the “sexual activity in question” so as to exclude whether a condom was used from the definition of consent, nonconsensual condom removal is treated as a form of fraud that only vitiates consent, falling under s. 265(3)(c) in the second of the *GF* court’s three categories. In *Hutchinson*, the risk of bodily harm was an unwanted pregnancy, which actually materialized in that case. But not everyone faces a significant risk of serious bodily harm from the removal of a condom. Unless one’s sexual partner has an STI, deceptive or nonconsensual condom removal does not create a risk of serious bodily harm for complainants who are already pregnant or unable to become pregnant. Thus, the criminal law fails to acknowledge the choice about condom use, for example, in regard to men having sex with men, pregnant women, older women and others so long as there is no STI involved. Nor does the doctrine of fraud apply where there has been no deception by the accused and instead, he simply proceeds with sexual activity without a condom despite the wishes of his partner.<sup>106</sup>

It is surprising that the *GF* majority thought it was a good idea to go into fraud in this much detail in a case that had nothing to do with fraud, especially given that the court, even at the time *GF* was released, had a case before it that squarely raises nonconsensual condom refusal and fraud. In *R. v. Kirkpatrick*,<sup>107</sup> the court has been asked to reconsider its decision in *Hutchinson* that agreement to sex with a condom necessarily includes agreement to sex without a condom. The complainant in *Kirkpatrick* made clear to the accused that she would only participate in sex with a condom. The accused ignored that request and proceeded with intercourse without a

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105. It has also led to widespread calls to remove HIV nondisclosure from sexual assault. See e.g. Grant, “Complex Legacy”, *supra* note 4 at 71-72; Women’s Legal Education and Action Fund, “A Feminist Approach to Law Reform on HIV Non-Disclosure” (2019), online: <[www.leaf.ca/wp-content/uploads/2019/01/2019-01-08-LEAF-HIV-ND-Position-Paper-FINAL.pdf](http://www.leaf.ca/wp-content/uploads/2019/01/2019-01-08-LEAF-HIV-ND-Position-Paper-FINAL.pdf)> .

106. See further Gotell & Grant, *supra* note 4.

107. *Kirkpatrick* SCC, *supra* note 101.

condom. The Court of Appeal for British Columbia was divided on whether he had pretended to use a condom (in which case fraud might apply), or whether he had just ignored her expressed wishes. The majority in the Court of Appeal differentiated *Hutchinson* on the basis that condom refusal (*Kirkpatrick*) is different than condom deception (*Hutchinson*). Excluding condom refusal from the definition of consent “would leave the law of Canada seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy.”<sup>108</sup> The confusion created by *Hutchinson* could be remedied through the simple recognition that sex with a condom is a different sexual activity than sex without. This is common sense to most Canadians and clearly troubled the majority of the Court of Appeal for British Columbia.<sup>109</sup> It is encouraging that the majority in *GF* began its judgment by quoting from *Ewanchuk* that “control over who touches one’s body, and how, lies at the core of human dignity and autonomy”<sup>110</sup> The majority in *Hutchinson* had removed the crucial “and how” part of this important statement from *Ewanchuk*. Its recognition in *GF* opens the door for the *Kirkpatrick* Court to rethink this flawed approach of a narrow four-judge majority in *Hutchinson*.

(iii) Appellate Review

The other important aspect of the decision in *GF* is the court’s analysis of the proper scope of appellate review. The accused in *GF* were convicted at trial, and the convictions were overturned by a divided Ontario Court of Appeal, leading to an appeal as of right to the Supreme Court of Canada. The Supreme Court allowed the appeal and restored the convictions. In the months prior to *GF*, the Supreme Court did the same thing in a number of other sexual offence cases, most of which reached the court as Crown appeals as of right, and all of which resulted in trial convictions being restored.<sup>111</sup>

108. *R. v. Kirkpatrick* (2020), 388 C.C.C. (3d) 60, 63 C.R. (7th) 338, 2020 CarswellBC 1201 (B.C. C.A.) at para. 3, leave to appeal allowed *Ross McKenzie Kirkpatrick v. Her Majesty the Queen*, 2021 CarswellBC 189, 2021 CarswellBC 190 (S.C.C.).

109. Lower courts appear to also have been troubled by the fraud framework in *Hutchinson*, *supra* note 7, or have ignored it altogether. See e.g. *R. v. Rivera*, 2019 CarswellOnt 10331, 2019 ONSC 3918, 157 W.C.B. (2d) 220 (Ont. S.C.J.); *R. v. Lupi*, 2019 CarswellOnt 10334, 2019 ONSC 3713, 157 W.C.B. (2d) 3 (Ont. S.C.J.); *R. v. S.Y.*, 2017 CarswellOnt 18320, 2017 ONCJ 798, 143 W.C.B. (2d) 423 (Ont. C.J.). See also Gotell & Grant, *supra* note 4 at 25-28 (for a discussion of these cases).

110. *Ewanchuk*, *supra* note 5 at 348, cited in *GF* SCC, *supra* note 3 at para. 1 [emphasis added].

In *GF*, the majority took the unusual step of rebuking appellate courts for being too willing to overturn valid convictions in the sexual assault context, based on grounds of appeal such as inadequacy of reasons, uneven scrutiny, or errors in the assessment of credibility:

Despite this Court's clear guidance in the 19 years since *Sheppard* to review reasons functionally and contextually, we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is the findings of credibility that are challenged.<sup>112</sup>

Justices Brown and Rowe, concurring, agreed with the majority's treatment of capacity and consent, but expressed concern with the part of the majority reasons dealing with appellate review, a position shared by Côté J. in her dissenting reasons. They disagreed that where reasons are ambiguous, judges should be presumed to know the law, and took issue with the concern about over-scrutiny:

Of course, safe convictions free from legal error should not be overturned. But, and with respect, this is an unhelpful observation, since it is not possible to conclude that convictions are "safe" or that trials were "fair" where the reasons are insufficient to permit appellate review. Our colleague's critique assumes the conclusion. While a trial judge's reasons need not be letter-perfect, we do not consider scrutiny of a trial judge's reasons to be inconsistent with this Court's guidance in *Sheppard*. To the contrary, appellate courts are tasked with reviewing a trial judge's reasons on appeal, and an appellant from a conviction has a statutorily granted right to have the trial verdict "*properly* scrutinized" (*Sheppard*, at para. 46 (emphasis in original)).<sup>113</sup>

Of course, in a basic sense, both of these positions have merit. An appellate court should not require an entire criminal trial to be re-done merely because a trial judge has failed to make reference to some piece of evidence or has not spelled out in ponderous detail the components of legal tests that are well-known to all and not in dispute. An appellate court should, however, provide an opportunity for a meaningful second look at criminal verdicts that could result in the loss of individual liberty and a criminal record. The trial record

111. See e.g. *Slatter* SCC, *supra* note 74; *R. v. C.P.* (2021), 404 C.C.C. (3d) 217, 71 C.R. (7th) 118, 457 D.L.R. (4th) 553 (S.C.C.); *Snelgrove* SCC, *supra* note 87; *R. v. Smith* (2021), 405 C.C.C. (3d) 413, 456 D.L.R. (4th) 549, 2021 CarswellBC 1278 (S.C.C.).

112. *GF* SCC, *supra* note 3 at para. 76.

113. *Ibid.*, at para. 110.

must be capable of facilitating that review. These propositions are so basic and uncontroversial that they hardly merit mention by the Supreme Court.

In fact, the problem in the sexual assault context is that appeals from considered verdicts of conviction have become routine and the grounds of appeal raised are often rote. It is unusual to see an appeal from conviction for non-sexual offences on the grounds of inadequate reasons, or a failure to properly apply reasonable doubt to credibility, but these grounds are the bread and butter of conviction appeals in the sexual assault context.

In most sexual assault cases, the complainant testifies to a series of events that clearly meet the definition of sexual assault, and the defence attacks the credibility of the complainant. If she is an adult, the defence argues that she consented and so is bringing a false complaint of sexual assault, and if she is a child, the defence argues that no sexual activity ever took place, and so the child has made a false complaint of sexual abuse. Sometimes the complainant is attacked indirectly as being unreliable rather than directly as a liar. Very rarely does the accused have another argument – that he mistakenly believed the complainant was consenting after having taken reasonable steps to ensure that she was, or that the complainant was sexually assaulted by someone else, but he has been misidentified as the perpetrator. While the accused is not required to offer an explanation as to why the complainant would lie, the explanations suggested by the defence are predictable as well, if slightly more varied: the complainant wanted to cover up the fact she was having sex with someone else;<sup>114</sup> the complainant wanted to impress her friend;<sup>115</sup> the complainant had a financial motive;<sup>116</sup> the complainant wanted to punish the accused for rejecting her;<sup>117</sup> the complainant was influenced by the sexual assault centre where she was now working.<sup>118</sup> All of these explanations continue to resonate with some judges and jurors because they are rooted in deeply held sexist myths and stereotypes.

114. See e.g. *R. v. R.V.* (2019), 378 C.C.C. (3d) 193, 55 C.R. (7th) 297, 436 D.L.R. (4th) 265 (S.C.C.) at para. 54.

115. See e.g. *Slatter* ONCA, *supra* note 74 at para. 32.

116. See e.g. *R. v. Grabinski* (1997), 209 A.R. 163, 160 W.A.C. 163, 1997 CarswellAlta 849 (Alta. C.A.) at para. 11.

117. See e.g. *R. v. Zou* (2017), 346 C.C.C. (3d) 490, 2017 ONCA 90, 2017 CarswellOnt 1157 (Ont. C.A.) at para. 28.

118. See e.g. *R. v. Sivasubramanian*, 2021 ONCA 61, 2021 CarswellOnt 1026, 169 W.C.B. (2d) 494 (Ont. C.A.) at para. 7; *R. v. Smith* (2020), 393 C.C.C. (3d) 581, 2020 BCCA 271, 456 D.L.R. (4th) 553 (B.C. C.A.), at para. 12, reversed (2021), 405 C.C.C. (3d) 413, 2021 SCC 16, 456 D.L.R. (4th) 549 (S.C.C.).

Sexual assault trials are, for the most part, not that complicated. Those who justify the disproportionate acquittals rates in sexual assault trials as compared to other offences point to the effect of the “he said, she said” dynamic of many sexual assault cases as an explanation, in light of the presumption of innocence. (In fact, many sexual assault trials are just “she said” cases, with the accused deciding not to take the stand.) If this is true, then there is little reason for error on the part of the trial judge. These cases engage very little substantive sexual assault law and are basic credibility exercises, within the framework of the presumption of innocence and the requirement of proof beyond a reasonable doubt. So long as judges do not make the mistake of thinking their task is merely choosing whom to believe, and the rules of evidence are respected, the task is straightforward. As the majority in *GF* stated:

The respondents received a fair trial. They were presumed innocent and held the Crown to its burden to prove their guilt beyond a reasonable doubt. They thoroughly cross-examined the complainant and mounted a multi-faceted defence against the charge. But fairness does not require perfection: *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45, per McLachlin J. The trial judge accepted the evidence of the complainant that sexual activity began when she was unconscious and continued despite her pleas for the respondents to stop. His reasons revealed no error on a proper appellate reading. The respondents’ convictions should not have been overturned simply because the trial judge expressed himself poorly.<sup>119</sup>

Reading the court of appeal decisions in many of the cases that were overturned leaves one with the impression that courts still believe that wrongful convictions in the sexual assault context, produced by lying complainants, are a particular and pervasive threat.<sup>120</sup>

The result is that the complainant who manages to get the police to take her report of sexual assault seriously and to investigate it thoroughly, to convince the Crown that she is not so damaged or lacking in credibility that the case should proceed to trial, and to convince a trier of fact beyond a reasonable doubt that she was sexually assaulted by the accused, finds her attacker’s conviction overturned on appeal for the flimsiest of reasons,<sup>121</sup> requiring that the

119. *GF* SCC, *supra* note 3 at para. 91.

120. There has also been some backlash to the majority’s comments in subsequent academic commentary. See e.g. Palma Paciocco, “Presumptions, Assumptions, and Reasons for Reasons: The Sufficiency of Trial Judgments After *R v GF*” (2021), 71 CR (7th) 54.

121. See e.g. *R. v. Kruk*, 2022 BCCA 18, 2022 CarswellBC 102 (B.C. C.A.).

whole ordeal start over again from the beginning. We believe that the cautions in the *GF* majority are sound, and long overdue.

## 5. Conclusion

We suggest that the *Criminal Code* would benefit from a unified set of provisions on consent and non-consent that brings together the 1983 and 1992 revisions into a coherent whole. Those revisions should retain the definition of consent as voluntary agreement, and add a definition of non-consent as meaning that the complainant did not, in her own mind, want the sexual activity to take place, codifying the definition in *Ewanchuk*. The *Code* could then specify, for greater certainty, a non-exhaustive list of circumstances that amount to non-consent, combining the lists of factors in ss. 265(3) and 273.1(2). The provisions that relate to the age of consent could also be included, so as to clearly indicate that age is a prerequisite to capacity where the accused is outside the close in age exceptions. These factors should be seen as negating consent, not vitiating it.

Even with a more robust statutory definition of non-consent and a clear list of factors that negate consent, there may still be a need for the common law to provide for vitiation of a voluntary and capable consent where the complainant maintains that she wanted the sexual activity to take place. For example, the infliction of serious bodily harm in a sexual context may be a situation in which consent is vitiated for reasons of public policy, but only where the complainant asserts that she wanted the specific sexual activity that caused the bodily harm to take place. Where more force was used than was consented to, there is no consent and vitiation plays no part. This limits the concept of vitiation to specific situations where the risk of harm or exploitation makes voluntary agreement insufficient. In other words, vitiation should be limited to cases where we are overriding an otherwise voluntary and capable consent for public policy reasons. It should not be used to tell a woman that she subjectively agreed to sexual activity that, in her mind, she did not want to take place.

*GF* was not a complicated case, particularly once the evidence of the accused was rejected. The complainant was 16 years old, intoxicated to the point of being ill, and did not want to have sex with her mother's coworkers. She behaved in a manner entirely consistent with that state of mind and level of impairment. Despite this straightforward set of facts, the case required three levels of court to secure the convictions of the accused, three sets of reasons at the Supreme Court of Canada, and a detailed attempt to reconcile and

explain the law on non-consent and incapacity to consent. It is time to bring coherence to the law of sexual consent by grounding the definition in an understanding focused on whether the complainant wanted the sexual activity to take place, and reflecting that definition in a unified set of statutory provisions on non-consent.