

Does No “No” Mean Reasonable Doubt?

Assessing the Impact of *Ewanchuk* on Determinations of Consent

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Ewanchuk a eu un impact évident dans les cas d'agressions sexuelles quand la plaignante a pu communiquer son refus au consentement. L'auteure montre que dans les circonstances où la plaignante était silencieuse, passive ou ambiguë, le juge n'ont pas appliqué systématiquement *Ewanchuk*. Elle ajoute qu'essentiellement, plusieurs juges vont déterminer le consentement sur la base de “non c'est non” plutôt que “seulement oui, c'est oui.”

To the delight of the feminist community, the Supreme Court of Canada released its decision in the case of *R. v. Ewanchuk*¹ in 1999, which clarified the defence of honest but mistaken belief in consent in sexual assault cases and emphatically rejected a defence of implied consent. This decision was widely heralded as confirming, once and for all, that No Means No. Considered radical in this sense, the judgment also attracted considerable criticism from those who claimed that it burdened men who would otherwise face the possibility of a criminal conviction, with the onerous task of explicitly seeking consent before each sexual act. Many grumbled that consent requirements would become so stringent as a result of the decision that men, in effect, would need signed contracts before sex to prove that consent was in fact given.²

Given predictions made by both supporters and opponents about the significance of *Ewanchuk*, I will explore how the decision has actually impacted on the resolution of sexual assault cases over the approximately seven years since it was released. First, I will briefly overview the *Ewanchuk* case and explain how it more accurately stands for the proposition that “only yes means yes” rather than “no means no” as is commonly asserted. With this clarification in mind, I will discuss a number of sexual assault cases to consider how *Ewanchuk* has affected the determination of consent.³ Although a number of cases that I refer to involve adolescent complainants, the concerns raised are not limited to younger women as these decisions resemble those involving adult women as well. I will argue

that *Ewanchuk* has been most clearly and consistently applied in cases in which the complainant expressly communicated her lack of consent. In circumstances where the complainant was silent or her conduct was passive or ambiguous, judges have been less consistent in their application of *Ewanchuk*. Essentially, many judges determine consent on the basis of “no means no” rather than “only yes means yes.” Moreover, even where courts have properly applied *Ewanchuk*, stereotypical assumptions about women as complainants continue to inform their analysis of the facts and the applicable law.

Ewanchuk

Before *Ewanchuk*, the case law on sexual assault was haphazard, despite legislative attempts to offer direction.⁴ Judicial determination of consent was inconsistent, unpredictable and unprincipled. Many judges relied heavily on stereotypical assumptions about women as complainants to find that male perpetrators had an honest but mistaken belief in consent, even when a complainant had clearly refused.⁵ *Ewanchuk* has undoubtedly helped to clarify the law of consent and has offered a useful framework for adjudicating guilt in sexual assault cases.

In *Ewanchuk*, the accused interviewed the 17-year-old complainant in his van for a job. After the interview, he invited the complainant to see some of his work that was in a trailer behind the van. The complainant left the trailer door open and became frightened when the accused shut the door in a way that suggested he had locked it. The accused initiated a number of increasingly intimate incidents involving touching, notwithstanding the fact that the complainant plainly said no on each occasion. He stopped his assaults after each “no,” only to resume shortly afterwards with a more serious assault. The trial judge acquitted the accused on the basis that there had been implied consent, even though he believed that the complainant did not want the touching to take

place and that she was afraid.

The Supreme Court unanimously rejected the availability of an implied consent defence in sexual assault cases. In addition, the Court laid out a framework for assessing both the *actus reus* and *mens rea* of sexual assault. The *actus reus* should be determined from the perspective of the complainant, and particularly through a consideration of whether the complainant, in her mind, wanted the sexual touching to take place. If there is reasonable doubt as to consent or if the complainant participated (or was passive or ambiguous in her conduct),⁶ the courts must ask whether the complainant consented because of force, fear, threats, fraud or the exercise of authority as enumerated in s. 265(3) of the *Criminal Code*.

The *mens rea*, on the other hand, should be determined from the perspective of the accused: did the accused honestly believe that the complainant communicated consent through her words and/or actions? If yes, the trier of fact must consider whether the accused's belief was reckless, wilfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2 of the *Criminal Code*.⁷ The trier of fact should also consider whether the accused took reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.⁸ If the complainant at any point expressed a lack of agreement to engage in sexual activity, it is incumbent on the accused to point to evidence that supported his belief that consent had been unequivocally communicated before he had proceeded.

Quoting the concurring decision of Justice L'Heureux-Dubé in the case of *Parks*, Justice Major reiterated one of the most important clarifications of the law of sexual assault in the *Ewanchuk* decision:

...the mens rea of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no," but it is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes."⁹

In other words, only yes means yes.

Cases Following *Ewanchuk*

The Ontario Court of Appeal encountered one of the earliest opportunities to interpret *Ewanchuk* in *R. v. O.(M.)*.¹⁰ The Court had to determine whether the trial judgment was consistent with the principles articulated in *Ewanchuk*, even though the trial decision was released before the judge had the benefit of the Supreme Court's directions.

In this case, the complainant, a 15-year-old ward of the Children's Aid Society, met the 23-year-old accused at a bus stop. They chatted and agreed to go to the accused's apartment, where they drank beer. The complainant testified that she had said "no" when the accused tried to

remove her pants. However, the accused testified that the complainant removed her own pants. He acknowledged that at some point, the complainant had said "no," but he took that as meaning "no" without a condom. The trial judge found that it was common ground that the complainant did say "no" at one stage, although on the evidence it was unclear when she said it and under what circumstances.

The trial judge held that the complainant was not an active participant in the sexual activity and that in her mind, she did not want to have sexual relations with the accused. However, the trial judge acquitted the accused because the complainant had not expressed by words or conduct a lack of agreement to engage in such activity. Therefore, the accused had an honest, if mistaken, belief that the complainant was consenting.

The majority decision at the Court of Appeal, written by Justice Finlayson, held that although the trial judge did not express the correct criterion given that his decision preceded *Ewanchuk*, his findings were compatible with the standard articulated in *Ewanchuk*. In his view, there was ample evidence on which the trial judge could have based a finding that the complainant had affirmatively communicated her consent as required by *Ewanchuk*. The trial judge's finding that the accused honestly believed that the complainant consented coupled with his finding that she did not express a lack of agreement to engage in such activity substantially complied with *Ewanchuk*, such that a new trial was not warranted. The majority opinion demonstrates the difficulty in, or perhaps resistance to, interpreting *Ewanchuk* as intended, and exemplifies the types of application issues that subsequent decisions have encountered as well.

On the other hand, the insightful dissenting opinion of Justice Rosenberg, whose reasons were later accepted by the Supreme Court,¹¹ offers further clarification on the proper application of *Ewanchuk*. Justice Rosenberg asserted that recent cases of the Supreme Court have made it clear that "neutral conduct" on the part of the complainant cannot on its own serve as a basis for the defence of mistake.¹² Moreover, the accused must have a belief in the way that consent was manifested: "The accused must believe that either by actions or words the complainant said 'yes'."¹³ Applying these principles to the *O.(M.)* case, Justice Rosenberg stated the following:

In my view, the trial judge in this case asked himself the wrong question. He asked whether it was apparent to the respondent from the complainant's words or actions that she was not consenting. He answered that question in the negative. He was unable to conclude that "she expressed by words or conduct, a lack of agreement to engage in such activity" and therefore found that the defence of mistake was established. However, that was not sufficient to establish the defence. *Applying Ewanchuk, the question*

was whether the accused honestly believed that the complainant had communicated consent.¹⁴

The confusion evident in the majority decision of *O.(M.)* is not unusual. Many subsequent decisions that have attempted to interpret and apply *Ewanchuk* have also become muddled. In some cases, the judge has recognized the relevance of *Ewanchuk* but has failed to apply it in a meaningful way.

For example, in *R. v. S.D.P.*,¹⁵ Justice Wayne Gorman quoted extensively from the *Ewanchuk* decision. How-

what stage he thought the prosecution had failed. I assume that he was not convinced that the requirements of *mens rea* had been met.

A particularly shocking example of resistance to the principles in *Ewanchuk* was evident in a Quebec case involving an Inuit complainant and an Inuit accused in Kuujuaq, who, along with two other Inuit friends, was accused of sexually assaulting the complainant.¹⁷ The accused suggested that the sexual contact between the complainant and the three men had been consensual, the version preferred by the trial judge. Interestingly, the trial

The judge was willing to overlook the inconsistencies in the testimonies between the three accused as being a result of the four-year time lapse before trial. He was less forgiving of inconsistencies in the complainant's testimony (details as petty as that they were drinking Labatt Blue beer and not Budweiser).

ever, *Ewanchuk's* analysis was not applied to the facts at hand. In fact, *Ewanchuk* was never mentioned in the decision again. In *S.D.P.*, Justice Gorman recognized that the 16-year-old complainant had expressed her lack of consent to sexual touching by the accused, which had escalated over the course of the evening. Although the trial judge found the complainant to be a credible witness for the most part, he remained unconvinced by some aspects of her version of events. He remarked that although the complainant had left the impression that she had resisted all of the accused's attempts at sexual contact, she had willingly unzipped part of the hooded sweatshirt she was wearing. Moreover, she "should have easily been able to frustrate any attempts by S.D.P. to unhook her brazier [sic] by simply moving a small bit."¹⁶ In the end, the trial judge was left with reasonable doubt about whether an assault had taken place and thus entered an acquittal.

The trial judge had discretion to make determinations of credibility based on the evidence before him, which in this case involved finding parts of the complainant's testimony to be inconsistent with her account of resisting the sexual advances of the accused. However, his token recognition of *Ewanchuk*, without application, suggests that he was not clear on how to apply the case. *Ewanchuk* does not require a complainant to actively resist as an indication of non-consent to establish the accused's culpable state of mind. Even if the trial judge was concerned about the truthfulness of the complainant's resistance, there was no evidence that the accused believed the complainant had actually communicated consent to his sexual touching. That she said "no" at some point should make this finding even more difficult. To complicate things further, the trial judge did not distinguish between his analysis of her non-consent and the accused's culpable awareness of her non-consent, which would have been helpful in pinpointing at

judge was willing to overlook the inconsistencies in the testimonies between the three accused as being a result of the nearly four-year time lapse before trial. He was less forgiving of inaccuracies and inconsistencies in the complainant's testimony (including details as petty as her claim that they were drinking Labatt Blue beer and not Budweiser as reported by the men). The judge noted the complainant's delay in bringing forth a complaint, her crush on one of the accused, the fact that the accused were more than mere acquaintances of the complainant, and her incentive to reconceptualize a consensual sexual encounter as a rape to avoid further blame by her spouse for being with three men. In addition, the judge noted that the "assault from the three individuals would be completely incompatible with the reputation and image they project in the community."¹⁸

In finding the complainant's version of events to be irrational, Justice Denis Lavergne made the following statement about the application of *Ewanchuk*:

Even when applying the statement of the Supreme Court in the *Ewanchuk* case, cited before about the notion of consent in sexual assault, one cannot, with due respect, give any credit to this sequence of her testimony where she states not having protested, resisted or expressed her refusal in any way, out of fear. Now, nothing in the evidence attributes to any of the three men, in any way possible, whatever gesture of a hostile or threatening nature, whether direct or indirect, used so as to induce her consent to sexual relations. Furthermore, Mrs. Adams states without hesitation that neither one treated her harshly, threatened or forced her in any way. Quite on the contrary, all three were quite nice. In short, the three individuals are persons she knows well enough to

accept to go for a ride with; neither one of them has the reputation of being violent, even less of being a woman abuser; neither one of them acts towards her in any reprehensible manner so as to force her into having intercourse. Actually, if she was afraid, we do not know why. We do not know why, for example, as she mentions, it could have been worse if she would have attempted something....¹⁹

Besides displaying reprehensible stereotypical assumptions about complainants and perpetrators of sexual as-

properly in finding that there was no consent communicated by the complainant in the second incident, which was around 30 seconds after the first, he was not persuaded beyond a reasonable doubt that the complainant had not consented to the first incident. While the accused was convicted for the second incident based on an application of *Ewanchuk*, the judge was clearly uncomfortable with the law he felt compelled to apply. He stated:

Though not specifically at issue here, I must say this application of the law gives me some concern. The

This characterization of the sexual assault in biological terms, as hormonal, is disturbing. It ignores that sexual assault is an exercise of power and control over a woman. It echoes the highly criticized comments of Justice McClung in which he stated that the “clumsy passes” of the accused were “far less criminal than hormonal.”

sault, and implicitly suggesting Inuit women to be promiscuous,²⁰ the decision reveals an alarming misapprehension about the meaning of *Ewanchuk*. For this woman to prove she had been raped, she needed to convince the judge that she had protested the assault. Again, this is not what *Ewanchuk* requires. The judge disbelieved her claim that she did not resist out of fear because there was clearly no reason, in his view, to fear these “nice” men. *Ewanchuk* will undoubtedly have less impact when the accused’s version varies greatly with that of the complainant; credibility will continue to be the defining factor in these cases. However, for an accused’s version to be credible, *Ewanchuk* makes it clear that a man’s belief in consent cannot be based on the complainant’s lack of resistance.²¹

Even when courts have correctly applied *Ewanchuk* and rendered convictions, stereotypical assumptions continue to inform the discussion for many judges. These decisions remind us that although *Ewanchuk* has helped to protect the interests of complainants, work in judicial and public education continues to be necessary.

For example, in *R. v. C.R.N.*,²² the 16-year-old complainant alleged that she had been raped twice at a party by the 20-year-old accused. The accused claimed that the first act was consensual, but admitted that he figured she did not want to have sexual intercourse with him the second time. The judge questioned the complainant’s judgment in putting herself in a potentially dangerous situation by accompanying her friend to a party at the residence of five young men and sleeping over. However, the judge noted that this fact did not reflect upon her credibility directly and had no bearing on whether she consented. He went on to wonder, however, whether a 16-year-old girl might, “in guilt and hindsight place blame on someone to take condemnation away from herself.”²³

Although Justice Ian M. Gordon applied *Ewanchuk*

practical reality of a sexual incident becoming non-consensual within a short period of time, some 30 seconds, requiring immediate control of a hormonal urge which in some cases has been jointly nurtured seems objectively somewhat idealistic.²⁴

This characterization of the sexual assault in biological terms, as hormonal, is disturbing. It ignores that sexual assault is an exercise of power and control over a woman. It also echoes the highly criticized comments of Justice John McClung of the Alberta Court of Appeal in *Ewanchuk*, in which he stated that the “clumsy passes”²⁵ of the accused were “far less criminal than hormonal.”²⁶ In *C.R.N.*, the accused admitted that he knew that the complainant was not interested in participating in the second sexual act. Essentially, Justice Gordon suggested that once men are “turned on,” it is unrealistic to expect them to “turn it off” instantaneously.

Whereas some decisions have relied on stereotypes despite *Ewanchuk*, more encouragingly, others have referred to Justice L’Heureux-Dubé’s concurring judgment to explicitly counter myths about sexual assault. For example, Justice Mary Ellen Turpel-Lafond criticized an accused’s suggestion that not paying a sex worker as agreed upon before sex was fraud, but not sexual assault.²⁷ In her view, accepting this position in sexual assault would be tantamount to resurrecting the rape myth that a prostitute’s consent to sex is less worthy of legal protection than it is for other women. This approach to consent, she noted, was rejected by the concurring opinions of Justices L’Heureux-Dubé and McLachlin in *Ewanchuk*.

Similarly, Justice R. Leslie Jackson rejected the accused’s claim that the complainant greeted his unannounced visit at 4:00 a.m. where the complainant was babysitting with requests for money in exchange for sexual

favours.²⁸ Although the judge found that *Ewanchuk* was not applicable in the circumstances given that no consent was given or alleged to have been given, he noted that the accused's evidence relied on an acceptance of myths and stereotypes about women. Referring to Chief Justice Fraser's comments in the dissenting opinion in *Ewanchuk* for the Alberta Court of Appeal, which were later cited with approval by Justice L'Heureux-Dubé, Justice Jackson noted that, "this attitude or myth implies that women are "walking around this country in a state of constant consent to sexual activity."²⁹

Conclusion

Ewanchuk has brought us a long way in protecting a woman's right to be free of unwanted sexual intrusions. It has given more teeth to the requirement that an accused must have honestly and reasonably believed that consent was expressly communicated in order to raise it as a defence. Despite progress, ingrained stereotypes about complainants will be slow to disappear altogether. These myths and stereotypes continue to appear in many sexual assault decisions, regardless of the ultimate verdict rendered, and seem to impact decision-making most directly when the complainant's conduct is viewed as neutral, passive or ambiguous. In many of these cases, judges misapply *Ewanchuk* in finding that the complainant did not explicitly communicate non-consent rather than considering whether the accused had any basis to believe that the complainant had positively communicated her voluntary agreement.

We must continue to hold our courts accountable and ensure that *Ewanchuk* is applied in an accurate and responsible manner. Even when convictions are entered, we need to draw attention to stereotypical assumptions about women who have been raped that creep into decisions. We cannot depend on appellate courts to correct the mistakes of trial judges given that the majority of sexual assault acquittals will not be appealed by the Crown, even when incorrect in law.

Although the controversy surrounding *Ewanchuk* has died down in the years following its release, its message must continue to be heard loud and clear: Only Yes Means Yes.

The author would like to thank Liz Sheehy for her encouragement and generous contributions.

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¹[1999] 1 S.C.R. 330 [*Ewanchuk*].

²See e.g. Lorne Gunter, "Courtship in monosyllables:

Poor manners distract us from the high court's sophistry" *The National Post* (1 March 1999) A18.

³Although the determination of consent is a function of the trier of fact, it has legal parameters and, since the vast majority of cases are tried by judge alone, is usually decided by a judge.

⁴In 1992, ss. 273.1 and 273.2 were added to the sexual assault provisions in the *Criminal Code* to clarify the meaning of consent: *An Act to Amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38. For examples of how these provisions were applied, see: *R. v. J.J.*, [1994] O.J. No. 1576 (Prov. Ct.)(QL) [where accused found not guilty of sexually assaulting 14-year-old complainant on blind date in movie theatre when he touched her breast and digitally manipulated her vagina, causing bleeding. Although complainant was credible, "while having the opportunity to do so, did not communicate her refusal to the accused or cry out for assistance in resisting him when such would have been possible" at para. 21.]; *R. v. R.J.S.* (1994), 123 Nfld. & P.E.I.R. 317 (P.E.I. S.C.(T.D.)) [35-year-old male accused was not guilty of sexually assaulting 19-year-old male complainant because he did not express lack of consent. "While "no means no", nothing does not necessarily mean no" at para. 51].

⁵For an obvious example, one need not look beyond the trial and the Court of Appeal's decisions in *Ewanchuk*.

⁶The concurring judgment of Justice L'Heureux-Dubé offers a broader view on the application of s.265(3) than Justice Major's opinion, which limits the application of s.265(3) to cases where the complainant chooses to "participate in, or ostensibly consent to, the touching in question" (para. 38). As Justice L'Heureux-Dubé points out, s. 265(3) applies to cases where the "complainant submits or does not resist" to the sexual touching on the basis of one of the enumerated factors. As a result, she concludes that the section should also apply in cases where the complainant is silent or passive (para. 86).

⁷These factors include: whether the complainant was capable of consenting to the activity; whether consent was induced by an abuse of a position of trust, power or authority; and, whether the belief arose from the accused's self-induced intoxication.

⁸This requirement arises from s. 273.2(b) of the *Criminal Code*.

⁹*R. v. Park*, [1995] 2 S.C.R. 836 at para. 39 cited in *supra* note 1 at para. 45.

¹⁰(1999), 138 C.C.C. (3d) 476 (*O.(M.)*).

¹¹[2000] 2 S.C.R. 594.

¹²*O.(M.)*, *supra* note 7 at para 52.

¹³*Ibid.* at para. 53.

¹⁴*Ibid.* at para. 57 (emphasis added).

¹⁵[2004] N.J. No. 371 (Prov. Ct.)(QL).

¹⁶*Ibid.* at para. 41.

¹⁷*R. v. McDonald*, [1999] Q.J. No. 4957 (Sup. Ct.) (QL).

¹⁸*Ibid.* at para 147.

¹⁹*Ibid.*

²⁰One must wonder whether Justice Lavergne would have been as quick to prefer the accused's version if it was suggested that a white woman had consented to sex with three men. That he finds this account more compelling in the case of an Inuit woman is telling.

²¹It should be noted that the judgment does not specify whether the accused were suggesting that they had an honest but mistaken belief in consent or whether they were arguing that there was actual consent on the part of the complainant. From the judge's reasons, it appears to be the latter. Some cases have used the *Ewanchuk* framework to assess both actual consent and honest but mistaken belief in consent. See e.g. *R. v. Robinson* (1999), 218 N.B.R. (2d) 240 (Prov. Ct.). In other decisions, *Ewanchuk* has been distinguished on the basis that actual consent was at issue and not an honest but mistaken belief in it. See e.g. *R. v. Patrick*, [2002] B.C.J. No. 2261 (Prov. Ct.)(QL). In either case, a reliance on passive or ambiguous conduct is not sufficient to ground consent.

²²[1999] O.J. No. 3918 (Sup. Ct.)(QL).

²³*Ibid.* at para 14.

²⁴*Ibid.* at para. 45.

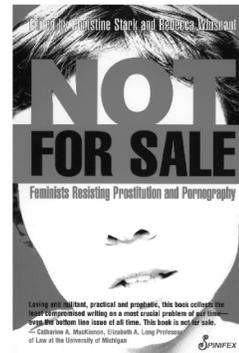
²⁵*R. v. Ewanchuk* (1998), 212 A.R. 81 at para. 5.

²⁶*Ibid.* at para. 21.

²⁷*R. v. Gartner*, [2003] S.J. No. 825 (Prov. Ct.).

²⁸*R. v. K.R.M.* (1999), 211 N.B.R. (2d) 347 (Prov. Ct.).

²⁹*Ibid.* at para. 19.



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