

CBA Criminal Justice Conference

Saturday, April 6, 2024 | Vancouver, BC

Prosecuting, Defending and Adjudicating Sexual Offences

Honest But Mistaken Belief in Communicated Consent

Ian E. Gauthier

Introduction

Consent is often a central issue in sexual assault allegations that can be challenging to prosecute, defend, and adjudicate because the alleged offence often occurs in private with only the accused and the complainant present.

Whether the accused believed that the complainant was consenting at the time of the sexual activity may be a defence at trial. Honest But Mistaken Belief in Communicated Consent is a question of fact that, if established, can result in the acquittal of the accused. How and when this defence can be invoked is the subject of this paper through an analysis of the constituent parts of the defence: “Honestly Held Belief”, “Mistaken Belief”, and “Communicated Consent”.

Classification as a “Defence”

Honest but Mistaken Belief in Communicated Consent as a defence arises in the umbrella provisions for assault in section 265 of the *Criminal Code*.¹ Although understood as a defence, Honest But Mistaken Belief in Communicated Consent is rather the absence of a requisite element of the offence; the *actus reus* is admitted, but the *mens rea* is absent.²

However, despite not technically being a “defence”, in practice it is treated as one, and a jury is to be instructed on the availability of Honest But Mistake Belief in Communicated Consent if the defence is grounded in the evidence.³ Conversely, if the defence is not grounded in the evidence, the defence is not to be put to the jury.⁴

¹ *Criminal Code*, RSC 1985, c C-46 at ss. 265(2) and (4).

² *R. v. Davis*, 1999 CanLII 638 (SCC) at para 80.

³ *Criminal Code*, *supra* note 1, ss. 265(4); *Pappajohn v. The Queen*, 1980 CanLII 13 (SCC); see also *R. v. Gagnon*, 2018 CMAC 1 (CanLII) at para 16-18, affirmed 2018 SCC 41.

⁴ *R. v. Davis*, *supra* note 2 at para 81. See also *R. v. Despins*, 2007 SKCA 119 at para 23. See also *R. v. H.W.*, 2022 ONCA 15 at para 98 for guidance on jury instructions in cases where Honest But Mistaken Belief in Communicated Consent is asserted but found to not have an air of reality.

As this paper will showcase, the requirements to establish Honest But Mistaken Belief in Communicated Consent are narrow and onerous, and thus cases where it can be successfully established are rare.⁵

Air of Reality

For Honest But Mistaken Belief in Communicated Consent to be grounded in the evidence, and subsequently put to the jury, it is required that there be an “air of reality” to the defence.⁶ Specifically, there must be sufficient evidence for the trier of fact that they could *possibly* conclude that the complainant did not consent to sexual touching, and the accused honestly but nevertheless mistakenly believed consent had been communicated.⁷

When assessing whether there is an air of reality, one must keep in mind the ultimate purpose of the analysis, which is determining whether the defence must be put to and considered by the trier of fact. When assessing whether there is an air of reality, the trial judge is not to weigh the evidence at this preliminary stage; the sole concern is the facial plausibility of the defence.⁸ To do otherwise risks usurping the role of the trier of fact.

When determining whether there is an air of reality, the trial judge should consider the totality of the evidence.⁹ Although the core requirement is that there is “some evidence” to support an air of reality, the accused’s bare assertion that they believe the complainant consented will *not* give rise to an air of reality; there must be evidence capable of explaining how the accused could honestly have mistaken the complainant’s lack of consent as consent.¹⁰ There must be evidence of an ambiguity in which the accused could

⁵ *R. v. Osolin*, 1993 CanLII 54 (SCC) at para. 205. See also *R. v. Davis*, *supra* note 2 at para 85. It is stated by the court that it is a rare occurrence that a sexual assault happens by accident.

⁶ See *R. v. Cinous*, 2002 SCC 29, for determination of the fundamental evidentiary standard for establishing an “air of reality”.

⁷ *R. v. Davis*, *supra* note 2 at para 81.

⁸ *Ibid* at para 82.

⁹ *Ibid* at para 82.

¹⁰ *Davis*, *supra* note 2 at para 83.

honestly have misapprehended that the complainant was consenting to the sexual activity.¹¹

The limits of the application of the defence of Honest But Mistaken Belief in Communicated Consent will be discussed later in this paper, but it is worth noting that the accused's recklessness or willful blindness to whether consent was given ends the inquiry of whether there was Honest But Mistaken Belief in Communicated Consent at the air of reality stage.¹² This could potentially be an issue in a jury trial if either Crown or defence is trying to argue for either the inclusion or exclusion of the jury instruction on the availability of the defence.

Honestly Held Belief

In order for the defence to be successful, the evidence must show that the accused honestly believed that there had in fact been consent communicated by the complainant.¹³ The definition of consent and its limitations are found in s. 273.1 of the *Criminal Code*. Communication of consent must be through express words or unambiguous action. Speculation by the accused about the meaning of the complainant's silence, passivity, or ambiguous conduct is not a defence; there is no such thing as "implied consent".¹⁴ Further, there is no concept of "broad advance consent", and it is a mistake of law to infer propensity to consent.¹⁵

There is no burden placed upon the accused, in the sense that the accused does not need to prove the defence, and the accused need not testify to raise the defence. However, in practice the defence is extremely unlikely to succeed unless the accused testifies.¹⁶ There does exist some evidentiary burden on the accused to establish how honestly they held

¹¹ *Ibid* at para 86.

¹² *Ibid* at para 87.

¹³ *R. v. Barton*, 2019 SCC 33 at para 86 and para 90.

¹⁴ *R. v. Ewanchuk*, 1999 CanLII 711 (SCC) at para 46, 47, 51, 64, and 101.

¹⁵ *R. v. Barton*, *supra* note 13 at para 99-100. See also *Criminal Code*, *supra* note 1 at ss. 273.1(1.1)

¹⁶ *R. v. Ross*, 2012 NSCA 56 (CanLII) at para 40 describes "grave risk" of not testifying. See also *R. v. Slater*, 2005 SKCA 87 at para 24-30. The defence in *Slater* was mistake of age, not consent, but the cited paragraphs illustrate the difficulty in establishing reasonable steps to ascertain a mistaken fact in issue without the accused testifying. The court states at para 24 and 26 that they only were able to find one case at the time of judgement where the accused did not testify.

their belief the complainant was consenting.¹⁷ To ensure that the air of reality test is not inconsistent with the presumption of innocence guaranteed by s.11(d) of the *Charter*, the test is solely concerned with whether a defence can be submitted to a jury for consideration.¹⁸ However, the accused can theoretically rely solely on the Crown's evidence in chief to raise the defence. Once an air of reality has been established on the available evidence, the Crown then assumes the burden of disproving the defence beyond a reasonable doubt.¹⁹

The availability of the defence must arise from a situation where the interpretation of what was communicated is at issue. The defence of Honest But Mistaken Belief in Communicated Consent can realistically only arise when the accused and the complainant tell essentially the same story and then argue that they interpreted it differently. Where the evidence given is directly opposed as to whether there was consent, the defence simply cannot exist.²⁰ However, it is not required that the stories be identical, and it is open to the trier of fact to "cobble together" or "splice" the evidence of each party into a set of facts capable of sustaining a defence of Honest But Mistaken Belief in Communicated Consent.²¹

Specific instances where the defence cannot exist:

- Consent was gained through threats or fear;²²
- Where the victim is asleep. The accused cannot rely on non-verbal cues that the victim may be awake;²³

¹⁷ See *R. v. Malcolm*, 2007 MBCA 77, discussed later this paper, on the accused's burden to establish they took reasonable steps to ascertain consent from the complainant.

¹⁸ *R. v. Osolin*, *supra* note 5 at para. 86. See also *R. v. Darrach*, 1994 CanLII 7236 (ON SC), where the Ontario Supreme Court has found that the air of reality requirements are not inconsistent with s. 7 or 11(c) of the *Charter*.

¹⁹ *R. v. Robertson*, 1987 CanLII 61 (SCC).

²⁰ *R. v. Osolin*, *supra* note 5 at para 86. Note that the dissent in *Osolin* does not agree that it is logically impossible for the defence to arise if there are two diametrically opposed stories between the accused and complainant. However, even in the absence of the defence, the jury will nonetheless be bound to acquit if it has a reasonable doubt as to whether there was consent in light of the conflicting evidence on the issue.

²¹ *R. v. Esau*, 1997 CanLII 312 (SCC) at para 16 and 19.

²² *Criminal Code*, *supra* note 1, ss.265(3)(b).

²³ *Ibid* at ss. 273.1(2)(a.1). See also *R. v. Reichmuth*, 2007 BCPC 62.

- The victim's behaviour was passive or neutral and no reasonable steps were taken by the accused were taken by the accused to ascertain consent to increasingly intrusive sexual acts, short of reliance on the victim's silence or implied consent.²⁴
- Consent was gained through a significant power imbalance;²⁵
- Where the victim has no memory of the initiation of the sexual activity.²⁶

Communicated Consent

Section 273.2 of the *Criminal Code* stipulates when the defence of Honest But Mistaken Belief in Communicated Consent is not available. It is not a defence that the accused believed that the complainant consented to sexual activity that forms the subject-matter of the charge if: ²⁷

- 1) the accused's belief arose from the accused's self-induced intoxication,
- 2) the accused's belief arose from the accused's recklessness or wilful blindness, or
- 3) the accused's belief arose from circumstance referred to in *Criminal Code* s. 265(3):
 - a) the application of force to the complainant or to another person;
 - b) threats or fear to the complainant or to another person;
 - c) fraud;
 - d) the exercise of authority.
- 4) the accused's belief arose from circumstances in *Criminal Code* s. 273.1(2) or (3):
 - a) the agreement is expressed by a person other than the complainant;
 - b) the complainant is unconscious;
 - c) the complainant is incapable of consenting to the activity for any reason other than being unconscious;
 - d) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - e) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

²⁴ *R. v. Gagnon*, *supra* note 3 at para 53-54.

²⁵ *Criminal Code*, *supra* at ss. 265(3)(d) and 273.1(2)(c). See also *R. v. Geddes*, 2015 ONCA 292.

²⁶ *R. v. Crespo*, 2016 ONCA 454. See also *R. v. Carson*, 2018 ONCA 1001. In these circumstances, the court articulated the policy reason for rejecting the defence was that it would be available in any case where the victim was asleep and the accused provided uncontradicted testimony that there was consent.

²⁷ *Criminal Code*, *supra* note 1 at s. 273.2.

- f) the complainant, having consented to sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- 5) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- 6) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

Intoxication

Section 273.2(a)(i) of the *Criminal Code* is clear that the defence cannot be raised if the mistaken belief arose from the accused's self-induced intoxication. Although extreme intoxication akin to automatism may be used as a defence to sexual assault in extremely narrow circumstances,²⁸ logically, extreme intoxication would preclude the accused from engaging Honest But Mistaken Belief in Communicated Consent because the accused's ability to accurately ascertain and interpret communicated consent in a state of automatism would not be possible.

Intoxication on the part of the complainant also poses issues in cases where the accused asserts there was communicated consent. Whether the complainant was able to appreciate the nature and consequences of the sexual act, and thus provide consent, is a question of fact.

The fact that the complainant was intoxicated, in and of itself, is not sufficient for the court to determine that the complainant was not able to give consent; the central question is whether the complainant still had the capacity to consent.²⁹ The courts have held that consent to sexual acts does not require a high degree of consciousness, and for our purposes, when determining whether consent was communicated, the complainant's cognitive capacity must be assessed on whether they were impaired to an extent that they

²⁸ See *R. v. Daviault*, [1994] 3 SCR 63; see also *R. v. Bernard*, [1988] 2 SCR 833; see also *Criminal Code*, *supra* note 1, ss. 33.1(1)-(2).

²⁹ *R. v. Jensen*, 1996 CanLII 1237 (ON CA), affirmed [1997] 1 SCR 304.

were incapable of knowing they that they engaged in sexual activity or that they are able to refuse to engage in sexual activity.³⁰

Recklessness and Willful Blindness

Section 273.2(a)(ii) of the *Criminal Code* bars the accused from asserting Honest But Mistaken Belief in Communicated Consent if they are reckless or willfully blind to whether consent is communicated.

An accused is reckless when they realize the complainant may not be consenting but continues to advance sexual activity; the accused is aware of the risk but nonetheless takes the chance.³¹

An accused is willfully blind when they have become aware of the need to make inquiries, but deliberately do not make inquiries because they do not want to know the truth and prefer to remain ignorant.³² In the case of sexual assault, the accused's suspicion that the complainant may not be consenting has been aroused, but the accused does not take the necessary steps to ascertain consent lest they confirm that the complainant has not provided consent.

Although similar, the courts have emphasized that willful blindness is distinct from recklessness. Recklessness is the knowledge of risk or the potential for risk; willful blindness is a substitute for actual knowledge when knowledge forms part of the *mens rea*. While a failure to inquire may be evidence of recklessness or criminal negligence, such as when a failure to inquire is a marked departure from the conduct expected of a reasonable person, willful blindness is not simply a failure to inquire but “deliberate ignorance”.³³

By way of illustrative example, recklessness could arise in a situation where the victim is in a state of intoxication and the accused engages in sexual activity knowing that it is possible

³⁰ *R. v. M.T.*, 2016 ONCJ 614 at para 94. See also *R. v. Whitteker*, 2019 ONCJ 180 at para 66-74.

³¹ *Sansregret v. The Queen*, 1985 CanLII 79 (SCC) at para 16. Of note, the court in *Sansregret* is clear that recklessness is distinct from civil negligence; recklessness requires an element of the subjective *mens rea*.

³² *R. v. Briscoe*, 2010 SCC 13.

³³ *Ibid*, para 20-24.

the victim was too intoxicated to consent. Contrast to willful blindness, where the accused knows the victim is extremely intoxicated and unable to consent, and subsequently fails to take steps to ascertain the victim's ability to consent with the intent of "pleading ignorance" after the fact.

Reasonable Steps

Section 273.2(b) of the *Criminal Code* stipulates that despite the honesty of the accused's belief in consent, the accused must also take reasonable steps to determine consent and must believe that the victim communicated that consent.³⁴ The burden in establishing an evidentiary basis establishing that reasonable steps were taken is upon the accused to establish.³⁵

Determining whether an accused took reasonable steps is a highly fact-specific exercise, and the courts have indicated it would be unwise and unhelpful to draw up an exhaustive list.³⁶ However, certain situations have been identified as clearly *not* reasonable steps:³⁷

- 1) Steps based on rape myths or stereotypical assumptions about women;
- 2) The complainant's silence, passivity, or ambiguous conduct;
- 3) An accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching. This is a particularly acute issue in the context of unconscious or semi-conscious complainants.

Other circumstances attract a higher threshold for satisfying the reasonable steps requirement, although the analysis remains highly contextual and varies from case to case:³⁸

- 1) The more invasive the sexual act;
- 2) The greater risk posed to the health and safety of those involved;

³⁴ *R v Gagnon*, supra note 3 at para 28; *R. v. Barton*, supra note 13 at para 104.

³⁵ *R. v. Malcolm*, supra note 17 at para 20 and 22.

³⁶ *Barton*, supra note 13 at para 106.

³⁷ *Ibid* at para 107.

³⁸ *Ibid* at para 108.

- 3) The relationship between the accused and complainant, particularly if the parties are unfamiliar with each other.

The evaluation of the reasonableness of the steps taken is a modified objective standard, also referred to as a quasi-objective standard.³⁹ The reasonableness of the steps should be assessed on the standard of a reasonable person in the accused's position with the knowledge the accused had at the time, not what the accused *ought* to have known at the time.⁴⁰

Further, the accused is not required to take *all* reasonable steps to ascertain that consent has been communicated, just the steps necessary to establish if the complainant consented.⁴¹

Parliament has taken the further step of codifying the requirement that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.⁴² Conversely, "phrases of rejection" will trigger the requirement of the accused to ascertain positive affirmation of consent.⁴³

However, this requirement for affirmative consent must be assessed in accordance with the accused's subjective experience. The caselaw has affirmed that there may be situations where the complainant was found to be unconscious but appeared to the accused to be awake and consenting.⁴⁴ The absence of memory by the complainant must be considered with the evidence of the accused that the complainant appeared to willingly participate.⁴⁵

³⁹ *R. v. Malcolm*, *supra* note 17 at para 24.

⁴⁰ *Barton*, *supra* note 13 at para 104. See also *R. v. R.G.*, 1994 CanLII 8752 (BCCA) at para 28-29. See also *R. v. Zacher*, 2009 ABPC 347 at para 72-87, where the court expands on assessing "reasonable person" by incorporating the accused's background and experience.

⁴¹ *Barton*, *supra* note 13 at para 104. See also *R. v. Darrach*, 1998 CanLII 1648 (ON CA).

⁴² *Criminal Code*, *supra* note 1 at s. 273.2(c).

⁴³ *R. v. Cornejo*, 2003 CanLII 26893 (ON CA) at para 29-30.

⁴⁴ *R. v. Esau*, *supra* note 21 at paras. 17-25.

⁴⁵ *Ibid* at para 21 and 23; See also *R. v. Crespo*, 2016 ONCA 454 at para 11. Note that a complainant is not capable of consenting in any circumstances while unconscious: *R. v. J.A.*, 2011 SCC 28.

Conclusion

Deconstructing the title of the defense provides a rudimentary framework for approaching an analysis of whether there is an air of reality to whether there is an Honest But Mistaken Belief in Communicated Consent:

- 1) Was there consent? There must be evidence that the complainant refused consent, did not consent, or was incapable of consenting to satisfy the *actus reus* component before an analysis into the lack of *mens rea*.
- 2) How was “consent” communicated? There must be evidence of a state of ambiguity that can explain how the accused mistakenly interpreted the complainant’s words and actions as affirmative consent.
- 3) Was the accused’s belief honest? There must be evidence the accused believed the complainant was consenting and took reasonable steps to ascertain affirmative consent.

The ultimate question of the analysis is whether the defense is to be put to the trier of fact for consideration on whether the accused had the requisite *mens rea* to be convicted for a sexual offence.