The Defence of Belief in Consent: Guidelines and Jury Instructions for Application of Criminal Code Section 265(4)

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The availability of the defence of belief in consent under s. 265(4) is a question of law, subject to review on appeal.[1] The statutory provision is based on the common law rule that applies to all defences. Consideration of the defence when it is unavailable in law and failure to consider it when it is available are both incorrect. A judge is most likely to avoid error when ruling on availability of the defence if the ruling: (1) is grounded on sound analysis of the substantive basis for the defence and its relationship to the principles of criminal responsibility; and (2) uses precise legal criteria to govern practical application of s. 265(4) to the evidence in specific cases. The guidelines proposed in Part 1 are based on analyses of the substantive defence and culpable awareness[2] and were developed[3] to ensure

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1. *R. v. Osolin*, [1993] 4 S.C.R. 595 at p. 676, 109 D.L.R. (4th) 478, 86 C.C.C. (3d) 481 *per* Cory J.

2. Lucinda Vandervort, "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and *Mens Rea* in Sexual Assault" (2004), 42 Osgoode Hall L.J. 625-660. In this article I examine the substantive law of the defence of belief in consent in relation to culpable awareness and the theory of criminal responsibility. I argue that analysis of culpability in sexual assault must focus on the accused's awareness of facts and circumstances material for consent as defined in law, not on belief in consent. A focus on "honest belief in consent" results in a truncated analysis of culpable awareness and error.

3. Lucinda Vandervort, "Sexual Assault: Availability of the Defence of Belief in Consent" (2005), 84 Can. Bar Rev. 89-105. This article applies the approach to

that appropriate criteria are properly used when s. 265(4) is applied. When a trial judge rules that the defence is available in law, the trier of fact must determine whether the defence is available on the facts as found, based on the evidence in the case. The model jury instructions proposed in Part 2 are designed to ensure that deliberations by the trier of fact are also guided and shaped by appropriate legal criteria. At both stages, the objective is to ground the deliberation process on fact, not fiction, and to regulate the exculpatory effect of the defence by using legal norms to exclude excuses based on extra-legal considerations such as sexual/racial fantasy, stereotype and myth, or community attitudes and custom.

1. Guidelines for Ruling on Availability of the Defence of Belief in Consent

These guidelines are intended for use by judges who must determine whether a defence of belief in consent is available in law, pursuant to s. 265(4). Prosecutors and defence counsel may also find the guidelines useful when assessing the merits of the defence in individual cases. The theoretical and doctrinal basis for these guidelines is discussed in the two articles referred to above.

(1) Analysis of the availability of the defence of mistaken belief in consent must be grounded on the legal definition of consent and the doctrine of mens rea.

(2) When there is evidence of more than one mistake, the availability of the defence of belief in consent must be considered in relation to each mistake as a potential alternative ground.

(3) When a mistaken belief in consent is based on a mistake about the law of consent and could only result in acquittal if the law was as the accused believed it to be, the defence of belief in consent is not available in law, pursuant to ss. 19 and 265(4) of the *Criminal Code*.

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analysis of culpable awareness that was proposed in the 2004 Osgoode Hall Law Journal article to develop legal criteria for use by judges who must determine whether a defence of belief in consent is available in law pursuant to s. 265(4) of the *Criminal Code*. Examples are used to illustrate application of the criteria.

(4) If there is no evidence of a mistake of fact that bears directly on (a) the accused's awareness of the complainant's verbal and non-verbal communication of consent, (b) the accused's awareness of whether consent was voluntary and capable as these issues are defined in law, or (c) the accused's awareness that consent was "tainted" by any of the factors in s. 273.1(2), then the defence of belief in consent lacks an evidentiary foundation and is unavailable in law, pursuant to s. 265(4).

(5) Where there is evidence of one or more mistakes of fact that bear directly on (a) the accused's awareness of the complainant's verbal and non-verbal communication of consent, (b) the accused's awareness of whether consent was voluntary and capable as these issues are defined in law, or (c) the accused's awareness that consent was "tainted" by any of the factors in s. 273.1(2), that evidence is nonetheless "insufficient" within the meaning of s. 265(4), and the defence of belief in consent therefore lacks the necessary evidentiary foundation and is not available in law *if*:

(i) the only evidence from any source in support of the belief is a bare assertion by the accused;

(ii) the trier of fact, having concluded that the actus reus has been proven, could not splice some of each person's evidence and settle upon a reasonably coherent set of facts, supported by the evidence, *including the evidence of mistake of fact*, that is capable of sustaining the defence of belief in consent;[4]

(iii) the totality of the evidence for the accused is incapable of amounting to the defence being sought or is clearly logically inconsistent with the totality of evidence that is not materially in dispute,[5] or

(iv) even on the view of the evidence most favourable to the accused, there is no evidence of mistake of fact (other than evidence that would necessarily be rejected in the process of concluding that the actus reus had been proven beyond a reasonable doubt) to provide an evidentiary basis for a reasonable doubt that the accused was, at

4. *R. v. Park*, [1995] 2 S.C.R. 836 at p. 856, 99 C.C.C. (3d) 1, 97 W.A.C. 241.

5. *Ibid.,* at p. 859.

> minimum, reckless or wilfully blind with respect to consent, in that he/she was aware of at least one fact whose legal significance (pursuant to s. 273.1 and the common law) was that consent might not have been communicated, that the communication might not be voluntary, that the complainant might have lacked capacity to consent, or that consent might be "tainted" by one or more of the factors identified in s. 273.1(2).[6]

(6) Where there is evidence of a mistake of fact that bears directly on (a) the accused's awareness of the complainant's verbal and non-verbal communication of consent, or (b) the accused's awareness of whether that communication was voluntary and capable as these issues are defined in law, or (c) the accused's awareness that consent was "tainted" by any of the factors in s. 273.1(2), *and* the defence of belief in consent is not excluded from consideration under (3) to (5) above, the defence of consent is available pursuant to s. 265(4).[7]

(7) Where there is evidence of mistake of fact to support a belief in consent that is not excluded from consideration under (3) to (5) above, but that may have been held by the accused as a consequence of the accused's self-induced intoxication or impairment, the defence is available under s. 265(4) and must be considered by the trier of fact, as set out above under (6), as if the accused had not been intoxicated or impaired.[8]

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6. In this case the defence of belief in consent is not available to the accused pursuant to s. 273.2(a)(ii) (which bars any defence of belief in consent that arises from the accused's recklessness or wilful blindness) and therefore, pursuant to s. 265(4), may not be considered by the trier of fact because the defence could not result in acquittal. Where the defence of belief in consent is unavailable pursuant to s. 273.2(a)(ii), consideration of the effect of s. 273(b) is unnecessary. The "reasonable steps" provision in s. 273.2(b) simply provides an alternate method for analysis of "wilful blindness," and will often be redundant when s. 273.2(a)(ii) is properly applied. When s. 273.2(a)(i) bars the defence, ss. 273.2(a)(ii) and (b) will both be redundant.

7. The trier of fact will determine whether the defence is barred pursuant to s. 273.2(a)(ii) and (b) and the common law on the ground that the mistake arose from the accused's recklessness or wilful blindness and, if not, whether it gives rise to reasonable doubt about the accused's culpable awareness in relation to consent.

8. The trier of fact may conclude that the belief in consent arose from self-induced intoxication and therefore, pursuant to common law and s. 273.2(a)(i), that it is not available as a defence.

2. Model Jury Instructions

Jury instructions must be clear. The instructions must set out the questions the jury must answer and direct jurors to adopt a legal perspective in their deliberations. Model instructions for use in sexual assault cases in which a mistake of fact defence is available under s. 265(4) may be useful to trial judges sitting without a jury and to appellate judges who must determine whether a jury was properly instructed on the defence of belief in consent and whether a properly instructed jury could have arrived at a particular verdict. When a trial judge determines that the defence of belief in consent is not available to the accused, it is prudent for the judge to advise the jury that no such defence is available to the accused, despite any references made by the accused in testimony or by counsel in argument to an "honest mistaken belief in consent". The category of cases in which the defence of belief in consent must be considered by the trier of fact are those in which the trial judge has determined that the defence of mistake of fact is available in law because the accused may not have been aware of one or more facts that constituted reason, pursuant to s. 273.1 or the common law, to suspect that:

(a) valid consent was not "obtained",
(b) the communication of consent was not voluntary, or
(c) the complainant lacked capacity to consent.

The standard instructions on the mistake of fact defence and *mens rea* in relation to the absence of consent should clearly and accurately state the questions to be decided. The jury instructions set out below are based on current law as discussed in the articles referred to above.[9]

(1) Proposed Instructions on Mens Rea and Consent[10]

1. In the event that you determine beyond a reasonable doubt that the complainant did not consent, did not communicate consent

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9. *Supra*, footnotes 2 and 3.

10. The precise wording of the instructions on consent will vary depending on whether the alleged offence occurred prior, or subsequent, to the 1992 amendments to the *Criminal Code*. In either case, reference to voluntariness and capacity, as essential prerequisites of valid consent at common law, is fully appropriate. Indeed, there is a common law basis for all of the elements of the 1992 amendments.

voluntarily, or lacked capacity to consent to the sexual activity engaged in by the accused, and that the conduct of the accused was therefore an assault rather than a consensual encounter, you must proceed to consider whether the accused is criminally culpable, that is, criminally responsible and liable to be convicted for the assault. In your deliberations about this issue, the sixth ingredient or element of the offence, you must decide whether the Crown has proven that [accused] either knew, suspected, or was aware of a possibility that [complainant] had not communicated consent, or had not done so voluntarily and with full legal capacity, or knew, suspected, or was otherwise aware of facts or circumstances, including but not limited to the factors listed in s. 273.1(2), that indicated the complainant might not be capable of expressing his or her actual preferences, or did not feel free to express his or her preference in the matter because of the impact or influence of one or more types of coercion including, but not limited to, fear of physical force or shock caused by the assault itself.[11] The legal purpose of this element or ingredient of the offence is to establish that when the accused made the choice to initiate the activity or continue it, he or she did so without knowledge that the complainant had communicated consent, or with knowledge that valid consent had not been obtained, or with awareness of facts and circumstances that indicated consent might be absent or invalid, because the complainant lacked capacity, or the consent was tainted by any of the factors in s. 273.1(2), or was not voluntary. [Review factors referenced in those sections.]

2. A person is reckless when he or she is aware that his or her conduct may result in a criminal harm but goes ahead and acts anyway. In other words, he or she takes the chance. A person is wilfully blind when he or she suspects that a circumstance exists but deliberately decides not to inquire or investigate further

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11. When there is evidence that the assault may have had the impact of a psychological/social blow on the complainant and may have interfered with the complainant's ability to express his or her preferences effectively, the jury should be specifically directed, in connection with the instructions on voluntariness and capacity as prerequisites for valid consent or agreement, to consider the impact of the assault on the complainant when interpreting the significance of the complainant's behaviour in response to the assault. For an example, see the facts in

because he or she does not want to know the truth. In other words, he or she deliberately shuts his or her eyes to a possibility of which he or she is aware because he or she would prefer to remain ignorant. The choice to pursue sexual activity without knowledge of the communication of valid and voluntary consent by the other person to that activity is, as a matter of law, a choice to take an unjustifiable risk of serious harm to the interests of the other person. Such a choice demonstrates indifference or disregard for the law and for the rights of the other person and requires conviction if you conclude that the other elements of the offence, outlined to you earlier, are proven beyond a reasonable doubt.[12]

3. When you decide whether [the accused] knew that [the complainant] had not communicated consent, or was aware that [the complainant] did not or might not have voluntarily communicated consent to the sexual activity, or did not or might not have capacity to consent you should consider the following evidence: [Review evidence.]

(2) Proposed Instructions on Mistake of Fact and Belief in Consent

Introduction.

4. I will now discuss the defence of mistake of fact with you. The defence will not be relevant to your deliberations unless you decide beyond a reasonable doubt that the complainant did not consent to the activity alleged in the indictment.

Application of the defence.

5. The defence operates by negating the conclusion that the accused had the knowledge or awareness of an essential fact or facts required for conviction. An accused cannot be held to be

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R. v. Whitley, [1992] O.J. No. 3076 (QL), 15 W.C.B. (2d) 353 (Ont. Ct. (Gen. Div.)). Locke J. describes the assault by three young men as terrorizing the complainant into "shocked silence" and compares the psychological impact of the assault to the psychological impact of battle conditions.

12. The instructions proposed in paragraphs 1 and 2, with their emphasis on the choice to act in the face of knowledge, suspicion or awareness of the possible existence of the prohibited circumstance, *i.e.* the absence of consent, arguably encompass all the issues raised in s. 273.2. Although it may be assumed that an accused could be found to have failed to take "reasonable steps, *in the circumstances*

criminally responsible unless he or she is proven beyond a reasonable doubt to have the minimum level of awareness of the facts that the law regards as essential to the offence as defined in the *Criminal Code*.

Example.

6. An example of a defence of mistake of fact in a homicide case involving death caused by a knife wound would be an allegation by the accused that he or she believed the deceased was already dead, or was an animal or an inanimate object rather than a human being, when he or she stabbed the deceased's body.[13]

7. There is evidence before you that goes to the issue of whether the accused knew, suspected, or was otherwise aware of the possibility that consent had not been communicated or, if communicated, was not communicated voluntarily and with legal capacity, or was otherwise not obtained pursuant to s. 273.1. It is the contention of [the accused] that he/she believed that [the complainant] consented to the sexual conduct in this case. The accused claims not to have been aware of any verbal or non-verbal conduct by the complainant *other than* conduct

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known to the accused at the time, [emphasis added] to ascertain that the complainant was consenting", and yet *not* be found to be reckless or wilfully blind, I suggest this is entirely unlikely. Indeed the very same conclusions follow under both subsections. The same accused, on the same facts, will inevitably be barred from reliance on belief in consent, pursuant to s. 273.2(a)(ii), when the instruction proposed here is applied to characterize the accused's choice to rely on the belief as reckless or wilfully blind, at best, because the accused was aware that he/she lacked knowledge of valid consent. Section 273.2(b) guides decision making by providing an alternate process for analysis of the basis for the culpability of the wilfully blind accused. If none of the conditions set out in s. 273.2 apply to bar reliance on a defence of belief in consent, the trier of fact proceeds to assess culpability pursuant to the principles of subjective liability in sexual assault at common law. Section 273.2 is therefore a *statutory bar* to reliance on the defence of belief in consent when the specified conditions are found to have been present, not a statutory definition of the mental element in sexual assault. The mental element for culpability in sexual assault, as such, remains uncodified and continues to be governed by common law principles of subjective liability.

13. In the past it was common to illustrate this issue with the example of theft of a personal possession, such as a hat or an umbrella, caused by a mistake about whether the item belonged to you. Such examples arguably: (1) trivialized the significance of mistake, and (2) tacitly invited the trier of fact to rely on an analogy between the colour of right defence available in property offences and mistaken

that the accused interpreted as communicating consent. The accused has stated in his/her evidence that he/she had no awareness of any conduct by the complainant that suggested lack of consent to participate in the sexual activity or that consent was tainted by any factors listed in s. 273.1(2). At the same time the accused does not claim that he/she did not intend to engage in the sexual activity. The only issue here is whether [as the case may be] there is a reasonable doubt that the accused knew that the complainant had not communicated consent, or a reasonable doubt that the accused was aware of one or more reasons to believe or suspect that the complainant did not actually consent to the activity in question, that the complainant's conduct was not voluntary, or that the complainant lacked capacity to consent. Earlier I explained that to convict the accused of sexual assault the Crown is required to prove that [the accused] was aware that [the complainant] had not or might not have communicated consent, or did not or might not have consented to the sexual activity that took place, voluntarily and with legal capacity. This is why a mistake of fact about what the complainant actually did or said, the complainant's capacity to consent, or the effect of the factual circumstances on the voluntariness of the complainant's words or conduct in relation to consent, may create a reasonable doubt about what the accused knew or was aware of.

8. It is for you, as triers of fact, to decide whether the accused might have made the mistake(s) of fact it is now alleged he/she made.

9. If you find the evidence supporting the mistake of fact credible, you must consider whether the mistake, together with all the other facts and circumstances of which you find the accused to have been aware, would have provided reasonable grounds not only to believe that the complainant communicated consent to the activity that is the subject of the indictment, but also, — and this point is ultimately of crucial importance

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belief in consent. See L. Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987-1988), 2 Canadian Journal of Women and the Law 233 at pp. 300-309, for a discussion of the issues raised by reliance on an alleged analogy between the colour of right defence and mistaken belief in consent. Property based examples invite error when they are used in jury instructions on belief in consent. Such examples should be avoided in this context.

for your reasoning about this particular issue — negatived all awareness by the accused of the possibility that [as the case may be] the complainant had not communicated consent, did not consent voluntarily, or lacked capacity. The accused is not *required* to have had what you regard as reasonable grounds for what he/she allegedly believed, but it may assist you in your deliberations to consider whether there were reasonable grounds for the belief. If the totality of the facts and circumstances of which you find the accused to have been aware, including any mistakes of fact that you conclude the accused may actually have made, were rationally consistent with *valid consent as defined by law*, consent that is voluntarily communicated, capable and not tainted by any of the factors in s. 273.1(2), then you must conclude that the accused may have had a belief in consent. If, based on that examination, you decide that the accused *may* have actually made a mistake of fact that creates a reasonable doubt that he/she was actually aware of *even a possibility* that consent was absent or invalid, you must acquit. However, if you decide that the totality of facts and circumstances of which the accused was aware were rationally consistent with the absence of valid consent you must conclude that, *despite the alleged mistake*, the accused was nonetheless aware that valid consent was not or might not be present. The decision to be made is a decision about this particular accused and must be based on your conclusions about what facts and circumstances he/she *was actually aware* of at the time of the alleged offence, not what you believe you or anyone else would have been aware of in the same circumstances.

10. You should consider the following evidence, and any other evidence you conclude is relevant for the question as I have stated it, when deciding whether the alleged mistake of fact creates reasonable doubt about what I earlier identified as the sixth element or ingredient the Crown must prove — that the accused knew, suspected, or was aware of a possibility that the complainant had not communicated consent, lacked capacity to consent, had not communicated consent voluntarily, or was affected by the factors in s. 273.1(2). [Review evidence.]

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11. The Crown must prove each element of the offence beyond a reasonable doubt. If, on the basis of the whole of the evidence, you have a reasonable doubt about whether the evidence proves one or more elements of the offence as I have outlined them for you, you must find the accused not guilty. That doubt may be based on, or with respect to, evidence presented by the Crown, or the accused, or both. Your deliberations must be based solely on the evidence actually presented during the trial, however. It is not proper for you to bring your personal views and attitudes, biases, or prejudices about sexual assault or sexual relationships or male or female sexuality, or any assumptions about the accused or the complainant to bear on your deliberations. You must decide the case on the evidence and the facts as you find them to have been based on that evidence. Speculation about questions of fact, that is, consideration of possible facts and events not supported by the evidence as presented in the course of this trial, is not appropriate and is not permitted.

(3) Concluding Summary

12. If you find, based on the whole of the evidence, that (1) the sexual activity that is the subject of the indictment was not consensual, that is, was not consented to by the complainant, and (2) you also find that the accused *was aware* that he/she did *not know* that the complainant had capacity to consent and voluntarily communicated consent to the activity, then, as a matter of law, the accused's decision to persevere with the activity was blameworthy and the accused is liable to be convicted of sexual assault.[14] The law provides that sexual activity that is not consensual is assault. Only if the accused believed he or she knew that the complainant voluntarily communicated consent to engage in the sexual activity in question, and did so with legal capacity, can the accused claim to have acted "innocently" as the criminal law understands that term in this context.

14. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at p. 354, 169 D.L.R. (4th) 193, 131 C.C.C. (3d) 481.

13. Again, I emphasize that the Crown must prove each element of the case against the accused beyond a reasonable doubt; your deliberations and findings of fact must be based on the evidence as presented in the trial. Bias, prejudice, and assumptions based on private attitudes, views, and opinions have no proper role in your deliberations as jurors.