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The Legal Regulation of Sadomasochism and the So-Called “Rough Sex Defence”

Elaine Craig*

The focus of this article is on the judicial application of Canada’s sexual assault doctrine in the context of the so called ‘rough sex defence’. Canadian criminal courts have seen an increased prevalence of legal narratives about S/M in recent years. In particular, courts are increasingly confronted with individuals who defend themselves against allegations of sexual assault by claiming that the impugned acts constituted consensual S/M or ‘rough sex’. The analysis is aimed at illustrating the way in which courts may fail to properly apply legal doctrine because of a problematic approach to the S/M context in which allegations arose.

Le présent article porte sur l’application judiciaire de la doctrine canadienne en matière d’agression sexuelle dans le contexte de la défense dite des « pratiques sexuelles brutales ». Au cours des dernières années, les tribunaux pénaux canadiens ont constaté une prévalence accrue des exposés des faits mentionnant des pratiques de sadomasochisme. En particulier, les tribunaux sont de plus en plus confrontés à des personnes se défendant contre des allégations d’agression sexuelle en affirmant que les actes reprochés constituaient du sadomasochisme ou des « pratiques sexuelles brutales » consensuels. L’analyse vise à illustrer la manière dont les tribunaux peuvent omettre d’appliquer correctement la doctrine juridique en raison d’une approche problématique à l’égard du contexte du sadomasochisme duquel les allégations découlent.

I. INTRODUCTION

Media attention, cultural awareness, and rising public interest in experimenting with sadomasochism [S/M] have led some to proclaim that S/M has gone mainstream.¹ Indeed, research suggests that a substantial minority of the population have fantasized about, or experimented to some degree with, S/M – or bondage, discipline (or domination), sadism (or submission), and masochism [BDSM], as it is sometimes called.²

* Elaine Craig, Professor, Schulich School of Law at Dalhousie University. The author would like to thank Lise Gotell for reviewing an earlier version of this article and sharing her insights. I am grateful to the anonymous reviewers whose comments undoubtedly improved the article and would like to thank Bailey Selig and Kiran Sharma for their excellent research assistance. This research was supported by an Insight Grant from the Social Sciences and Humanities Research Council.

¹ See Cheryl Hanna, “Sex Is Not a Sport: Consent and Violence in Criminal Law” (2001) 42:2 Boston College L Rev 239 at 243; Margot D Weiss, “Mainstreaming Kink” (2006) 50:2–3 J Homosexuality 103.

² See Ashley Brown, Edward Barker & Qazi Rhaman “A Systematic Scoping Review of the Prevalence, Etiological, Psychological, and Interpersonal Factors Associated with BDSM” (2020) 57:6 J Sex Research 781 at 783; Cara Dunkley & Lori Brotto, “The Role of Consent in the Context of BDSM” (2020) 32:6 Sexual Abuse 657 at 660; V Coppens et al, “A Survey on BDSM-related Activities: BDSM Experience Correlates with Age of First Exposure, Interest Profile, and Role Identity” (2020) 57 J Sex Research 129 at 129 (citing several recent studies). Maneesha Deckha summarizes descriptions of sadomasochism as follows: “While S/M has varied meanings to its practitioners and eludes precise definition, it is generally associated with the giving and receiving of pain to incite sexual pleasure in a role-play/relationship mediated by power.” Maneesha Deckha, “Pain, Pleasure, and Consenting Women: Exploring the

S/M has also hit the courts. Canadian criminal courts have seen an increased prevalence of legal narratives about S/M in recent years.³ In particular, courts are increasingly confronted with individuals who defend themselves against allegations of sexual assault by claiming that the impugned acts constituted consensual S/M or that they honestly, but mistakenly, believed that their accuser had communicated consent to engage in S/M or “rough sex.” Virtually, all of the Canadian sexual assault case law in which claims about consensual S/M arise involve allegations that an accused engaged in sexual acts without the complainant’s consent.⁴ In other words, as Karen Busby demonstrates in her research, “Canadian case law sees women going to the police alleging violent sexual assaults, while their partners are raising the defence of consensual BDSM. ... [T]he issue in all of the Canadian sexual assault cases is not the legal question: can they consent to BDSM? It is the factual question: did they consent to BDSM?”⁵ This issue might be characterized as the legal interpretation of the so-called “rough sex defence.” The vast majority of reported sexual assault cases in which the prospect of consensual “rough sex” is raised have occurred in the past ten years.⁶ In the reported case law from twenty years ago, the “rough sex defence” was nowhere to be found.⁷

It would be difficult to conclusively explain this rise in reliance on consensual rough sex as a defence to allegations of sexual assault. Elizabeth Shef argues that “[t]he vast influx of new members to the subculture has destabilized older norms and values and created more situations in which communication is poor, consent is unclear, play is unsafe, and people get hurt.”⁸ This is one explanation. Alternatively, it may be that the increased prevalence of legal narratives about S/M is more a function of opportunistic legal strategy than an influx of incompetent new S/M practitioners. Busby hypothesizes that “increased social openness to BDSM may [] permit defendants to claim a BDSM practice by relying on judicial ignorance about BDSM practices and, thereby, raise doubt about consent” in cases in which that doubt is

Feminist Response to S/M and Its Legal Regulation in Canada through Jelinek’s *The Piano Teacher*” (2007) 30 Harv JL & Gender 425.

³ Based on a CanLII search conducted 3 April 2021, more than 80 percent of reported cases involving the terms “rough sex” and “sexual assault” occurred after 2010. Of the thirty-one reported cases that include the terms “sexual assault” and “BDSM,” only one is prior to 2010 (*R v Price*, 2004 BCPC 103 (CanLII)). It did not involve a rough sex or consensual sadomasochism (S/M) defence to sexual assault. There are no reported cases prior to 2010 in which an accused relied on consensual “sadomasochism” as a defence to sexual assault. There is one case – *R v RDW*, 2006 BCPC 300 (CanLII), – in which an accused pled guilty to the lesser included offence of assault but relied on the argument that the incident involved consensual S/M at sentencing.

⁴ Karen Busby, “*Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions*” (2012) 24 CJWL 328 at 347. While not exclusively limited to allegations of non-consensual behaviour, as is the case in Canada, the vast majority of cases appear also to be of this type in other, comparable, jurisdictions. See e.g. Elizabeth Shef, “Kinky Sex Gone Wrong: Legal Prosecutions Concerning Consent, Age Play and Death via BDSM” (2021) 50:3 Archives of Sexual Behavior 761 at 763. There have been a very small number of decisions in the United Kingdom that did involve criminal prosecutions for bondage, discipline (or domination), sadism (or submission), and masochism (BDSM) in which none of the participants alleged non-consent. See e.g. *R v Brown*, [1993] UKHL 19, [1994] 1 AC 212.

⁵ Busby, *supra* note 4 at 347.

⁶ *Ibid.*

⁷ Only two reported cases prior to 2000 raise the prospect of a “rough sex defence”: *R v Welch* (1995), 25 OR (3d) 665 (ON CA); *R v RKJ*, 1998 CANLII 12252 (NB CA). It is not clear whether the accused in *RKJ* relied on the couple’s supposed history of consensual rough sex as a defence. The accused in *Welch* did rely on the “rough sex defence.”

⁸ Shef, *supra* note 4 at 761.

not warranted.⁹ Regardless of the explanation, and as I will argue in Parts III and IV, the proliferation of the “rough sex defence” is dangerous for women.¹⁰

A. A Note About Sex Positivity and the Construction of Sex as Dangerous

Feminist reflection on the notion of S/M or consensual “rough sex” requires consideration of the relationships between protecting human health and safety, preserving personal autonomy, and promoting the social conditions in which the good of sex might flourish. There exist, for example, tensions between ensuring legal protection for the sexual integrity of women and the criminalization of consensual sexual acts on the basis of heteronormative or “vanilla” attitudes about the (un)desirability or worthlessness of certain marginalized sexual minorities and practices.¹¹ Katherine Franke argues that legal feminists have focused exclusively on the dangers of sex at the cost of properly recognizing the female body as a site of pleasure and desire.¹² She suggests that implicit in this focus of legal feminism is the problematic assumption that before sexuality can be explored positively, harmful, dangerous sex must be eliminated.¹³ Franke juxtaposes legal feminism with feminist work in other disciplines – work that simultaneously addresses questions of sexuality in both negative and positive terms.¹⁴

I agree that waiting until the dangers of sex have been eliminated to embrace the capacity of sex to promote human flourishing seems ill advised.¹⁵ That said, ensuring that the legal protection of the right and ability to say no is effectual seems necessary to facilitate and expand women’s capacity to pursue

⁹ Busby, *supra* note 4 at 346.

¹⁰ One of the ways in which legal narratives about rough sex pose a threat to women’s sexual integrity involves erroneously granted applications to introduce evidence of a complainant’s other sexual activity in cases in which the “rough sex defence” is invoked. See e.g. *R v TJN*, [2018] OJ No 429 [TJN] (application to ask complainant whether he had tied her up in the past and whether it was sometimes with her consent granted); *R v DAB* (2021), MBQB 6 (CanLII) [DAB] (application granted on the basis of an expert’s opinion that it was relevant to the mentally ill accused’s state of mind at the time of the incident); *R v Marsden*, [2020] OJ No 2217 [Marsden] (denying an application for certiorari to quash the trial judge’s decision (Wolfe J, 27 January 2020, unreported) to admit evidence of the complainant and the accused engaging in consensual anal intercourse and BDSM in the past despite his conclusion that he would not have admitted it. See also Busby, *supra* note 4 at 332; *R v Gravel*, 2018 QCCQ 1379. In addition, and equally if not more problematically, evidence of other sexual activity has also crept into cases involving a rough sex defence without a section 278.92 application. See e.g. Busby, *supra* note 4 (discussing *R v JA*, [2011] 2 SCR 440 [JA]).

¹¹ For an examination of this tension, see Monica Pa, “Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex” (2001) 11:1 *Tex J Women & L* 51; Lise Gotell, “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R. v. J.A.*” (2012) 24:2 *CJWL* 359; Sharon Cowan, “Criminalizing SM: Disavowing the Erotic, Instantiating Violence” in Antony Duff et al, eds, *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011) 59; Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014) 225; Vera Bergelson, “The Right to Be Hurt: Testing the Boundaries of Consent” (2007) 75 *Geo Wash L Rev* 165; Stear Nils-Hennes, “Sadomasochism as Make Believe” (2009) 24:2 *Hypatia* 21; Deckha, *supra* note 2; Hanna, *supra* note 1. For an argument that society’s paradoxical relationship to sex (sexual exceptionalism and sex negativity) results in legal regulation that under values sexual autonomy, see Ummni Khan, “Hot for Kink, Bothered by the Law: BDSM and the Right to Autonomy” (8 August 2016), online: *Canadian Bar Association* <www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Summer-2016-Issue/Hot-for-Kink,-Bothered-by-the-Law-BDSM-and-the-Rig> [Khan, “Hot for Kink”].

¹² Katherine Franke, “Theorizing Yes: An Essay on Feminism, law and Desire” (2001) 101 *Colum L Rev* 181 at 182.

¹³ *Ibid.*

¹⁴ *Ibid* at 182.

¹⁵ I have examined the failings of a strict good sex/bad sex dichotomy elsewhere. See Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012).

pleasure – to say yes.¹⁶ It is not sufficient to assert that feminists ought to pursue these objectives simultaneously without recognizing that these objectives are indivisibly overlapping, if not co-extensive. Both as a matter of theory and practice, S/M seems to throw this circumstance into relief.¹⁷

A legal regime that properly and consistently delineates between consensual and non-consensual acts in adjudicating “rough sex defences” would promote freedom from oppressive, harmful sexual experiences. Confidence that such a regime was in place would promote women’s freedom to pursue more sexual creativity and greater exploration of desire. One of the many harms of sexual violence at a structural level is that it diminishes the capacity of women to seek self-fulfilment, develop identity, and pursue desire, pleasure, and joy through sex. While Franke’s call to legal feminists to “theorize yes” should be heeded, it would be foolish not to recognize that the capacity to “say yes” to sex or other erotic activity is furthered by, and, arguably, even reliant on, the right to “say no.”¹⁸

There remains considerable debate within legal feminist communities as to whether the law ought to vitiate consent to S/M that causes bodily harm. Theorizing “yes” in the context of this debate is important work. But it is work that cannot be divorced from a recognition that, as it stands, some courts do not consistently or properly delineate between consensual and non-consensual sex, even absent the types of activities that cause injury.¹⁹ In other words, consideration of the implications for the sexual autonomy of women posed by laws that limit women’s ability to “say yes” must be informed by, among other things, the reality that some courts continue to struggle with the “did she consent” question in sexual assault cases²⁰ and that this struggle may be heightened in cases in which accused individuals invoke S/M, or consensual “rough sex,” in response to allegations of non-consensual sexual contact.²¹

...

The focus of this article is on the judicial application of Canada’s sexual assault doctrine in the context of the “rough sex defence.” One way to pursue this focus is through a close reading of cases in which the judicial failure to delineate between consensual S/M and sexual assault is clear. An examination of the trial proceeding and judicial reasoning in *R. v Hunter* provides this opportunity.²² The reasoning in *Hunter*, which involved allegations of sexual assault following a series of consensual acts in the context of a S/M

¹⁶ Franke would arguably agree with this proposition: “[I]t may be that the best we can aspire to, as feminist legal theorists, is a set of legal analyses, frames, and supports that erect the enabling conditions for sexual pleasure.” Franke, *supra* note 12 at 208.

¹⁷ In *R v Jobidon*, (1991) 66 CCC (3d) 454 (SCC) [*Jobidon*], the Court held that one cannot consent to the infliction of bodily injury arising from a socially undesirable activity such as a fist fight. The same approach was used in *Welch*, *supra* note 7, in which the accused claimed to have engaged in consensual S/M. In *R v Paice*, [2005] 1 SCR 339, the Supreme Court of Canada clarified that the rule in *Jobidon* stipulated that consent to a fist fight would be vitiated in circumstances in which the accused intended to, and did, cause bodily harm. In *R v Quashie*, (2005) 198 CCC (3d) 337, the Ontario Court of Appeal confirmed that consent is only vitiated if the accused both causes, and subjectively intended to cause, bodily harm.

¹⁸ Franke, *supra* note 12.

¹⁹ Busby, *supra* note 4.

²⁰ See Jennifer Koshan, “The Judicial Treatment of Marital Rape in Canada: A Post-Criminalisation Case Study” in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Oxford: Hart Publishing, 2017) Chapter 9; Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22 CJWL 397; Elaine Craig, *Putting Trials on Trial* (Montreal and Kingston: McGill-Queens University Press, 2018); Elaine Craig, “Judging Sexual Assault Trials: Systemic Failure in the Case of Regina v Bassam Al-Rawi” (2017) 95 Can Bar Rev 180.

²¹ Busby, *supra* note 4.

²² *R v Hunter*, 2019 NSSC 369 [*Hunter*].

“scene,” exemplifies this failure.²³ Certainly, some courts have avoided these types of mistakes.²⁴ Unfortunately, other decisions reflect errors similar to those found in *Hunter*.²⁵

The remainder of this article will proceed in four parts. Part II involves a brief explanation of the facts in *Hunter*. Relying on the reported decision and the audio recording of the trial itself, Part III examines the errors in *Hunter* regarding the *actus reus* for sexual assault. Part IV shifts the focus to the Nova Scotia Supreme Court’s erroneous analysis of the *mens rea* in *Hunter*. The inquiry in both Part III and Part IV is aimed at illustrating the way in which the Court failed to properly apply the legal doctrine because of a problematic approach to the S/M context in which these allegations arose. Part V offers a concluding summary of the legal principles that must be applied to properly adjudicate a “rough sex defence” in response to allegations of sexual assault.

Again, confidence in law’s capacity to protect women’s sexual integrity would promote women’s sexual autonomy. Decisions like the one in *Hunter* suggest that, at this point, such confidence would be misplaced. Instead of sending the message “proceed with extreme care, negotiate S/M scenes carefully and in a detailed way, learn the rules and follow them,” this decision has the opposite effect. While a detailed doctrinal dissection of a single case is laborious, it should aid future courts in ensuring that the legal definition of consent in Canada is applied properly, including in cases in which the “rough sex defence” or notion of consensual S/M is invoked.

II. THE FACTS IN *HUNTER*

The factual accounts in the overwhelming majority of reported cases in which the “rough sex defence” is invoked depict incidents that occur in private, involving an accused man and a woman complainant, and without any mention of membership of either party in an organized or semi-organized S/M community.²⁶ *Hunter* is no exception.

The complainant in *Hunter*, A.G., had a hearing disability that made it difficult for her to understand a speaker unless she was lip reading.²⁷ She and the accused arranged through an online messaging application to meet for a “dominant-submissive type” sexual encounter involving the two of them and another woman, S.D.²⁸ The accused and the complainant agreed that she would take the bus from Halifax to Cow Bay, where the accused would pick her up. Due to difficulties with her bus route, it was 10:30 p.m. before Hunter picked her up at the bus stop and drove her to S.D.’s residence, a trailer in a wooded

²³ “Scene” typically refers to a S/M encounter. See Staci Newhmar, “Rethinking Kink: Sadomasochism as Serious Leisure” (2010) 33 *Qualitative Sociology* 313 at 315.

²⁴ For an example of reasoning that interprets and applies the law of consent correctly in a case involving similar allegations, see *R v MacMillan*, 2019 ONSC 6018 [*Macmillan*]. See also *R v Davidson*, 2010 BCPC 228 (CanLII) [*Davidson*].

²⁵ See e.g. *R v AE*, Action No 161500723Q1, 10 April 2019, unreported, Court of Queen’s Bench of Alberta (on file with author) [*AE*]. The acquittals in *AE* were overturned on appeal: *R v AE*, 2021 ABCA 172 [*AE* 2021]. At the time of writing, this case was before the Supreme Court of Canada. See also *R v MS*, [2018] OJ No 5258 [*MS*]; Busby, *supra* note 4.

²⁶ CanLII search of all reported Canadian case law between 1 April 2021 and 31 December 2010 (using the search terms “sexual assault” and “S/M” or “BDSM” or “sadomasochism”) conducted 1 April 2021. But see *R v BTH*, 2018 SKQB 85 (CanLII) (section 276 application seeking to introduce evidence that the complainant belonged to a BDSM community denied). One of the only reported cases to refer to a BDSM community – *R v DM*, 2018 ONCJ 423 (CanLII) – involved a female accused and her husband who were convicted of possessing and creating child pornography. The couple also engaged in a master-slave relationship that included S/M and membership in a BDSM community.

²⁷ *Hunter*, *supra* note 22 at para 6.

²⁸ *Ibid* at para 8.

area of rural Nova Scotia. The complainant had never been to, and was unfamiliar with, this location.²⁹ S.D. was a long-time friend and “somewhat regular” sexual partner of the accused.³⁰ The complainant had never met S.D. and did not know the accused’s real name. Hunter used a pseudonym in their communications on the messaging app. The complainant was significantly outweighed by the accused.³¹ The complainant, Hunter, and S.D. all testified. The only other witness was the investigating officer. The complainant’s evidence was that the incident began with a series of consensual sexual acts between the three of them. Her allegation was that, following these consensual acts, the accused engaged in several acts to which she did not consent. She alleged that he, without her consent, repeatedly choked her with his penis, slapped her face, grabbed and twisted her breast, and partially strangled her while penetrating her vagina with his penis. Hunter was charged with sexual assault. He was acquitted.

The trial judge determined that the Crown had failed to prove that the complainant did not consent to being choked with the accused’s penis or having her breast wrenched painfully. Justice Patrick Duncan accepted that the complainant did not consent to having the accused place his hands around her throat, partially constricting her breathing, while penetrating her vagina with his penis. However, he concluded that there was a reasonable doubt as to whether the accused knew that the complainant did not want to be partially strangled while he penetrated her vaginally with his penis.³² Despite its multiple legal errors, Justice Duncan’s decision to acquit was not appealed by the Crown.

III. *ACTUS REUS* IN THE CONTEXT OF THE “ROUGH SEX DEFENCE”

The complainant’s evidence was that she and S.D. took turns performing oral sex on the accused while kneeling in front of him. She testified that “he wanted me to have his penis all the way down my throat until I threw up and I didn’t like that so I was hesitant in letting his penis go all the way back, but I uh, but it was still consensual. Um, during this point he would also pull on my hair.”³³ Following some further consensual sexual acts between the three, the accused then instructed the complainant to lie on the bed and hang her head off the edge of the bed. From this position he would be in “complete control” of how far he could push his penis down her throat.³⁴ A.G. testified that while in this position the accused:

AG: ... inserted his penis into my mouth and he went so far back, to the back of my throat, and I remember feeling like I couldn’t breath [sic] and his stomach was pressed up against my face, and he ...

Q: What were, what were his hands doing?

A: Umm ... I don’t remember.

Q: Okay, carry on.

²⁹ *Hunter*, *supra* note 22 at para 181.

³⁰ *Ibid* at para 82.

³¹ *R v Hunter*, Audio Trial Transcript: Testimony of Accused, 26 September 2019, Halifax CRH481783 (NSSC) at 14h:37m:01s [Testimony of Accused].

³² *Hunter*, *supra* note 22.

³³ *R v Hunter*, Audio Trial Transcript: Testimony of Complainant, 25 September 2019, Halifax CRH481783 (NSSC) at 11h:28m:35s [Testimony of Complainant].

³⁴ Testimony of Complainant, *supra* note 33 at 11h:33m:02s – 11h:33m:27s. A.G. stated in her testimony: “Eventually he then instructed me to lay on the bed with my head over the edge of the bed because he wanted to perform oral sex, but this time when I did that he would be in complete control and I was again hesitant but I did lay on the bed with my head over the edge.”

AG: Umm, so he did this about twice, and I started to panic because I couldn’t breath [sic] and I lifted my hands up above my head and started to try to push him off me. So I was pushing on his stomach area to try to push his penis out of my mouth because I could not breath while he was doing this. Umm ... I remember I started to cry, and there were, umm ... visible tears at that point, umm ... and then –

Q: And were you ... at this point were you consenting to what was going on with the oral sex, with the insertion of the penis further down your throat so that you couldn’t breathe?

A: No. No.

Q: Okay, carry on Ms. G.

A: So, umm ... he did, after I tried pushing him off of me, he did back his penis out of my mouth, and I shook my head and I told him “no,” that I did not want to do it any more, and at this point I was still crying and he slapped me across the face, and the female, she said “just do it one more time and then Daddy will fuck you again.” Umm ... and then as response Logan [Hunter] said he won’t go as far down this time and just for me to do it one more time. Umm ... I did give in and agree because by that point I was feeling scared and like he wasn’t going to listen to anything I had to say. Umm ... though he did agree and not go as far down my throat this time. Umm ... this lasted maybe ten minutes.³⁵

S.D. testified under cross-examination that the complainant was “kind of resistant” during the “oral sex.”³⁶ She agreed that she had told the police that the complainant either said “stop” or “no” or otherwise indicated a lack of consent during the “oral sex.”³⁷

The accused testified that “there were multiple insertions”³⁸ of his penis down the complainant’s throat and that at “no point did she say no or push against” him.³⁹ He stated that “each time there was a longer pause between each one because of the gagging. You tend to like lose your breath and you know your nose becomes stuffy and things so I would give her a break between each insertion.”⁴⁰ He testified that

each time she’s catching her breath her mouth is not available for oral sex. So you know she’s breathing heavily and she’s just laying there. That she has to open her mouth wide in order to actually permit my penis back into her mouth. So there’s just a longer pause each time before she eventually opened her mouth. But I didn’t threaten her. I didn’t smack her ... and I did not make any threat about, you know, not driving her home or any type of violence.⁴¹

³⁵ *Ibid* at 11h:33m:31s.

³⁶ *R v Hunter*, Audio Trial Transcript: Testimony of S.D., 26 September 2019, Halifax CRH481783 (NSSC) at 11h:16m:00s – 11h:16m:26s [Testimony of S.D.]: “Q: So was there another point then in the evening when during oral sex she said either stop or no? A: Not those words no. Q: Well what did she say then? A: Not necessarily that she would have said but more just been like kind of resistant I guess.”

³⁷ *Ibid* at 11h:06m:30s – 11h:09m:40s.

³⁸ Testimony of Accused, *supra* note 31 at 11h:36m:03s.

³⁹ *Ibid* at 11h:36m:28s.

⁴⁰ *Ibid* at 11h:36m:06s.

⁴¹ *Ibid* at 11h:36m:35s.

The accused stated that

I did not observe any obvious emotion. Each time that she gagged, like, her face would turn, you know a shade of red from, like, I guess the gagging or coughing. Its like – involuntary reflex that, like, you become a little flush and that your eyes may, like, appear, like, glassy. But I did not see her looking upset or crying or making any sounds that indicated that she was in any state of discomfort.⁴²

Note the absurdity of testifying that the complainant was gagging and coughing, had lost her breath, her nose was running, her eyes were glassy, and her face was turning red and then asserting that he did not see or hear any indication that “she was in any state of discomfort.”⁴³

The Crown’s cross-examination of the accused regarding these acts of choking the complainant with his penis included the following:

Q: And during this process when you were forcing your penis into her throat there were times when Ms G. squirmed correct?

A: Yes.

Q: There were times when she gagged?

A: Yes.

Q: There were times when she clearly couldn’t breathe and needed air?

A: Yes.

...

Q: And the reason for that particular position with her lying on her bed with her head [hanging] over the bed is that it allows you to push your penis deeper down her throat than you would otherwise be able to do?

A: In an upright position it doesn’t, its not able to, go as far, so yes.

Q: And that position also allows you to control [] the situation more. You’re kneeling over her head as it dangles off the bed. You’re in control of how far the penis goes down her throat?

A: Yes.

Q: I’m going to suggest to you that Ms G. began crying during this process.

A: I didn’t notice that she was crying. There was no audible sounds that made it seem like she was crying. There was no, I guess, crying face or like ugly crying ... her eyes may have watered from the actual gagging but it didn’t seem like she was upset and crying.⁴⁴

The accused told the police “there may have been tears, because when you gag your eyes water and your nose tends to run. But I wouldn’t say, like, she was crying I guess. It’s just, like, the involuntary response of coughing that hard or something.”⁴⁵ When pressed on this point during cross-examination, the accused

⁴² *Ibid* at 11h:39m:58s.

⁴³ *Ibid*.

⁴⁴ *Ibid* at 14h:18m:13s.

⁴⁵ *Ibid* at 14h:21m:00s (the Crown put this to him during cross-examination).

agreed that he was simply guessing when he suggested that the tears were from gagging and not because she was upset or in distress.⁴⁶

The complainant’s testimony was that she did not, during this interaction in which her head was hung over the bed and the accused was in “complete control,”⁴⁷ consent to the insertion of his penis down her throat so that she could not breathe.⁴⁸ Despite her evidence that she did not want to be choked by the accused’s penis, despite S.D.’s evidence that the complainant indicated resistance when the accused was pushing his penis down her throat, and despite the accused’s evidence that the complainant was squirming, gagging, coughing, and could not breathe, Duncan J was “not satisfied beyond a reasonable doubt that A.G. was not consenting to the[se] acts of fellatio.”⁴⁹ While the trial judge accepted that “at one point she decided that she did not want to have Mr. Hunter’s penis so deep in her throat that it caused her to gag and tear,”⁵⁰ he was left with a reasonable doubt regarding her evidence that she did not consent to any of these acts while in this position on the bed.

On what basis did the Court in *Hunter* conclude that the Crown had failed to prove beyond a reasonable doubt that the complainant did not want to be choked with the accused’s penis in this manner while in this position on the bed? Justice Duncan offered three reasons, each of which included errors.

First, he expressed doubt about “A.G.’s evidence that she attempted to push the accused away.”⁵¹ He reasoned that “if she did that it was not apparent to the accused. This could be explained by the fact that he is a large man and she may not have used enough force to make her intentions known to him.”⁵² Pointing to a woman’s failure to use adequate force to physically resist an accused as evidence of consent seems perilously close to reliance on the discredited stereotype that “real victims fight back.”⁵³

⁴⁶ *Ibid* at 14h:21m:28s – 14h:21m:57s: “Q: So, Ms. G’s eyes may in fact have been watering as she was gagging. A: That’s correct. Q: There may have been tears coming from her eyes. A: Yes. Q: And you’re not a mind-reader. A: That’s correct. Q: You don’t know for sure why there may have been tears from her eyes. You were simply guessing it was because she was gagging and not because she was upset or in distress. A: That’s a fair assessment.”

⁴⁷ Testimony of Complainant, *supra* note 33 at 11h:33m:02s – 11h:33m:27s.

⁴⁸ *Ibid* at 11h:34m:50s – 11h:35m:00s. The trial judge appears to have misapprehended this aspect of her evidence. He stated that her evidence was that only “the last act of fellatio, after she said no” was non-consensual (*Hunter*, *supra* note 22 at para 15; see also paras 42–43). This is not consistent with the complainant’s testimony. The complainant was asked by the Crown, in reference to the first incidents of oral penetration while she was in this position on the bed: “Um, and were you, at this point were you consenting to what was going on with the oral sex – with the insertion of the penis further down your throat so that you couldn’t breathe?” She responded: “No, no.” Her evidence was that as this was occurring she could not breathe, panicked, tried to push his penis out of her mouth, and started crying. Later in her testimony, she stated that during these first instances of oral penetration while in this position on the bed he continued to penetrate her mouth and throat after she tried to push him away (*ibid* at 12h:14m:00s). She was asked specifically whether she was consenting to his penis down her throat from the time she was trying to push him away and she responded: “no.” She testified that she stopped consenting “when he had his penis all the way down her throat and [she] tried to push him off.” Her evidence was that it took another minute before he “backed his penis” out of her throat and mouth (*ibid* at 12h:15m:45s). During cross-examination, she confirmed that the first time he did this while her head was hung over the bed he went further than she wanted, and defence counsel characterized her testimony as alleging that all acts of oral penetration while in this position on the bed were non-consensual (*ibid* at 2h:36m:00s).

⁴⁹ *Hunter*, *supra* note 22 at para 161.

⁵⁰ *Ibid* at para 156.

⁵¹ *Ibid* at para 157.

⁵² *Ibid*.

⁵³ See *R v M (ML)*, [1994] 2 SCR 3 [*M (ML)*]: “The majority of the Court of Appeal was in error in holding that a victim is required to offer some minimal word or gesture of objection and that lack of resistance must be equated with consent.” See also *R v ARJD*, [2017] AJ No 746, aff’d [2018] 1 SCR 218 [*ARJD*]. In *ARJD*, the Supreme Court of Canada affirmed a decision of the Alberta Court of Appeal to overturn an acquittal because the trial judge relied on an impermissible stereotype (at para 2): “[H]e judged the complainant’s credibility based solely on the correspondence between her

In addition, the repeated emphasis in this paragraph of the decision on what the accused saw and knew – on what was apparent to the accused – suggests that Justice Duncan may have conflated the *actus reus* for the offence of sexual assault with the *mens rea* for this offence. In analyzing the *actus reus*, “the focus is placed squarely on the complainant’s state of mind, and the accused’s perception of that state of mind is irrelevant.”⁵⁴ It is not that evidence of the accused’s observations of the complainant’s conduct or (lack of) communication is irrelevant to the trier of fact’s assessment of her state of mind at the time of the incident. Such evidence is relevant.⁵⁵ Rather, it is that Justice Duncan’s repeated emphasis on the accused’s perceptions – particularly, his explanation as to why the accused may not have been aware of her resistance – suggests that his conclusion regarding the *actus reus* may have been informed by an assessment of the accused’s state of mind at the time of the incident. This would be an error of law.

Justice Duncan also pointed to the complainant’s failure to provide the accused with “verbal cues” indicating her lack of consent to being choked with his penis.⁵⁶ This aspect of the decision also suggests a possible conflation of the *actus reus* and the *mens rea*. A complainant’s lack of verbal cues indicating non-consent following consensual S/M sexual acts might be probative of the *mens rea* for sexual assault, depending on the facts. Recall, however, that the *actus reus* for the offence of sexual assault is determined based on the complainant’s state of mind at the time of the incident.⁵⁷ In the face of evidence from both the complainant and the accused that she was gagging, coughing, and, at times, could not breathe because the accused was shoving his penis down her throat, a lack of verbal cues indicating non-consent is not particularly probative of her state of mind at the time of the incident. She testified that she was unable to speak while she was trying to push him away because “his penis was all the way down [her] throat, as well his stomach was blocking over [her] nose area.”⁵⁸ Moreover, her evidence was that she was crying – which is a form of verbal cue.

The trial judge’s second basis for concluding that the Crown failed to prove that the complainant did not voluntarily agree to be choked with the accused’s penis was as follows: when the accused did become aware that the complainant was “uncomfortable with the deep throat experience,” he promised not to push his penis in as far and he kept his promise.⁵⁹ The complainant’s evidence was that all of the incidents of choking her with his penis while in this position on the bed – both the incidents before and after he “kept his promise” – were non-consensual.⁶⁰ She testified that when the accused pushed his penis into the back of her throat while she was in that position on the bed she felt like she could not breathe. She panicked,

behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law.” See generally Susan Estrich, *Real Rape* (Boston: Harvard University Press, 1987).

⁵⁴ *R v Barton*, [2019] SCJ No 33 at para 89 [*Barton*]. See also *R v Ewanchuk*, [1999] SCJ No 10 at para 26 [*Ewanchuk*].

⁵⁵ *Ewanchuk*, *supra* note 54 at para 29 (“[w]hile the complainant’s testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant’s words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place”). See also Lisa Dufraimont, “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44:2 Queen’s LJ 316.

⁵⁶ *Hunter*, *supra* note 22 at para 42 (in reference to the first instances of oral penetration – which she characterized as consensual – before she took the position on the bed), para 43 (in reference to the oral penetration while she was laying on the bed – which she testified were non-consensual).

⁵⁷ *Barton*, *supra* note 54 at para 89; *Ewanchuk*, *supra* note 54 at para 26.

⁵⁸ Testimony of Complainant, *supra* note 33 at 11h:34m:00s, 12h:15:12s

⁵⁹ *Hunter*, *supra* note 22 at para 158.

⁶⁰ Testimony of Complainant, *supra* note 33 at 11h:34m:01s – 11h:37m:00s: “Umm ... and then as a response Logan said he won’t go as far down this time and just for me to do it one more time. Umm ... I did give in and agree because by that point I was feeling scared and like he wasn’t going to listen to anything I had to say.”

began crying, and tried to push him away.⁶¹ Whether the accused promised not to choke the complainant with his penis again, and then kept his promise, is not probative of whether she voluntarily agreed to him repeatedly choking her by pushing his penis that far down her throat in the first place.⁶² Nor is the fact that he kept his promise probative of her state of mind, either before or after the promise was issued.

The complainant testified that, after his promise not to push his penis as far down her throat, she allowed the accused to penetrate her throat one further time out of a fear generated in part because he slapped her. In articulating the basis for finding there was a reasonable doubt that A.G. was not consenting to the last “act[] of fellatio,” Justice Duncan pointed to the lack of physical evidence that she had been slapped across the face; the lack of evidence that she was otherwise threatened by the accused; and the fact that further sexual acts were negotiated and occurred after he stopped choking her with his penis.⁶³

To be clear, the trial judge may have relied on his rejection of her evidence that she had been slapped simply to assess her credibility, which would be acceptable. It would be a legal error, however, to conclude that a lack of physical violence itself raised a reasonable doubt about the allegedly non-consensual nature of the oral penetration.⁶⁴ In terms of the lack of evidence that the accused threatened her, recall that the complainant was in a position on the bed such that the accused had “complete control”⁶⁵ over how far he pushed his penis down her throat. She was in an unknown trailer, in a remote and unfamiliar rural area, late at night, without her own transportation. She was outnumbered by two individuals, well known to each other but unfamiliar to her. It seems highly unlikely that threats of further violence would have been necessary to facilitate the accused’s acts under these circumstances. Nor does it seem reasonable, in these circumstances, to reject a complainant’s evidence that she was afraid on the basis of a lack of evidence that the accused had made threats.

It is also problematic to rely on subsequent sexual acts, or their alleged negotiation of subsequent sexual acts, as evidence that the complainant voluntarily agreed, in her own mind, to being choked with the accused’s penis while in this position on the bed. This is true even though the Court rejected her claim during her examination in chief that the subsequent sexual acts were also non-consensual.

Following the incidents of choking the complainant with his penis, and other sexual acts involving the three parties, the accused penetrated her vaginally with his penis. She testified that, while this was occurring, he “grabbed my, my breast ... and then he was squeezing it incredibly hard, [to] the point where it was painful, and I told him “ow” but he continued having sex with me.”⁶⁶ The Crown introduced photographs the complainant took after the incident which showed some bruising on her breast. The complainant testified that the accused “then put his hand over my neck, while having sex with me ... and

⁶¹ See *ibid* at 11h:33m:31s – 11h:35m:00s. See also *Hunter, supra* note 22 at para 43 (“[i]n relation to the next two instances of fellatio, she said that he asked her to lie on the bed and she did so. She testified that Mr. Hunter went further than she wanted to on the first occasion, but she did not tell him that. In cross-examination she agreed that she ‘permitted’ him to do this.” That she did not tell him that she did not want him to insert his penis so far down her throat does not mean it was consensual.

⁶² *Barton, supra* note 54; *JA, supra* note 10; *Ewanchuk, supra* note 54.

⁶³ *Hunter, supra* note 22 at para 161.

⁶⁴ *M (ML), supra* note 53; *Ewanchuk, supra* note 54.

⁶⁵ Defence counsel’s cross-examination of the complainant certainly seemed to be aimed at raising the prospect that the accused had an honest but mistaken belief in communicated consent rather than a focus on challenging her evidence that the incidents of oral penetration while she was on the bed in this position were consensual. See e.g. *Hunter, supra* note 22 at paras 46, 54 (“I’m gonna suggest to you as well Ms. G. that a lot of your lack of consent was happening in your head, but not necessarily being expressed to Mr. Hunter and the female party. Would you agree with that?”); see also para 126 (in which the trial judge’s summary of the defence position is also consistent with this assertion regarding defence counsel’s seeming theory of the case).

⁶⁶ *Ibid* at para 16.

at that point I panicked again and I didn't want it to continue anymore."⁶⁷ Her evidence was that she tried to remove his hand from her throat and said stop but that he continued penetrating her, keeping his hand around her throat, until he ejaculated shortly after that.⁶⁸

Justice Duncan concluded that the Crown had failed to prove that the complainant "did not consent to the fondling and pinch of her breasts."⁶⁹ The basis for this conclusion was that "pinching" of the breasts is within the scope of BDSM activities; the complainant did not protest to the conduct; and the accused saw no indication that the complainant was either not consenting or wanting to withdraw consent to this type of conduct.⁷⁰ This reasoning includes errors similar to those he made with respect to the allegations that Hunter non-consensually choked the complainant with his penis.

First, it was inaccurate to assert that the complainant did not protest. She testified that she said "ow."⁷¹ Expressing "ow" in response to the application of force is a form of protest and evidence of her state of mind at the time the squeezing of her breast occurred.

Second, as occurred in his analysis of the incidents in which the accused pushed his penis down her throat, the trial judge's focus on what the accused perceived suggests he may not have properly distinguished between the *actus reus* and the *mens rea* of the offence.

Third, whether breast pinching (which is not the term the complainant used to describe the incident) is within the scope of BDSM activities is not probative of the complainant's state of mind at the time her breast was, according to her, squeezed "incredibly hard" by the accused. Consent must be determined in relation to specific sexual acts, not a scope of activities. As stated by Chief Justice Beverley McLachlin in *R v J.A.*, "the definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity."⁷² There was no evidence that the complainant understood the wrenching of her breast to be part of the, as she described it, "dominance submissive kind of relationship"⁷³ she thought was to occur.⁷⁴ Without such evidence, the conclusion that breast wrenching

⁶⁷ Testimony of Complainant, *supra* note 33 at 11h:39m:14s.

⁶⁸ *Ibid* at 15h:44m:23s – 15h:45m:07s. The evidence of the length of time between when the complainant told him to stop and when he ejaculated and then removed his penis was inconsistent. The complainant initially indicated that it was one to two minutes but later agreed that the period of time was short. S.D. told the police that there was a delay between A.G. telling him to stop and the accused actually stopping. Testimony of S.D., *supra* note 36 at 10h:09m:05s – 10h:10m:53s; *Hunter*, *supra* note 22 at para 76. At trial, she testified that it was a matter of seconds, agreeing on cross-examination that it was approximately ten seconds. *Hunter*, *ibid*, at para 77. The trial judge rejected the Crown's suggestion that Hunter ignored the complainant's direction to him to stop, instead ceasing only after he had ejaculated.

⁶⁹ *Hunter*, *supra* note 22 at para 175.

⁷⁰ *Ibid* at para 175. Part IV examines this particular aspect of the reasoning in *Hunter*. There was no evidence, expert or otherwise, that "breast pinching" was "within the scope of BDSM activities." Duncan J appears to have taken judicial notice of this "fact." More significantly, there was no evidence from either the complainant or the accused that the complainant had agreed to breast pinching. One of the problems in this case is that, in questioning the complainant and the accused, both the Crown and defence counsel tended to ask questions about their understanding of BDSM generally rather than questions about what specifically they had contemplated and understood themselves to be consenting to at the time.

⁷¹ Testimony of Complainant, *supra* note 33 at 11h:39m:07s – 11h:39m:11s. A.G. stated in her testimony: "I told him "ow" but he continued having sex with me."

⁷² *JA*, *supra* note 10 at para 66.

⁷³ Testimony of Complainant, *supra* note 33 at 11h:22m.

⁷⁴ The complainant was asked: "what does BDSM mean?" She responded: "a style of consensual sexual activity that usually involves either um so like bondage or submissives or things like that um it usually involves ... it can be a bit more rougher but its usually all communicated beforehand." *Ibid* at 2h:18m. Duncan J found that the parties had not communicated about which sexual acts they would engage in as part of the "threesome."

is within “the range of acceptable actions within the BDSM culture” is irrelevant to the complainant’s state of mind at the time that it occurred.

To be clear, the trial judge’s written reasons reflect an articulation of the law that was, with one important exception,⁷⁵ accurate.⁷⁶ The errors in applying this legal doctrine outlined in the preceding paragraphs might be explained by the judicial approach taken to the assessment of these acts in light of the S/M context in which they are said to have occurred. To facilitate the ability of women to pursue sexual desires that extend beyond, or subvert, norms of monogamy, reproductive sex, and romantic ideals, without forfeiting their legal protections under the criminal law, it is critical that the feminist-informed legal doctrine of consent developed in the past several decades in Canada be applied properly.⁷⁷ The doctrine does not differ based on the nature of the sexual activity. The legal test for consent is the same regardless of the context in which the allegations arise.

To summarize, the Court in *Hunter* concluded that the Crown failed to prove that the complainant did not want to be choked with the accused’s penis, have her breast grabbed hard, or be vaginally penetrated while, and after, the accused was causing pain to her breast or partially strangling her. Justice Duncan did conclude that the complainant did not consent to having the accused’s hand around her throat while he was penetrating her vagina. This raised the issue of *mens rea* – whether the accused had an honest but mistaken belief that the complainant communicated consent to having his hand around her throat while he penetrated her vagina with his penis. Justice Duncan found that he did.

IV. *MENS REA* IN THE CONTEXT OF THE “ROUGH SEX DEFENCE”

The legal errors in this part of the *Hunter* decision were also significant. They can be grouped into three categories. First, Justice Duncan misstated the legal standard for the honest but mistaken belief in communicated consent defence and relied on the notion of implied consent.⁷⁸ Second, his finding that there was an air of reality to the defence was premised on evidence of broad, advance consent to sexual activity of an undefined scope. Third, Justice Duncan failed to properly analyze whether the accused took reasonable steps in the circumstances known to him to ascertain consent.

A. Consent to “Rough Sex” Must Be Communicated Not Implied

The trial judge’s articulation of the defence of honest but mistaken belief in communicated consent failed to adequately capture its affirmative and communicative elements. In describing the legal principles governing the *mens rea* for sexual assault, Justice Duncan stated that “[i]f I have a reasonable doubt about whether Mr. Hunter honestly believed that A.G. consented to the sexual activity with which he is charged, then I must find Mr. Hunter not guilty.”⁷⁹ He referred to the defence as the “mistaken belief in apprehended

⁷⁵ See e.g. *Hunter*, *supra* note 22 at paras 129–133. As discussed in the next part, he did misstate the law with respect to the issue of honest but mistaken belief in communicated consent.

⁷⁶ See e.g. *ibid* at paras 110–125.

⁷⁷ See e.g. *Ewanchuk*, *supra* note 54 at paras 26, 45 (in which the majority of the Supreme Court of Canada adopted the definition of consent articulated by Justice Claire L’Heureux-Dubé in *R v Park*, [1995] 2 SCR 386. L’Heureux-Dubé J was widely known to be a feminist (see Constance Backhouse, *Claire L’Heureux-Dubé: A Life* (Vancouver: UBC Press, 2017) and regularly relied on the work of feminist academics in her decisions (see e.g. *Ewanchuk*, *supra* note 54 at paras 68, 82).

⁷⁸ While commonly referred to as a defence, the burden remains on the Crown to prove beyond a reasonable doubt that the accused did not honestly believe the complainant had communicated consent.

⁷⁹ *Hunter*, *supra* note 22 at para 129.

consent.”⁸⁰ He stated that “[t]he accused must honestly believe that the complainant voluntarily agreed to participate in the sexual activity which she says she did not consent to.”⁸¹

In fact, as the Supreme Court of Canada established in *R. v Ewanchuk* in 1999 and reiterated in *R. v Barton* a few months before the *Hunter* decision was released, “in order to make out the ... defence, the accused must have an honest but mistaken belief that the complainant actually *communicated* consent, whether by words or conduct.”⁸² The focus on communication is sufficiently critical such that the Court in *Barton* directed courts to refer to the defence as “an honest but mistaken belief in *communicated* consent.”⁸³ Far from trifling semantics, the Supreme Court’s direction was intended to “focus all justice system participants on the crucial question of *communication* of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.”⁸⁴

Unfortunately, the territory of assumed or implied consent is precisely where the reasoning in *Hunter* landed. The trial judge stated:

It was the first and only time that a choking action was attempted. It was an escalation of *what was seen by Mr. Hunter as within the range of permissible BDSM conduct*. I accept that it could be within the range of such conduct as the infliction of pain or other forms of discomfort are *implied by the BDSM construct*.⁸⁵

The Supreme Court of Canada’s point, in the long-standing line of cases from *Ewanchuk* to *Barton*, is that the defence of honest but mistaken belief in communicated consent does not turn on what was seen by an accused to be within the range of permissible sexual conduct or on what a judge considers to be implied by a particular sexual “construct.” It is the accused’s perception of what the complainant communicated that drives the analysis. As the Court highlighted in *Barton*, “the principal considerations that are relevant to this defence are (1) the complainant’s actual communicative behaviour and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent.”⁸⁶ The accused must point to some evidence to support his belief that the complainant contemporaneously communicated a willingness to engage in the specific sexual act at issue. As Justice Andromache Karakastanis stated in *R. v Goldfinch*, “contemporaneous, affirmatively communicated

⁸⁰ This is the subheading used between paragraphs 128 and 129 of the decision. *Ibid*.

⁸¹ *Ibid* at para 131. He made the same mistake at paragraph 132. He also stated that “there can be no honest belief if Mr Hunter was aware that he needed to find out whether A.G. would agree to participate in this activity but did nothing about it because he did not want to know the truth” (at para 31; emphasis added). This is also a problematic way to describe the legal standard. Mr. Hunter did need to find out whether A.G. was agreeing to participate, whether he was aware of this legal obligation is not part of the standard. A lack of awareness of this requirement on the part of the accused would be a mistake of law, not a mistake of fact.

⁸² *Barton*, *supra* note 54 at para 91 (emphasis in original).

⁸³ *Ibid* at para 91.

⁸⁴ *Ibid* at para 92.

⁸⁵ *Hunter*, *supra* note 22 at para 176 [emphasis added]. Of note, it was not the first time a choking action was attempted. The accused repeatedly choked the complainant with his penis prior to placing his hand around her throat. Moreover, the appropriate word to use to describe this latter aspect of the allegation is strangulation or partial strangulation, not choking. While pushing his penis that far down her throat does involve choking, partially constricting her breathing by placing his hand around her throat is an act of strangulation, not choking. See Busby, *supra* note 4 at 338 (discussing the distinction between strangulation (which involves applying external pressure to the trachea to impede blood and oxygen flow to the brain and is more dangerous) and choking (which involves an obstruction inside the throat caused by a foreign object or substance)).

⁸⁶ *Barton*, *supra* note 54 at para 91 (quoting L’Heureux-Dubé J’s decision in *R v Park*, *supra* note 77 at para 44).

consent must be given for each and every sexual act.”⁸⁷ This requirement is the same whether the parties are engaged in vanilla, S/M, or any other type of sexual activity.

The accused in *Hunter* was permitted to rely on implied consent as a defence to strangling the complainant while penetrating her vaginally. Asphyxiation, or what is sometimes referred to as “breath play” in S/M circles, is considered one of the most extreme S/M activities because of its inherent and unpredictable risks.⁸⁸ Experts recommend that individuals exercise “extreme caution” before engaging in “breath play,” including safety training, ensuring all participants are sober, and carefully negotiated and established consent.⁸⁹ They also recommend that it never be done by placing external pressure on someone’s airway, which is what the accused did in *Hunter*.⁹⁰ As Busby explains, unlike loss of oxygen from choking or suffocation (which involves an obstruction to the mouth and nose or the inside of the throat caused by a foreign object or substance and which takes longer to become life threatening), impeding blood and, thus, oxygen flow to the brain by applying external pressure to the trachea can cause cardiac arrest or brain damage within seconds.⁹¹ According to Shef, “[a]ny neck compression can not only deter breath, but also inhibit blood circulation to the brain. Blood vessels that have collapsed under pressure can be slow to begin circulating blood again, even after the pressure is released.”⁹² Not only was it a legal error to permit the accused to imply consent to this dangerous and unpredictable act, even if consent to sexual acts could be legally “implied by [consent to] the BDSM construct,” Justice Duncan’s empirical conclusion regarding what falls within “the permissible range of BDSM conduct” was not well founded.⁹³ This same type of lack of awareness or knowledge on the part of judges was highlighted in Busby’s review of Canadian case law more broadly.⁹⁴ Trial judges ought not take judicial notice of what falls within the range of a particular sexual dynamic or context.

Hunter testified that he finds it very arousing to strangle someone in this manner but that he does not do it for more than thirty seconds because he thinks that that is about how long someone can hold their breath.⁹⁵ Again, any neck compression, even for a very brief period of time, can cause serious injury or death.⁹⁶ To permit accused individuals to rely on the notion that a woman implied consent to being strangled by agreeing in advance to a “dominance-submissive type relationship” is to profoundly undervalue not only the sexual integrity, but also the physical safety, of women. It is also a legal error.⁹⁷

This particular legal error highlights the inextricable relationship, discussed in the introduction, between promoting the ability of women to explore and pursue sexual desire and protecting their sexual integrity through law. The boundary between preserving personal autonomy and protecting human health and safety through criminal laws remains contested. Currently, a complainant’s consent to sexual activity will be vitiated under Canadian law if the accused caused, and intended to cause, serious bodily harm.⁹⁸ There remains resistance, even among some feminists, to the assertion that sexual activities that cause

⁸⁷ 2019 SCC 38 at para 44 [*Goldfinch*].

⁸⁸ See Busby, *supra* note 4 at 11, citing Lisa Downing, “Beyond Safety: Erotic Asphyxiation and the Limits of SM Discourse” in Barker Darren Langdridge & Meg Barker, eds, *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* (Basingstoke, UK: Palgrave Mcmillan, 2008) 119 at 122–123.

⁸⁹ Shef, *supra* note 4 at 6.

⁹⁰ *Ibid*; Busby, *supra* note 4.

⁹¹ See Busby, *supra* note 4 at 11.

⁹² Shef, *supra* note 4 at 7.

⁹³ *Hunter*, *supra* note 22 at para 176.

⁹⁴ Busby, *supra* note 4.

⁹⁵ Testimony of Accused, *supra* note 31 at 2h:34m.

⁹⁶ Shef, *supra* note 4 at 7.

⁹⁷ *JA*, *supra* note 10.

⁹⁸ See *Jobidon*, *supra* note 17; *Paice*, *supra* note 17; *Quashie*, *supra* note 17.

serious bodily harm ought to be legally prohibited even if engaged in with consent.⁹⁹ The suggestion that consent to an act that can cause brain damage and death ought not to be vitiated on policy grounds in an effort to protect sexual autonomy must be assessed in light of a legal context in which judges are still willing to imply consent to acts like strangulation.¹⁰⁰ This aspect of the reasoning in *Hunter* throws this legal context into relief.

More generally, the standard of contemporaneous, affirmative communication and corresponding rejection of the notion of implied consent are of particular importance in the context of S/M. Without this standard, there is a significant risk that problematic social assumptions, or stereotypical thinking, will infiltrate judicial analysis in cases involving women who consented to some form of sexual activity outside the parameters of monogamous heteronormativity, such that men will be permitted to assume that they were consenting to other, or any, sexual activity. In addition to endangering the physical safety of women, reliance on implied consent to adjudicate the “rough sex defence” is highly likely to produce legal reasoning that is infected with problematic social assumptions about sex, gender, race, and rape.

Take, for example, the relationship between racism and the well-documented historical “whiteness of BDSM” in both practice and academic writing.¹⁰¹ Katherine Martinez highlights a wealth of research demonstrating the way in which BDSM practice and research has traditionally centred the experiences of white people.¹⁰² Martinez suggests that more recent research and practices have challenged the “whiteness of BDSM” but that processes of racialization continue to maintain white privilege in BDSM spaces.¹⁰³ Similarly, Arian Cruz argues that, while “the controversial praxis of race play” permits black women to subvert the “racial and sexual otherness that characterizes the lived experience of Black womanhood,” it also introduces racial scripts and racism into these simulated acts of dominance and submission.¹⁰⁴ Cruz explains “race play” as “a BDSM practice that explicitly uses race to script power exchange and the dynamics of domination and submission. Most commonly an interracial erotic play, race play employs racism, often involving the exchange of racist language, role-playing, and the construction of racist scenes.”¹⁰⁵

Judicial reasoning that implies consent to violent sexual acts on the basis of a complainant’s purported agreement to participate in a “race play” BDSM construct would be highly susceptible to infection by discriminatory thinking about the human worth of racialized and Indigenous women and racist stereotypes about their sexual availability and hyper sexuality.¹⁰⁶ It would be almost certain to reify law’s already too

⁹⁹ See e.g. Khan, “Hot for Kink,” *supra* note 11.

¹⁰⁰ Busby, *supra* note 4.

¹⁰¹ See Katherine Martinez, “Overwhelming Whiteness of BDSM: A Critical Discourse Analysis of Racialization in BDSM” (2020) 24:5-6 *Sexualities* 733 at 734.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Ariane Cruz, “Beyond Black and Blue: BDSM, Internet Pornography, and Black Female Sexuality” (2015) 41:2 *Feminist Studies* 409 at 410.

¹⁰⁵ Cruz argues that “[m]utually consensual pleasure in the moment, regardless of whether such rapture is linked to the internalization and/or perpetuation – conscious, unconscious, or subconscious – of oppressive white heteropatriarchal supremacist structures and values (past, present, and future), is what matters.” *Ibid.* at 413. Even if that is what matters, we have to produce a jurisprudence that can properly identify whether a particular act is mutually consensual pleasure. Using a consent to a sexual construct framework risks reliance on the stereotypes and social assumptions that underpin those supremacist structures and values to make this assessment and clearly will not achieve this objective.

¹⁰⁶ See e.g. Sherene Razack, “Gendering Disposability” (2016) 28 *CJWL* 285; Akeia Benard, “Colonizing Black Female Bodies within Patriarchal Capitalism: Feminist and Human Rights Perspectives” (2016) 2:4 *Sexualization, Media & Society* 1.

frequent and deeply unjust failure to render legible the sexual violation of women legally and socially marginalized on the basis of race and Indigeneity.¹⁰⁷

B. Consent to “Rough Sex” Must Be Affirmative Not Negative

A related, equally important, and well-established aspect of the legal standard for this defence is its construction of consent as affirmative: “[F]or purposes of the defence of honest but mistaken belief in communicated consent, ‘consent’ means that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused.”¹⁰⁸ In *Goldfinch*, the Supreme Court of Canada commented: “Today, not only does no mean no, but only yes means yes. Nothing less than positive affirmation is required.”¹⁰⁹ Contrast this standard with the summary of the position of the defence offered by the trial judge in *Hunter*:

The accused advances a variety of responses to the allegations made against him:

- [h]e says that he did not hear the complainant say “no” or otherwise communicate to him that she was not consenting to the last act of fellatio that she performed upon him;¹¹⁰
- [h]e denies slapping her in the face;
- [h]e acknowledges squeezing her breasts during intercourse, but he was not aware that the complainant was not consenting to these acts;
- [h]e admits that he put his hand on the complainant’s throat during intercourse but that it was not intended to enable an act of sexual assault.¹¹¹

Even if accepted, not one of these assertions gives rise to an air of reality to the defence of honest but mistaken belief in communicated consent. Again, the legal test for honest but mistaken belief in communicated consent is affirmative communication. Relying on a complainant’s failure to resist, or a lack of threat and physical coercion on the part of the accused, to establish or support a belief in consent is a mistake of law.

For purposes of analyzing the *mens rea*, the issue in *Hunter* was not whether the accused heard the complainant say “no” or otherwise communicate that she was not consenting. The issue is whether he heard or observed words or actions on the part of the complainant that would support a belief that she communicated her consent to being partially strangled while he was penetrating her with his penis. There was nothing in the evidentiary record to support a belief that the complainant had communicated her willingness to have him place his hand around her throat, partially constricting her airway, while he was penetrating her vagina.

In S/M, as Cheryl Hanna describes it, “sex and violence intersect.”¹¹² As with the communicative element of the *mens rea* for sexual assault, this “intersection” makes the affirmative aspect of the legal

¹⁰⁷ *Barton*, *supra* note 54 at para 162.

¹⁰⁸ *Ibid* at para 90, citing *Ewanchuk*, *supra* note 54 at para 49.

¹⁰⁹ *Goldfinch*, *supra* note 87 at para 44. See also *Criminal Code*, RSC 1985, c C-46, s 273.2(c).

¹¹⁰ One point that appears to be blurred in this decision is that the complainant’s evidence was that she did not consent to any of the repeated acts of fellatio that occurred while her head was hung over the side of the bed. Her evidence was that she consented to the earlier acts of oral penetration, before she was in this position on the bed. See *Hunter*, *supra* note 22 at para 16.

¹¹¹ *Hunter*, *supra* note 22 at para 126.

¹¹² Hanna, *supra* note 1 at 239.

standard for consent particularly important in the context of S/M. The reasoning in *Hunter* failed to apply this important aspect of the doctrine of honest but mistaken belief in communicated consent.

C. Consent, Whether Part of a S/M Scene or Not, Must Be Specific and Contemporaneous, Not Broad and in Advance

Evidence of broad, advance consent cannot be relied upon as the basis for an honest but mistaken belief in communicated consent, regardless of whether the parties contemplated S/M.

In *Hunter*, Justice Duncan concluded that

Mr. Hunter honestly and reasonably believed that his conduct in putting his hand on A.G.'s throat, in the way he did, was within the bounds of permissible conduct contemplated by the mutual agreement that the activities that night were to be governed by the BDSM parameters of conduct. This was a defined context for the activities that night.¹¹³

In providing an “overview of [the accused’s beliefs],” he stated:

It is important to remember how this began. It was a plan that had been discussed previously and one that A.G. appeared to be interested in pursuing. She knew and agreed to participate in a BDSM governed sexual experience with two persons, in a place she had never been and with one person she had never met. She showed considerable determination to make her way to Cow Bay to participate.¹¹⁴

There are two problems with this reasoning. First, this is not an accurate representation of what transpired based on the evidence introduced at trial. In fact, a plan had not been previously discussed and agreed to by the three parties involved. A.G. and S.D. had never met, or spoken, let alone discussed a plan for the sexual activities.¹¹⁵ At trial, S.D. did not appear even to know the complainant’s name.¹¹⁶ There was no evidence that A.G. and the accused had discussed what was to occur, beyond the broad stroke suggestion of a threesome that would involve, in the complainant’s words, a “dominance-submissive type relationship.”¹¹⁷ Indeed, Duncan J noted that there was “no evidence that the parties had such a discussion and so the parameters of what might be permitted was left unstated.”¹¹⁸

The lack of a common understanding of this supposed “BDSM governed sexual experience,” as Justice Duncan described it, was starkly evidenced by the fact that the complainant and Hunter and S.D. did not share a view regarding even the most basic elements of the “scene.”¹¹⁹ For example, the complainant testified that she was the submissive and that S.D. and the accused were the dominants.¹²⁰ S.D. testified

¹¹³ *Hunter*, *supra* note 22 at para 179.

¹¹⁴ *Ibid* at para 181.

¹¹⁵ *Ibid*.

¹¹⁶ Testimony of S.D., *supra* note 36.

¹¹⁷ Testimony of Complainant, *supra* note 33 at 11h:22m:24s. When asked by the Crown what the purpose of the meeting was, A.G. responded: “The purpose was for a um like a threesome almost, so in a- so it was um, like a dominant-submissive kind of relationship.”

¹¹⁸ *Hunter*, *supra* note 22 at para 150.

¹¹⁹ *Ibid* at para 181.

¹²⁰ See Testimony of Complainant, *supra* note 33 at 14h:23m:12s – 14h:23m:46s.

that she and the complainant were both submissives and that Hunter was the dominant, which appears to have also been the accused’s understanding.¹²¹

Similarly, while there was a text message between Hunter and the complainant (subsequent to the incident) in which he reminds her that he had told her she was “going to learn to take it deep,”¹²² there was no evidence to suggest that the complainant and the accused discussed him repeatedly choking her with his penis while she lay in that position on the bed. Nor was there any evidence of a discussion about him inflicting pain upon her by grabbing her breast, or any evidence of a shared plan for him to place his hand around her throat while penetrating her vagina with his penis. Nor was there any evidence that they had discussed how consent was to be communicated with respect to each of these acts. Again, the trial judge specifically found that the complainant, S.D., and Hunter had not discussed and agreed to the sexual acts that took place.¹²³ As Cara Dunkley and Lori Brotto note, “explicitly negotiated consent is “the single universal characteristic in BDSM sexual interactions and is considered a fundamental tenet in the BDSM community.”¹²⁴

Throughout the trial, there were references by the complainant, the accused, and legal counsel to other sexual activity between the complainant and the accused.¹²⁵ There was no section 276 application in this case.¹²⁶ The complainant and the accused sent digital communications to each other both before and after the incident. If the evidence of other sexual activity, alluded to at trial, involved sexual communications stipulating specifically what was to occur and how consent to each agreed upon sexual act was to be contemporaneously communicated it should have been introduced. Either the Crown ought to have sought a *voir dire* or the accused ought to have brought a section 276 application pursuant to section 278.93 of the *Criminal Code* so that the Court could determine whether, and the purpose for which, it could be admitted.¹²⁷

¹²¹ See *Hunter*, *supra* note 22 at para 88.

¹²² *Ibid* at para 29.

¹²³ *Ibid* at para 173.

¹²⁴ Dunkley & Brotto, *supra* note 2 at 17.

¹²⁵ *R v Hunter*, Audio Trial Transcript, 25–26 September 2019, Halifax CRH481783 (NSSC). Unfortunately, at one point, the Crown objected to a question posed during the cross-examination of the complainant on the basis that it was “straying very close to the prior meetings between these two which were I believe all of a sexual nature.” The trial judge pointed out that he would not have known that if the Crown had not just revealed it to him. *Ibid* at 2h:24m:14s.

¹²⁶ *Hunter*, *supra* note 22 at para 104.

¹²⁷ As an aside, improper admission of evidence of a complainant’s other sexual activity has been particularly problematic in cases in which an accused defends himself on the basis of the “rough sex” defence. It serves as another example of the way in which this “rough sex defence” can be dangerous for women. See e.g. *TJN*, *supra* note 10; *DAB*, *supra* note 10; *Marsden*, *supra* note 10; *JA*, *supra* note 10. See also Busby, *supra* note 4 at 332. An especially disturbing example of this is *MS*, *supra* note 25. In *MS*, McKay J allowed the defence to introduce numerous, sexually graphic text messages between the accused and complainant. While some may have been properly admitted, many of them were highly prejudicial to the complainant and irrelevant to the basis upon which McKay J granted defence counsel’s section 276 application. He then went on to rely on some of these irrelevant and prejudicial texts in his decision to acquit. To provide one example, at para 39 of his decision:

A series of text messages dated September 5, 2006 included the following conversation:

Ms. L: Did I ever tell you about that dude I fucked in the bathroom in Thailand

Mr. S: I don't think so, tell me.

Ms. L: I went to a bar and met this Russian guy and he was really aggressive. And so he pulled me into the bathroom and I was sucking his dick, and he started aggressively skull fucking me and I smashed my head off the wall and blacked out for a second and that's the story of how I got a concussion from giving a blow job

Perhaps more important than the manner in which Justice Duncan characterized their prior “plan,”¹²⁸ the second problem with this aspect of the reasoning in *Hunter* is that it relies on broad, advance consent as the basis for the defence. Relying on a complainant’s agreement in advance to participate in a so-called “BDSM governed sexual experience”¹²⁹ to establish an air of reality to the honest but mistaken belief in communicated consent defence is an error of law.¹³⁰ From a criminal law perspective, sexual interactions in Canada are “governed” by the law of consent not the “BDSM construct.”¹³¹ One cannot contract out of the law of sexual assault in Canada.¹³² That is to say, one consents to sexual acts, not sexual constructs. The Crown should have appealed this case on the basis of that aspect of the decision alone.

As is true of any sexual activity, and as Cheryl Hanna observed, “[i]ndividuals who initially consent to S/M encounters ... can change their minds, unaware of what exactly it is that they are getting into.”¹³³ If, at the moment the contact occurred, the complainant was unwilling or not desirous of the particular act – whether that is because she changed her mind for any reason or because what occurred is different than what she anticipated due to miscommunication or misunderstanding, or because the accused used more force than she wanted, or for any other reason – then the contact is non-consensual.¹³⁴ If the accused cannot point to some evidence as the basis for a belief that the complainant was communicating consent at the time the act occurred, and that he took reasonable steps in the circumstances known to him at the

Mr. S: hahaha god damnnn.

Ms. L: Yeah he was great

Mr. S: it was probably nice finding white men there eh, they probably were not in high stock in Thailand ahah

Ms. L: Meh, doesn't really matter to me

Mr. S: hahaha anybody will do

Mr. S: haha literally do hah

Mr. S: anybody roughly the least haha

Ms. L: Hahah

The complainant testified that this was a fictional story she shared with the accused. These communications were admitted as relevant to honest but mistaken belief in (communicated) consent (at para 13). Given that the story had nothing to do with interactions between the complainant and the accused, it is difficult to understand why it was admitted on this basis. In discussing these text messages, McKay J noted that the complainant had “agreed that the message exchange was part of her wanting Mr. M.S to know or at least believe that sort of violent, aggressive fictional episode was something that she enjoyed. She agreed that she wanted Mr. M.S to believe that she enjoyed rough and even slightly violent sex.” It would be impermissible to conclude that her supposed propensity for violent sex made it more likely she consented to sex with the accused. It would be an error of law to rely on these communications as part of the basis for acquitting an accused based on a reasonable doubt regarding his honest but mistaken belief in communicated consent.

¹²⁸ *Hunter*, *supra* note 22 at para 181.

¹²⁹ *Ibid* at para 181.

¹³⁰ *Barton*, *supra* note 54 at para 91.

¹³¹ *Hunter*, *supra* note 22 at para 176.

¹³² Tellingly, the decision in *Hunter* included the following excerpt from the testimony of SD: “Q. Can BDSM include no consent? A. Well it ca- ca- it can include no consent, providing that there is a safe word or something established prior to the situation” (*ibid* at para 80). It was odd for counsel to ask in a sexual assault trial whether BDSM can include no consent. See Hanna, *supra* note 1 (noting that sadomasochism is, by definition, consensual activity).

¹³³ Hanna, *supra* note 1 at 275.

¹³⁴ *JA*, *supra* note 10 at para 66.

time to ascertain this, then he is guilty of sexual assault.¹³⁵ Whatever a complainant might have agreed to in advance is not determinative. Advance consent has no legal effect.¹³⁶ Relying on it is an error of law.¹³⁷

A proximate, highly detailed discussion that involved specifics regarding how communication of consent for each specific sexual act would occur, including whether that communication would be verbal or physical, may be relied upon as evidence of an accused’s honest but mistaken belief in communicated consent.¹³⁸ But “[a] belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.”¹³⁹

The reasoning of the trial judge in *R. v A.E.* contained the same type of error regarding advance consent to rough sex as occurred in *Hunter*.¹⁴⁰ *A.E.* involved a horrific sexual assault of a young woman by three men. One of them pled guilty to sexual assault. His sentencing judge described the incident, which was videotaped, as “the most appalling acts of human depravity I have had the displeasure to witness as a judge.”¹⁴¹ The other two accused stood trial and were acquitted of most of the charges. The trial judge found that there was a reasonable doubt as to the complainant’s consent to most of the acts, in part because of evidence that the incident was initially consensual and that she had asked for rough sex.¹⁴² The Crown appealed the acquittals.

In substituting a conviction for the trial judge’s decision to acquit two of the men in that case, Justice Peter Martin of the Alberta Court of Appeal stated: “With respect, the trial judge erred in law by assuming that since the complainant had initiated the sex and asked that it be rough, she was consenting to all that followed. His apparent reliance on broad advance consent was misplaced. He failed to consider whether the complainant consented to all that occurred at the time it occurred.”¹⁴³

In *Hunter*, Justice Duncan relied on a broad, general agreement between two of the three parties, made in advance, to engage in a threesome involving “sexual practices associated with BDSM.”¹⁴⁴ Again, there was no evidence that this general agreement included details regarding each specific act or what communication was to occur during the activity with respect to each specific act. Relying on the complainant’s willingness to take the bus to Cow Bay, or her advance consent to participate in a threesome to be “governed by a dominance-submissive relationship,” as the basis for an honest belief that she had communicated consent to have her breathing partially constricted by placing his hand around her throat while she was being vaginally penetrated by the accused was a mistake of law on the part of the accused, not a mistake of fact.¹⁴⁵ Nor would this unspecified, general advance agreement to engage in a threesome

¹³⁵ See *Barton*, *supra* note 54; *Ewanchuk*, *supra* note 54.

¹³⁶ *Criminal Code*, *supra* note 109, s 273.1(1.1)

¹³⁷ See *JA*, *supra* note 10.

¹³⁸ See *Barton*, *supra* note 54 at para 93.

¹³⁹ *Barton*, *supra* note 54 at para 99, citing *JA*, *supra* note 10.

¹⁴⁰ *AE*, *supra* note 25.

¹⁴¹ *R v MM*, 2017 ABPC 268 at para 59 (CanLII) (sentencing decision).

¹⁴² *AE*, *supra* note 25.

¹⁴³ *AE* 2021, *supra* note 25 at para 99.

¹⁴⁴ *Hunter*, *supra* note 22 at para 147.

¹⁴⁵ See *Barton*, *supra* note 54 at para 99 (“[b]road advance consent refers to the legally erroneous notion that the complainant agreed to future sexual activity of an undefined scope”). See *JA*, *supra* note 10 at paras 44–48. As summarized in *JA*, the definition of “consent” under section 273.1(1) “suggests that the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind,” and “this Court has also interpreted this provision as requiring the complainant to consent to the activity ‘at the time it occur[s]’” (para 34, citing *Ewanchuk*, *supra* note 54 at para 26). Thus, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.

with a dominance theme provide the basis for an honest but mistaken belief that the complainant communicated consent to being repeatedly choked with his penis or to having her breast squeezed “incredibly hard.”¹⁴⁶ Had the trial judge found that these acts were non-consensual, the defence would not properly have been available for them on this basis either.¹⁴⁷

The *obiter* offered in *R. v M.S.*, on the issue of mistaken belief in communicated consent, is similar to this error in *Hunter*.¹⁴⁸ In *M.S.*, the complainant (who was younger than the accused and had met him when she was a thirteen-year-old child) alleged that the accused sexually assaulted her twice when she was seventeen. She alleged that on the first occasion he, against her resistance, kissed her, pushed her against a wall, put his hand around her throat, and bit her. Four days later, according to the complainant, he kissed her, bit her lips and neck, ripped open her shirt and bit her breasts while she repeatedly asked him to stop.¹⁴⁹

Justice James McKay found that the Crown had failed to prove lack of consent beyond a reasonable doubt. He went on to note that, had he been satisfied regarding lack of consent, he would have acquitted on the basis of honest but mistaken belief in (communicated) consent. The complainant and accused had exchanged sexually graphic digital communications. These communications extended over the course of more than a year. None of the communications relied on by the trial judge, including those most proximate to the incident, involved discussion of the specific acts engaged in by the accused during the alleged sexual assault or where or when they were to occur.¹⁵⁰ Nor did these text messages discuss how consent to being kissed, pushed, and bitten would be communicated between the two.¹⁵¹ Justice McKay reasoned: “Normally, Ms. L.’s indication to Mr. M.S in the barn to stop would obligate him to do so. However, this case is unusual on its facts.”¹⁵² He pointed to “the totality of the communications between the parties in which they both, over the course of more than one year, expressed an interest in having a sexual relationship with each other. Both parties expressed a strong interest in violent sex, including rape fantasies.”¹⁵³ The complainant had told the accused that she would never tell him she “want[ed] it” and that she would tease him until the end.¹⁵⁴ Justice McKay relied on this exchange (which again, did not address specific sexual acts or a time, location, or mode of communication for any specific acts) for his conclusion that the accused may have had an honest but mistaken belief in (communicated) consent. Justice McKay’s reasoning appears to ignore the fact that the complainant also told the accused that she knew he was unhealthy for her and that she should avoid him; that she meant it when she told him to stop on an earlier occasion; that she did not know whether she wanted to be close to the accused; that she did not know if she would like it if he was rough with her; and that she did not want to play rough with him.¹⁵⁵

¹⁴⁶ Testimony of Complainant,” *supra* note 33 at 11h:38min.

¹⁴⁷ Nor would the accused be entitled to rely on her lack of resistance or failure to protest loud enough for him to hear, or his proclaimed lack of physical violence and threat, as the basis for an honest but mistaken belief that she had communicated consent through words or actions.

¹⁴⁸ *MS*, *supra* note 25.

¹⁴⁹ *Ibid* at paras 7–8.

¹⁵⁰ *Ibid* at paras 35–53.

¹⁵¹ *Ibid*.

¹⁵² *Ibid* at para 109.

¹⁵³ *Ibid* at para 110.

¹⁵⁴ *Ibid* at para 37: “Mr. S: oh come onnnnn baby you know you want it. Ms. L: You want me to admit it daddy? Hmm? Because I won’t, you’ll never hear me say I want it. Because as soon as I do you’ll have the reassurance to go ahead, I won’t give it to you. I’ll tease you till the end daddy, because we know that’s what YOU really want.”

¹⁵⁵ *MS*, *supra* note 25 at paras 35–53.

The reasoning in *Hunter* (and the *obiter* in *M.S.*) can be helpfully contrasted with the analysis in *R. v MacMillan*.¹⁵⁶ *MacMillan* is a recent Ontario decision rejecting the accused’s application to introduce the complainant’s prior statements to the accused indicating her interest in S/M. In excluding this evidence, Justice Michael Dambrot stated: “Undoubtedly, as a matter of law, consent must be specifically renewed, and communicated, for each sexual act, and the proposition that the complainant could give broad advance consent to whatever the accused wanted to do to her is a mistake of law.”¹⁵⁷

Similarly, in *R. v Davidson*, the complainant testified that she had consented to vaginal intercourse and “knew that spanking” would be a part of the interaction.¹⁵⁸ The accused told her he wanted to choke her during the sexual contact. She did not respond. While engaged in vaginal intercourse, he placed his arm around her neck in a choke hold. In explaining his decision to convict in *Davidson*, Justice Gregory Rideout stated: “[T]here would be a clear obligation on the accused to ensure that before he performed the choking and strangulation actions on D.B. that she was fully informed of what he was going to do and that he had her express consent to engage in such activity. He did not do so.”¹⁵⁹

Notions of consent to a sexual construct invite judges to rely on their own “common sense” to adjudicate an allegation of harmful sexual behaviour. Even if it were not an error of law, relying on the type of reasoning used in *Hunter* – specifically, this idea of consent to the “BDSM construct” – leads to inconsistency and unpredictability in the law and risks unjust, stereotype infused legal reasoning. Any individual judge is likely to have a different view of what falls within the “scope” of a particular sexual “construct.” For example, how might a court discern what falls within the “heterosexual construct”? Given that many heterosexuals engage in anal sex,¹⁶⁰ should consent to a “heterosexual governed sexual experience” include anal penetration? What about a supposed “leather fetish construct” or a “gay bear construct”?

To further problematize the Court’s reliance in *Hunter* on this so-called BDSM construct, S/M practitioners would surely argue that their sexualities are not confined to a singular construct. Moreover, some of these “constructs” replicate real world gender, race, and class inequalities. As already explained, invoking the notion that one consents to a sexual construct invites judicial reliance on implied consent. Reliance on implied consent opens the door to reasoning based on stereotypes and discriminatory social assumptions.

To repeat, under Canadian sexual assault law one consents to sexual acts, not sexual constructs. An accused who seeks exoneration on the basis of an honest but mistaken belief in communicated consent must point to some evidence to support a belief that consent was communicated for the particular sexual act at issue at the time the act occurred. That there was a general agreement in advance to engage in a S/M-themed threesome does not change this requirement.

D. The Reasonable Steps Requirement Must Be Understood in the Context, Not of S/M, but of the Specific Incident

The defence of honest but mistaken belief in communicated consent is only available to an accused if there is evidence that he took reasonable steps in the circumstances known to him to ascertain that the

¹⁵⁶ *Macmillan*, *supra* note 24.

¹⁵⁷ *Ibid* at para 19.

¹⁵⁸ *Davidson*, *supra* note 24 at para 21.

¹⁵⁹ *Ibid* at para 167.

¹⁶⁰ See Kimberly R McBride & J Dennis Fortenberry, “Heterosexual Anal Sexuality and Anal Sex Behaviors: A Review” (2010) 47:2–3 J Sex Research 123; Jami Leichter et al, “Prevalence and Correlates of Heterosexual Anal and Oral Sex in Adolescents and Adults in the United States” (2007) 15 J Infectious Diseases 196; Jami Leichter, “Heterosexual Anal Sex: Part of an Expanding Sexual Repertoire?” (2008) 35:11 Sexually Transmitted Diseases 910.

complainant was consenting.¹⁶¹ What did the Court in *Hunter* rely upon as evidence that the accused took reasonable steps to ascertain the complainant's consent to place his hand around her throat, partially constricting her breathing, in order to assert his "total control" over her while he penetrated her vagina with his penis?¹⁶² Justice Duncan pointed to her advance agreement to participate in a "BDSM governed experience,"¹⁶³ and her consensual participation in intercourse with the accused and a variety of sexual acts with S.D. in front of the accused.¹⁶⁴ In other words, this aspect of his decision relies on the combination of the complainant's supposed broad, advance consent and her participation in other consensual sexual acts. As previously explained, and as highlighted in *Barton*, "it is an error of law – not fact – to assume that unless and until a woman says 'no', she has implicitly given her consent to any and all sexual activity."¹⁶⁵ Securing broad, advance consent to participate in a S/M scene does not constitute reasonable steps for purposes of raising an honest but mistaken belief in communicated consent defence.

There is an additional problem with this aspect of the decision in *Hunter*. The trial judge's assertion that the complainant knew and agreed to participate in a "BDSM governed sexual experience"¹⁶⁶ in an unfamiliar place with unfamiliar people¹⁶⁷ raises the spectre of discriminatory and victim-blaming attitudes about women who make so called "risky choices" – such as to consume alcohol, dress provocatively, allow themselves to be alone with men, or, as in this case, agree to a threesome in a remote location with an individual she did not know.¹⁶⁸ For example, Justice Duncan's comment that A.G. "showed considerable determination to make her way to Cow Bay"¹⁶⁹ may suggest a perception that she was, to borrow from arguments advanced by Elizabeth Sheehy, Isabel Grant, and Lise Gotell, "'up for anything' and presumed to be consenting."¹⁷⁰

Later in the reasonable steps analysis in *Hunter*, the trial judge explicitly assigned blame to the complainant, referring to the three parties' "mutual failure" to set a safe word and stating that "[a]ll three of the participants were unwise to not set more specific boundaries of permissible conduct."¹⁷¹ This is not how the law of sexual assault in Canada works. The complainant did not repeatedly choke Hunter by shoving her genitals so far down his throat that his face turned red, his eyes watered, and he gagged and panicked, unable to breathe.¹⁷² The complainant did not, while penetrating him, grab a sensitive part of his body and squeeze "incredibly hard [to] the point where it was painful" and may have caused

¹⁶¹ See *Criminal Code*, *supra* note 109, s 27.

¹⁶² *Hunter*, *supra* note 22 at para 55.

¹⁶³ See *ibid* at para 181.

¹⁶⁴ See *ibid* at para 183.

¹⁶⁵ *Barton*, *supra* note 54 at para 98.

¹⁶⁶ *Hunter*, *supra* note 22 at para 181.

¹⁶⁷ While she had previously communicated with the accused through a form of text messaging, and there was some suggestion she had previously met him, he was relatively unknown to her. Indeed, as noted, she did not even know his real name at the time of the incident. Testimony of Accused, *supra* note 31 at 11h:30s.

¹⁶⁸ See Lise Gotell "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 *Akron L Rev* 865.

¹⁶⁹ *Hunter*, *supra* note 22 at para 181.

¹⁷⁰ See Elizabeth Sheehy, Isabel Grant & Lise Gotell, "The Misogyny of the So Called 'Rough Sex' Defence," *Policy Options* (31 January 2020), online: <policyoptions.irpp.org/magazines/january-2020/the-misogyny-of-the-so-called-rough-sex-defence/>.

¹⁷¹ *Hunter*, *supra* note 22 at para 185. At another point in his decision, he asserts that "the failure of all three participants to discuss in advance what they thought was permitted was a likely a contributing reason for this matter to have included conduct that led to the laying of criminal charges" (at para 151).

¹⁷² See *Hunter*, *supra* note 22 at paras 16, 19, 42.

bruising.¹⁷³ The complainant did not place her hands around the accused’s neck and partially constrict his breathing to demonstrate her total control while penetrating him.

While S/M proponents would argue that careful negotiation and open and genuine communication is the social responsibility of all S/M participants,¹⁷⁴ from a legal perspective, this was not the accused and the complainant’s “mutual failure.”¹⁷⁵ An individual who chokes a woman by repeatedly pushing his penis down her throat or squeezes a woman’s breasts “incredibly hard”¹⁷⁶ or partially strangles her by placing his hand around her throat while penetrating her vagina is legally obligated to take reasonable steps to ensure that this woman is communicating her contemporaneous consent to such acts. Moreover, what is required in terms of reasonable steps depends on the circumstances. The circumstances here involved a man partially strangling a woman who did not even know his real name.¹⁷⁷ An individual who engages in such acts without taking reasonable steps takes the risk that they are sexually assaulting this woman.

In *Hunter*, the legal obligation to take reasonable steps to ascertain that the complainant was communicating consent before engaging in these violent acts lay exclusively with the accused. To instead attribute any blame to the recipient of this violence because she failed to sufficiently negotiate a safe word is intensely unjust. It is also legally incorrect. As a legal matter, any “mutual failure” in this case was the mistake of law made by the accused and affirmed by the Court.¹⁷⁸

Maneesha Deckha notes that proponents of S/M assert that it is marked by “extensive consultation and contracting beforehand and respect of boundaries during the power play.”¹⁷⁹ Reasonable steps in *Hunter* required detailed discussion, very proximate in time to the incident, confirming that the complainant wanted the accused to engage in each of these acts, discussion and agreement on how consent would be communicated for each of these acts during the “scene,” confirming that the complainant had capacity to provide consent both during this discussion and during the “scene,” and agreement on some form of contemporaneous confirmation by the accused of ongoing consent based on the complainant’s words or actions during each of these acts.

V. CONCLUSION

An assessment of what constitutes reasonable steps such that an accused might avail himself of the defence of honest but mistaken belief in communicated consent must account for the circumstances in which the incident of sexual assault is alleged to have occurred. *Hunter* involved a complainant, with a hearing disability, who took a bus from the city where she lived to a mobile home in a wooded area in a rural part of Nova Scotia where she had never been, at night, in the winter.¹⁸⁰ She had no way to leave this location without the accused (who had not told her whose residence they were at) and did not even know the accused’s real name.¹⁸¹

¹⁷³ *Ibid* at paras 16, 38.

¹⁷⁴ Dunkley & Brotto, *supra* note 2 at 5: “Safety precautions, such as negotiation and safe words, are of paramount importance in the practice of healthy BDSM. Acceptable BDSM is predicated on thorough negotiation. Negotiation should be explicit, rather than tacit, and based on a mutual definition of what activities are permissible. During negotiation, practitioners are able to communicate what they are interested in, voice any health issues or activities that are off limits, and come to an agreement on the parameters of what activities a scene will involve.”

¹⁷⁵ *Hunter*, *supra* note 22 at para 185.

¹⁷⁶ *Ibid* at para 16.

¹⁷⁷ Testimony of Accused, *supra* note 31 at 11h:30s.

¹⁷⁸ *Hunter*, *supra* note 22 at para 185.

¹⁷⁹ Deckha, *supra* note 2 at 438.

¹⁸⁰ See Testimony of Complainant, *supra* note 33 at 11h:23m:17s – 11h:23m:26s.

¹⁸¹ See Testimony of Accused, *supra* note 31 at 11h:29m:59s – 11h:30m:30s.

Without discussion of what acts the complainant was willing to engage in, and how consent to engage in them would be contemporaneously communicated, the significantly larger accused in *Hunter* choked this woman repeatedly with his penis, wrenched her breast painfully, and placed his hand around her throat while penetrating her vagina with his penis. The Court's application of the law to these facts was almost exclusively focused on what Logan Hunter desired, perceived, and thought reasonable. This occurred at both the *actus reus* and *mens rea* stages of the analysis.

The complainant in this case appears to have been seeking some form of sexual pleasure for the sake of pleasure. She was not bound by the shackles of domestic obligation, gendered economic power differentials or love narratives. When she boarded the bus to Cow Bay, she left a boyfriend waiting for her at home. A.G.'s initial consent cannot be questioned by challenges to legal liberalism based on women's lack of choice. This was not a decision forced by a familial power imbalance or economic vulnerability. Indeed, the complainant may have been disbelieved by the Court and arguably held responsible for her own victimization, precisely because this was, at the outset, an exercise of choice on her part.

The law of consent must not be applied in a manner that permits any form of exceptionalism for sexual acts that are perceived as being outside the mainstream. This is true not only because such judicial perceptions are unreliable but because any tendency to orient the application of the doctrine of consent to perceptions of the normal is susceptible to reasoning based on stereotype. Reasoning based on stereotype inevitably fails to protect the sexual integrity of women who turn to the criminal justice system to respond to experiences of harmful sexual behaviour.

Judges who avoid relying on "common sense" or their own incomplete knowledge of S/M practices to assess a complainant's credibility, and who apply the doctrine of consent and mistaken belief in communicated consent rigorously and strictly in assessing "rough sex defences," contribute to a legal landscape that promotes sexual liberty for women. Judicial reasoning that fails in this regard has the opposite effect. Not only does the latter fail individual complainants, it also makes it less safe, less possible, for women to pursue self-fulfilment and pleasure through desire in all of its complicated forms. If legal feminists are to follow Franke's appeal to take up projects beyond the use of "law to tame sexual danger,"¹⁸² if we are to embrace an account of female desire that includes contradictions, complexity, and the erotic potential of loss of control, trial judges must do much better than what occurred in cases like *Hunter* (or *A.E.*¹⁸³ or *M.S.*¹⁸⁴).

¹⁸² Franke, *supra* note 12 at 206.

¹⁸³ *Supra* note 25.

¹⁸⁴ *Ibid.*