When Yes Means No
An Examination of the Distinction Between
Genuine Consent
and
Acquiescence

by

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A thesis submitted in conformity with the requirements
for the degree of Masters of Law
Graduate Department of Law
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ABSTRACT

This thesis examines the boundaries which separate valid consent from invalid consent. It has two objectives: first, to show how the courts have responded to this central issue in various areas of law and, second, to extract from the case law a coherent test to be used to assess whether apparent consent constitutes valid consent. This paper addresses these goals in two main parts.

Part One reviews various areas of law and shows how the courts have dealt with assessing whether consent is valid. This section examines the tests applied by the courts and isolates the theoretical bedrock that supports such analyses. Although it is well established that genuine consent must be voluntary and informed, this part fleshes out what it means in real terms for consent to be voluntary and informed.

Part Two relies upon the leading case law set out in Part One. It shows there is a fundamental meaning of consent which is universal to all areas of law. The case law demonstrates there is a consistent theoretical pillar upon which the meaning of consent rests. Part Two also identifies the essential elements of consent. Based on the case law, this section sets out a test, with factors to be taken into consideration, to be used to assess whether apparent consent constitutes legal consent.

This thesis contributes to existing law by pulling together leading cases in each area of law that analyzes consent and examining them as a whole. This process serves two functions: it allows us to see the forest and the trees. First, this permits an examination of how each separate area of law defines valid consent. Second, it also affords a perspective of the connections and links between the different areas in law. After each area has been reviewed, we are able to view the whole law body of law in the context of the other analyses. This method is helpful because it illuminates the common threads that, together, form the meaning of consent. Thus, this thesis begins with a narrow focus on several areas of consent law and highlights the law within each area. It is the subsequent broader look at the whole body of law, made up of the various areas put together, that highlights the difference between acquiescence and valid consent.
Acknowledgment

I wish to thank my supervisor, Professor A. Mewett, for his editorial assistance, his academic and organizational guidance and his encouragement. I also wish to acknowledge his extraordinary open mind and to thank him for tolerating and permitting what may have been my sometimes annoying habit of dropping by to bounce ideas around. I had the opportunity to be a student in his class as well as to write under his supervision; he is everything a Professor and academic supervisor should be.

I accept responsibility for all errors in law and logic.
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INTRODUCTION

Yes means no in certain circumstances. Sometimes apparent consent does not constitute genuine consent. For example, acquiescence is a form of invalid consent because it occurs when the true will is overborne. As a result, acquiescence does not constitute genuine consent. This is not controversial. The difficult question is: “When does yes mean no?” “What is the difference between genuine consent and acquiescence?”

Not all power imbalances or other indicia of imperfect negotiating conditions establish that consent is not valid. In this area, contention arises over the factual foundation necessary to show that apparent consent constitutes invalid consent. This thesis aims to answer this controversy by setting out a test through which the validity of consent may be probed.

The validity of a consent may be rejected based on two established legal rationales. First, apparent consent is not legally recognized where it does not constitute genuine consent. A consent is genuine where it is informed and voluntary. Second, in certain circumstances apparent consent is vitiated, regardless of whether it is real, for public policy reasons. This paper will flesh out both rationales.

The central question in this field arises here: how does the law delineate the boundary between valid consent and circumstances which fall short of valid consent? With each rationale, where is this line, and what are the theoretical underpinnings which support such analyses? What is the fundamentally distinguishing feature between consent that is legitimate and consent which the law does not acknowledge? This paper aims to explore the nature and quality of the boundary for each rationale.
This thesis has two objectives: first, to show how the courts have responded to this central question in various areas of law and, second, to extract from the case law a coherent test to be used to assess whether apparent consent constitutes legal consent. This paper addresses these goals in two main parts.

The first part reviews various areas of law and shows how the courts have dealt with assessing whether consent is genuine and whether consent ought to be vitiated for public policy reasons. This section examines the tests applied by the courts and isolates the theoretical bedrock that supports such analyses. Although it is well established that genuine consent must be voluntary and informed, this part fleshes out what it means in real terms for consent to be voluntary and informed.

The second part relies upon the leading case law set out in part one and shows there is a fundamental meaning of consent which is universal to all areas of law. It asserts the meaning of consent does not vary depending on the context. The case law demonstrates there is a consistent theoretical pillar upon which the meaning of consent rests. Although the actual application of the test may vary depending upon the context, the meaning of consent in various areas is bound by a consistent analysis which runs through different areas of law.

Part two then identifies the essential elements of consent. Based on the case law, this section identifies a test, with factors to be taken into consideration, to be used to assess whether apparent consent constitutes legal consent.

This thesis contributes to existing law by pulling together leading cases in each area of law that analyzes consent and examining them as a whole. This process serves two functions: it allows us to see the forest and
the trees. First, this permits an examination of how each separate area of law defines valid consent. Second, it also affords a perspective of the connections and links between the different areas in law. After each area has been reviewed, we are able to view the whole law body of law in the context of the other analyses. This method is helpful because it illuminates the common threads that, together, form the meaning of consent. Thus, this thesis begins with a narrow focus on several areas of consent law and highlights the law within each area. It is the subsequent broader look at the whole body of law, made up of the various areas put together, that highlights the difference between acquiescence and valid consent.
PART I CURRENT LEGAL ANALYSIS OF CONSENT

Determining Whether Apparent Consent Constitutes Genuine Consent

CHAPTER 1 SEARCH AND SEIZURE LAW: Assessing the Validity of Consent to an Apparently Consensual Search

Consent police searches, in search and seizure law, is one area where the courts have assessed whether apparent consent constitutes genuine consent. Section 8 of the Canadian Charter of Rights and Freedoms guarantees that, “Everyone has the right to be secure against unreasonable search or seizure”. There is no guarantee to be secure against reasonable search or seizure. As a result, the protection afforded in s.8 of the Charter is limited to persons subjected to unreasonable searches or seizures. A reasonable search thus falls outside the ambit of Charter protection.

There are many grounds upon which a search may be held to be reasonable. One form of a reasonable search is a search conducted with the valid consent of the party being searched. The validity of the consent to a search is particularly important in such cases because an accused may not allege a s.8 Charter breach where he provided a valid consent to the search.

The following cases represent the recent progression of legal thinking in this area. Each has endeavored to set out the legal requirements necessary to establish that apparent consent constitutes valid, effective consent. As the cases develop, it is apparent that the law becomes clearer with the passage of time. The 1987 Alberta Queen’s Bench decision in R. v. Meyers represents an earlier, shadowy sketch, or an outline, of the meaning of genuine consent. But with each subsequent analysis, new lines are filled in and a clearer picture begins to emerge. By the Supreme Court
decision in 1996 in *R. v. Clement*, the essential elements of genuine consent seem firmly in place. Part II of this thesis will bring together the law in each area and articulate a coherent legal test for establishing genuine consent.

**R. v. Meyers - Alberta Queen’s Bench - 1987**

Mr. Justice O’Leary’s decision in *R. v. Meyers* addressed the nature of consent necessary to constitute valid consent. In that case the accused was charged with nine counts of possession of stolen property. Part of the investigation included a seizure of items after police searched the accused’s residence. The accused’s wife, who lived with the accused at the home, had agreed to this search.

- **Constitutional Consideration - s. 8 of the Charter**

One issue for the trial judge was whether the apparent consent search to the residence was done with genuine consent. Mr. Justice O’Leary begins his decision by clarifying that a consent search falls outside the scope of *Charter* scrutiny: “a consensual search and seizure, conducted in a reasonable manner and within the scope of the consent, is not protected by s.8”

Thus, the accused is foreclosed from raising a s.8 *Charter* issue where the search is found to have been conducted with genuine consent.

- **Factual Background**

The police received information which led them to believe the accused was in possession of stolen property at his home. The police

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2 Ibid, at p. 186
decided not to get a search warrant because they assumed the accused would co-operate with their investigation and agree to a search. That assumption was correct.

At 11:45 pm two plainclothes and other uniformed officers arrived at the home of the accused and his wife. The accused was awakened from sleeping and the police identified themselves. They advised the accused they were investigating the theft of property and they had information that the accused was in possession of this property. One officer then asked the accused, "if he wished to help them find the property". The accused agreed. In the presence of the accused, some of the officers searched the accused's van and motorhome. Nothing was seized during that search.

While those officers searched the van and motorhome with the accused, another officer stood at the front door of the residence and called for the accused's wife. She was inside the residence. He asked her if he could search their residence (which was separate from the motorhome). The officer told the accused's wife that, "if she refused to let him search the house he would obtain a warrant". The accused's wife made no verbal response. The officer assumed this meant that he had permission to search. He entered the home and searched it. For the first portion of the search, the officer was accompanied by the accused's wife who directed his attention to certain areas of the house. After a period of time, the accused and the other officer's returned and the accused's wife stopped accompanying the officer. The search lasted one hour. A number of items were seized as a result of this search. ³

• Analysis of the Elements of a Genuine Consent

The decision sets out the threshold necessary to establish that an apparent consent constitutes a valid consent. Apparent consent will constitute genuine consent where the Crown shows on a balance of probabilities that the consent was:

1) Granted by a person with the “ostensible or apparent” authority to give consent;

2) An informed consent, requiring that the decision-maker be informed of the identity of the party making the request, the purpose of the request, the right to withhold the consent;

3) Consciously, freely and voluntarily given, whether by words or conduct, requiring that the consent was not obtained through threats, intimidation, manipulation or inducement. 4

Despite the reference to complex concepts such as, “consciously”, “freely” and “voluntarily”, this decision offers little guidance to assist in understanding the meaning of these criteria in real life terms. Rather, this analysis may be seen as an early bare bones sketch of the requirements of valid consent - a starting place upon which later analyses build. Although there is little discussion of the meaning of consent, the judgment does refer to three other comments upon valid consent: the 1986 Alberta Queen's Bench decision in R. v. Bowers, the Supreme Court of Canada’s pre-Charter decision in R. v. Goldman, and the Law Reform Commission’s 1984 Report 24.

Mr. Justice O’Leary begins by citing from R. v. Bowers 5. In that case, the Alberta Queen’s Bench held that a valid consent must be,

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4 Op. Cit. R. v. Meyers, Footnote 1 at p. 188-9. This requirement is affirmed by the Alberta Court of Appeal in R. v. Love (1995), 102 C.C.C. (3d) 393 at 404. In this case, undercover police obtained samples of the accused’s hair through alleged “horseplay” with the accused. The court held that this conduct did not constitute genuine consent because the, “apparent consent was obtained through manipulation”.

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"objectively clear and unequivocal, but freely and voluntarily made". The evidence of these indicia will be found in the circumstances which surround the apparent consent. R. v. Meyers endorses R. v. Bowers holding that lack of resistance cannot be equated with consent. Instead, when considering whether lack of resistance to a request constitutes voluntariness, the court must, "question whether some coercive or intimidating element short of force induced acquiescence in, or inhibited resistance to" the request.

O'Leary J. also fills in the meaning of voluntariness somewhat by referring to the pre-Charter comments of the Supreme Court of Canada in R. v. Goldman. In that case, McIntyre J. also found a valid consent must be, "voluntary in the sense that it is free from coercion". To be, "valid and effective", the consent must be the, "conscious act of the consentor doing what he intends to do for reasons which he considers to be sufficient". It must also be made "knowingly" in the sense that the, "consentor must be aware of what he is doing and aware of the significance of his act" and the use to be made of the fruits of the request.

R. v. Meyers further explains the content of these terms by reference to the Law Reform Commission of Canada's December 1984 Search and Seizure Report 24. The commission confirms the proposition that valid consent must be voluntary and informed. They add to this the idea that acquiescence occurs where an individual is induced, threatened or

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7 This reasoning is confirmed later by the Supreme Court of Canada in R. v. M.L.M. (1994), 89 C.C.C. (3d) 96n where the court finds that lack of resistance, alone, cannot be equated with consent.
manipulated and that acquiescence must be distinguished from cooperation.

When examining the facts of this case, the court found as a fact that police, "did not inform her that she could withhold consent". In addition, the judgment also held that Mrs. Meyers' acquiescence to the police request was insufficient to show valid consent. However, after examining these issues and considering the evidence, Mr. Justice O'Leary held the consentor's apparent consent did constitute genuine, valid consent.

Despite the lack of information about the right to withhold consent, the consentor's conduct throughout the search was found to raise, "a strong inference that genuine consent pre-existed the initial entry". The court held the following facts showed the consent was valid: the consentor was a mature, educated woman, she assisted police in conducting the search and she registered no protest to the entry of the officer, or to the manner of the search. The court decided the consentor would have been well aware of the right to refuse due to the close proximity in time between the first and second search. The factual basis for this finding is unclear.

In the history of the development of the definition of consent, Meyers represents an early attempt to apply the criteria of voluntary and informed consent to a factual reality. The application of the law to the facts in Meyers must be read in light of this. R. v. Wills, the next major decision in this area, concurs that a consent must be voluntary and informed. However, Wills provides greater explication of the meaning to be attributed to the requirements that a consent be "voluntary" and "informed".

10 Ibid., at p. 190
11 Ibid., at p. 189
12 Ibid., at p. 190
Both Wills and Meyers hold that a valid consent must be voluntary and informed. However, Wills goes into a more detailed account of the meaning of these hallmarks to valid consent. Under the Wills description of these terms, it is questionable whether the Meyers consent was genuine. As the next section shows, Wills holds that valid consent must be distinguished from situations where the consentor merely acquiesces to an apparently inevitable situation without proper information about her opportunity to refuse. Had Wills been decided before Meyers, it is questionable whether Meyers would have given rise to the same result.

R. v. Wills - Ontario Court of Appeal - 1992

The Ontario Court of Appeal decision in R. v. Wills is the first Canadian appellate decision in recent history to attempt to clarify the meaning of consent in the context of consent to a police search. Wills relies on Meyers to a degree but makes a more detailed effort to flesh out what it means for consent to be voluntary and informed.

- Constitutional Consideration - s.8 of the Charter

Wills concurs with Meyers that the definition of valid consent is significant because an accused may not seek a s. 8 Charter remedy to a valid consent search. This is confirmed when the judgment holds, “the essence of a seizure under s.8 is the taking of a thing from a person by a public authority without that person's consent”. As a result, a consent

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13 R. v. Wills (1992), 70 C.C.C. (3d) 529 (Ont. C.A.). This case continues to represent a leading case in this area in Canada.

14 Where the police engage in a search to which the accused provided a valid consent, it is still open to the accused to challenge whether the search was conducted in a reasonable fashion.

search is a reasonable search. Section 8 is not triggered where the state takes something from a person with that person’s consent because:

“If an individual chooses to give something to a police officer, it is a misuse of the language to say that the police officer seized the thing given. Rather, the officer simply received it. As there is no seizure, the reasonableness of the police conduct need not be addressed.”

Thus, the validity of the consent is crucial because, “a valid consent must be an answer to any subsequent claim of a s.8 violation”.

- **Factual Background**

The accused was convicted by a jury of impaired driving causing death and operating a motor vehicle when his blood-alcohol level exceeded the permitted limit. There were two passengers in a vehicle driven by the accused at the time of the accident. Both passengers died as a result of the accident. Immediately after the accident, the accused went to a farmhouse to seek assistance. The police attended the scene shortly after.

One officer who arrived at the scene was a friend of the accused’s father. That officer demanded that the accused take a roadside A.L.E.R.T. test; the accused registered a “warn”, indicating that the accused’s blood-alcohol level was between .05 and .1. At that time the officer had no grounds to demand that the accused provide a breath sample.

The officer did not anticipate laying any criminal charges as he believed the accused’s reading would be closer to .05 than to .1. However,

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17 *Op. Cit.*, R. v. Wills, Footnote 13 at p. 541-f, and 541-g

18 The legal limit is .08 milligrams of alcohol per 100 millitres. of blood, for further details see s. 253 of the *Criminal Code* and related annotations.
the officer suggested to the accused that it may be helpful to take a breathalyzer test so he would know his exact blood-alcohol level in the event of a civil lawsuit. A second officer also explained that taking the breathalyzer test might be beneficial in a civil lawsuit. The accused was not receptive to this suggestion.

The accused’s parents then arrived and the officer explained the situation to the accused’s father, including the fact that one passenger had died and the second passenger was seriously injured (the second passenger later died). The officer said it may be in the accused’s best interests to take a breathalyzer test in light of possible civil implications. The accused then spoke to his father in private and the accused was persuaded to take the test. Before taking the test, the officer said to the accused, “Tim, you understand that you don’t have to provide this sample and you are doing this of your own free will?” and he replied, “Yes, I know.” The accused knew that he could be charged criminally if he “blew over”, but he did not believe he was over the legal limit after taking the A.L.E.R.T. test. He was never warned of any possible criminal consequences that flow from the results of the test.

The accused registered .128 on the breathalyzer, well over the legal limit of .08. This shocked the police. It was subsequently discovered that the A.L.E.R.T. had malfunctioned on the accused’s earlier “warn” reading. As a result of the breathalyzer results, the accused was charged with the criminal offences of which he was convicted. The case for the Crown rested heavily upon the results of the analysis of the accused’s breath sample\(^\text{19}\).

• Analysis of the Elements of Genuine Consent

There was no doubt in this case that the accused agreed to provide a sample of his breath. The issue was whether the accused's consent was "effective" or whether it was "vitiated by non-disclosure or innocent misrepresentation of material facts". R. v. Wills concludes that consent to a search is effective where it represents a true choice. The onus is on the Crown to establish on a balance of probabilities that five main elements are present. The consent must be:

1) Given by a party with authority to give consent;

2) A voluntary, free choice, and not the product of power dynamics which cause oppression or coercion or other external conduct which negates the freedom to choose (requires a consideration of whether the consentor merely acquiesced);

3) Given by a decision-maker who was informed of the nature of the conduct to which he or she was asked to consent;

4) Given by a decision-maker who was informed of the right to refuse to engage in the conduct requested (requires a consideration of whether there was truly another course of conduct available to the decision-maker);

5) Given by a decision-maker who was informed of the potential consequences of giving the consent.

In the course of his decision, Mr. Justice Doherty, writing for a unanimous court, fleshes out the meaning of these elements of valid

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20 Ibid, at p. 540-f. In my view, the court misused the word "vitiated" in this sentence. It is clear from the context the court meant to frame the question as, "Whether the consent was effective or whether it was not genuine due to non-disclosure or innocent misrepresentation of material facts". A consent is legally "vitiated" by the courts where the consent given is genuine but the court interferes with that consent and deems it to be "vitiated" for public policy reasons (as in R. v. Jobidon (1991), 66 C.C.C. (3d) 454 (S.C.C.)). On the other hand, where the apparent consent is not meaningful, not genuine, or not legally effective, then there is no consent in the first place to be vitiated.


22 Ibid., at p. 542-e and 546-b to e [Emphasis added]
consent. To assist in examining these criteria in this context, the court refers to other decisions that assess the validity of consent in other contexts. Mr. Justice Doherty relies upon the meanings of consent from those other contexts. The court then assesses the consent by considering the underlying values that "give definition to the concept of consent in the present context." Thus, the court looks at the factual circumstances and asks itself, "What does it mean to make a voluntary, informed choice with an awareness of the right to refuse in this context?" This analytical approach of relying upon the meaning of consent in other contexts shows that the meaning of true consent has a number of fundamental, essential threads which run consistently through every area of consent law. Although they manifest themselves in different ways in each factual context, these fundamental components of true consent do not vary depending upon the context. The second part of this thesis will bring together the legal analyses of consent in various contexts and explain the analytical coherence through these cases.

1) Given by a party with authority to give consent

The authority of a person’s consent is limited to matters which the person is entitled to control. A person’s consent does not represent the integrity of individuals as decision-makers if the consent relates to a matter outside that person’s domain. This boundary reflects the notion that respect for individual autonomy requires recognition of the effect of one person’s consent on the individual autonomy of another, and the entitlement of the giver of the consent to have that effect.

23 Ibid., at p. 540-g
The legal effectiveness of consent is limited to matters within each person’s domain because, “individuals are free to define their own privacy interests and to yield those interests when so inclined”\textsuperscript{24}. This notion of defining one’s own privacy interests is a guiding principle for valid consent because it reinforces the principle of individual autonomy. And it is this very principle of individual autonomy that underlies the rights set out in the \textit{Charter} \textsuperscript{25}.

2) \textit{Consent as a voluntary, free choice, and not the product of power dynamics which cause oppression, coercion or other external conduct which negates the freedom to choose}

The court begins its analysis of voluntariness by assessing the values which underlie consent in this context. Encouraging people to co-operate with police is identified as one value in this context; however, true co-operation must be distinguished from acquiescence in or compliance with a request:

“True co-operation connotes a decision to allow the police to do something which they could otherwise not do. Acquiescence and compliance signal only a failure to object; they do not constitute consent.” \textsuperscript{26}

Where A relies upon B’s consent to do something which A would otherwise be unable to do, the court warns that, “care must be taken to ensure that the consent is real. Otherwise, consent becomes a euphemism

\begin{footnotes}
\item[24] \textit{Ibid.}, at p. 541-f
\item[25] \textit{Ibid.}, at p. 541-e
\item[26] \textit{Ibid.}, at p. 540-h
\end{footnotes}
for failure to object or resist...”27. Fairness demands that the individual make a voluntary decision to allow the intrusion upon himself28.

When examining the necessity for a voluntary and informed choice, Wills refers to the test set out by the Supreme Court of Canada to establish a valid waiver of a constitutional right. The waiver cases are related to the issue of consent because the test for a waiver of a Charter right requires analysis of similar voluntariness issues. It is worth noting that, while waiver of a Charter right raises analogous issues to a consent search, a consent search is not a waiver of a Charter right29. A waiver of a Charter right is not conceptually identical to a consent search; the two cannot logically be the same30. But despite this difference, the considerations in each area are similar because, “fairness demands that the individual make a voluntary and informed decision to permit the intrusion of the investigative process upon his or her constitutionally protected rights”.

Power dynamics between the parties

The decision emphasizes the need to examine the power dynamics within each context. To decide whether consent is effective, one must carefully inspect the nuances of the power relations between the parties32. Understanding the power dynamics allows the trier to appreciate all the

27 Ibid., at p. 541-c
28 Ibid., at p. 543-a
29 Mr. Justice S. Casey Hill affirms this view in R. v. Brunczlik (Unreported decision of the Ontario Court of Justice - General Division released November 17, 1995, at para. 72 of quicklaw) when he writes, “To the extent that the concepts of waiver and consent may be viewed as analogous (see Doherty, J.A. in Regina v. Wills, supra at p. 544), the section 8 Charter jurisprudence may inform the instant analysis.” The issue in that case was the validity of the accused’s alleged waiver of a Charter right.
30 One does not enter the realm of a s.8 Charter analysis if the search was done with consent. If a search is conducted with genuine consent, then there is no s.8 analysis. A person who consents to a search is not waiving his s.8 rights, because a consent search is a reasonable search and thus s.8 is not triggered. See Ibid, p. 540.
32 Ibid., at p. 541-a
circumstances in the full context. Without this, it would be impossible to root out involuntary conduct which arose due to, "an element of authority, if not compulsion, into a request" 33. The courts must not render valid consents where the decision-maker was situationally compelled to acquiescence in or comply with the request34.

3) Given by a decision-maker who was informed of the nature of the conduct to which he or she was asked to consent

_Wills_ does not go in to detail to explain the meaning of this requirement. However, the case does refer to the importance of examining the concept of consent in the present context35. The context in which the consent occurs and the nature of the act to which one consents are clearly connected to the voluntariness of the consent and to whether the consent was informed. If a person consents to a request, but the person is misinformed about the nature of the request and the context in which it was made the person is actually providing a consent to an activity which is different in substance than that which will take place. In such a case, the activity requested exceeds the scope of the consent and is thus invalid.

4) Given by a decision-maker who was informed of the right to refuse to engage in the conduct requested

The power dynamics between the parties also raise the issue of the consenting party's awareness of the opportunity to refuse to consent. A power imbalance should trigger an inquiry into whether the consenting party was aware of the opportunity to refuse. The court refers to the

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33 _Ibid._, at p. 541-b
34 _Ibid._, at p. 541-d
35 _Ibid._, at p. 540-g
Supreme Court of Canada ruling in *R. v. Dedman* 36 to buttress the notion that power dynamics may clearly affect the Voluntariness of a person’s conduct:

“A person should not be prevented from invoking a lack of statutory or common law authority for a police demand or direction by reason of compliance with it in the absence of a clear indication from the police officer that the person is free to refuse to comply. Because of the intimidating nature of police action and uncertainty as to the extent of police powers, compliance in such circumstances cannot be regarded as voluntary in any meaningful way.”

It is significant that *R. v. Dedman*, a pre-Charter case, recognizes the nexus between voluntariness and power dynamics and the awareness of the opportunity to refuse. As a result, these concepts are clearly relevant factors in assessing the validity of consent in other non-Charter contexts.

The applicability of these concepts to non-Charter contexts is confirmed in *R. v. Wills* when Mr. Justice Doherty refers to *R. v. Dedman* and writes:

“In this passage [cited above], LeDain J. recognizes that even in the non-Charter context an individual could not be said to have consented to police conduct and waived his or her right to object to that conduct unless the individual knew that he or she had the right to refuse to comply. Knowledge of that right to refuse is central to the concept of waiver.”

5) *Given by a decision-maker who was informed of the potential consequences of giving the consent*

An analysis of the context must include a consideration of the effect, or consequences, that flow from the consent to the party giving consent. As

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37 *Ibid*, at p. 116-117
Mr. Justice Doherty explained, individuals are generally free to define their, “privacy interests and to yield those interests when so inclined”\textsuperscript{39}. We may visualize this notion as though individuals are shrouded with a privacy shield. This shield protects one from outside interference with his or her privacy. When an individual consents to lower this privacy shield, he or she relinquishes the right to be left alone\textsuperscript{40}. Thus, the valid consent of an individual must constitute a decision to lower the barrier. In order to make an informed decision about lowering the barrier, a person must have a reasonable awareness of what is on the other side of the barrier. As a result,

> "When one consents to the police taking something that they otherwise have no right to take, one relinquishes one’s right to be left alone by the state and removes the reasonableness barrier imposed by s.8 of the Charter. The force of the consent given must be commensurate with the significant effect which it produces”\textsuperscript{41}.

The test for this element is similar to the requirement of awareness of the consequences required in the context of the waiver of s.10(b) Charter rights. The decision-maker must have a, “general understanding of the jeopardy in which he found himself, and an appreciation of the consequences of deciding for or against” the request made\textsuperscript{42}. In this context, this means the decision-maker must,

> “appreciate in a general way what his or her position is vis-a-vis the ongoing police investigation. Is that person an accused, a suspect, or a target of the investigation, or is he or she regarded merely as an ‘innocent bystander’ whose help is requested by police? If the person whose consent is requested

\textsuperscript{39} Ibid., at p. 541-f
\textsuperscript{40} Ibid, at p. 541-h
\textsuperscript{41} Ibid., at p. 541-h. This quotation from \textit{R. v. Wills} is specifically upheld in \textit{R. v. Borden} (1994), 92 C.C.C. (3d) 404 at p. 417 (S.C.C.) (see below for detailed explanation of that case).
\textsuperscript{42} Ibid., at p. 546-f
is an accused, suspect or target, does that person understand in a general way the nature of the charge or the potential charge which he or she may face ... the person ... must [also] understand that if the consent is given the police may use any material retrieved by them in a subsequent prosecution."^{43}.

As mentioned earlier, a valid consent search is a reasonable search. There is no constitutional protection from a reasonable search and, thus, a true consent search falls outside the ambit of s.8. However, an assessment of whether an apparently consensual search constitutes a valid consensual search does raise issues similar to those raised in constitutional privacy rights. Because privacy rights are constitutionally protected in s.8 of the Charter, and because of the conceptual relationship between consent searches and privacy rights, the court considers statutory provisions relating to consent searches. Mr. Justice Doherty decides the test for a valid consent search must be at least as high as that required by Criminal Code provisions that deal with privacy rights^{44}. Thus, with this relationship between the two areas in mind, the nature of the consent required to render a consent to be a valid consent under s.184(2)(a) of the Criminal Code is examined.

**R. v. Borden - 1994 Supreme Court of Canada Decision^{45}**

Mr. Justice Iacobucci wrote for the majority of the Supreme Court of Canada in this 1994 decision. In this case, the police took the accused’s blood for investigative purposes with his apparent consent. The police did not obtain a warrant. One issue in this case was whether the accused’s

^{43} Ibid., at p. 546-g to h
^{44} Ibid., at p. 544-a
consent was effective and valid. The validity of the apparent consent affected the efficacy of the accused’s s.8 *Charter* argument. If the blood was taken without the accused’s consent, then it constituted a seizure and triggered a s.8 inquiry. In analyzing the search, the court confirms the relationship between a “consent” search and s.8 of the *Charter* and sets out a test to be used when assessing the validity of alleged consent searches.

- **The Relationship Between the Constitutionality and the Validity of an Allegedly Consensual Search**

  Although the issue in this case was the constitutionality of the seizure of the blood with respect to the October sexual assault charge, the court analyzed the validity of the accused consent with respect to that October charge. This case shows that the constitutionality of a search and the validity of a consent to search are closely inter-related, although not identical issues. The relationship arises because a s.8 *Charter* violation occurs where there is a seizure, and a seizure occurs where the state takes an item in respect of which the citizen has a reasonable expectation of privacy and that item is taken without the consent of the citizen\(^{46}\). Thus, if the search is done with the valid consent of the accused, then it is not a seizure and there is no s.8 inquiry.

  Despite the fact that these issues are connected, it appears that the onus for each question rests on opposite parties. *Borden* does not address the issue of who shall bear the burden of establishing the validity of consent. However, it is worth noting that *Borden* does not reject the onus set out in *Wills*. and that *Borden* does rely upon *Wills* for other reasons\(^{47}\).

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\(^{46}\) *Ibid*, at p. 415-d

\(^{47}\) *Ibid*, at p. 416-7, see also p. 416-f where the court explicitly acknowledges that the onus is on the Crown is an analogous situation to show valid consent.
The logical inference is that *Borden* endorses the finding in *Wills*. This leaves us in a situation where the onus is on the Crown to establish on a balance of probabilities that the alleged consent is valid. On the other hand, with the s.8 *Charter* motion, the onus shifts so that, as usual, the onus is upon the party seeking to establish the *Charter* breach, in this case the accused, to show the breach on a balance of probabilities.

The court concluded the police did obtain a lawful and valid informed consent from the accused to take his blood as part of the investigation into the December motel sexual assault. However, the court held that taking the blood to also investigate the October sexual assault violated s.8 of the *Charter*. Because the accused did not provide a valid, informed consent to take the blood for the October sexual assault, taking the blood for use in the October sexual assault constituted an unlawful seizure. Thus, the analysis of the validity of the consent is the determining factor in this case.

- **Factual Background**

The accused in this case was under arrest for one sexual assault. He consented to provide a blood sample to police while under arrest for that sexual assault. The validity of the consent became an issue because the police took the blood with the intent of using it, not just for the offence for which he was under arrest, but also to investigate another sexual assault for which the accused was not under arrest. The accused did not know the police intended to use the blood for any purpose other than the offence for which he was under arrest at the time he consented.

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On October 11, 1989, an elderly woman was sexually assaulted by an intruder in her home. The offence occurred in the dark. Her face was covered during the attack. As a result, the woman was unable to identify her attacker. A comforter stained with semen from the attack was seized by police. The accused, who was staying nearby at the time of the attack, was suspected by police.

On December 2, 1989, another woman was sexually assaulted at a motel. There was no sexual intercourse or ejaculation. The complainant in this case had seen the accused on occasions prior to the assault and was able to identify him from a photo-line up. The police seized hair from the motel that was found on the bathroom floor and on the bed.

That day, the accused was arrested and taken to the police station. He refused the police offers to talk to a lawyer, and explained he had already contacted a lawyer. The next day, the accused was again advised of his right to counsel and his right to silence. He was then told he was the suspect in a sexual assault at the motel. The accused made an oral exculpatory statement to police and then agreed to commit the statement to writing. The accused was then advised again of his Charter rights. He decided to call his lawyer. After the call, he told police he had been instructed not to tell police anything except his name. There was further discussion and then the accused agreed to provide a written statement.

Later that day the police asked the accused to provide a sample of scalp and pubic hair. The accused agreed. He was described by police as very cooperative. The police collected about 150 hairs. At that point, in the absence of the accused, the officers began to discuss whether to request a blood sample. They wanted in mainly for the investigation of the October
sexual assault against the elderly woman, "in order to compare the blood with the semen found on her comforter".

The officer decided to ask the accused for a blood sample. The accused said, "sure, no problem man.". The police then consulted with a Crown prosecutor and drafted a "consent form" for the accused to sign. The form stated: "I, Josh Randall Borden, of Frederick Street, in New Glasgow, Pictou County, do hereby give my consent to the New Glasgow Police Department to take a sample of my blood for the purposes relating to their investigations." The form was read to the accused, passed to him and he signed it.

The use of the plural "investigations" was deliberate. However, other than the use of the plural "investigations", the accused was never told his blood was also sought for possible use in the investigation of the October sexual assault. In addition, the accused was given no indication that he was a suspect in that October offence. As a result of the blood analysis, the accused was also charged with the October sexual assault against the elderly woman. 51

- Assessing the Constitutionality and Validity of a Consensual Police Search

The court establishes a set of questions which, together, address the constitutionality of a consent search and the validity of the consent to an alleged "consent" search. Although the onus rests upon different parties to establish the constitutionality question compared to the consent question, the court approaches this problem by dealing with it in one test. This test, however, does break down the issues into a series of questions. The validity

51 Ibid, Facts summarized at p. 412-d to 414-g
of the “consent” is a pivotal issue in the inquiry because, as we saw in *R. v. Wills*, a consent search is reasonable and a reasonable search is consistent with the *Charter*.

Essentially, the court first asks whether there was a seizure. This is crucial because s.8 only is limited to situations where there has been a search or seizure. To decide whether there has been a seizure, the court then asks two further questions: first, did the state take an item in respect of which the citizen had a reasonable expectation of privacy and, second, was this done without consent. If the answer to both questions is yes, then the conduct in question represents a seizure.

Thus, the following represents the *Borden* test for assessing the constitutionality and validity of an allegedly consensual police search where the police do not possess the statutory authority to demand to take such an item without a warrant or consent:

1) “Did the state take an item in respect of which the citizen had a reasonable expectation of privacy?”

The first question in this inquiry asks whether the state took an item towards which the person had a reasonable expectation of privacy. If the citizen had no reasonable expectation of privacy then the inquiry ends, as s.8 of the *Charter* only applies to such items. In addition, the police do not require the consent of the accused to take an item in respect of which he has no reasonable expectation of privacy.

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52 The facts of this case did not relate to an alleged search but rather an alleged seizure.
53 As mentioned above, the onus for the first and second question may be upon different parties.
The court re-affirms its position in *R. v. Dyment* that, "the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity"\(^{57}\). A person has a reasonable expectation of privacy in respect of his or her blood at any time while that blood is still inside his or her body\(^{58}\). On the facts of this case, the accused, "had an expectation of privacy with respect to his bodily integrity and the informational content of the blood"\(^{59}\). Thus, as there was a reasonable expectation of privacy in this case, then next question asks whether there was consent.

2) *If the state did take an item where the citizen had a reasonable expectation of privacy, was there consent?*

Once it is shown the state took an item where the person had a reasonable expectation of privacy in that item, the second question asks whether there was consent to the taking of the item. The assessment of the consent is significant because, if the item was taken without consent, the taking becomes a seizure. And if there was a seizure, then the reasonableness of the seizure must be scrutinized to determine whether s.8 of the *Charter* was violated\(^{60}\).

*Link between Scope of Consent and Scope of Consensor's Knowledge of the Consequences*

*Borden* begins its analysis of valid consent by reiterating the comment from Wills' that, "the force of the consent must be commensurate

\(^{59}\) Ibid., at p. 416-a
\(^{60}\) Ibid., at p. 416-a
with the significant effect which it produces”61. *Borden* goes on to confirm the test for a valid consent is analogous to the waiver test. Both a valid consent and a valid waiver must include two essential components: the conduct in question must represent an exercise of the right to choose and the decision-maker must be possessed of the, “requisite informational foundation for a true relinquishment of the right”.

Making such a choice, “requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful”62. An awareness of the right to refuse and an awareness of the consequences are necessary regardless of whether context involves a decision about whether to waive the right to counsel or to, “relinquish to the police something which they otherwise have no right to take”63.

Where there is a valid consent to take an item, the use of the item will be limited by the extent of the consentor’s awareness of the purpose of taking of the item. As a result, there is, “a link between the scope of a valid consent and the scope of the accused’s knowledge in relation to the consequences of the consent”64. Thus, among other things, the validity of a consent rests upon the informational foundation which gave rise to the consent.

In this case, because the accused was not aware his blood could be used as part of another investigation, the accused was held to lack the requisite informational foundation necessary to show valid consent65.

61 Ibid., at p. 417-a
62 Ibid., at p. 417-b
63 Ibid., at p. 417-c
64 Ibid., at p. 417-e
65 See also Alberta Court of Appeal decision in R. v. Love, *Op. Cit.*, Footnote 4. In that case the accused explicitly refused to provide police with tissue samples for DNA testing. Later, the accused believed he was
However, for a consent to be valid, the consentor need have a detailed comprehension of every possible consequence of providing consent. The requisite degree of awareness of the consequences of the consent will vary depending upon the particular facts of each case.66

a) If there was consent to the taking, then there was no seizure

If the item was taken with the valid consent of the party involved, then this ends the inquiry and the court does not engage in a s.8 analysis. If the police take such an item with the valid consent then the taking of the item is lawful.67

b) If there was no consent then there was a seizure

If the inquiry advances to this stage, then the court simply engages in a regular s.8 R. v. Collins analysis and asks, in the absence of prior judicial authorization, i) Was the search or seizure authorized by law, ii) was the law itself reasonable, and iii) was the search or seizure conducted in a manner that was reasonable? Unless these are shown, the search or seizure will be unreasonable and violate s.8 of the Charter.68

Borden further develops the line of reasoning in Wills

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67 Ibid, At p. 419-c the court writes, “A lawful seizure in this case required the respondent’s consent”. This cannot be an accurate comment, in light of the earlier comments that a consent search is not a seizure. It appears the court mis-spoke by using the word “seizure” and the sentence should have read, “A lawful taking of an item to which the respondent had a reasonable expectation of privacy required the respondent’s consent”.
68 Ibid., at p. 419-a to b
*Borden* does not explicitly state that it upholds all of *Wills*. However, according to *Borden*, it is necessary to establish certain essential elements to demonstrate that a consent is informed and valid. And those essential elements are consistent with those in *Wills*.

In *Borden*, the accused obviously had authority to consent to the seizure of his own blood, so it is no surprise that the Supreme court did not mention the first *Wills* element, that the consentor have authority to give consent. Because the court held the accused did provide a valid consent to the use of his blood for the purposes of which he was aware, it is also to be expected that the court did not analyze the power dynamics in this case. The heart of the issue on the *Borden* facts lies with the third, fourth and fifth *Wills* elements. It is here that the court provides more clarity than in *Wills*.

The third requirement in *Wills* is that the consentor must be informed of the nature of the conduct to which he or she is consenting. *Borden* endorses this requirement by emphasizing the informational foundation required to exercise a meaningful preference. The fourth *Wills* requirement is that the consentor must be informed of the right to refuse the request. This is affirmed when *Borden* refers to the fact that the right to choose includes the opportunity to prefer one option over another.

Finally, the fifth *Wills* requirement is that the consentor must be informed of the potential consequences. *Borden* clearly upholds the importance of this when it discusses the link between the scope of the consent and the scope of the awareness of the consequences of the consent.

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69 *Ibid.*, at p. 417-b  
70 *Ibid.*, at p. 417-b  
In this case, the Supreme Court of Canada considered the validity of the consent to a search of a car. In its one paragraph decision, the Supreme Court of Canada only addresses whether the consentor was aware of his right to refuse to consent. As a result, this may appear at first glance to minimize the importance of the essential elements to a consent search outlined in Borden and Wills. However, based on the facts of this case, the only real issue was whether the consentor knew he could refuse to consent. As a result, that is the only factor upon which the Supreme Court comments. Consequently, this case should not be read to mean that the right to refuse is the only essential element to a valid consent.

**Factual Background and Analysis**

The accused was charged with robbery, using a firearm in the commission of an indictable offence and being masked with intent. At trial, the accused brought a s. 8, 9 and 10 Charter motion to exclude a mask and a gun that were obtained as a result of a consent search of his car.

The validity of the accused's consent to a police search was an issue. At the time of the search, the accused was being investigated but was not detained. The trial judge made a finding of fact that the accused voluntarily pulled into a gas station, aware that a police cruiser was behind him. When the accused was outside his car, the police exited their cruiser.

The accused asked the police if there was a problem. The trial judge found the officer told the accused there had been a complaint about the

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accused and his car. The judge also found the officer told the accused he was investigating a drug problem. The officer asked the accused’s permission to search the car. The officer asked, “If you would let me have a quick look in your car, I can solve it here, or right now.” The accused agreed. The trial found that the police were polite and courteous throughout. The police did not inform the accused he had the right to refuse. However, the judge accepted the accused’s evidence that he knew, when he consented to the search, that police had no right to search his car.73

Based on the trial judge’s findings of fact and the accused’s awareness of his rights, the Ontario Court of Appeal upheld the trial judge’s finding that the accused had given his, “unequivocal, voluntary and informed consent to the search”74. The court also decided the accused made his decision for reasons which he considered good and sufficient75 and that he voluntarily chose this course of conduct rather than another course of conduct76.

In his reasons, the trial judge stated the onus was on the “applicant” (in this case, the accused) to establish informed consent. However, the majority of the Court of Appeal held this was an inadvertent comment. Rather, the Court of Appeal decided that the judge’s full reasons showed he had properly placed the onus upon the Crown to show informed consent77. As the Supreme Court of Canada did not comment upon this finding in its decision, it is clear that R. v. Clement stands for the proposition that the

73 Ibid., Ontario Court of Appeal decision at p. 119-121
74 Ibid., Ontario Court of Appeal decision at p. 120-h and 121-f
75 One may reasonably infer that this indicates the court found there was no power imbalance which improperly influenced the accused's decision.
76 Op. Cit. R. v. Clement, Ontario Court of Appeal decision footnote 69 at p. 121-g. Note the reference here to two other essential elements from Wills and Borden.
77 Ibid., at p. 121-b
onus is on the Crown to establish the validity of the accused’s consent to a search.

The Supreme Court of Canada released a unanimous one paragraph dismissal of the appeal:

"There was cogent evidence to support the trial judge’s finding that the appellant consented to the search of his car before he was detained. The appellant testified that he knew that the police had no right to search his car. It is apparent that he gave his consent freely and voluntarily. It follows that the search thus consented to did not infringe s.8 of the *Canadian Charter of Rights and Freedoms*. The appeal is therefore dismissed."

The Ontario Court of Appeal decision read together with the Supreme Court decision shows, not only that the onus is clearly on the Crown to show valid consent, but that all the essential elements of a valid consent must be established. In this case, the court only referred to the right to refuse because there was no issue on the facts with respect to the other essential elements.
CHAPTER 2 DEFENCE OF LACK OF CONSENT TO POSSESSION: Assessing the Validity of Consent to Possess

The problem of defining genuine consent also arises with respect to the criminal offence of possession of property obtained by crime. The issue of consent arises in this context because an accused person must consent to being in possession of the item in question before he or she may be found to be criminally liable for possession of the item.

Section 4(3) of the Criminal Code of Canada sets out three means through which a person may be in possession of stolen property; there must be proof that the person accused was either in 1) personal possession, 2) constructive possession or 3) joint possession of the property. Personal possession occurs when a person knows that he or she has actual possession of the item, knows the true character of the item and has a measure of control over the item. Actual knowledge or willful blindness on the part of the accused will establish the offence. Constructive possession occurs when a person knowingly has the prohibited item in the actual possession of another person or has it in any place for the use or benefit of himself or another.

Joint possession, however, deals directly with the issue of consent. Joint possession occurs where more than one person jointly possess an item. When an item in the possession of one person, and that person has the item with the knowledge and consent of others, then those others are deemed to

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78 See s. 354 of the Criminal Code of Canada
79 Section 4(3)(a) of the Criminal Code of Canada, and see also Beaver v. The Queen (1957), 118 C.C.C. 129 at 140 (S.C.C.)
81 Section 4(3)(a)(i) and (ii) of the Criminal Code of Canada
be in joint possession of the item. This arises where one person is in personal possession of the item and more than one person consents and retains some measure of control over the item. To prove joint possession, then, the Crown must show the accused knowingly consented to the prohibited item being in the personal possession or custody of another. As a result, joint possession cases raise the issue of the genuineness of the accused’s consent to possess the item.

"Knowledge and Consent" Requires A Measure Of Control

Section 4(3)(b) of the Criminal Code sets out the circumstances in which multiple persons may be found to be in joint possession of an item:

"where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them".

The 1983 Supreme Court of Canada decision in R. v. Terrence interpreted this Criminal Code provision. This case contributes to the law significantly as it specifically clarifies that control is an essential element of consent. Until R. v. Terrence, the law was unclear as to whether it was necessary to prove a degree of control to establish consent.

In the following excerpt from R. v. Terrence, the Supreme Court upheld the 1942 British Columbia Court of Appeal finding in Rex v. Colvin and Gladue. This passage is important because it shows the Court

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82 Section 4(3)(b) of the Criminal Code of Canada
85 Ibid., Rex v. Colvin and Gladue
has firmly decided it is necessary to prove a measure of control to establish consent:

"It follows that 'knowledge and consent' cannot exist without the co-existence of some measure of control over the subject-matter. If there is the power to consent then there is equally the power to refuse and vice versa. They each signify the existence of some power or authority which is here called control, without which the need for their existence could not arise or be invoked."86

Factual Background

The accused Terrence was charged with possession of a stolen automobile. The Crown alleged the accused was in joint possession of the stolen car pursuant to s. 3(4)(b) (now s. 4(3)(b)) of the Criminal Code. There was no question at trial that the accused had accepted a ride in a car that was later proven to be stolen. The issues in this case were whether the accused knew the car was stolen and whether he consented to being driven in a stolen car, pursuant to s. 4(3)(b) of the Code. As a result of the facts in this case, the court addressed whether and to what degree control is an essential element of consent.

The accused testified he was at his neighbour's house watching television on the night in question. The neighbour's roommate returned home around midnight. The accused was still there. The roommate drove up to the house in a new Camero and asked if anyone wanted to go for a ride in his "brother-in-law's new car". The accused agreed and went with the roommate for a ride. Shortly afterwards, the police noticed the car was stolen and attempted to stop it. A short chase followed and eventually the

The accused was arrested for possession of a stolen car. The accused testified he first learned the car was stolen when the police chase began. The trial judge rejected the accused’s evidence and assumed the accused knew the car was stolen. The accused was convicted. On appeal, the Ontario Court of Appeal overturned the conviction because, “…the necessary measure of control was not established…” To establish joint possession, the Court of Appeal decided, “it was necessary that there should be evidence of control on the part of the accused.” The Supreme Court of Canada upheld the Court of Appeal’s decision and agreed that, “a constituent and essential element of possession under s. 3(4)(b) (now 4(3)(b)) of the Criminal Code, is a measure of control on the part of the person deemed to be in possession.”

This decision is important as it confirms that proof of “knowledge and consent” requires evidence of a measure of control. This finding is particularly relevant to this thesis because it shows that examining the control in a situation helps in ascertaining whether consent is genuine. Thus, in order to delineate the boundary between passive acquiescence and genuine consent, we must carefully consider the degree of control of the party whose consent is in question.

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87 Ibid., at p. 194-196 for facts
88 Ibid., at p. 197
89 Ibid., at p. 197
90 Ibid., at p. 198
CHAPTER 3
DEFENCE OF CONSENT TO DURESS

INTRODUCTION
Restitution for duress is another area of law that examines the meaning of genuine consent. The problem of defining genuine consent manifests itself as the law of duress wrestles with distinguishing between acceptable and unacceptable threats. Consequently, duress law considers the meaning of genuine consent, voluntariness and free will. This chapter shows that the concepts of voluntariness and free will have limited value in advancing an understanding of meaningful consent. Rather, Knutson v. The Bourkes Syndicate and Morton Construction Co. Ltd. v. Corporation of City of Hamilton show that the defendant’s entitlement to make the demand in question and the plaintiff’s entitlement to engage in the behaviour that does not comply with the demand are of central importance to determining whether consent is genuine.

There is no question that duress constitutes a ground for restitution. This is not controversial. However, contention does arise over the circumstances which establish grounds for duress. In law, not all threats or compulsion will be sufficient to prove duress. Some forms of threats and pressure are tolerated. Nonetheless, there is a point where certain types of threats and pressure are recognized as duress. This chapter endeavors to focus on this boundary and to identify the difference between an action performed consensually and an action performed under duress.

The central question in the field of duress arises here: how does the law delineate the boundary between duress and circumstances which fall short of duress? Where is the line between voluntary and involuntary conduct, acceptable and unacceptable threats? What is the essential feature
that distinguishes consensual conduct from non-consensual conduct arising from duress? What is fundamentally different between a party making a payment he would rather not make and a party making a payment under duress? In light of the broader grounds of duress which have been recognized in recent years, this chapter aims to explore the nature and quality of the boundary between duress and acceptable threats. In doing so, this chapter deals with issues related to distinguishing between genuine consent and acquiescence.

This portion of the thesis has two objectives: first, to show how the courts have responded to this central question and, second, to propose a test for assessing whether the facts establish duress. This chapter addresses these goals in five sections. The first section briefly reviews the legal evolution of conditions necessary to show duress; the second section provides an overview of the caselaw and academic commentaries on the central question of defining duress; the third section suggests a clearer legal test is necessary; the fourth section asserts that the academic Rick Bigwood’s test would be clearer if it incorporated an inquiry into entitlement and that this is supported by the leading cases; and the fifth section briefly articulates a response to a possible criticism of the proposed approach.

With the evolution of legal analysis surrounding duress, criticism has been aimed at the impossibility of pointing with accuracy to the limits of duress. This chapter explains how the law has broadened over time and how these analyses have further illuminated the meaning of genuine consent. Although the legal test proposed in this chapter is not held out as panacea to all the problems in this area, this chapter does assert that the proposed test is a cleaner articulation of an approach currently adopted by
The very early development of duress as a ground for restitution is somewhat complex and could form a chapter by itself. Unfortunately, a detailed analysis of this initial development of the law of duress is outside the scope of this chapter. However, academics appear to agree that, in English common law, recovery based on threats was first recognized in the tort of intimidation by the 1700's. Although this tort did give rise to recovery, it was limited to situations where the act or threat related to unlawful conduct.

Apart from the tort of intimidation, duress began to be recognized as a ground for restitution in the 1700's. Originally, a threat against one's life or the life of someone in one's care constituted the only grounds giving rise to restitution for duress. A finding of duress as a ground for restitution was initially limited to circumstances where actual or threatened coercion was physical and was aimed either at the plaintiff or his family.

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91 For the purposes of this chapter, I have excluded from my discussion *colore officii*, which is also a traditional ground giving rise to duress. This ground leads to the additionally complicating factor of liability of officials and detracts from the central purpose of this chapter, which is to flesh out the distinguishing feature of duress and consider its relationship with the meaning of consent.


93 *Ibid.*, at p. 532

In eighteenth century England, the courts began to apply a wider test in recognizing duress. The courts expanded their interpretation of duress to include situations where the plaintiff acted, not only under a threat to the person, but under a threat to his property as well. However, the notion of duress for threats to property was limited by the condition that the threat to the property had to occur in circumstances of "urgent and pressing necessity." Unless the threat to property was of "urgent and pressing necessity", the plaintiff's conduct was considered to be voluntary. By the early twentieth century, Canadian courts also began to recognize duress as a grounds for recovery where there was a threat to the person or to property.

A claim of duress may also be founded upon a threat to use the legal process in bad faith. Such claims will be rare due to the difficult onus of establishing bad faith. Nonetheless, duress may be said to have been exercised where the law is invoked in bad faith giving rise to irregular proceedings. The distinguishing feature here is whether the law was invoked for proper or improper purposes. There is no duress where pressure is brought about by invoking the aid of the law for proper purposes. As Bigwood suggests in his 1996 article, *Coercion in Contract: The Theoretical Constructs of Duress*, an, "'improper' purpose is one that is considered contrary or extraneous to the purposes for which the right to bring legal proceedings is intended."
ii. The Traditional Definition of Duress Expanded to Include Economic Duress and Practical Compulsion

The historical development of the law has seen an expansion of the definition of duress. The law has gone from limiting recovery for duress to circumstances where threats are made against the person to including circumstances where threats are made against property and against abuse of the legal process. These may be seen to be the traditional grounds through which one may claim recovery for duress. However, the definition continues to be flexible. In the last hundred years, Canadian courts have been willing to recognize economic duress and practical compulsion as grounds for restitution.

The continued broadening of the circumstances which establish duress has brought into sharp focus the need for a clear definition of duress. As may be expected, the need for a definition has created a debate. This chapter will now review the recent cases which recognize economic duress and practical compulsion and then turn in part two of this paper to the question highlighted by these new areas. The second part of this chapter will consider how the courts define the essential characteristic of duress that binds together the various grounds which give rise to duress.

- Practical Compulsion

*Knutson v. The Bourkes Syndicate* 100 stands for the proposition that a party is entitled to restitution for a benefit conferred where the benefit was conferred to another under a "practical compulsion"101. The Supreme

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101 See also Maddaugh and McCamus *Op. Cit.*, Footnote 92 at p. 547 for further discussion of this case. See also p. 548 (at Footnote 97) in Maddaugh and McCamus for additional cites of cases which grant
Court found in this case that payments made under "practical compulsion" give rise to restitution for duress because they are not voluntary. A payment constitutes an involuntary and, thus, "compulsory payment", and gives rise to restitution where, "...the party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled... "102. Despite the fact that, in this case, there were no physical threats, no property was seized and the legal process was not abused, the Supreme Court held that the compulsion was sufficient to warrant recovery under grounds of duress.

The Supreme Court seems to draw the line between voluntary and involuntary conduct by suggesting that conduct is involuntary where it is done in response to a threat to take away that to which one is entitled. However, the Court does not go on to explain what it means by entitlement to something.

- Economic Duress

According to Peter Maddaugh and John McCamus, in their book The Law of Restitution, the 1970 English case of The "Siboen and The "Sibotre"103, was the first judicial recognition of economic duress as a grounds for restitution104. In that case, the plaintiff failed because the court found the conduct in question fell short of duress. Instead, the court decided the defendant's actions amounted to commercial pressure, which is distinguishable from duress105. The court suggested that the appropriate

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restitution for duress.

102 Op. Cit., Footnote 100 at p. 423
103 The "Siboen and The "Sibotre [1976] 1 Lloyd's Rep. 293
104 Op. Cit., Footnote 92 at p. 557-8
105 Op. Cit., Footnote 103 at p. 336
test for distinguishing between acceptable commercial pressure and unacceptable duress would be,

"[T]he court must in every case be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of any animus contrahendi. This would depend on the facts of each case. One relevant factor would be whether the party relying on the duress made any protest at the time or shortly thereafter. Another would be to consider whether or not he treated the settlement as closing the transaction in question and as binding upon him, or whether he made it clear that he regarded the position as still open."\(^\text{106}\)

With respect to the issue of the requirement for protest in economic duress, Maddaugh and McCamus point out the logic of Windeyer J.'s comments in the Australian case of Mason v. State of New South Wales that protest is not an analytically helpful tool because:

"...there is no magic in a protest; for a protest may accompany a voluntary payment or be absent from one compelled...Moreover, the word "protest" is itself equivocal. It may mean the serious assertion of a right or it may mean no more than a statement that payment is grudgingly made."\(^\text{107}\)

2. **HOW COURTS DEFINE THE DISTINGUISHING FEATURE OF DURESS**

The central question which arises in defining duress relates to identifying the distinguishing feature of an act performed under duress. What is different between an act under duress and an act which is done in circumstances which fall short of duress? The legal analysis typically deals

\(^{106}\) *Ibid.*

\(^{107}\) *Op. Cit.*, Footnote 92 at p. 535
with this by considering what an act under duress lacks compared to an act that is not performed under duress. This section will explore the case law and academic analysis regarding what it is that an act under duress lacks: whether it be choice, will, intention or voluntariness.

It is worth noting that duress is defined in negative terms, that is in terms of the characteristics that are absent. This may be contrasted with, for example, criminal law where the structure of the inquiry relates to assessing whether the facts establish the essential elements of the offence. In the case of restitution, however, one asks not whether the essential elements are present, but whether certain elements are lacking. Thus, duress is defined in terms of what it is not; in order for an action to be considered to have been performed under duress it must be established that it was not something else (ie. willful, voluntary etc.). I have chosen to structure this review around these concepts through which duress if defined because it is the absence of these that signal duress in law.

i. **Voluntariness, Free Will and Consent as Analytical Aids in Defining Duress**

The 1978 British case *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.*\(^{108}\) was one of the first decisions to hold that restitution for duress could also arise from economic duress. Mr. Justice Mocatta, writing for the court, held that a threat to break a contract could give rise to economic duress. The case recognized the extension of traditional grounds of duress to include economic duress. The court found that a payment made under duress is made under compulsion, and that a payment made under compulsion is involuntary.

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\(^{108}\) *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. [1978] 3 All E. R. 1170 (Q.B.)*
The decision also adopted the comments of Isaacs J. in the 1924 case *Smith v. William Charlick Ltd.* 109 as a "broad statement of principle" regarding duress. The court there held that compulsion is the only ground upon which recovery may be gained. Compulsion was defined as follows:

"'Compulsion' in relation to a payment of which refund is sought, and whether it is variously called 'coercion', 'extortion', 'exaction', or 'force', includes every species of duress or conduct analogous to duress, actual or threatened, exacted by or on behalf of the payee and applied to the person or the property or any right of the person who pays...Such compulsion is a legal wrong, and the law provides a remedy by raising a fictional promise to repay."110

To determine whether a payment is voluntary or compelled, the court recommended the test set out in the 1958 case *Deacon v. Transport Regulation Board* 111: "No secret mental reservation of the doer is material. The question is - what would his conduct indicate to a reasonable man as his mental state."112. This chapter asserts, however, that the "reasonable man" test for assessing voluntariness is not helpful as it fails to provide guidance regarding the considerations to factor in and it does not advance the analysis.

Another major case that defines duress in terms of coercion and will is the 1979 British case *Pao On and others v. Lau Yiu and another* 113. In that case, the court upheld the finding that economic duress may constitute grounds for recovery in restitution but that the duress must amount to a coercion of the will which vitiates true consent114. The plaintiff must be

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109 *Ibid.* at p. 1182-f
110 *Ibid.* at p. 1180-g
111 *Ibid.* at p. 1184-c
112 *Ibid.* at p. 1184-c
113 *Pao On and others v. Lau Yiu and another* [1979] 3 All E. R. 65 (P. C.)
114 *Ibid.* at p. 79-a
deprived of the freedom of exercising his will. Pressure alone in a commercial context could not give rise to a finding of duress. There are three key factors relevant to determining whether the case amounts to a finding that the action was involuntary and thus made under duress: 1) whether the plaintiff protested, 2) whether the plaintiff had an alternative course available to him at the time of the alleged coercion and 3) whether he was independently advised. However, this chapter asserts the notion of "exercising free will" is not helpful because it does not assist in drawing the line between acceptable constraints to "free will" and unacceptable constraints.

An extensive analysis of the relationship between will and duress is made by Lord Wilberforce in *D.P.P. for Northern Ireland v. Lynch* 116. Although this statement of the issue arises in the criminal context, the court makes it clear that the issue is the same in the civil context. Lord Wilberforce suggests that, although duress does not deprive the actor of his will, an act performed under duress lacks an element necessary to be deemed valid:

"The principle upon which duress is admitted as a defence is not easy to state. Professor Glanville Williams indeed doubts whether duress fits into any accepted theory: it may, in his view, stand by itself altogether outside the definition of will and act. The reason for this is historical. Duress emerged very early in our law as a fact of which account has to be taken, particularly in times of civil strife where charges of treason were the normal consequence of defeat, long before the criminal law had worked out a consistent or any theory of 'mens rea' or intention...'Coactus volui' sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the

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115 *Ibid.* at p. 78-g
116 *D.P.P. for Northern Ireland v. Lynch* (1975) A.C. 653 at 679
law from treating what he has done as a crime. One may note...that an analogous result is achieved in a civil law context: duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law..."[Emphasis added]

This identifies an important issue revolving around duress: whether an act performed under duress may be said to be performed by a person who is willing to do the act in the sense that he is doing the act and creating a situation where the act will be set in motion. But the frustrating part of the above quote is that his Lordship does not expand upon what it is specifically that prevents the law from treating an act under duress as valid. If acts under duress are not acts in which the actor is deprived of his will, what is lacking in duress to make acts under duress invalid?

There is an argument to be made that will and voluntariness are meaningful only when the actor is given a true choice between complying with the demand and not complying with the demand. Can it not be said that free and meaningful willful conduct presumes that the actor's action reflects his state of mind rather than another's state of mind? Lynch may be seen to be analytically unhelpful as it brings into question the meaning of willfulness. Willfulness may be understood to contain more than performing an act; for example in the Ontario Court of Appeal decision in R. v. Wills, Mr. Justice Doherty held that consent is only valid and effective where it is the voluntary act of the consentor. The consent must be given as a result of his own decision, and not as a result of external coercion. The consentor must also have the real opportunity to refuse.

117 Ibid. at p. 679-80
118 R. v. Wills (1992), 12 C.R. (4th) 58 at p. 75 and 77, See Chapter 2 on Search and Seizure for details of this case.
Thus, it is significant that genuine choice was held to require the meaningful opportunity to not do the act.

In the 1988 Ontario Court of Appeal decision in *Stott v. Merit Investment Corp.*, Mr. Justice Finlayson, writing for the majority, held that coercion of the will is what distinguishes actions performed under duress. The legitimacy of the pressure used will determine whether duress exists. To decide the legitimacy of the pressure, the question is: "What coercion of the will took place here, or what were the practical alternatives to submission to the pressures applied?".

*Stott* arrives at this final question after considering Lord Diplock's comment on economic duress in *Universe Tankships Inc. of Monrovia v. Int'l Transport Workers' Federation*. In that case, the court held duress is distinguishable from circumstances in which the plaintiff does not appreciate the nature of the activity in question: "the rationale [behind duress] is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind."  

The point reiterated from *Universe Tankships Inc. of Monrovia v. Int'l Transport Workers' Federation* is that duress is not about the lack of will. Instead, duress is seen as an example of, "the victim's intentional submission arising from the realization that there is no other practical choice open to him."  

The case asserts that lack of genuine choice is the "thread of principle" that links all cases of duress. It is worth noting that

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120 *Ibid.* at p. 563
the court considers free will to be a separate concept from choice, such that a person may be said to have no meaningful choice but at the same time have maintained the will to submit. Thus, the court finds that the essential feature of duress is the plaintiff's lack of any practical choice.122

However, lack of choice may be seen, once again, to be not analytically helpful in determining duress. If A is a bus driver and A demands that B pay the train fare or B will not be allowed to ride the train, and if B pays because he must ride the train to attend a doctor's appointment, we would not logically say that B made the payment under duress. However, the choice and "practical alternatives" test set out above may take us upon a trajectory in which we arrive at a decision in which B is awarded restitution for duress because he had no practical alternative. But, logically, this should not amount to duress as bus fare is simply an acceptable cost of living. Rather, this chapter suggests an inquiry into the legitimacy of the request is more helpful. For example, asking whether the bus driver is making a demand for something to which he is entitled will assist in developing the analysis.

122 Ibid.
ii. The Nature of the Pressure and the Nature of the Demand as Aids in Defining Duress

The English decision *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation* 123 recognized the need to consider duress in light of the legitimacy of the pressure applied. This is highlighted when the court explains the relevance of a passage from the 1976 decision in *Barton v. Armstrong*:

"[I]n life, including the life of commerce and finance, many acts are done 'under pressure, sometimes overwhelming pressure'; but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate...In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support."[Emphasis added]

This approach suggests legitimacy is relevant to determining voluntariness. However, according to this case legitimacy, in itself, is not a very helpful tool because the determination of legitimacy depends upon nature of the pressure and the nature of the demand the pressure supports. This approach does advance the analysis in the sense that it acknowledges the role of the plaintiff through examining whether the pressure actually triggered the payment and also acknowledges the role of the defendant through examining whether the pressure supports a legitimate demand. However, I

suggest assessing duress according to the legitimacy test boils down to deciding whether the demand constitutes a demand for something to which the defendant was not entitled.

iii. Entitlement as an Analytical Aid to Defining the Distinguishing Feature of Duress

*Knutson v. The Bourkes Syndicate* and *Morton Construction v. City of Hamilton* deal with the meaning to be attributed to "voluntary" action and the effect of involuntary action. *Knutson v. The Bourkes Syndicate* appears to stand for the proposition that a party is entitled to restitution for a benefit conferred where the benefit was conferred to another under a "practical compulsion". The Supreme Court found in this 1941 case that payments made under "practical compulsion" are not voluntary. A payment constitutes an involuntary "compulsory payment" and gives rise to restitution, where, "...the party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled...". This case draws the line between voluntary and involuntary conduct by suggesting that conduct is involuntary where it is done in response to a threat to take away that to which one is entitled.

*Morton Construction v. City of Hamilton* also raises the issue of defining voluntary action. In this case, the court views the voluntariness of the plaintiff's actions through a consideration of the defendant's entitlement to make the demand. This approach is novel in the sense that it recognizes that duress necessarily involves two parties and that the nature of the plaintiff's conduct occurs in the context of the defendant's conduct. First,

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the defendant's conduct must be shown to demand something to which he is
not entitled, and then the plaintiff must be understood to comply with the
demand in a manner that deprives it of its voluntary character. It is
through the nature of the defendant's act that the plaintiff's act must be
understood. This recognizes that voluntariness cannot be assessed in a
vacuum as it involves a complex set of factors which includes the
interaction between the plaintiff and the defendant.

The court decides that,

"The plaintiff's consent to do the work in question was not
deprived of its voluntary character by reason of
threats made by certain members of the City Council to the
effect that the plaintiff would receive no further contracts
from city unless it effected the required repairs at its own
expense. The defendant was legally entitled to make a
threat of that nature and, indeed, to carry it out and, fixed
with this knowledge, the plaintiff in its letter of August 3,
1957 stated: "Accordingly since the committee at city hall put
it the way they did we have no choice, if we are to stay in
business, but to do the work."[emphasis added]

If this case may be assumed to follow the Supreme Court in Knutson v. The
Bourkes Syndicate, then perhaps implicit in this case is the notion that
Morton Construction was not deprived of anything to which it was entitled.
It may be said that the City is threatening to take away from Morton the
opportunity to be considered in future contracts. This may be seen to be a
threat, then, to deprive Morton of a future contingency to which they are
not entitled. These cases may be seen to stand for the proposition that
restitution for duress is not triggered where one confers a benefit as a
result of a threat to take away that to which one is not entitled.

A similar approach was also adopted by Mr. Justice Cartwright in his
dissent in Peter Kiewit Sons Co. of Canada Ltd. v. Eakins Construction
In that case, Cartwright J. referred to entitlement as a key factor in determining whether duress has been established. Referring to *Knutson v. Bourkes*, Cartwright J. held that, "a person who has paid money, under protest and under circumstances of practical compulsion, to another who was not in law entitled to the payment can recover it back by action". It appears Cartwright J. agrees with *Knutson v. Bourkes* finding that the defendant's honest belief in his entitlement to make the demand is not relevant. When his judgment finds that honest belief in entitlement is not decisive and that money is improperly obtained when a man is compelled to pay money which he is not legally bound to pay, Cartwright J. may be understood to endorse the position that actual entitlement to money or money's worth should govern restitution for duress.

If we re-evaluate the judgment of Lord Reading C.J. in *Maskell v. Horner* in light of the recurring role of entitlement, it is apparent that the court has been factoring in entitlement, although under the guise of voluntariness. In that case, the court held that payments are made under duress where they are made under pressure of seizure or detention of goods. This is seen to constitute duress because it is not a voluntary payment, and it is not voluntary because the plaintiff was, "not bound to pay". I suggest that assessing the voluntariness of a payment in light of whether the plaintiff is "bound" to pay is tantamount to considering the entitlement of the defendant to receive the payment.

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125 *Peter Kiewit Sons Co. of Canada Ltd. v. Eakins Construction Ltd* [1960] S.C.R. 361
126 *Ibid.* at p. 380
3. CASELAW AND ACADEMICS HAVE FAILED TO ARTICULATE A CLEAR TEST FOR DURESS

In order to identify the controversy in this area, Maddaugh and McCamus refer to the comment in Boddy v. Finley that, "The question seems to be, as put by Lord Eldon, whether or not the mind was so subdued, that though the execution was the free act of the party, it was the act speaking the mind, not of that person but of another". Maddaugh and McCamus suggest this shows, "it is not enough to find intimidation at some point during the transaction, it must be present throughout so as to prevent the party intimidated from acting as a free agent. In their view, the caselaw has not resolved the debate over whether the will of the victim must be overcome.

According to Maddaugh and McCamus, duress occurs where the plaintiff's free will is so overwhelmed that his consent to the payment is considered involuntary. They propose that the test for duress should be, "whether the plaintiff has conferred a benefit against his will which he otherwise was not obliged to bestow". They attempt to resolve the debate by suggesting that submission is involuntary, and thus constitutes duress, where the will of the coerced party is intact but he consents to a lesser evil than the other alternatives that are available to him. As I argue below, the legal boundaries of duress are unclear. The above cases may not be

129 Op. Cit., Footnote 92 at p. 534
130 Op. Cit., Footnote 92 at p. 534
131 Op. Cit., Footnote 92 at p. 534
132 Op. Cit., Footnote 92 at p. 534
133 Op. Cit., Footnote 92 at p. 534
134 Op. Cit., Footnote 92 at p. 552
135 Op. Cit., Footnote 92 at p. 559
helpful in the hard cases as they define voluntariness by reference to consent and free will.

In his 1996 article, Coercion in contract: The theoretical constructs of duress, Bigwood agrees that the law has not articulated a philosophically defensible method of distinguishing between what he refers to as, "permissible and illegitimate uses of coercive pressure". Although this article relates to duress in contracts, the basic conceptions of duress are equally helpful to restitution. Bigwood suggests that to define duress we must extend our idea of what it means to abuse the negative duty not to exercise duress.

In endeavoring to flesh out the idea of duress, Bigwood proposes a two prong test. Both prongs are necessary to show duress, as neither prong is sufficient alone. The first prong is the choice prong. This choice prong asks whether the defendant made a proposal or a threat which deprived the plaintiff of the freedom of exercising his will or which put the plaintiff in a position where he had no reasonable choice but to submit to the demands. The second prong is the proposal prong. The proposal prong asks whether the threat or proposal is wrongful or illegitimate.

In examining the choice prong, Bigwood sets out to define circumstances in which a person is deprived of choice such that he is coerced. His article points out that a crucial distinction between an offer and a coercive threat lays in the effect on the plaintiff, namely whether it removes from the plaintiff any reasonable alternatives other than the demand. In an effort to further define the choice prong, Bigwood refers to Robert Nozick's statement that:

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136 Op. Cit., Footnote 98 at p. 203
137 Ibid.
138 Op. Cit... Footnote 98 at p. 212 to 213
"Whether a person's actions are voluntary depends on what it is that limits his alternatives. If facts of nature do so, the actions are voluntary... Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends on whether these others had a right to act as they did." [Emphasis added] 139

Bigwood suggests this point demonstrates that the key to duress is the genesis of the choice situation, namely that duress must come from outside the plaintiff and not from within. It is clearly true that duress must originate from the defendant, not from the plaintiff, but this chapter suggests Nozick's point is more profound than that; Nozick's reference to duress being dependent on whether the other had the "right" to act as he did highlights the significance of the defendant's entitlement to make the demand. This brings us to the proposed test set out below.

4. A LEGAL TEST FOR RESTITUTION WHICH WOULD ARTICULATE THE CASE LAW

This chapter suggests Bigwood's two prong test would be more clear if, in addition to the inquiry in the second prong, there was also an inquiry here into whether the defendant threatened to do something with respect to the plaintiff which he was not entitled to do. Bigwood's proposed test advances the analysis because it examines the relationship between the plaintiff and the defendant. The problem with the caselaw and the analyses of will and consent is that they take a one dimensional perspective of duress, and largely ignore the context that gives meaning to the situation.

Contrary to this one dimensional approach, Bigwood's framework endeavors to look at the position of both parties. Bigwood factors in the plaintiff's position through looking at the nature of the plaintiff's choice and factors in the defendant's position by examining the nature of the defendant's proposal. The first prong questions whether there is a demand made that creates no reasonable alternative for the plaintiff. However, the second prong shifts the focus by inquiring into the legitimacy of the demand through looking at the relationship of the defendant with the plaintiff. This issue would be clearer if Bigwood included the notion of entitlement in the second portion of his test. Although Bigwood does not address the entitlement issue (perhaps because he is writing in the contract context), this chapter suggests the distinguishing feature of the proposal prong is that proposals constitute duress when they are proposals which demand that to which the defendant is not entitled. To include the question of entitlement into this second prong would point us in a trajectory which would address the heart of the legitimacy question.

As Bigwood acknowledged by referring to Nozick, we face a daily barrage of limits to our activities which are considered to be acceptable; these include limits such as train schedules, class schedules, prices of items, time limits, running direction at the running track. I shall refer to limits which are considered to be acceptable as "acceptable external constraints" because they are imposed upon us from the outside but they simply constrain rather than coerce. These acceptable external constraints may be contrasted with limits to our activities which are considered coercive and unacceptable. The distinguishing feature between coercive and acceptable limits is that acceptable external constraints do not make demands on that take away anything to which they are not entitled. With acceptable external
constraints we are not forced to give away anything to which we are entitled.

The following authority, read together, supports the position that entitlement is a critical distinguishing feature between acceptable constraints and duress:

"Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not voluntary, but a compulsory payment, and may be recovered back..."\textsuperscript{140} [Emphasis added]

[In life, including the life of commerce and in finance, many acts are done 'under pressure, sometimes overwhelming pressure'; but they are not necessarily done under duress.\textsuperscript{141}

"The plaintiff's consent to do the work was not deprived of its voluntary character by reason of the threats...The defendant was legally entitled to make a threat of that nature and, indeed, to carry it out..."\textsuperscript{142}

Let us now keep in mind Fridman's basic point that duress relates to the "injustice of the transaction" \textsuperscript{143}. He suggests the theoretical basis of duress is that, "restitutionary recovery for duress is founded upon the principle of unjust enrichment, which provides a juristic basis for all forms of restitutionary recovery"\textsuperscript{144}. This basic principle that restitution is based on the injustice of an enrichment supports the idea that, in the area of duress, Bigwood's two pronged test, together with the entitlement inquiry added

\textsuperscript{140} Op. Cit., Footnote 100 at p. 423
\textsuperscript{141} Universe Tankships Inc. of Manrovia v. Int'l Transport Workers Federation [1983] 1 A.C. 366 (H.L.) at 400-401
\textsuperscript{142} Morton Construction Co. Ltd. v. Corporation of City of Hamilton [1962] O.R. 154 at 160 (C.A.)
\textsuperscript{143} Op. Cit., Footnote 94 at p. 70
\textsuperscript{144} Ibid.
into the second prong, provides a more helpful analytical structure to address duress problems.

5. POSSIBLE CRITICISM OF THIS PROPOSED TEST AND A RESPONSE

One possible criticism of this proposed test is that it cannot be reconciled with the notion that blackmail constitutes duress. For example, in *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation* 145, Lord Scarman clearly assumes blackmail constitutes duress. In an effort to flesh out the boundary between legitimate and illegitimate pressure he finds:

"The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand. Blackmail is often a demand supported by a threat to do what is lawful, e.g. to report criminal conduct to the police. In many cases therefore, "What [one] has to justify is not the threat but the demand..." 146

However, I would respond to this by suggesting that this position is based upon an assumption that duress is blackmail, rather than a theoretical framework which establishes blackmail to constitute duress. According to the proposal in this chapter, blackmail does not necessarily constitute duress; it would only constitute duress if it satisfied the regular test.

145 *Op. Cit.*. Footnote 141 at 401
However, an examination of the cases shows that blackmail, as described above, is not theoretically consistent with duress. Perhaps blackmail is not a problem of duress. As Maddaugh and McCamus point out, the leading cases on duress refer to the "coercion of the will" as a, "convenient shorthand to describe a situation where the pressured party has no "realistic alternative" but to submit". It cannot be said that a person who has committed a criminal act is left with no realistic alternative but to submit to a demand if he is presented with a demand and an alternative that the police will be told the truth about his criminal act. I suggest that it is precisely this type of situation where the "will" theory leads courts astray because it ignores the entitlement issue. With blackmail allegations, the crux of the issue to be decided is not whether the will of the plaintiff was overborne, but whether the defendant was entitled to make the demand and whether the plaintiff was entitled to the thing which was being demanded of him. In the alleged blackmail situation described above, the criminal is not entitled to be free from being reported to police and any person is entitled to truthfully report crimes to police. Had the threat been to falsely report a crime to police, that would constitute duress because no one has the right to falsely report offences to police.

CONCLUSION

The case law thus far has progressed from recognizing duress as a ground giving rise to restitution, to acknowledging that duress occurs when one is under a practical compulsion and to recognizing that a practical compulsion occurs when one acts involuntarily. However, the cases have failed to explicitly define voluntariness. When courts assess whether the plaintiff acted under duress, the law considers whether the plaintiff was
entitled to that which was threatened and whether the defendant was entitled to that which he threatened. Legal entitlement, as we have seen in *Knutson v. The Bourkes Syndicate* and *Morton Construction Co. Ltd. v. Corporation of City of Hamilton*, is a fundamental consideration in resolving disputes over duress. Although the courts already do implicitly consider entitlement and the defendant's right to make the threat, it would be helpful if the court set out a crisper test in which this consideration was explicitly incorporated. Thus, the law of restitution for duress contributes to understanding genuine consent because duress is proven when, in addition to Bigwood's test, the defendant threatened to do something which he was not entitled to do or to take away something from the plaintiff to which the defendant was not entitled. This shows that entitlement is a key factor in assessing whether consent is genuine.
CHAPTER 4. DEFENCE OF CONSENT TO ASSAULT

The interpretation of genuine consent is as crucial to assault cases as it is in other areas of law. Just as with search and seizure, possession and duress, the legal meaning ascribed to a fight varies according to whether both parties genuinely consented. According to s.265(1) of the Criminal Code, an act which would otherwise constitute an assault will not be an assault where the complainant consents: "A person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly"147. Thus, the accused's actions in an alleged assault have no meaning in a factual vacuum; rather, they are judged according to the context of whether the complainant consented to them. It is the complainant's consent, or lack thereof, that dictates the meaning of the accused's conduct148.

The Criminal Code assists the trier of fact in assessing whether apparent consent is genuine by setting out circumstances which show no consent in s. 265(3)149:

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148 Of course, this is only true with the defence of consent. With the defence of mistaken belief in consent, the state of mind of the accused influences the meaning given to the acts in question.
149 This provision is not exhaustive, see R. v. Jobidon (1992), 92 D.L.R. (4th) 449 at p. 475, 477, 479, 482 (S.C.C.). It is significant to note that this chapter, and this thesis generally, deals with the defence of consent, not the defence of mistaken belief in consent. The defences of consent and mistaken belief in consent are conceptually and legally distinct. The defence of consent suggests the complainant did in fact consent. On the other hand, the defence of mistaken belief in consent suggests, regardless of whether the complainant consented, the accused honestly but mistakenly believed the complainant consented. Section 265(4) deals with the defence of mistaken belief in consent.
(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
(a) the application of force to the complainant or to a person other than the complainant;
(b) threats of fear of the application of force to the complainant or to a person other than the complainant;
(c) fraud; or
(d) the exercise of authority.

From this provision one thing is clear: there is little statutory guidance to assist triers of fact in determining the boundaries between a genuine consent fight and a non-consensual assault. This brings us to the common law.

The following cases disclose factors that judges take into consideration when assessing whether the consent to a fight will be effective. As with the other chapters, the factors considered in these cases will be isolated and put together in the second part of this thesis to form a test for assessing consent.


The British Columbia Court of Appeal's decision in *R. v. Stanley* was one of the first Canadian assault appellate decisions to set out a framework for determining whether consent is genuine. This case is unusual because it examines whether the accused's decision to fight represented a realistic, genuine choice to engage in the activity in question. This case contributes significantly to this body of work because it identifies a necessary ingredient to consent: *an effective consent to a fight must be freely given with appreciation of all the risks.*

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151 Ibid, at p. 233. In most cases, the emphasis is on assessing whether the complainant's consent to the assault was genuine. As the facts in this case are unusual, it is apparent why the emphasis in this case is on the accused's consent rather than the victim's.
addition, and significantly, consent is not genuine where it represents mere submission to an apparently inevitable situation \(^{152}\). Although these elements of consent are not sufficient alone to show genuine consent (as there are other issues in other factual circumstances), these are necessary elements.

**Facts**

On the facts of this case, there was no issue that the accused fatally stabbed the deceased during a fight. At trial, the accused was convicted of unlawfully committing murder. On appeal, one of the issues was whether the accused consented to fight to deceased. Although the events which led to the fight in question are rather complex\(^ {153}\), several details stand out as especially significant.

The main parties to this incident are the accused, his wife, the deceased and the deceased’s four friends. Some time before the night in question, the accused’s wife was at a mall. She was approached by the deceased and two of his friends Stole and Janz. They asked her to go to Stole’s place. She went. The deceased took seven caps of heroin from her without her permission. She was pushed around while she was there. She asked what was going on and she was pushed out the door. Janz then pulled a knife on her and said, “If you come back here or if your old man (meaning the accused) ever comes back, he will get this” and he pointed to the knife\(^ {154}\).

Later, the deceased heard from others that the accused had said he could do the deceased in by shooting him in the knee if he wanted to. As a result of this, the deceased decided to go, with his four friends, to the

\(^{152}\) *Op. Cit.*, R. v. Stanley Footnote 150 at p. 234

\(^{153}\) *Ibid.*, Reference should be made to the facts set out in the case for full details.

\(^{154}\) *Ibid.*, at p. 223
accused’s home on the night in question. The deceased told the others there might be a fight and that he thought there would be155.

The deceased and his friends arrived at the accused’s home some time after 2 am. They had no weapons. Four of them were intoxicated on alcohol and the deceased was also intoxicated on drugs. The accused and his wife were asleep and the house was in darkness. The deceased and his friends knocked on the door until the accused answered it156.

When the accused answered the door, he was groggy as he had just been awakened. In addition, the accused had taken valium before going to sleep. The five entered the accused’s home as soon as he opened the door. The accused retreated to his bedroom. His wife started to repeatedly scream at the five to get out. The five backed into the kitchen. The deceased invited the accused to a fight. The accused replied, “Okay, if we are going to have it out then the rest of you guys get outside”. The deceased and another told the other three to leave. The three left and went outside. The deceased’s friend stayed to make sure things did not get out of hand. The accused and the deceased stared at each other for a short while.

The accused produced a knife and stabbed the deceased. The deceased’s friend then offered to fight the accused and the accused declined. The deceased stumbled outside and his other three friends took him to the hospital where he died. The deceased’s friend who was still in the kitchen then invited the accused and his wife to his house as he believed that the other three would return with guns157.

155 Ibid., at p. 218-219
156 Ibid., at p. 218
157 Ibid., at p. 223-224
Analysis of Genuine Consent

The main decision in this case was written by Mr. Justice Branca, with a additional comment written by Mr. Justice McIntyre. Mr Justice Maclean agreed with both, including the additional comment by Mr. Justice McIntyre. The issue before the court was whether the accused used excessive force to preserve himself, pursuant to s. 34(1) of the Criminal Code 158. The Crown argued the accused consented to the fight and that the accused should be convicted.

In the course of assessing consent, Mr. Justice Branca points to a number of facts. These facts are important as they reveal the factors the court considered in assessing consent. First, the court looks at the fact the accused was unable to control his surroundings. This was shown by the way the men entered the house uninvited and did not leave when the wife told them to leave. This shows the deceased, not the accused, had control of the environment in the sense that he was able to tell the men to come and go159.

Next, Branca, J. A. examines the fact there was no avenue of escape from the situation presented by the deceased. The only exit to the home was blocked by the three friends of the deceased and there was no phone in the house160. This reference shows the court is considering whether the accused had options available to him other than the one he acted upon.

After commenting on the facts, the court concludes it is "sheer nonsense" to suggest the accused consented to the fight161. In these circumstances the accused had no choice because every avenue of escape

158Ibid., at p. 232
159 Ibid., at p. 230
160 Ibid
161Ibid., at p. 233
was blocked. The court went on to find, "There can be no consent, at law, unless it is a free and voluntary one and I add that where a consent is extracted by threats and violence it does not and cannot amount to a consent in law at all".

In his additional comment, Mr. Justice McIntyre, with Mr. Justice Maclean concurring, held that, "In the circumstances of this case it may seem somewhat unrealistic to put the issue of consent to fight to the jury. However, with the issues of self-defence and defence of property in issue, the issue of consent was raised. In light of this, "The jury should have been told that to be effective to remove the defences any consent given by Stanley must have been a genuine consent freely given expressing an acceptance of battle with an appreciation of its risks and with, in his view, freedom to make an alternative choice if he desired. A consent forced upon him by the presence of his adversaries and not freely made would amount only to a submission, an acceptance of what may have seemed to be inevitable. The trial judge should have cautioned the jury to consider all the circumstances and to consider whether any indication of consent which they may have found Stanley to have given was such a genuine consent or merely the act of a cornered man who had no free choice in the matter." [Emphasis added]

Thus, this decision stands for the proposition that it is an essential element of voluntary consent that consent must not represent mere submission to an apparently inevitable situation.

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162 Ibid. Quaere whether the court is also considering the entitlement of the "invaders" to be in the accused's home. As was discussed in the duress chapter, this case may also be seen to be incorporating into its analysis a consideration of the entitlement factor. The court appears to implicitly ask itself whether the deceased and his friends were entitled to be in the accused's home and whether they were entitled to make the "offer" to the accused to fight (with the implicit understanding that if the accused did not agree to fight then the intruders would do greater harm).

163 Ibid
164 Ibid., at p. 234
165 Ibid

Although this case primarily considers the defence of consent to a charge of assault causing bodily harm, R. v. Jobidon does clarify the defence of consent to assault. The decision holds that, in this factual situation, the common law operates to vitiate consent, “between adults intentionally (sic) to apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl”¹⁶⁷. The bodily harm required to render consent ineffective is set out in s. 267(2) of the Code: “any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature”¹⁶⁸.

Although the common law does limit the defence of consent to assault causing bodily harm, there is no such limit to the defence of consent to assault. The defence of consent is available to a charge of assault. The Supreme Court of Canada makes it very clear that consent is a defence to, “intentional applications of force which cause only minor hurt or trivial bodily harm”¹⁶⁹. As a result, “the policy of the common law will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional applications of force to which one consents are within the customary norms and rules of the game”¹⁷⁰.

¹⁶⁶ Op. Cit., Footnote 149. This case is reviewed in full detail in Chapter 6 which deals with the defence of consent to Assault Causing Bodily Harm.
¹⁶⁷ Op. Cit., Footnote 149 at p. 494-g
¹⁶⁸ The actual definition of bodily harm is found in s.2 of the Code.
¹⁶⁹ Op. Cit., Footnote 149 at p. 495-g. The decision also notes the common law does not interfere with a person’s consent to medical treatment, consent to be a stuntman or schoolyard scuffles between children (see p. 495-6).
¹⁷⁰ Op. Cit., Footnote 149 at p. 495-a
Scope of Consent To Assault

Not all apparent consent to fist fights will be legally effective. The legal effectiveness of apparent consent depends upon whether the accused’s application of force falls within the scope of the complainant’s consent. The scope of the complainant’s consent will reflect the activity to which the complainant did or may, in law, consent.

One way to understand this is to visualize the accused’s application of force to the complainant as a circle or a range of activity. The complainant’s consent creates another circle or another range of activity. It is the relationship between the two, the way they intersect or do not intersect, that determines the lawfulness of the accused’s actions.

If the accused’s conduct falls outside the scope of the complainant’s consent then the accused’s conduct is unlawful. Consent to an assault is legally effective where the two circles cover the same area; where the complainant’s consent relates to the same actions undertaken by the accused. However, the consent will be rendered legally vitiated or ineffective if the accused’s actions fall outside the scope of the consent. The accused’s actions are judged according to whether they exceed the scope of the complainant’s consent.

However, the scope of the complainant’s consent may be limited in two ways. First, the scope of the complainant’s consent may be limited by the common law limitation, set out in *R. v. Jobidon*, which relates to the degree of harm incurred by the complainant. Second, the scope of the complainant’s consent may be limited by the type of activity to which the complainant actually consented.

Thus, the accused’s actions are measured against the scope of the complainant’s consent. The accused will attract liability if any of the
accused’s actions fall outside the scope of consent. The range of activity within which consent is acceptable is defined by the degree of harm incurred by the complainant and by the type of activity in question. The following explains each way in which the scope of consent may be limited.

i) Degree of Harm Incurred by the Complainant

As mentioned above, R. v. Jobidon holds that a complainant’s consent will be subject to the common law limitation that one cannot consent to the intentional application of force that causes serious hurt or non-trivial bodily harm. Conversely, one may consent to the intentional application of force that causes minor hurt or trivial bodily harm. The difference between the two is clearly the degree of harm incurred by the complainant. Thus, the common law imposes a limit to the scope of the complainant’s consent based upon the degree of harm incurred by the complainant.

ii) Type of Activity in Question

This issue is discussed in R. v. Ciccarelli. Although this Ontario District Court case was decided before the Supreme Court of Canada decision in R. v. Jobidon, it does contain an interesting discussion of the issues related to the scope of implied consent. Ciccarelli was a professional hockey player; the issue in this case was whether the complainant consented to the accused’s assault in the course of a hockey game.

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171 Ibid., at p. 494-g
172 Ibid., at p. 495-g
174 See the chapter on assault causing bodily harm - consent is deemed to be implied to assault causing bodily harm in the course of games.
Where there is no evidence of express consent to an assault, the court must consider whether, in the particular circumstances of the case, the complainant impliedly consented\textsuperscript{175}. The court goes on to find that the accused’s conduct in this case fell outside the ambit of any implied consent on the part of the complainant. This conclusion was arrived at after assessing the objective criteria of the nature of the game, the nature of the particular act in the case, the degree of force used, the degree of risk of injury and the state of mind of the accused\textsuperscript{176}.

This case is noteworthy because it shows that, by engaging in a particular activity such as a hockey game, a complainant may impliedly consent to engage in a certain degree of intrusive activity. However, there is a limit to that implied consent. The limit may be understood by reference to the criteria set out above\textsuperscript{177}.

A similar approach was adopted in the 1987 Alberta Court of Appeal decision in \textit{R. v. Berenger} \textsuperscript{178}. In this case, the accused was convicted of assault for kicking the complainant while they were engaged in a consensual fist fight. The Court of Appeal upheld the trial judge’s decision that the complainant consented to a fight of a certain nature, namely a \textit{fist} fight. Thus, when the accused kicked the complainant he acted outside the scope of the complainant’s implied consent\textsuperscript{179}. This is significant because it shows that consent to a fist fight has limits within it. Consent to a fist fight does not equate consent to a fist fight and whatever that leads to. A separate

\textsuperscript{175} \textit{Op. Cit., R. v. Ciccarelli} Footnote 173 at p. 124-h

\textsuperscript{176} \textit{Ibid.}, at p. 126-a. These criteria are borrowed from the analysis of the defence of consent to assault causing bodily harm in \textit{R. v. Cey} (1989), 48 C.C.C. (3d) 480 (Sask. C.A.).

\textsuperscript{177} See the conclusion of this thesis. \textit{Quaere} whether the principle that implied consent is limited to certain forms of intrusive activity does apply and should apply equally to sexual assault cases.

\textsuperscript{178} \textit{R. v. Berenger} (1987) 58 C.R. (3d) 281 (Alta. C.A.). This case is now not correct in law on the \textit{R. v. Jobidon} point that consent is vitiated for public policy reasons where bodily harm in incurred. However, it is worth examining for the consideration of the scope of implied consent to assault.

\textsuperscript{179} \textit{Ibid.}, at p. 284
express consent would be required before a complainant could be said to consent to kicking in the course of a fist fight.\textsuperscript{180}
CHAPTER 5 DEFENCE OF CONSENT TO SEXUAL ASSAULT

This chapter addresses the defence of consent to sexual assault. First, this chapter outlines the statutory provisions which relate to assessing consent. Second, this chapter reviews the main leading cases which contribute to interpreting whether apparent consent constitutes genuine consent in this context. As with the other chapters, the groundwork from this chapter forms the foundation for the proposed test set out in Part II of this thesis.


There are several statutory provisions which specifically deal with defining the boundaries around the defence of consent to a charge of sexual assault. Section 265 of the Criminal Code generally defines the offence of assault and the methods by which an assault may be committed; these provisions apply to sexual assault as well. Where the defence of consent is raised, s. 265(3)\textsuperscript{181} sets out specific circumstances which show that no consent is obtained:

265(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
(a) the application of force to the complainant or to a person other than the complainant;
(b) threats or fear of the application of force to the complainant or to a person other than the complainant;
(c) fraud;
(d) the exercise of authority.

\textsuperscript{181} Once again, it should be pointed out that the defence of consent is logically and legally distinct from the defence of mistaken belief in consent. Section 265(4) deals with the defence of mistaken belief in consent.
Whereas s.265 applies to both assault and sexual assault, s. 273.1 is a special provision which defines the meaning of consent for the purposes of sexual assault offences.

s. 273.1 (1) Subject to subsection (2) and s.265(3), "consent" means, for the purposes of sections 271, 272 and 273 [sexual assault provisions], the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273 where
(a) the agreement is expressed by the words or conduct of a person other than the complainant;
(b) the complainant is incapable of consenting to the activity;
(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

Section 273.1 of the Criminal Code only applies to sexual assault offences. However, common sense and common law dictates that the rules set out in s.273.1 apply to all contexts in which consent is assessed. Although at first glance s.273.1 appears to be a special provision for sexual assault offences, in fact, all s.273.1 does is articulate the rules applied in all analyses of whether apparent consent represents genuine.

The result is that the purpose of s.273.1 is to apply the same standard to consent in sex offences as is applied to consent in other contexts. It is clear, then, that Parliament deemed it unnecessary to enact provisions to statutorily ensure that the common law would be upheld in the context of
non-sexual offences. The obvious question that arises is: why did Parliament feel it necessary to explicitly set out such provisions for assessing consent in the context of sex crimes and not for other contexts in which consent is examined?

For example, there is no *Criminal Code* provision to define the meaning of genuine consent for an accused person who consents to a search. It would be so self-evident that it would seem almost absurd to have an analogous provision for search and seizure. Although common law dictates that analogous provisions do apply to search and seizure, it is not necessary to make a statutory declaration in the context of search and seizure.

Were such a provision enacted, let us consider what it would state. Such a section may read: “No consent is obtained for the purposes of a consent police search where the agreement is expressed by the words or conduct of a person other than the suspect, the suspect is incapable of consenting to the activity, if the police induce the suspect to consent to the search by abusing their position of trust, power or authority, if the suspect expresses by words or conduct a lack of agreement to engage in the activity and if the suspect, having consented to the search, expresses by words or conduct a lack of agreement to continue to engage in the search”.

This leads to the obvious question: if it is self-evident in other areas of law, why is it not self-evident in sexual assault cases? What is different? Part II of this thesis suggests that the notion of genuine consent is not fundamentally different in sexual cases than in other contexts and that the same essential elements exist. Thus, the proposed test in Part II applies equally to all contexts in which consent is assessed.
Analysis Of Caselaw

Legal analysis of the defence of consent to sexual assault represents, to some degree, an effort to wrestle with determining the impact of power imbalances upon agreements. As the leading cases Norberg v. Wynrib 182 and R. v. Audet 183 show, some power imbalances between parties can create a situation where, in this circumstance, “Yes means no”. This chapter endeavors to examine the cases in this area to assist in identifying Part II’s analysis of the factors courts take into consideration when assessing whether the apparent consent constitutes genuine consent.


In this case, the Supreme Court of Canada considered the meaning to be attributed to the apparent consent of a drug-addicted patient who had sex with her doctor in exchange for prescription drugs to which she was addicted. The plaintiff brought an action against the defendant for battery, negligence and breach of fiduciary duty. The six Justices who took part in the decision185 rendered three separate judgments. Although each decision does examine the patient’s consent and holds the doctor liable, each arrives at its conclusion through different means and through different views of the patient’s apparent consent.

Essentially, La Forest J., also writing for Gonthier J. and Cory J., examines this case under the tort of battery. His judgment finds the doctor liable because the patient’s consent was not genuine. McLachlin J., also

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185 There were originally seven Justices. Unfortunately, only six Justices rendered decisions as Mr. Justice Stevenson, the seventh, took no part in the judgment.
writing for L’Heureux-Dube J., holds the doctor liable for breach of fiduciary duty. Although it is not explicitly stated, McLachlin J.’s decision is built around the implicit notion that the patient’s consent was not meaningful. Sopinka, J. writing for himself, found the patient did consent but the doctor was liable for breach of contractual duty or negligence.

Each decision frames the facts as giving rise to a different issue - tort, contract and fiduciary duties. As a result, it is difficult to reconcile these three analyses. However, certain approaches towards consent are taken by the majority in this case. As the following examination of this case reveals, according to all the Justices, except Sopinka J., the facts disclose the patient’s consent to sex was not genuine. In addition, all the Justices find the consent must be examined in the context of the power relations between the parties. For all the Justices, except Sopinka J., the power relations between the parties in this case cannot be separated from the issue of consent.

**Facts**

In 1978, the patient was a, “modestly educated young woman in her late teens”. She began to experience severe headaches and pains in her jaw. No medical professional was able to diagnose the source of the problem. Despite prescribing various pain-killers, the pain persisted. More and more medication was prescribed. The patient’s sister, a drug addict, also gave her a prescription pain-killer called Fiorinal. In December 1978, a dentist finally diagnosed the cause of the problem: an abscessed tooth. The tooth was removed and the pain was relieved. However, the patient was left with a craving for pain-killers.

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The patient's sister gave her more Fiorinal and in 1981, after breaking her ankle, she found a doctor willing to prescribe Fiorinal. The doctor then retired. She then began to see Dr. Wynrib, a doctor in his 70's. He also prescribed her Fiorinal for her ankle. Later that year, when she again asked for a repeat on the prescription, he reviewed her chart. He said she could not be taking the drugs for so long without being addicted. He asked her if she was addicted and told her he would not prescribe it unless she admitted her addiction. The patient eventually admitted she was addicted; the doctor responded by saying if she was good to him he would be good to her, indicating to the upstairs of the office where he lived.

The patient stopped going to him; she got her drugs from other doctors and by buying them on the street. Eventually, her supply diminished. She was desperate. She returned to Dr. Wynrib in 1983 and gave in to his demands. He told her he would not give her the Fiorinal unless she complied with his sexual demands. The patient complied with these demands between 10 to 12 times up to 1985. At trial, the patient agreed that Dr. Wynrib did not use physical force with her. She also agreed that she "played" on the fact he liked her and that she knew he was lonely. Dr. Wynrib did not testify at trial.

At the time, she was also obtaining the drug from other sources. In 1985 the patient left her job and became depressed. She told Dr. Wynrib she needed help. He told her to quit using the drug. She said she could not. The patient was charged with the offence of "double doctoring" under the Narcotic Control Act and plead guilty in 1985. She went to drug rehabilitation on her own initiative and has not abused drugs since. At the time of the appeal, the patient continued to attend Narcotics Anonymous.
and continued to crave pain-killers. However, she had learned to live without them.

i) La Forest J., Gonthier J. and Cory J.

According to these members of the court, the issue in this case was the validity of the patient's consent. This decision concludes the doctor was liable for the tort of battery because the patient's consent was not genuine. Mr. Justice La Forest framed the central issue as follows: whether the defence of consent can be raised against the intentional tort of battery in this case. It is worth noting this view was endorsed, in the 1996 case *R. v. Audet*, by the majority of the Supreme Court of Canada. In that case the Court confirmed that the issue in *Norberg v. Wynrib* "revolved around the validity of consent given by a patient to sexual relationships".

To assess whether consent is genuine, the lower courts held the only factors to be considered were whether the consent was obtained by force or threat of force, whether the consent was given under the influence of drugs, or whether there was fraud or deceit as to the nature of the defendant's conduct. However, this approach to consent was held to be too limited.

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189 The majority in *R. v. Audet* consisted of La Forest, L'Heureux-Dube, Gonthier, Cory and McLachlin. The minority was made up by Sopinka and Major.
Analysis of Consent Requires Examining Power Relationships Between the Parties

The court adopts what may be seen as a purposive approach to consent by assessing the voluntariness of consent. This may be seen as a purposive approach to consent because the reason voluntariness is an issue is that it addresses the purpose of ensuring consent; the purpose of ensuring a party consents is to ensure that the conduct in question is the result of an act of volition. In adopting this approach, the court considers the presumptions regarding voluntariness which underlie the concept of consent:

"'A man cannot be said to be 'willing' unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with his will.' A 'feeling of constraint' so as to 'interfere with the freedom of a person's will' can arise in a number of situations not involving force, threats of force, fraud or incapacity. The concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will. *It is presumed that the individual has freedom to consent or not to consent. This presumption, however, is untenable in certain circumstances.* A position of relative weakness can, in some circumstances, interfere with the freedom of a person's will. *Our notion of consent must, therefore, be modified to appreciate the power relationships between the parties....* The doctrines of duress, undue influence and unconscionability have arisen to protect the vulnerable when they are in a relationship of unequal power. For reasons of public policy, the law will not always hold weaker parties to the bargains they make."[^192] [Emphasis added]

[^192]: *Ibid.*, at p. 457 f to 458-b. See Part II of this thesis - quære whether it is public policy that dictates that weaker parties ought not be held to these bargains. Rather, we ought to consider whether these agreements are not enforced due to a concern that the consent is not established to be meaningful and genuine. Consider whether *Norberg v. Wynrib* fails to explicate the distinction between genuine consent which is vitiated for public policy reasons and consent which is not genuine. See also Part II of this thesis which analyses the problems presented when the courts are faced with a party who may be seen to not possess free will. This raises the question: how should the courts deal with a person who may be seen to not possess free will when the law is based on the presumption of free will?
In this examination of consent, La Forest J. makes it clear that genuine consent must be shown to be voluntary\(^{193}\). To flesh out the meaning of voluntariness, the court refers to Professor George Klippert’s comment that the common thread of various forms of coercion is, “an illegitimate use of power or unlawful pressure which vitiates a person’s freedom of choice”. An act is said to be involuntary where there is a disparity in bargaining strength which induces one party to enter into an unconscionable transaction\(^{194}\). Thus, a consent is not genuine where it represents the involuntary conduct of the decision-maker.

The question, then, is how does an examination of voluntariness advance the inquiry into whether consent is genuine? And what constitutes indicia of involuntariness? In his judgment, it is clearly La Forest J.’s position that assessing the voluntariness of the consent does advance the analysis of consent because examining voluntariness triggers an analysis of the power relationship. And it is clearly his view that examining the power relations between the parties offers a crucial insight into whether the consent is genuine. Thus, the power relations inform the examination because, “An unconscionable transaction arises in contract law where there is an overwhelming imbalance in the power relationship between the parties”\(^{195}\).

La Forest J. appears to holds that fair power relations are an essential element of genuine consent. It is important to note that power relations are not significant when they merely disclose an advantage by one party; rather, the power relations are informative when they show an

\(^{194}\) Ibid., at p. 458 b to e
\(^{195}\) Ibid., at p. 458-f
"unfair advantage". As a result, the courts will not necessarily intervene when one party takes advantage of another, but rather when one party takes "undue advantage" of another.

In referring to Lord Denning in *Lloyds Bank Ltd. v. Bundy*, La Forest J. acknowledges that the power imbalance between the parties may be such that the consent is not legally upheld. The courts must be alert to the fact that an invalid consent may occur where a party apparently knowingly consents to certain conduct:

"I have also avoided any reference to the will of the one being ‘dominated’ or ‘overcome’ by the other. One who is in extreme need may knowingly consent to the most improvident bargain, solely to relieve the straits in which he finds himself."

It is significant that La Forest’s discussion of voluntariness of consent evolves into a discussion of consents which are vitiated for public policy reasons. However, in the end, this judgment does not determine why the consent of an overborne party is legally invalid: because it is involuntary or because it is vitiated for public policy reasons.

There are two perspectives as to the reasons that an apparent consent may be legally invalid. First, as La Forest J. points out, “It may be argued that an unconscionable transaction does not, in fact, vitiate consent: the weaker party retains the power to give real consent but the law nevertheless provides relief on the basis of social policy.” Second, the

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199 Ibid., at p. 460
consent may be legally invalid if it reflects an involuntary action. However, La Forest J. merges these concepts when he writes:

"But whichever way one approaches the problem, the result is the same: on grounds of public policy, the legal effectiveness of consent of certain types of contracts will be restricted or negated. In the same way, in certain situations, principles of public policy will negate the legal effectiveness of consent in the context of sexual assault. In particular, in certain circumstances, consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely."200

To support the argument that consent analysis in the civil context ought to consider power relations, La Forest J. refers to s. 265 of the Criminal Code. This provision relates to assault and sexual assault. Section 265(3)(d) states, "No consent is obtained where the complainant submits or does not resist by reason of the exercise of authority"201. The principles underlying this statutory provision are relevant to consent analysis, he asserts, because the offence was derived from the common law of assault and battery. This provision, "is an expression of the fact that in certain circumstances, considerations of public policy will negate the legal validity of consent as a defence to a charge of assault"202.

La Forest J. further affirms the view that understanding power relations is a crucial step to understanding whether consent is genuine when he endorses the Trainor J.'s comments in Lyth v. Dagg 203. In that case,

200 Ibid., at p. 460-c. See Part II - consider whether the public policy grounds for vitiating consent are truly distinct from the voluntariness grounds. Quaere the reason that consent is vitiated for public policy grounds - could it be that consent is vitiated under public policy grounds because the consent is understood to be involuntary. As this quote shows, there does not appear to be a clear analytical distinction made between the two.
201 Criminal Code, R.S.C. 1985, c. C-46
Trainor J. was required to assess whether the apparent consent of a 15 year old student to have sex with his teacher was genuine. He held the court must carefully examine the relationship between the parties to appreciate whether one party was “dominated and influenced” by the other and to see, “whether one of the parties had such a greater amount of power or control over the other as to be in a position to force compliance”. Although there is no explicit mention of this, it is clear the issue is not whether one party influenced the other, but rather whether one party unfairly influenced the other.

The phenomenon whereby one party dominates and influences the other may occur in many contexts; this decision affirms Phyllis Coleman’s assessment of such relationships as “power dependency” relationships. In such a relationship, apparent consent to have sex is inherently suspect because of the underlying professional or personal association which creates a significant power imbalance. This imbalance is an environment in which exploitation occurs when the powerful person abuses the position of authority by inducing the dependent person to have sex, and “while the existence of one of these special relationships is not necessarily determinative of an overwhelming power imbalance, it will at least in the ordinary case, be required.

205 Op. Cit., Norberg v. Wynrib, Footnote 186 at p. 463-h. This analysis is limited in the sense that it does not offer assistance to the trier of fact to distinguish between a power imbalance which renders consent unenforceable and one in which consent is genuine. Clearly, not all power imbalances create a situation in which apparent consent is not genuine.
Test For Assessing Whether Consent To Sexual Assault Constitutes Legally Effective Consent

Borrowing from the test for proof of an unconscionable transaction, La Forest J. develops a two-step process for assessing whether or not consent to a sexual assault is legally effective\textsuperscript{207}. First, proof is required to show that there is an inequality between the parties. This will ordinarily occur within the context of a special power dependency relationship\textsuperscript{208}. Second, it must be established that there has been exploitation. La Forest J. suggests that referring to community standards may be of assistance and that a consideration of the type of relationship may be a strong indication of exploitation.

In applying the above test to these facts, La Forest J.'s judgment concludes the circumstances of this case show the patient's consent was not genuine\textsuperscript{209}. As a result, the defence of consent cannot succeed. He finds, "the unequal power between the parties and the exploitative nature of the relationship removed the possibility of the appellant's providing meaningful consent to the sexual contact"\textsuperscript{210}. First, La Forest J. decides there was an inequality between the parties. The patient was held to be vulnerable due to her limited education, her drug addition and the prospect of a painful withdrawal. The doctor, on the other hand, was a professional

\textsuperscript{207} Ibid., at p. 464-b. This problem, namely looking for a test to assess whether the consent to a sexual assault is legally effective, seems to be rather circular. Presumably, if there was consent to a sexual act, it would not constitute an assault and thus would not constitute a sexual assault. It seems it would be more logical if the question was framed as "How to assess whether consent to sex is legally effective". Although the decision is silent as to who bears the onus, it would seem that the party seeking to show that the apparent consent is ineffective bears the onus; thus the Crown or the plaintiff's counsel would bear the onus.

\textsuperscript{208} Examples of power dependency relationships may be found at Norberg v. Wynrib, Op. Cit., Footnote 182 at p. 463-g

\textsuperscript{209} Op. Cit., Norberg v. Wynrib, Footnote 182 at p. 467-c

\textsuperscript{210} Ibid., at p. 468-c
who was aware of her vulnerabilities and knew she could not quit without treatment.

Second, the doctor was found to have exploited the situation. He was aware of the patient’s addiction, he knew there were treatments available for the addiction and he knew the patient would be motivated by her cravings for the drugs. Yet, “instead of fulfilling his professional responsibility to treat the appellant, he used his power and expertise to his own advantage and to her detriment.” The doctor abused his power over her and exploited his knowledge of her weaknesses all to pursue his personal interests. In addition, La Forest J. refers to the fact that, “a sex for drugs arrangement initiated by a doctor with his drug addict patient is a relationship which is divergent from what the community would consider acceptable”.

ii) McLachlin J. and L’Heureux-Dube J.

McLachlin J.’s judgment finds the principles of contract and tort, as relied upon by La Forest J. and Sopinka J., are insufficient to deal with this case because they, “view that relationship through lenses which distort more than they bring into focus.” Rather, the true relationship and the wrongdoing are encompassed in their totality by applying the principles applicable to fiduciary duty and a breach of such a duty.

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211 The matter of motivation raises the obvious question: is motivation assumed to be voluntary? What about a person who may be seen to be motivated to act in an involuntary manner due to duress or unfair power imbalances? Does the law not acknowledge certain motivations as unfair and thus unenforceable? Under what grounds would the law be prepared to discount a person’s motivation? See the Chapter 3 on for a discussion of this issue.


213 Ibid., at p. 484 f to g
Difference Between Fiduciary Relationship and a Contractual Relationship: Trust

For McLachlin J., the fiduciary nature of the relationship is the most fundamental fact which shapes the context of this case. To highlight why this is so pivotal, McLachlin J. pinpoints the heart of the difference between a contractual relationship and a fiduciary relationship: trust. Whereas self-interest is at the core of a contractual relationship, trust is at the core of a fiduciary relationship:

"The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest...The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other." [Emphasis added]

Although trust characterizes the fiduciary relationship, the particular obligations of the fiduciary in each case are dictated by the particular relationship. For instance, "a relationship may properly be described as 'fiduciary' for some purposes but not for others." To determine whether

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214 Ibid. It is worth noting that only three of the six Justices, McLachlin, J., L'Heureux-Dube J., and Sopinka J., affirmatively held this case represented a fiduciary relationship. La Forest J.'s judgment, concurred in by Gonthier J. and Cory J., is silent as to whether the patient's relationship with the doctor was fiduciary (see p. 459-d). For Sopinka J., although he finds the relationship between the doctor and the patient was fiduciary, this is not a determinative fact for him. Sopinka J. decides the doctor did not exercise such control or authority over the patient that the patient's submission could not be considered to be genuine (see p. 476 e to h). Although La Forest J. does not refer to this as a fiduciary relationship, it is clear that his decision is based on the same understanding that the power imbalance and the nature of the relationship is a most central fact to this case.


216 Ibid., at p. 487-b, 488-c

217 Ibid., at p. 487 b to c

218 Ibid., at p. 488-c, citing with approval from the reasons of La Forest J. in McInerney v. MacDonald at
the patient and the doctor in this case had a fiduciary relationship for purposes relevant to this case, McLachlin J. applies the test, approved by La Forest J. and Sopinka J., for fiduciary relationships from *Lac Minerals Ltd. v. International Corona Resources Ltd.*<sup>219</sup>.

**Test To Determine Whether A Relationship Constitutes A Fiduciary Relationship**

The following characteristics are attributed to a fiduciary relationship:

1) The fiduciary has scope for the exercise of some discretion or power;

2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests;

3) The beneficiary is pecuniarily vulnerable or at the mercy of the fiduciary holding the discretion or power<sup>220</sup>.

It is not appropriate to classify certain relationships, such as doctor-patient, as always constituting fiduciary relationships. Rather, each case must be factually examined to determine whether it represents a fiduciary relationship in that context, having reference to the degree of the power imbalance and the patient’s vulnerability in the relationship. McLachlin J.’s decision holds that, on the facts of this case, this doctor-patient relationship was a fiduciary one with respect to the issues in question on this appeal.

Regarding the first characteristic, the doctor was in a position of power over the patient, as he had the discretion to exercise power over her. By accepting the patient, the doctor pledged himself to act in her best

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interests and to not permit any conflict between his interests and his duty to act in her interests\textsuperscript{221}.

Dr. Wynrib was also found to have the power, set out in the second ground, to unilaterally exercise his discretion so as to affect the patient's legal, vital non-legal or practical interests\textsuperscript{222}. The interests at stake here relate to the duties universally recognized as essential to the physician-patient relationship\textsuperscript{223}. Although this case was not held to concern a traditional legal interest, the societal and personal interests in this case are of the highest importance\textsuperscript{224}. The societal interest in this case relates to the fact, "Society has an abiding interest in ensuring that the power entrusted in physicians by us, both collectively and individually, not be used in corrupt ways...the plaintiff, as indeed does every one of us when we put ourselves in the hands of a physician, has a striking personal interest in obtaining professional medical care free of exploitation for the physician’s private purposes".

Finally, McLachlin J.'s judgment held that the patient in this case was pecuniarily vulnerable or at the mercy of the fiduciary, thus satisfying all requirements to render this a fiduciary relationship\textsuperscript{225}. To ascertain whether this condition was met, McLachlin J. examines the \textit{structure} and \textit{nature} of the relationship\textsuperscript{226}. The emotional and physical vulnerability of the patient to the doctor is noted. This decision also considers the following points as factors which induce a heightened degree of vulnerability in this case: the patient has less expertise than the doctor, the " 'submission' which

\textsuperscript{221} Id., at p. 489 a to c
\textsuperscript{222} Id., p. 488-h and 489-h
\textsuperscript{223} Id., at p. 490-e
\textsuperscript{224} Id., at p. 490-c
\textsuperscript{225} Id., at p. 491-g
\textsuperscript{226} Id., at p. 491-c
is essential to the relationship” in question, the patient is in a position of comparative powerlessness “by reason of the nature of the illness itself”, and the fact society encourages us to trust doctors.

In addition, McLachlin J. responds to the issue of the patient’s conduct by finding the patient did nothing wrong in the context of the relationship: “She was not a sinner, but a sick person, suffering from an addiction which proved to be uncontrollable in the absence of a professional drug rehabilitation program”227. Regarding the question of whether the patient comes to the court with “clean hands”, this decision holds: “It is difficult not to see the attempt to bar Ms. Norberg from obtaining redress for the wrong she has suffered through the application of the clean hands maxim as anything other than ‘blaming the victim’ ”.

On the other hand, the doctor, “chose to use his power to keep her in her addicted state and to use her for his own sexual purposes”228. As a result, he did not properly discharge the trust relationship he assumed. Instead, the doctor,

“took advantage of her sickness to obtain sexual favors in exchange for the drugs she craved. While there is no doubt that he maintained control of the relationship following his realization, he did so not by retaining a professional attitude and treating Ms. Norberg as the sufferer of a serious illness who needed help, but by exploiting his knowledge, position and the power they gave him over her to coerce her to satisfy his sexual desires.” [Emphasis added]229

Although the patient may be seen by some as participating in the sex for drugs scheme, the patient’s conduct, namely going to the doctor to get drugs in exchange for sex, was symptomatic of her illness. However, the

227 Ibid., at p. 496-c
228 Ibid., at p. 497-b
229 Ibid., at p. 496 g to
doctor's exploitation of her dependency for his own ends constituted a breach of his fiduciary duty\textsuperscript{230}. It is the doctor who assumes responsibility for the welfare of the person in his care for matters relating to that trust. As a result, it would be inappropriate to allow the doctor to depend upon the actions of the patient to defend his own actions because, “the fiduciary cannot rely on the other party's weaknesses or infirmity as a defence to an action grounded on his failure to discharge his fiduciary duty properly”\textsuperscript{231}.

Finally, McLachlin J. defends her reliance on fiduciary law, as opposed to contract or tort law, to resolve this problem. She asserts neither contract nor tort law can fully comprehend the wrong in this case. Assessing fiduciary obligations, on the other hand, adds to the understanding of this case because the law of fiduciary duties factors in the reality of the situation, namely that the parties are not deemed to be governed by mutual self-interest. Where one party entrusts another to exercise power over her exclusively in her best interest that is significantly distinct from a situation where the parties are self-interested. However, fiduciary law comprehends this situation as it deals with the wrong of a physician who has undertaken to “look after” his patient but who, instead, abuses his position to obtain sexual favors from a patient\textsuperscript{232}.

**Scope of Consent**

As we saw with search and seizure law, the party providing consent was deemed to provide it for a specific purpose. This is equally true when

\begin{footnotes}
\item[230] Ibid., at p. 498-c
\item[231] Ibid., at p. 498-f
\item[232] Ibid., at p. 499-h, 501-c, 501-e
\end{footnotes}
the issue of consent arises in sexual assault cases; once again, consent has a definitive scope. In the context of this case, McLachlin J.'s decision holds that when a patient consents to a doctor to "look after" her, that consent is for the purpose of acting in the patient's best interest. Thus, the scope of the consent is limited by the boundaries of that consent in the particular context. The legitimacy of the doctor's conduct, then, relates to whether the doctor's actions are in the best interest of the patient. As a result, the scope of the consent is conditional upon the limits inherent to the context:

"It is as though the fiduciary has taken the power which rightfully belongs to the beneficiary on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary. Thus, the trustee of an estate takes the financial power that would normally reside with the beneficiaries and must exercise those powers in their stead and for their exclusive benefit. Similarly, a physician takes power which a patient normally has over the body, and which she cedes to him for purposes of treatment. The physician is pledged by the nature of his calling to use the power the patient cedes to him exclusively for her benefit. If he breaks that pledge, he is liable." 233[Emphasis added]

It appears McLachlin J. finds that the consent to treatment carries with it boundaries which limit the validity of the consent to conduct which is in the best interests of the patient.

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233 Ibid., at p. 501-g. See also Part II for a consideration of how the law deals with people who act in a manner that may be seen to be contrary to their best interests. For example, in this case, one may seek to rebut McLachlin J.'s position by suggesting that the purpose of the patient's consent in this case was NOT for the doctor to "look after" her best interests but, rather, that she consented to the doctor prolonging her addiction. One may look at these facts and argue that the patient used her autonomy to choose to continue with her addiction and that she was using the doctor, not as a doctor, but as a source for drugs - a drug dealer. It appears that McLachlin J. does not even entertain the use made of the doctor by the patient, but rather finds as a fact that one may only consent to put one's care in the hands of a party who will act in her best interests. This raises the question, how should the law deal with a person who puts her trust and power in the hands of a person whom she knows will not act in her best interests? For this reason, it is problematic that McLachlin J.'s decision does not explicitly analyze whether the patient's consent was genuine. Also, quere whether the true issue here is the patient's consent. Perhaps the unspoken issue for the court is whether the doctor will be legally permitted to exercise his authority for this purpose, regardless of consent.
Whether The Patient's Consent Was Genuine

Although McLachlin does not explicitly analyze the issue of genuine consent, her judgment appears to be firmly rooted in the assumption that the patient's actions did not represent true, genuine consent to sexual activity. McLachlin J. clearly sees the patient's participation as a function of and symptomatic of her addiction\textsuperscript{234}.

As a result of this underlying theme, it seems contrary, indeed, when McLachlin J. characterizes the patient's sexual activity as, "consensual"\textsuperscript{235}. Tort and contract law are inadequate to deal with the harm in this case, she asserts, because, "The law has never recognized consensual sexual relations as capable of giving rise to an obligation in tort or contract"\textsuperscript{236} [Emphasis added]. Since McLachlin J. does not acknowledge or analyze the distinction between consent which is genuine and consent which is not genuine, it is somewhat mystifying when she simply refers to the patient's consent as "consensual".

Because McLachlin J.'s entire judgment is based on the analysis of power relations between the parties and on the fact the patient's conduct was motivated by her illness and her craving for drugs, one may question whether McLachlin J. intended to convey the idea that the patient's consent was genuine. In light of the whole of her decision, it appears that she, too, is not persuaded that the consent was genuine. The argument that McLachlin J. does not accept the consent as genuine is buttressed by her comments in her damages assessment, where she heavily implies the sex

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\item \textsuperscript{234} \textit{Op. Cit., Norberg v. Wynrib,} Footnote 182 at p. 496-d
\item \textsuperscript{235} \textit{Ibid.} at p. 500-a
\item \textsuperscript{236} \textit{Ibid.}
\end{itemize}
\end{footnotesize}
was non-consensual. This decision characterizes the apparent consent to sex in the following light:

"Ms Norberg suffered repeated sexual abuse at the hands of Dr. Wynrib. As the trial judge found, she did not want to have sexual relations with Dr. Wynrib. She submitted only because it was the only way to get the drug she desperately craved, and the deprivation of which plunged her into what was described...as the "extremely unpleasant experience" of withdrawal...The evidence is clear that Ms. Norberg found the sexual contact degrading and dehumanizing. She avoided it for as long as she could, leaving Dr. Wynrib's care when he first suggested it. When desperation drove her back, she submitted only when her addiction rendered it absolutely necessary...The repeated sexual encounters caused her humiliation and robbed her of her dignity...While the sexual encounters lack the violence of rape, the pain may be just as great because of the insidious psychological overtones. " [Emphasis added] 237

The interpretation that McLachlin J. sees the consent as not genuine is also confirmed by her characterization of the harm in this case as including, not only the doctor's prolongation of the patient's addiction, but also the doctor's sexual violation of the patient 238.

Thus, McLachlin J.'s judgment distinguishes itself from those of La Forest J. and Sopinka J. as it incorporates the analysis of the power relations into the framework of fiduciary duties. It views the doctor's conduct as inseparable from his fiduciary obligations to the patient 239.

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237 Ibid., at p. 504-d
238 Ibid., at p. 503-f
239 Consider whether an unspoken issue in this appeal is how the law ought to deal with the patient's decision to act in a self-destructive manner. Perhaps underlying Sopinka J.'s decision is the idea that the patient made a choice to use the doctor, not as a doctor to whom she referred for legitimate treatment but as a drug dealer. On the other hand, La Forest J. and McLachlin J.'s reasons do not entertain the possibility that a patient could, in law, legally turn to the doctor for anything other than treatment in the patient's best interest. Their reasons are supported by the underlying idea that the patient's true wishes were to get better. This provokes the obvious question: how should the law deal with the person whose apparent true interest is to self-destruct? Perhaps there is an unspoken presumption in law that a person cannot have a genuine true interest in self-destructing.
However, this decision shares with La Forest J.'s judgment the focus on the power relations and the view of the impact of the power imbalance.

iii) Sopinka J.

According to Mr. Justice Sopinka, the issue in this case is not whether the patient’s consent was genuine but, rather, whether the doctor breached his duty to treat the patient\textsuperscript{240}. Sopinka J. agrees consent must be genuine, and that, “in assessing the reality of consent and the existence of the impact of any factors that tend to negate true consent, it is important to take a contextually sensitive approach”\textsuperscript{241}. However, the factors which demonstrate invalid consent are limited to force, duress, fraud or deceit as to the nature of the conduct in question or if it was given under the influence of drugs\textsuperscript{242}.

The power relations between the parties alone is not a factor which may show that consent is not genuine. For Sopinka, J., power relations between the parties and any relationship that involves a high degree of trust merely constitute relationships that, “may require the trier of fact to be particularly careful in assessing the reality of consent”\textsuperscript{243}.

Sopinka J. finds the facts of this case do not disclose lack of genuine consent. The drug addiction of the patient is irrelevant to consent in this case because the patient was not under the influence of the drug when the sexual activity took place\textsuperscript{244}. With respect to the special doctor-patient

\textsuperscript{241} \textit{Ibid.}, at p. 474-g
\textsuperscript{242} \textit{Ibid.}, at p. 474-f
\textsuperscript{243} \textit{Ibid.}, at p. 475-c. Unfortunately, Sopinka J. does not explain why power relations are excluded from the factors which may demonstrate invalid consent, and how this is different from the trier of fact being “particularly careful in assessing the reality of consent”.
\textsuperscript{244} \textit{Ibid.}, at p. 476-d
context in which the sex occurred, this alone is not determinative of lack of consent.

Although the trier of fact should be alert to the issue of the special nature of the relationship, "the beneficiary of a fiduciary relationship can still consent to a transaction with the fiduciary but the court will subject such a consent to special scrutiny"\textsuperscript{245}. However, on the facts of this case, Sopinka, J. decides, "while it is clear that the sexual contact was contrary to the appellant's wishes, in my view it cannot be said that it was without her consent" [Emphasis added]\textsuperscript{246}.

Although Sopinka J. agrees with La Forest that there was a special relationship, and Sopinka J. goes so far as to find it a fiduciary relationship, Sopinka J. decides that the doctor did not exploit or exercise authority over the patient. The doctor was held to not have exploited the patient because the patient began and continued to participate in the sexual activity to obtain drugs and played on the doctor's "loneliness" in order to continue to get drugs.

In analyzing the doctor's liability, Sopinka J. finds:

"While the appellant consented to the sexual encounters, she did not consent to the breach of duty that resulted in the continuation of her addiction and the sexual encounters. The fact the patient acquiesces or agrees to a form of treatment does not absolve a physician from his or her duty if the treatment is not in accordance with medical standards."\textsuperscript{247} [Emphasis added]

\textsuperscript{245} \textit{Ibid.}, at p. 476-f
\textsuperscript{246} \textit{Ibid.}, at p. 476-h. This give rise to the question: is there a distinction between doing something one wishes to do and consenting to do something. For example, I do go to the dentist, and I consent to go, but it could not be said that I wish to go. If I could choose how I wish to spend my time, I would not wish to go to the dentist. See Chapter 3 on Duress for a discussion of this. It is also worth noting that Sopinka J. rejects La Forest's comparison in this case to the doctrine of unconscionability.
\textsuperscript{247} \textit{Op. Cit.}, Norberg \textit{v. Wynrib}, Footnote 182 at p. 483-b
Thus, for Sopinka J., there is a theoretical and practical distinction between the consent to the activity and the consent to the treatment from the doctor. Although she consented to the sexual acts in question, Sopinka J. found she did not consent to the doctor engaging in treatment that is not standard practice\textsuperscript{248}.

**Conclusion**

Despite the various approaches to the problem in this case, this decision clearly establishes consent to sexual relations must be shown to be valid before it will be legally recognized. In addition, all the Justices, except Sopinka J., found that the case revolved around the validity of the patient’s consent and that the patient’s consent in this case was not valid due to the power relations inherent in this circumstances. As a result, this case stands for the proposition that it is an essential element of genuine consent that, where there is a power imbalance, the power relations between the parties must not operate unfairly so as to exploit one party by impairing free choice\textsuperscript{249}.

\textsuperscript{248} Consider whether these are really theoretically distinct. Perhaps it is not logically possible for the patient to genuinely consent to engage in a sex for drugs scheme and at the same time not consent to medical practice that deviates from the standard. Conversely, it is not logically possible that the patient’s consent to the sex was genuine but the consent to the illegitimate treatment (namely the continuation of her addiction by the doctor) was not. The arrangement was for sex in exchange for drugs. The apparent consent was to the arrangement and the arrangement included both the sex and the drugs. The issue appears to be whether the apparent consent was genuine, and it is questioned how the validity of the consent may be severed and be genuine for the sex and not genuine for the treatment.

\textsuperscript{249} For example, Noberg v. Wynrib clearly overrules a decision such as M. v. K. (1987), 35 D.L.R. (4th) 222 (B.C.S.C.). The issue in that civil assault case was whether the plaintiff genuinely consented to have sex with her foster father over a two year period when she was aged 15 to 17 at the time. The court held that the plaintiff consented to the sexual contact. In making this assessment, the court found the relevant factors included the age of the parties, the relationship between the parties, the circumstances in which it occurred and the nature of the conduct. However, the court did not engage an analysis of the power relations between the parties. Despite the findings of fact that she did not want to sleep with him and the fact she felt compelled to sleep with him, the court held she was not coerced. Although she slept with him because she wanted his attention, and although the court characterized the activity as, "sexual abuse", they found she was old enough to understand the nature and consequences of the sexual activity in which she was involved. It is suggested that Noberg v. Wynrib changed the law because since Noberg v. Wynrib courts are required to ask whether the power imbalance was such that it robbed the plaintiff of her ability to choose freely.
R. v. Ryan, 1993, B.C.C.A.250

This case represents an interesting example of the courts struggling to identify the boundaries surrounding genuine consent. In this case, the court had to decide whether the complainant’s apparent consent to engage in repeated sexual activity with her psychiatrist constituted genuine consent. The majority held that the complainant’s apparent consent to her psychiatrist’s initial sexual advances was not genuine, at least not at the beginning. As a result, the conviction was upheld.

Although the decision does not enter a detailed analysis of the consent issue, the logic applied is unique because the court leaves open the possibility the complainant may have gradually become involved in a consenting sexual relationship after the non-consensual sex. Despite the finding that the initial sexual activity was not done with genuine consent, the court left open the interpretation that the complainant’s later sexual activity with the psychiatrist may have represented genuine consent. Thus, the court appears to have held that a true, genuine consent may spring from the foundations of a consent which is not genuine251.

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251 This case may have implications in the area of search and seizure law. Quaere whether this case would leave it open to the Crown to argue that a series of illegal, warrantless alleged “consent” searches may become legal if the accused gets to know the police officers over the time of the searches and begins to believe that he consents to the searches. Quaere whether a genuine consent may truly evolve out of the bedrock of a flawed consent.
**Facts**

The accused was a 32 year old senior resident psychiatrist at a hospital at the University of British Columbia. The complainant was a 17 year old recent high school graduate. She was admitted to the psychiatric ward of the hospital for depression. She was diagnosed by another doctor as being depressed, thinking in an unmatured, schizoid, suspicious manner and being a suspicious young girl with poor self-esteem.

The complainant became the accused’s patient. He described the patient in a clinical note as probably being schizophrenic. The patient attempted suicide several times during the ten months she was the accused’s patient. Her problems related to two aspects of her neediness: her sense that she was crazy and her sexual and social anxiety. Her anxiety, in part, related to a deep upset at her unpopularity with boys.

About one or two months after the accused became the patient’s doctor, he initiated sexual contact with her on a couch in his office. It included a slowly escalating pattern of sexual advances, from touching to fondling to simulated sexual intercourse including ejaculation. The patient was usually the passive recipient of the accused’s attention. She was drawn into the sexual activity as it progressed over time and agreed that she sometimes became aroused.

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253 *Ibid.*, at p. 518-h
254 *Ibid.*, at p. 519-a
255 *Ibid.*, at p. 523 a to b
256 *Ibid.*, at p. 519
Analysis of Consent

At trial, the judge held the patient did not consent to the activity. The accused was convicted of indecent assault. Although the patient had fired other doctors, the trial judge accepted the patient’s evidence that she “couldn’t not” continue to see the accused as it was part of her self-hatred. The judge found the patient’s response to the accused’s conduct amounted to silence, passive submission and minimal cooperation: “To construe silence, passive submission and, ultimately, minimal co-operation as consent in these circumstances strikes me as unrealistic.”\(^{257}\)

At the Court of Appeal, the issue again was whether the Crown had proved no consent. In upholding the conviction, the court relied upon the fact there was, “no evidence of actual consent by the complainant to the appellant’s sexual advances during the earlier appointments”\(^{258}\)[Emphasis added]. Her evidence was that she did not consent the first time it occurred and that she held her body rigid and hoped he would stop\(^{259}\). As a result, the court held there was, “an abundance of evidence upon which the learned trial judge could be satisfied beyond a reasonable doubt that the complainant did not consent to the sexual advances of the appellant, at least in the early appointments”\(^{260}\).

Despite the fact the patient did not consent to the sexual activity during the earlier appointments, the court declined to make a finding regarding the sexual activity during the later appointments. Although it did not serve to exonerate the accused, this is a legally significant decision. The case held that, from the appellant’s point of view, “the most that can be said

\(^{257}\) Ibid., at p. 523 c to d
\(^{258}\) Ibid., at p. 526-g
\(^{259}\) Ibid., at p. 526-e
\(^{260}\) Ibid., at p. 527-b
is that there is some evidence that the complainant may have consented to some of the sexual advances made by the appellant in some of the later appointments”261. In light of the comment there was no evidence of *actual* consent to the earlier sexual activity262, this finding appears to suggest the court was undecided as to whether there was evidence of *actual* consent by the patient during the later appointments. Unfortunately, there is no discussion of what facts could possibly establish that a series of non-consensual sexual encounters, in this context, could evolve into a series of consensual sexual encounters.

With respect to the issue of the power imbalance in the relationship, the court does implicitly take into consideration the power difference between the two parties. At the Court of Appeal, the accused’s counsel urged the court to draw an analogy between the tentative first touchings of a dating relationship and the tentative first touchings between the patient and the accused psychiatrist. The court responded to this suggestion, however, by refusing to accept this analogy. This suggestion was rejected precisely due to the power difference and the function of a patient doctor relationship:

“The psychiatrist-patient relationship should be, by definition, non-sexual. There is no place for tentative, or other, sexual touchings in such a relationship. If psychiatrists make sexual advances to patients then they can expect their actions to be subjected to careful scrutiny, whether in professional, civil, or criminal proceedings against them.”263

Although the Court of Appeal found there was, “an abundance of evidence upon which the learned trial judge could be satisfied

261 Ibid., at p. 526-f
262 Ibid.
263 Ibid., at p. 527-a
beyond a reasonable doubt that the complainant did not consent to the sexual advances of the appellant, at least in the early appointments"264, is it unclear what factors led them to have a doubt about the later appointments and it is unclear how the submission may have turned into a meaningful consent, considering this power dynamic. Considering the finding that there is no place for any sexual touchings in a psychiatrist-patient relationship265, it is also unclear how the sexual activity in this case may have constituted genuine, meaningful consent266.

**R. v. Audet 267, S.C.C., 1996**

This case deals with the offence of sexual exploitation of a young person under s.153 of the *Criminal Code*. The issue was the meaning and scope of the terms “position of authority” and “position of trust”. The majority clarifies the essential elements of the offence of sexual exploitation, declares that teachers are subject to an evidentiary onus and establishes an analytical framework from which triers of fact must assess the power relationships between the parties.

The Court rendered 2 judgments and split along lines similar to those set out in *Norberg v. Wynrib*. The majority decision is written by La

264 Ibid.
265 Ibid.
266 This case also raises the difficult issue of the meaning of “knowledge of the context in which the consent occurred”. The Court of Appeal decision cites from portions of the patient’s trial transcript where she explains her feelings at the time. She felt the sexual activity was her fault. She participated in the sex at the time because she thought he cared for her and did not know it was non-consensual at the time. It happened because she liked the attention that she got from him and she liked being acknowledged by him and she was confused. She believed he could provide her with what she needed. See *R. v. Ryan* at p. 542-546. The comment that she thought he cared for her raises the question: if this had not been a patient-psychiatrist relationship, what impact would the complainant’s belief that he cared for her have on the validity of consent? How much knowledge must a person have about the context in which she provides consent to establish genuine consent?
Forest J., concurred in by L’Heureux-Dube J., Gonthier J., Cory J. and McLachlin J.; the dissenting decision is written by Major J., concurred in by Sopinka J..

Although this case examines an offence to which consent is not a defence, the analysis behind the majority decision is informative on issues which are relevant to assessing genuine consent. *R. v. Audet* provides a window into the court’s approach to analyzing factors which affect consent. This case highlights the impact of power dependency relationships on consent analysis and refers to other sexual offence provisions and clarifies the purposes of those sections.

In addition, the analyses of the meaning of a position of authority or trust are relevant to other provisions which refer to this element, namely s.265(3)(d) which states consent is no defence to assault or sexual assault where the consent is obtained by reason of the exercise of authority and s.273.1(2)(c) which states consent is no defence to sexual assault where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority. Thus, the analysis of the position of trust or authority may be helpful to future assessments in cases where consent is a defence.

**Facts**

The accused was a 22 year old physical education teacher at a public school. During the summer break from school, the accused went to a club one night with a friend. He encountered the complainant. She was with two females in their 20’s; they were her cousins. She had just turned 14 years old 10 days before the incident.

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The accused had taught the student the previous school year when she had been in grade 8. Sixteen days before the incident, the accused had been informed that his contract had been renewed for the next year. He would be teaching to grades 7, 8 and 9 at the student's school. She was going into grade 9.

The student and her cousins spent the evening with the accused and his friend. She drank a few beers offered to her by her cousins. At the accused's friend's suggestion, they all went to a cottage after leaving the club. The accused went to one of the bedrooms, complaining of a headache. There were two beds in the room. Shortly thereafter, the complainant entered the same room. She laid down on the same bed with the accused. She fell asleep.

During the night, they both woke up. The accused initiated sexually touching the student. They began to engage in oral sex. She became increasingly uncomfortable and asked him to stop. He did so immediately. The accused then asked the student to say nothing of the incident and he told her they may see each other before the end of the summer.

Majority decision - La Forest J., L’Heureux-Dube, Gonthier, Cory and McLachlin JJ.

The Essential Elements of Sexual Exploitation

The majority decision begins by clarifying the essential elements of the offence of sexual exploitation. The Court embarks upon a purposive analysis and assesses the means chosen by Parliament to meet the objective pursued by the offence of sexual exploitation\(^{269}\). The judgment concludes that, "while the purpose of the provision and the objective being pursued

\(^{269}\) *Ibid.* at p. 490-e
are relevant in interpreting s.153(1), great care must be taken to distinguish them from the means chosen by Parliament to achieve this purpose and meet this objective"\textsuperscript{270}.

When considering the essential elements of consent, the Court refers to the fact Canadian law has always recognized the relative positions of the parties as being relevant to the validity of consent\textsuperscript{271}. Power analyses are significant to consent analyses because, “The common law has long recognized that exploitation by one person of another person’s vulnerability towards him or her can have an impact on the validity of consent”\textsuperscript{272}.

In addition to the common law, Parliament passed the statutory provisions in ss. 265(3) and 273.1 of the Criminal Code to reinforce this long recognized common law rule in the area of sexual assault offences. As a result, ss. 265(3) and 273.1 of the Code explicitly set out the common law rule that the exercise of authority and the abuse of a position of trust, power or authority will vitiate consent in the context of regular sexual assault offences\textsuperscript{273}.

Regarding the objective of s.153 of the Code, the Court found, “Clearly, Parliament wanted to afford greater protection to young persons.”\textsuperscript{274} The logical inference here is that Parliament wanted to afford greater protection than that afforded by regular sexual assault offences. With this objective in mind, Parliament, “chose harsher means by

\begin{itemize}
\item \textsuperscript{270} \textit{ibid.}, at p. 491-f
\item \textsuperscript{271} \textit{ibid.}, at p. 493-a
\item \textsuperscript{272} \textit{ibid.}, at p. 493-a
\item \textsuperscript{273} \textit{ibid.}, at p. 493-h to 494-a. Regular sexual assault offences are s.271 (Sexual Assault), 272 (Sexual Assault with a Weapon), 273 (Aggravated Sexual Assault) of the Criminal Code
\item \textsuperscript{274} \textit{ibid.}, at p. 494-e, Emphasis in the original.
\end{itemize}
criminalizing the activity itself, *regardless of whether it was consensual*\(^{275}\). Because the offence occurs when the adult intentionally engages in sexual activity, regardless of whether the young person consented, the burden is placed on the adult in the relationship to decline sexual activity with a young person\(^{276}\).

After considering the means chosen to achieve the objective in this offence, La Forest J. finds that the essential elements of sexual exploitation are as follows: the Crown must prove beyond a reasonable doubt that, 1) the complainant is a young person within the meaning of s.153(2) *Code*, 2) the accused engaged in one of the prohibited acts set out in s.153(1) and 3) the accused was in a position of trust or authority towards the young person or the young person was in a relationship of dependency with the accused at the time in question\(^{277}\). Because there are other criminal offences which address actual exploitation of the position, it is not necessary to show that the accused exploited his or her position to prove an offence under s.153\(^{278}\).

**Analytical Framework To Be Used To Examine Power Relationships**

Although consent is not a defence to a sexual exploitation charge, this case is relevant to general consent analyses because it considers the general meaning and scope of the terms "position of authority" and "position of trust". While the meaning of these terms is obviously relevant to the offence of sexual exploitation, the meaning of these terms and the approach

\(^{275}\) *Ibid.*, at p. 494-e, Emphasis in the original

\(^{276}\) *Ibid.*, at p. 494-g

\(^{277}\) *Ibid.*, at p. 491-g to 492-a

\(^{278}\) *Ibid.*, at p. 493-495
to examining the scope of the power relationship is relevant to assessments of consent under sexual assault provisions in the Criminal Code.

The Court begins its analysis by refusing to permit a restrictive interpretation of the term “position of authority” and it takes a contextual approach. The analysis of the power within the relationship must be directed to, “the nature of the relationship between the young person and the accused rather than their status in relation to each other.” The majority starts by citing with approval from Proulx J.A.’s decision in R. v. Leon. That case found the power inherent in a position of authority is not limited to the exercise of a legal right, but extends to the lawful or unlawful power to command which the person may acquire in the circumstances. The meaning of a position of authority must be derived from the experience of the relationship, not the title of the relationship: “the meaning of the term must not be restricted to cases in which the relationship of authority stems from a role of the accused but must extend to any relationship in which the accused actually exercises such a power.”

Consequently, a position of authority is not limited to the legal meaning of a trust; rather, a position of authority is a, “broader social or societal relationship.” The Court went on to emphasize from Blair J.’s decision in R. v. S.(P.) the point that, “Trust”, according to the Concise Oxford Dictionary (8th ed.), is simply, “a firm belief in the reliability or truth or strength of a person”. Where the nature of the relationship
between an adult and a young person is such that it creates an opportunity for all of the persuasive and influencing factors which adults hold over children and young persons to come into play, and the child or young person is particularly vulnerable to the sway of these factors, the adult is in a position where those concepts and reliability and truth and strength are put to the test. Taken together, all of these factors combine to create a "position of trust" towards the young person." 286

When assessing whether an accused is in a position of authority with a young person, the trier of fact must consider the age of the parties, the evolution of the relationship between the parties and the status of the accused287. Another factor to consider is the mental attitude of the party in the potential position of trust, whether there is a mental attitude of trusting in or relying on the person. The mental attitude is significant because it allows the trier to understand the position of the parties; due to the nature of the power relationships with certain persons, young people are in a position of vulnerability and weakness in relation to some people288.

Thus, it is clear that the notion of a position of authority is at least partly forward-looking because it is related to the consequences that one person can create for the other party, as a position of authority, "invokes notions of power and the ability to hold in one’s hand the future or destiny of the person who is the object of the exercise of authority"289.

Evidentiary Burden On Accused Teachers

287 Ibid., at p. 500. Also, consider whether the finding that the evolution of the relationship is relevant overturns the possibility left open in R. v. Ryan that on-going non-consensual sexual activity may evolve into a consensual sexual relationship.
288 Ibid., at p. 500-b
289 Ibid., at p. 498-g
Where the accused is charged with the offence of sexual exploitation and the accused is the complainant’s teacher, there is an evidentiary burden on the accused to show he or she is not in a position of trust. Unless there is evidence to raise a reasonable doubt, the role teachers play in schools leads to the common sense conclusion that teachers are in a position of trust towards their students. The Court made a firm finding about this particular trust relationship when it held that, “in the absence of evidence raising a reasonable doubt on this point, teachers are necessarily in a position of trust and authority towards their students”\textsuperscript{291}. It is worth noting that, when assessing whether the accused is in a position of authority, the court considers the status of the accused and the relationship between this status and the integrity of the greater system within which this status operates: for example, the court looks at the fact that “teachers are inextricably linked to the integrity of the school system”. As a result, “in the vast majority of cases teachers will indeed be in a position of trust and authority towards their students”\textsuperscript{292}.

\begin{footnotesize}
\textsuperscript{290} Ibid., at p. 501-503  
\textsuperscript{291} Ibid., at p. 503-e  
\textsuperscript{292} Ibid., at p. 501-e, 502-g
\end{footnotesize}
CHAPTER 6 Determining Whether Consent Will Be Vitiated For Public Policy Reasons

THE DEFENCE OF CONSENT TO ASSAULT AND SEXUAL ASSAULT CAUSING SERIOUS HARM OR NON-TRIVIAL BODILY HARM

Consent is not a defence to assault where the accused intentionally applies force to the complainant and thereby causes serious hurt or non-trivial bodily harm. The Supreme Court of Canada made this clear in 1991 with R. v. Jobidon. This means of arriving at this conclusion is a departure from the analysis referred to in previous chapters. The defence of consent to offences causing bodily harm is different because the law is not concerned with whether the complainant’s apparent consent was genuine. Rather, the consent is vitiates for public policy reasons, regardless of whether the complainant’s consent was genuine.

Although consent is definitely not a defence where the accused’s assault causes serious harm or non-trivial bodily harm, there are three ways this caselaw offers guidance in distinguishing between genuine consent and acquiescence. First, it confirms that not all apparent consent is legally effective. Second, it sets out some of the basic principles and values which underlie consent analyses. Third, it represents an illustration of how the court illuminates a boundary between effective consent and non-effective consent. Previous chapters offered examples of cases where consent is effective when it is found to be genuine; in those cases, the courts wrestle with the understanding of “genuine” consent. The cases in this chapter show there is another way that consent may be seen to be legally ineffective; consent will be vitiates for public policy grounds when the

conduct in question gives rise to bodily harm, regardless of whether the consent was genuine.

**R. v. Jobidon, 1991, Supreme Court of Canada**

The Court split five to two in this case. Mr. Justice Gonthier wrote the majority decision for himself, La Forest J, L'Heureux-Dube J., Cory J. and Iacobucci, J.\textsuperscript{294} The majority held that consent will be vitiated on social policy grounds where an adult intentionally applies force causing serious hurt or non-trivial bodily harm in the course of a fist fight or brawl\textsuperscript{295}. The court decided that further delineations surrounding this limitation to the legal validity of consent will be developed on a case by case basis as the common law evolves.

**Facts\textsuperscript{296}**

The accused Jules Jobidon was charged with manslaughter for killing Rodney Haggart through an unlawful act. The manslaughter was alleged to have occurred through the unlawful act of assault. The assault was alleged to have occurred during an apparently consensual fist fight outside a bar.

The deceased and the accused were at the same bar on the night in question. The deceased was 25 years old. He was larger than the accused and had training as a boxer. Although he had drunk some beer, he appeared perfectly fine. The accused was a young, fit, powerful man who

\textsuperscript{294} The minority decision is written by Mr. Justice Sopinka, for himself and Stevenson J. Although the minority agreed with the majority that the accused should be convicted for the offence charged, the minority arrived at this conclusion through drastically different means. The minority held that the accused's conduct went beyond the scope of the complainant's consent and thus there was no consent to the conduct that caused the harm. Essentially, the minority held that the Criminal Code specifically requires that absence of consent to a fight is necessary for an offence of assault. It found that no consent is a fundamental element of assault and cannot be read out of the criminal offence of assault.

\textsuperscript{295} *Op. Cit.*, *R. v. Jobidon* Footnote 293 at p. 494-g

\textsuperscript{296} *Ibid.*, at p. 462 to 463
had also been drinking beer before the fight. The trial judge found the accused was not inebriated.

The deceased and the accused were at the bar separately with their respective friends. The deceased was celebrating his impending marriage. The deceased approached the accused and started a fight with the accused. The deceased was “prevailing” when the owner separated the two men. He told the accused and his brother to leave the bar. The accused and the deceased exchanged angry words and agreed the fight was not over.

The accused and his brother waited in the parking lot outside the bar. When the deceased exited the bar, his brother started to fight with the accused’s brother. The accused and the deceased started to argue. The two men stood facing each other. A crowd gathered around the men.

The accused struck the deceased with his fist and hit him with great force on the face and head. The deceased fell backwards onto the hood of a car. The deceased was rendered unconscious by this blow; he was not moving and offered no resistance. The accused continued forward and, “in a brief flurry lasting no more than a few seconds he struck the unconscious victim a further four to six times on the head”\textsuperscript{297}. There was no interval between the victim’s fall and the accused’s continued punching. The victim rolled off the hood and lay limp. He was taken to the hospital in a coma. He died there of severe contusions to the head and neck. One or more of the accused’s blows caused the injuries.

The accused did not intend to kill or cause serious bodily harm to the deceased:

\textsuperscript{297} Ibid., at p. 463-b
“Jobidon intentionally hit Haggart as hard as he could, but believed he was fighting fair. He did not depart intentionally from the kind of fight that Haggard had consented to. Jobidon believed that Haggart had consented to a fair fight, the object of which was to hit the other man as hard as physically possible until that person gave up or retreated.”298

The Issue

The main question in this case was this: is the absence of consent a material element of assault which must be proved by the Crown in all cases of assault or are there common law limitations which restrict or negate the legal effectiveness of consent in certain types of cases?299

The Relationship Between the Common Law and the Statutory Offence of Assault

R. v. Jobidon begins by discussing the relationship between the relevant Criminal Code assault provisions and the common law. This discussion is important because it demonstrates the Code is not the definitive authority on the meaning of consent; rather, the common law offers assistance to illuminate the meaning consent and to assist in fleshing out the boundaries around consent.

The offence of assault was originally a common law offence. Although assault was included in the 1869 Offences Against the Person statute, the basic assault offence was defined at common law300. This English law was the primary foundation of this early Canadian law. The statute assumed a previous knowledge of the doctrines of the common law.

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298 Ibid., at p. 463-f
299 Ibid., at p. 465-d
300 Ibid., at p. 467-g
and of the common law definitions of crimes which the Act punished but did not define$^{301}$.

The first Canadian Criminal Code was adopted in 1893. Since then, our common law has evolved into a blend of English and Canadian authority$^{302}$. According to this traditional common law, it was an essential feature of assault that the incident took place against the victim's will. The common law assumed that absence of consent was an essential element of assault$^{303}$. This traditional position makes sense because, "the genuine consent of the complainant has traditionally been a defence to almost all forms of criminal responsibility"$^{304}$.

Although proof of no consent is an essential element of assault in all definitions of assault, it is also the case that all Canadian statutory definitions of assault have acknowledged that apparent consent does not always constitute legally effective consent$^{305}$. Assault was first statutorily defined in Canada in the 1892 Criminal Code$^{306}$. 

Even the first statutory definition of assault recognized that consent obtained by fraud was not legally effective consent$^{307}$:

An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has, present ability to effect this purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud.

$^{301}$ Ibid., at p. 467-h citing from criminal law historian Sir James Fitzjammes Stephen.
$^{302}$ Ibid., at p. 468-d
$^{303}$ Ibid., at p. 468-b
$^{304}$ Ibid., at p. 468-c
$^{305}$ Ibid., at p. 470-c
$^{306}$ Ibid., at p. 468-g
$^{307}$ Ibid., at p. 468-g Emphasis added in the Supreme Court decision.
The next definition of consent arose in the 1927 revision of the *Code* 308. This provision continued to recognize that consent was not legally effective where it was obtained by fraud309:

A person commits an assault when

(a) *without the consent of another person or with consent, where it is obtained by fraud,* he applies force intentionally to the person of the other, directly or indirectly;
(b) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose; or
(c) while openly wearing or carrying a weapon or a imitation thereof, he accosts or impedes another person and begs.

In 1983, amendments to the *Code* expanded the statutory grounds upon which consent would be recognized as legally ineffective310. The change serialized factors which would vitiate consent on the basis of coerced or ill-informed will311. It is extremely significant that Gonthier J. held these additions did not in fact alter the law because they merely articulated the pre-existing common law:

"...these factors were not new, for they had already been part of the law previous to the proclamation of the *Code* in 1892. Any novelty of s.244(3) [now s. 265(3)] lay in its more explicit and general expression in the *Code..."*312

308 *Ibid*., at p. 468-h
310 *Ibid*., at p. 469-c
311 *Ibid*., at p. 469-c
312 *Ibid*., at p. 469-d
In 1985, the number of the assault provision was changed to s. 265 and now reads313:

(1) A person commits assault when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

... 

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
(a) the application of force to the complainant or to a person other than the complainant;
(b) threats or fear of the application of force to the complainant or to a person other than the complainant;
(c) fraud; or
(d) the exercise of authority.

This historical analysis is helpful in understanding the boundaries around consent in two ways. First, it establishes that, "various limitations on the validity of consent have a long lineage in the history of the offence"314. Second, it shows that the meaning to be attributed to the legal effectiveness of consent arises from the common law as well as from statutory definitions of assault. The Court makes this explicit when it finds that one must advert to the common law to observe the limitations on the validity of consent315.

The Influence of the Common Law Upon The Statutory Definition of Assault

The common law has a substantial influence on the meaning of consent because the common law serves as an archive in which one may

313 Ibid., at p. 469-h to 470-a Emphasis added.
314 Ibid., at p. 470-c
315 Ibid., at p. 470-c
locate situations or forms of conduct to which the law will not allow a person to consent\textsuperscript{316}. This is significant as it establishes the \textit{Code} is merely a partial expression of the law\textsuperscript{317}. In addition, it shows that the common law limits on the legal effectiveness of apparent consent are to be read into the statutory definition of consent.

Although the \textit{Code} clearly requires proof of no consent to establish the offence of assault, the common law breathes life into the meaning of effective consent. The Court refers to the fact the common law historically assessed the validity of consent and provided that consent is only valid or legally effective where it is given freely by a rational and sober person applies to the offence of assault\textsuperscript{318}. This common law relating to effective consent must be presumed to live on in harmony with the statutory assault provisions set out in the \textit{Code}. This is the case because there is nothing in the \textit{Code} to suggest the common law of effective consent is “emptied of its relevance” simply by the enactment of the statutory offence of assault\textsuperscript{319}.

The decision also reminds us that the meaning to be attributed to effective consent in this area is part of a general common law approach to consent. While the \textit{Criminal Code} contains a vast range of provisions, Gonthier J. finds the \textit{Code}, “speaks in a universal tone” in the sense there are general common law principles of criminal responsibility that inform this approach\textsuperscript{320}. One of these general rules is that, “one cannot commit assault if the other person agrees to the application of force”\textsuperscript{321}. Thus,

\begin{itemize}
\item \textsuperscript{316} \textit{Ibid.}, at p. 475-c
\item \textsuperscript{317} \textit{Ibid.}, at p. 473-b
\item \textsuperscript{318} \textit{Ibid.}, at p. 476-b
\item \textsuperscript{319} \textit{Ibid.}, at p. 472-f, and 473-a
\item \textsuperscript{320} \textit{Ibid.}, at p. 471-h
\item \textsuperscript{321} \textit{Ibid.}, at p. 471-h
\end{itemize}
although all forms of assault are covered by s.265 of the Code, the understanding of consent is arises from the common law:

"[The Code] does not attempt to define the situations or forms of conduct or eventual consequences which the law will recognize as being valid objects of consent for the purpose of the offence. It does not attempt to define the situations in which consent will or will not be legally effective. The present Code is silent in this regard." ³²²

This interpretation is further buttressed by reference to the similar role of common law in other areas of law. The influence of common law in contract law may be compared to the influence of common law in criminal law because the jurisprudence in both areas refers to common law to flesh out the meaning of the law. The majority makes this clear when it finds that, "Just as the common law has built up a rich jurisprudence around the concepts of agreement in contract law...it has also generated a body of law to illuminate the meaning of consent and to place certain limitations on its legal effectiveness in criminal law" ³²³.

In addition, the Court also considers the fact s.8 of the Criminal Code, "authorizes the courts to look to pre-existing common law rules and principles to give meaning to, and explain the outlines and boundaries of an existing defence or justification, indicating where they will not be recognized as legally effective - provided of course that there is no clear language in the Code which indicates that the Code has displaced the common law" ³²⁴. The Supreme Court makes it clear that the common law illuminates the definitions set out in the Criminal Code and, "gives content

³²² Ibid., at p. 472-a Emphasis in original.
³²³ Ibid., at p. 472-g
³²⁴ Ibid., at p. 475-b
to the various principles of criminal responsibility those definitions draw from”\textsuperscript{325}.

Based on this general reasoning, the Court extends this logic to assault and finds the enumerated factors which vitiate consent in the \textit{Code}\textsuperscript{326} are not exhaustive of the factors which are capable of vitiating consent\textsuperscript{327}. Although the enumerated factors in the \textit{Code} do represent examples of, “explicit, basic limits on the legal effectiveness of consent which had for centuries formed part of the criminal law in England and in Canada”\textsuperscript{328}, these statutory examples are not the only factors which may vitiate consent. Consequently, s. 265 of the \textit{Code} does not negate the, “applicability of common law rules which describe when consent to an assault will be vitiated for involuntariness, or defects in the will underlying the apparent consent”\textsuperscript{329}.

\textbf{Common Law Public Policy Considerations Relating to Consent}

After examining the general relationship between the common law and the \textit{Criminal Code}, and finding that the codification of offences did not replace common law principles of criminal responsibility but rather reflected them\textsuperscript{330}, the court goes on to look at the relationship between the legal validity of consent at common law and the specific offence of assault. In the case of fist fights, the common law has expressed a limitation to the validity of consent that is particular to this area: public policy

\textsuperscript{325} \textit{Ibid.}, at p. 473-c
\textsuperscript{326} These factors are set out in s.265 of the \textit{Code}
\textsuperscript{327} \textit{Op. Cit.}, \textit{R. v. Jobidon} Footnote 293 at p. 479-e
\textsuperscript{328} \textit{Ibid.}, at p. 475-h
\textsuperscript{329} \textit{Ibid.}, at p. 477-e
\textsuperscript{330} \textit{Ibid.}, at p. 477-d
considerations. Gonthier J. holds that common law policy-based limitations to the legal validity of consent are not new; rather, they are very much a part of our legal history. The common law related to fist fights shows that public policy considerations are, "sufficiently important to justify nullifying the legal validity of consent as a defence to a charge of assault".

There is no question, then, that generally an accused will be able to rely on the complainant's consent as a defence to assault. However, there have always been limits to the legal validity of consent. It would have been impossible for Parliament to create a list of all the exceptions to the general rule. Instead, Parliament has authorized the courts to administer the common law and to deal with issues related to public policy limits to consent.

In considering the public policy based limits to the defence of consent, the Supreme Court finds that Parliament left open the scope of public policy considerations to interpretation. The majority goes on to hold that Parliament intended the courts to explain the content of the defence of consent incrementally over time. Arguments for public policy limits to the defence of consent will require courts to balance the individual autonomy of a person to choose to have force inflicted upon himself and larger societal interests. Because this balancing must be done in the context of real life situations, and not in a factual vacuum, the courts will define

331 Ibid., at p. 476-f
332 Ibid., at p. 477-d
333 Ibid., at p. 476-f
334 Ibid., at p. 478-d
335 Ibid., at p. 479-b
336 Ibid., at p. 479-f
337 Ibid., at p. 479-a
the boundaries around consent as they are confronted with policy dilemmas which require them to engage in this balancing\textsuperscript{338}.

\textbf{Four Main Public Policy Considerations}

After deciding that the common law constrains the legal effectiveness of consent to assault based on public policy grounds, the Court goes on to canvass the policy considerations which influence the case on appeal\textsuperscript{339}. These public policy factors tip the scale against the validity of a person's consent to the intentional infliction of bodily harm in a fight\textsuperscript{340}. The public policy considerations for limiting the legal effectiveness of consent to fist fights are broken down into four main groups, all of which represent the "public interest": i) the social uselessness of fights, ii) the concern that fights lead to larger breaches of the peace, iii) the importance of deterrence, and iv) the moral need to discourage intentional hurting.

\textit{i) The social uselessness of fights}

The strongest policy consideration militating against the validity of consent to fist fights is the social uselessness of fist fighting\textsuperscript{341}. Fist fights

\textsuperscript{338} \textit{Ibid.}, at p. 479

\textsuperscript{339} It is significant that these considerations are merely the considerations which apply on this appeal. Thus, they do not represent an exhaustive list of policy considerations. Instead, the common law may evolve over time to recognize other policy considerations that would influence the validity of consent.

\textsuperscript{340} Despite all the ambiguities in this area, one of the few matters that is clear is that, in Canada, consent to an assault causing bodily harm can only be nullified where the accused intended the conduct which caused the complainant the harm in question. The consent could not have been vitiated where the accused did not intend to cause the harm. \textit{Ibid.}, \textit{R. v. Jobidon} at p. 490-e

\textsuperscript{341} \textit{Ibid.}, at p. 491-h It is interesting that the Courts do not explain the rationale for the exception for boxing. Although boxing may be a sport, it has the same goal as fist fighting. Also, it is noteworthy that this case at p. 495 does explicitly state that medical treatment, surgical intervention and rough sporting activities do have significant social value and are worthwhile. The court refers with approval to \textit{R. v. Cey} (1989), 48 C.C.C. (3d) 480 (Sask. C.A.). That case discusses the scope of implied consent to assault in the course of a hockey game. See also \textit{R. v. Leclerc} (1991), 67 C.C.C. (3d) 562 (Ont. C.A.) for further discussion of implied consent to assault in the course of hockey games. For cases relating to youthful offenders (to which a more flexible standard applies) see also \textit{R. v. Gordon W.} (1994), 18 O.R. (3d) 321 (Ont. C.A.), \textit{R. v. T.B.B.} (1994), 93 C.C.C. (3d) 191 (P.E.I.S.C.A.D.), \textit{R. v. G.W.} (1994), 90 C.C.C. (3d) 139 (Ont. C.A.), \textit{R. v. Susan M.} (1995), 97 C.C.C. (3d) 281, 22 O.R. (3d) 605 (Ont. C.A.)
are socially useless because they are, “motivated by unchecked passion” and often result in serious injuries.\footnote{Ibid., at p. 491-h} Fist fights have no social value because it is not in the public interest for adults to willingly cause harm to each other without good reason.\footnote{Ibid., at p. 491-h} Whereas historically men were required to fight for honour, “social norms no longer correlate strength of character with prowess at fisticuffs.”\footnote{Ibid., at p. 492-a}

\ii) The concern that fights lead to larger breaches of the peace

From the point of view of the broader interest of the community, consensual fist fights between individuals may lead to larger fights and to more serious breaches of the peace within a larger community.

\iii) The importance of deterring fist fights

Although fist fights often occur when the participants are drunk, the majority finds the common law limitation of consent to a fight might serve some degree of deterrence to engage in fights.

\iv) The moral need to discourage intentional hurting

The majority relies upon a basic lesson of a social society (one of the first lessons most of us learn as children): it is morally wrong to intentionally inflict pain on another person. The Court holds this principle is based on the “sanctity of the human body.”\footnote{Ibid., at p. 493-c} Consequently, it is this sanctity of the human body which militates against recognizing the validity...
of consent to cause bodily harm\textsuperscript{346}. To legally permit consensual fights that caused bodily harm, would be to erode the powerful social taboo against causing harm to others and to countenance the intentional hurting of other people\textsuperscript{347}.

Policy-based limits to the effectiveness of consent are not foreign, as both Parliament and the courts are, "mindful of the need for such limits"\textsuperscript{348}. It is not just the common law that declares a, "policy preference that people not be able to consent to intentionally inflicted harms". The majority notes that this policy decision may be found as well within the \textit{Criminal Code} in provisions such as the provisions which vitiate a person's consent to have death inflicted upon himself\textsuperscript{349}.

\textbf{Conflict Between Paternalism and Individual Autonomy}

The court also expresses a concern over the possibility that recognizing consent to bodily harm could open the floodgates to causing bodily harm. If individuals are permitted to consent to harm being done to them, then the people doing that harm, in some rare cases, may derive pleasure from it. That may make it easier to carry out the harm-causing

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\textsuperscript{346} This argument can also go the other way. The sanctity of the human body may also be expressed through the principle of individual autonomy. And it can be argued that to vitiate a genuine consent to cause bodily harm is to undermine that principle of autonomy. Thus, the issue of consent to bodily harm brings into stark contract the competing views highlighted by the notions of individual autonomy and bodily integrity. The obvious response to the individual autonomy argument is that expressed by the court at p. 492-h where they suggest that it would be a self-destructive person who is frail or weak who would consent to bodily harm. See R. v. Jobidon at p. 495-a where the Court clarifies that the vitiation of consent to harm does not apply to rough sporting activities, medical treatment or to stunts where those harms fall within the customary norms of the situation, because those activities have significant social and cultural value. This is another example of the Court considering the scope of the consent when assessing the validity of the consent.

\textsuperscript{347} \textit{Ibid.}, at p. 493 a-c  
\textsuperscript{348} \textit{Ibid.}, at p. 494-a  
\textsuperscript{349} \textit{Ibid.}, at p. 493-h. See also s.150.1, 159 and 286 of the \textit{Criminal Code}.
\end{flushright}
activity in the future thereby lowering the threshold into non-consensual harmful conduct and may loosen the inhibitions to sadistic acts.\(^{350}\)

It is significant that, in the course of presenting this view, the court expresses concern about the position of vulnerability of the person consenting to the harm. Gonthier J. indicates it is not inconceivable that the person consenting to the harm would be frail or suffer from unstable mental health. By taking this into consideration, the Court is in effect considering the power relationship between the two parties.\(^{351}\) Gonthier J. also cites with approval from criminal law theorist G. Fletcher, who stated that a person who would consent to bodily harm is self-destructive.\(^{352}\)

These references show the majority is not prepared to acknowledge consent to serious harm and run the risk of participating in the self-destructive choices of a person who is frail or mentally unstable. The Court’s view appears to be that to recognize such a consent as genuine would be to participate in the self-destruction of a person, and thereby undermine the bodily integrity of the person being hurt.

The above interpretation of the Court’s position is evident when the majority declares, “autonomy is not the only value which our law seeks to protect.”\(^{353}\) While acknowledging that some may see the vitiation of a consent as paternalistic and a violation of the individual’s freedom to govern himself, the Court points out that all criminal law is paternalistic to

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\(^{350}\) *Ibid.*, at p. 492-h. This position may be seen to be flawed because the Court clearly assumes that people who engage in consensually harmful conduct will eventually become involved in non-consensually harmful conduct.

\(^{351}\) *Ibid.*, at p. 492-g

\(^{352}\) *Ibid.*, at p. 492-h

\(^{353}\) *Ibid.*, at p. 494-a. Unfortunately, the court does not specifically identify the other values which the law does protect. Presumably, based on the reference to self-destruction and the sanctity of the body, the law also serves to protect an interest in a value related to bodily integrity and the preservation of human sanctity.
some degree\textsuperscript{354}. The purpose of the law's, "strong resistance to recognizing the validity of consent to intentional applications of force in fist fights and brawls" is held to be an instance of the, "law's concern that Canadian citizens treat each other humanely and with respect"\textsuperscript{355}.

**Analysis of the Scope of Consent**

*R. v. Jobidon* adopts the position that an analysis of the legal effectiveness of consent must include an examination of the scope of the consent in question. The majority finds that the scope of consent is related to the effectiveness of consent when they decided, "the policy of the common law will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional applications of force to which one consents are within the customary norms and rules of the game"\textsuperscript{356}. This comment constitutes an implicit reference to the relevance of the scope of consent because activities that fall outside the

\textsuperscript{354} *Ibid.*, at p. 494-b

\textsuperscript{355} *Ibid.*, at p. 494-c. One may also read in to this sentence at the end, "whether Canadians citizens want to be treated humanely and with respect or not".

\textsuperscript{356} *Ibid.*, at p. 495-a. It is conceptually important to keep in mind that the scope of consent raises two distinct questions to be considered. First, within a consensual fight or game, there may be seen to be genuine, implied consent to certain forms of aggressive touching. The scope of consent may be relevant in those cases to assess whether, in the context of a genuine, implied consent, the accused's conduct fell outside the scope of the genuine consent. This raises issues related to assessing whether there was genuine consent to the conduct that forms the subject-matter of the inquiry. Thus, scope is relevant to the type of genuine consent analysis engaged in the previous chapters. However, the scope of consent is also relevant to assessing the whether consent will be vitiated. This is the case because any consent to bodily harm is deemed to be vitiated for public policy reasons. Thus, scope of consent is relevant to inquiring about the genuineness of consent and to inquiring into whether consent, regardless of whether it is genuine, is nullified for public policy reasons. For an interesting discussion of this issue in the context of implied consent to a fight in the context of domestic violence, and whether a different standard should apply to these issues in that context, see *R. v. Bruce* (1994), 27 C.R. (4th) 225 (B.C.S.C.) especially at p. 236 where the court queries whether the "fist fight" limitations of consent to non-trivial injury ought to apply to the domestic violence context or whether a more stringent limitation ought to apply. The courts asks (and does not answer) whether public policy ought to mandate more stringent limitations on consent in domestic violence cases. The court also warns against jumping to the conclusion that the complainant consented to a domestic violence fight and infers there are special considerations to be factored in before the complainant may be said to have genuinely consented in that context.
normal rules of the game are clearly activities which fall outside the scope of activities to which the party may be said to have impliedly consented.

Although the majority does not engage a lengthy analysis of the importance of considering the scope of consent, the court does cite from and refer with approval to several cases which discuss the scope of consent. The reliance upon these cases is significant because it shows the Supreme Court recognizes that the scope of consent is a factor to consider when examining the effectiveness of consent. The scope of consent is an important addition to the factors to consider when assessing consent because the very notion of a "scope" of consent serves to remind us that all activities have within them a set of boundaries.

Recognizing that a "consent" has a "scope" indicates that consent to begin a course of activities which may become more intrusive does not necessarily equate consent to all levels of intrusiveness to which that activity may lead. As an activity becomes more intrusive, the courts have made it clear that there must be consent to engage in the additional levels of intrusion. Common sense dictates that it is not reasonable to assume implied consent to all possible levels of intrusiveness which may arise as a result of agreeing to a lower level of intrusion.

For example, the majority refers to the schoolyard fight case R. v. MacTavish. In R. v. Jobidon, the majority finds that the victim consented to a "fair fight", not to have his "head kicked in". The court clearly endorses the notion of assessing the scope of consent as they refer to the importance of the fact that the victim had, "not agreed to having that

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357 Ibid., at p. 482-490
358 See Footnote 285 for cases which discuss the scope of implied consent. These cases show that the scope of implied consent to an assault in the course of a game is to be determined on the basis of an objective standard having regard to the norms of the game.
kind of force inflicted upon him, nor had he agreed to that particular form of activity" [Emphasis added]. The majority in R. v. Jobidon also refers with approval to R. v. Dix, which held that the onus is on the Crown in these cases to show that the accused acted outside the scope of the victim's consent.

Thus, R. v. Jobidon is a significant decision as it reveals three noteworthy positions on this topic. First, R. v. Jobidon confirms the law does not accept that apparent consent automatically constitutes effective consent; rather, apparent consent is the proper subject of examination to assess whether it will be seen to be legally effective. Second, it establishes that personal autonomy is not the only goal of the law, and that it is appropriate for the law to be concerned that citizens treat each other humanely and with respect. Third, this decision shows the degree of seriousness of the injuries may justify vitiating the effectiveness of the consent in order to preserve the sanctity of the human body and the morality associated with promoting a community in which people are not permitted to hurt each other intentionally. Related to this is the acknowledgment that the scope of consent is a relevant factor to take into consideration when assessing effectiveness of consent.

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360 Ibid., at p. 483-g
361 Ibid., at p. 483-h
362 Interestingly, caselaw on this issue in the sexual context appears to be different. Contrary to Jobidon, caselaw suggests that having unprotected but apparently consensual sex, while HIV positive, without disclosing the HIV status does not constitute activity which exceeds the scope of consent to sexual contact. As a result, public policy was held to not render the consent ineffective. The complainant’s consent was held to be effective despite the fact the accused withheld the information about the HIV status. See R. v. Guerrier (1996), 111 C.C.C. (3d) 261 (B.C.C.A.) and R. v. Ssenyonga (1993), 81 C.C.C. (3d) 257 (Ont. Ct. Gen. Div.)
R. v. Carriere \(^{363}\), 1987, Alberta Court of Appeal

Although R. v. Carriere was decided before Jobidon, Carriere is worth noting as it offers guidance as to the theoretical underpinnings which support vitiating consent for public policy reasons where the conduct in question causes harm. Carriere is significant because it explains that the notion of a boundary or limitation to consent is inherent within the notion of consent. The concept of consent includes the concept that there is a scope to the consent.

This case is noteworthy for two reasons. First, it highlights the significance of whose consent is assessed, the accused’s or the victim’s. Second, the court indicates there is a scope, or a range, of touching to which liability attaches. The scope of liability is identifiable through the boundaries which surround it. On either end of this spectrum, the legality of the touch is determined without reference to the issue of consent. In the middle, the genuineness of consent is the defining feature for the effectiveness of consent.

On one end, there are trivial forms of touching that do not attract liability, even if there is no consent\(^ {364}\). In the middle, there is a range of activity that is defined according to whether there was genuine consent to engage in the conduct in question. On the other end, there are serious forms of touching to which liability attaches even if there is consent. Consent is no defence to these. This indicates the legal effectiveness of consent has boundaries, as it is limited to a range of activity\(^ {365}\).


\(^{364}\) For example, one can conceive of conduct falling into the \textit{de minimus} range such as a push at an escalator or picking lint off a person’s shirt.

Facts

The accused and the victim in this case engaged in a fight at the lobby of a hotel. The fight was stopped by hotel employees and the two women went to the parking lot. The victim started the renewed fight in the parking lot. Both the accused and the victim were armed with knives at that point. The accused knifed the victim and wounded her. The accused was convicted at trial of aggravated assault\textsuperscript{366}.

The Analysis of Consent

The trial judge focused his inquiry into whether the accused consented to the fight and whether the defence of self-defence could succeed. However, on appeal, the court held that before the issue of self-defence arises, the preliminary question was whether the victim freely consented to a fight, not whether the accused consented to the fight. As a result, the court asked itself: Can one consent to be stabbed?\textsuperscript{367} The structure of this analysis is significant because it shows that even where the victim is armed and the victim appears to be completely willing to engage in the acts in question\textsuperscript{368}, the accused may be liable if the conduct falls outside the scope of acts to which a person may legally consent.

In this case, the accused's conduct was held to fall outside the scope of the complainant's consent, as a person cannot consent to be stabbed\textsuperscript{369}. The court indicates that, although both consented to the fight, the accused

\textsuperscript{366} Ibid., at p. 277
\textsuperscript{367} Ibid., at p. 281
\textsuperscript{368} Ibid., at p. 286. It is interesting that, despite the facts of this case, the court questions whether people truly consent to fist fights: "I observe in passing, however, that the "consent" in many of these "fair fights" with fists is often more apparent than real. Challengers are, most often, those who feel assured that they can overwhelm opponents. Those who accept the challenge often do so, not because they wish to fight, or truly consent to it, but because they fear being branded as cowards by their peers."
\textsuperscript{369} Ibid., at p. 287
was guilty of the offence when she exceeded the scope of the consent by inflicting a stab wound to the victim\textsuperscript{370}. This is significant because the analysis of the consent is explicitly focused on identifying the boundaries around the scope of the consent. Thus, although this case arrives at the same conclusion as \textit{R. v. Jobidon} regarding the vitiation of consent to bodily harm, \textit{R. v. Carriere} is additionally helpful in understanding the issue of consent as it is explicit in its suggestion that examining the scope of consent is crucial in delineating the boundaries around consent.

\begin{center}
\textbf{The Defence of Consent to Sexual Assault Causing Serious Harm or Non-Trivial Bodily Harm}
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As one would expect, the caselaw related to sexual assault causing bodily harm follows the reasoning set out in \textit{R. v. Jobidon}. The leading case in this area is \textit{R. v. Welch} \textsuperscript{371}. These cases confirm that consent is not a defence to sexual assault causing bodily harm.

Mr. Welch was convicted of sexual assault causing bodily harm and unlawful confinement after a trial. The complainant testified the accused bound and gagged her, repeatedly beat her with a belt on her breasts and buttocks, laid on top of her and penetrated her with his penis. The complainant suffered obvious and extensive bruising and a bleeding rectum for which she was required to attend a doctor’s office six or seven times. He also inserted his finger into her vagina and an object into her rectum. At trial, the complainant testified these acts were done without her consent.

\textsuperscript{370} \textit{Ibid.}, at p. 287
The accused admitted most of the conduct; however, he said the complainant consented to it in the course of "rough sex"\(^{372}\).

The sexual assault provisions in the *Code* expressly indicate the defence of consent relates to ‘the voluntary agreement of the complainant to engage in the sexual activity in question’\(^{373}\). Despite the accused’s position that the complainant consented to the acts which caused the bodily harm, the issue in this case was whether the reasoning in *Jobidon* should be extended to vitiate consent to sexual assault causing bodily harm\(^{374}\). At trial, the judge had held that consent was not a defence to assault causing bodily harm and that defence was not put to the jury. On appeal, the court upheld this decision and found, “the victim cannot consent to the infliction of bodily harm upon himself or herself...unless the accused is acting in the course of a generally approved social purpose when inflicting harm”\(^{375}\).

*Welch* relies upon the finding in *Jobidon* that, while consent may be a defence to activities which create a socially viable cultural product, such as rough sporting activities, medical treatment, social interventions and stuntmen’s daredevil activities, “acts of sexual violence, however, were conspicuously not included among these exceptions”\(^{376}\) in *Jobidon*. The courts decided not to define the area in an abstract but rather have taken on the responsibility of determining on a case by case basis whether or not an act will be said to cause bodily harm in the creation of a cultural social goal\(^{377}\).

\(^{372}\) *Ibid.*, for facts see p. 218-221
\(^{373}\) *Ibid.*, at p. 226-f
\(^{374}\) *Ibid.*, at p. 227-a
\(^{375}\) *Ibid.*, at p. 238-g
\(^{376}\) *Ibid.*, at p. 238-h
\(^{377}\) *Ibid.*, at p. 227-f
The court acknowledges that its decision gives the law the power to tread upon a person’s choice and prevent a person from legally providing effective consent to bodily harm against himself. Consequently, where there is bodily harm the individual’s self-control may be seen to be compromised because the law is not concerned with whether the apparent consent was genuine, but rather, with the severity of the injury caused by the acts. This issue once again brings into stark contrast the conflict between the principle that the law should promote individual autonomy and self-rule and the principle that the law must not condone hurting people.

*Welch* recognizes this conflict between individual autonomy and the interest in preventing harm. The court defends its decision to vitiate consent to sadistic sexual acts by explaining that in such cases the person’s autonomy to provide consent is trumped by the social interest in criminalizing degrading and dehumanizing acts which cause bodily harm:

“The consent of the complainant, assuming it was given, cannot detract from the inherently degrading and dehumanizing nature of the conduct. Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.”\(^{378}\)

In considering the interests at stake in such cases, *Welch* cites with approval from *R. v. Brown* \(^{379}\), the leading British House of Lords decision that deals with the issue of vitiating consent to sadistic sexual acts. The majority in *Brown* decided public policy requires that consent to bodily harm.

\(^{378}\) *Ibid.*, at p. 239-b  
harm be vitiated. The imposition of criminal sanctions for causing bodily harm was intended to protect society against a cult of violence which contained the danger of the proselytisation and corruption of young men and the potential for the infliction of serious injury\textsuperscript{380}.

In \textit{Brown}, the accuseds belonged to a group of homosexual sadomasochists\textsuperscript{381}. They would meet on occasion in private in rooms equipped as torture chambers. The only evidence as to consent was that all parties did consent to the activities. The purpose of the meetings was to engage in sexual violence against each other with the aim of achieving sexual gratification. The activities included, among other things, degrading and dehumanizing each other, bloodletting, violence to the buttocks, anus, penis, testicles and nipples, beatings, branding the male genitalia with wire heated by a blow lamp, whipping, genital torture by caning and handling with spiked gloves\textsuperscript{382}.

The issue is that case was whether the prosecution was required to prove lack of consent to acts causing bodily harm to establish the offence of assault causing bodily harm\textsuperscript{383}. The court in \textit{Brown} split three to two. The majority found the matter should be decided according to public policy and that public policy required that consent was no defence to causing bodily harm. Lord Templeton, whose decision formed part of the majority, pointed out the conceptual distinction between violence which is incidental to another activity and violence inflicted, “for the indulgence of cruelty”. He decides he is not prepared to invent a defence of consent to such,

\textsuperscript{380} \textit{Ibid.}, at p. 83-84
\textsuperscript{381} For a review of the facts see \textit{Op. Cit.}, \textit{R. v. Welch}, Footnote 371, at p. 230
"encounters which breed and glorify cruelty."384 The court finds that these acts are primarily violent acts, not sexual acts and that, "the violence of sadists and the degradation of their victims have sexual motivations but sex is no excuse for violence."385 The majority further explains its decision by pointing out that,

"Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized." 386

Welch refers to Lord Templeton’s comment with approval that consent to causing bodily harm is only effective where the, "injury was a forseeable incident of a lawful activity in which the person injured was participating"387 [Emphasis in original]. Upon closer examination it is clear that this is not a particularly helpful analysis because the underlying logic is completely circular. According to this comment, the test for determining whether consent is a defence to bodily harm relates to whether the bodily harm occurred in the course of a lawful activity. However, the lawfulness of the activity cannot be determined without first determining whether there was consent to the activity.

Because the effectiveness of consent and the lawfulness of the act are inter-dependent, it is impossible to separate the test for the lawfulness of the act from the determination of the effectiveness of consent to the act. As a result, it is puzzling why the Court of Appeal in Welch would refer to

385 Ibid., at p. 84-a
386 Op. Cit. R. v. Brown, Footnote 379 at p. 84-g. Once again, the court does not explain why it is that pleasure derived from violence for sport is acceptable whereas pleasure derived from violence in sex is not. There is to be no question that the sport of boxing has no explicit main goal except the infliction of hurt to the opponent. If we accept the courts findings, we are still left with the fact the case does not address how it proposes to distinguish boxing from sado-masochism and how it is that boxing may be seen to be civilized or less evil than sado-masochists activity.
this comment with approval. It is additionally disappointing that Welch makes this reference without offering some comment as to its relevance in light of the Alberta Court of Appeal's criticism in the 1987 case R. v. Carriere that such reasoning is flawed because it contains the premise within the conclusion.

Welch agrees with author William Wilson who suggests consent to bodily harm must be vitiated for the simple reason that hurting people is wrong. Perhaps the core of Welch's fundamental position is best seen when Welch goes on to cite Wilson's argument with approval that Brown was, "not a test case for sexual freedom but the idea that even a tolerant, pluralistic society must enforce one fundamental residual moral value". That moral value suggests it is wrong to hurt people, even if there is consent.

Wilson frames the issue in this area as encompassing the need to balance the importance of allowing individuals the freedom choose their own destiny and the state's interest in maintaining societal cohesion through reducing activity which threatens humanity:

"As Fletcher (1978) suggests, a fundamental building block of our moral society is the social taboo against the infliction of injury on another. Remove this building block and not only do sensibilities stand to be damaged but, over time, perhaps our very commitment to the sanctity of life. To reduce this fundamental moral issue to an issue about the presence or absence of consent may be to miss what is really at stake, namely our humanity, as presently conceived. If sadism is allowable, if consented to, then it is consent rather than moral conviction which polices the barrier between a society of would-be sadists and the kind of society most of us would like to inhabit."

It is clear then that at this time, the courts remain unable to attach a name to the force which compels the law to vitiate consent to bodily harm. The best the cases do is to call it a “societal taboo” against hurting people. Perhaps it is that simple, that it is wrong to hurt people and thus it is illegal to intentionally inflict bodily harm. But the law must set out to reconcile this position with the countervailing significance of the principle of autonomy, and explain the reason that autonomy is trumped.

From this analysis, the law appears to represent a manifestation of a powerful intuitive, visceral reaction to the concept of legally permitting a person to intentionally cause harm to another, regardless of consent. Whether this arises out of a fundamental concern about the genuineness of the consent remains unclear from the cases. Perhaps the law is right to enforce the rule against hurting over the principle of autonomy. But the law also has a responsibility to explain itself. And as the cases show, the explanation for this result is unclear. What is clear is that we have some distance to go before the law itself will be in a position to clearly articulate the logical framework which buttresses the decision to override an apparent consent to cause bodily harm.
PART II ANALYSIS OF THE LAW, CONCLUSION AND DISCUSSION OF QUESTIONS THAT REMAIN UNANSWERED

CHAPTER 7 ANALYSIS OF THE LAW

Introduction

Whereas Part One of this thesis examined the individual trees, Part Two represents an effort to stand back and see the forest. Part One reviewed the current state of the law in individual various areas and reviewed the courts’ approaches to determining whether apparent consent constitutes effective consent. On the other hand, Part Two will examine this body of caselaw as a whole. Upon examining these cases together, it is apparent that a pattern has emerged and that the courts have essentially developed a set of consistent factors that are taken into consideration when assessing whether apparent consent constitutes effective, genuine consent.

Part two is divided into two portions. The first portion of Part Two will show what we have learned from reviewing these cases. This portion draws from the caselaw to flesh out the meaning to be attributed to “voluntary” and “informed” consent. It will set out factors which assist in assessing consent and show the pattern within the cases. This portion of the thesis demonstrates there is a consistent set of factors which, viewed together, form a set of essential elements to genuine consent. The caselaw in this area shows there is a consistent theoretical underpinning upon which the meaning of consent relies.

While the first portion of Part Two will show what we have learned from the cases, the second portion of Part Two will point out the questions
that remain unanswered and discuss the difficult theoretical issues raised by these points.

**Essential Elements Of Consent**
- Factors To Take Into Consideration To Determine Whether Apparent Consent Constitutes Genuine Consent

This portion of Part Two will point out who carries the burden of proof to establish whether consent is effective and the importance of the contextual approach to consent analyses. It will then isolate the factors the courts take into consideration to assess consent.

**Onus**

The preliminary question when assessing the effectiveness of consent is this: who carries the burden to prove whether consent is or is not effective? Although consent is a defence to many charges, the onus *is* on the party seeking to establish liability to prove the absence of consent. Consequently, in criminal law, the Crown must establish the absence of genuine, effective consent on a balance of probabilities. In civil law, the plaintiff would bear this burden.

**Context In Which Consent Occurs - Values which Underlie Consent in the Context**

After identifying the burden of proof, the next matter for the courts’ consideration is the context in which the apparent consent occurred. A consent cannot be analyzed in a vacuum, separate from the factual context.

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in which it took place. As a result, the courts adopt a contextual approach
to assessing consent. As the majority of the Supreme Court found in
*Norberg v. Wynrib*, "The factual context of each case must, of course, be
evaluated to determine if there has been genuine consent"\(^{391}\). Thus, before
examining the essential elements of effective consent in a particular case,
the courts seek to understand the context in which the consent occurred,
and the values which underlie consent in that context.

There are two significant factors to be considered within the context.
An inquiry into the factual context leads us contemplate the parties'
entitlement to initiate acts within a certain context and, conversely, the
parties' authority to give consent. As Mr. Justice Doherty held in
*R.v.Wills*, "Certain underlying values give definition to the concept of
consent in the present context"\(^{392}\). The underlying values in a context speak
to the concept of entitlement to take certain actions. And, as Doherty J.
points out, the issue of entitlement is related to consent because one
requires consent to do that which one would not otherwise be entitled\(^{393}\).
Thus, understanding the context assists in understanding whether the parties
are entitled to engage in certain activities in those factual circumstances.

The context is also significant because is reveals whether the party
providing consent had the *authority* to provide consent to that activity\(^{394}\).
This is significant because, to be effective, the consent relied upon must
have been granted by an individual with authority to give consent\(^{395}\).

\(^{392}\) *Op. Cit., R. v. Wills* Footnote 13 at 540-g
\(^{393}\) *Ibid.,* at 543-a
\(^{394}\) For example, a person clearly has no authority to provide consent to an activity beyond his control.
Factors To Take Into Consideration When Determining Whether Apparent Consent Constitutes Genuine Consent

Upon reviewing the cases from Part One cumulatively, a set of factors emerges. The following portion pulls together the leading cases and extracts from them a coherent test for analyzing consent. This portion organizes the cases according to the factors considered by the courts. Although the judges do not seem to have recognized the reality that they are in fact using a consistent set of considerations, and although the courts appear to "reinvent the wheel" with each case, this portion makes it clear that the law does factor in a consistent analysis with each examination of consent. Looking at the cases as a whole shows there is a set of essential elements that the courts rely upon to assessing whether apparent consent constitutes genuine consent.

It is trite law that, to be effective, consent must be voluntary and informed. Fairness demands that individuals make voluntary and informed decisions when they agree to consent. The following shows the patterns emerging from the law with respect to understanding what it means for a consent to be "voluntary" and "informed". First, when assessing whether apparent consent is voluntary, the courts look at:

1) Whether there was an Awareness of the Power to Refuse To Consent.
2) Whether the Consent Represented an Expression of Free Will and Autonomy.

396 Clearly, each case does analyse all the essential elements of genuine consent. Instead, each individual case raises issues related to the elements in question in that case. Within each factual context, the courts focus only on considering the elements at issue in that context. However, it is clear that all of these elements are necessary to show genuine consent.

397 Unless the consent in question gave rise to bodily harm and is vitiated by some public policy, as set out in Part One.

3) Whether there was a Capacity to Consent
4) The Power Dynamics and the Vulnerability and Power Relations Between the Parties,
5) The Fact that Failure to Object Does Not Equate Genuine Consent.

Second, when assessing whether apparent consent is informed, the courts look at:
1) Whether there was an Awareness of the Opportunity to Refuse,
2) The Awareness of the Consequences of providing the Consent,
3) The Scope of the Consent and the Awareness of the Nature of the Action To Which Apparent Consent was Provided.

Finally, in addition to the above, Part One shows consent may also be vitiated, and thereby rendered ineffective, where it is nullified for public policy reasons. It is worth noting, however, that the public policy ground is not explicitly limited to bodily harm cases. While the decision in Jobidon relates specifically to vitiating consent where bodily harm occurs, the court’s comments in Norberg v. Wynrib appear to indicate the Supreme Court does not take a pigeon-holed approach to public policy. Rather, the court suggests public policy grounds may serve to nullify apparent consent where there is some another equally compelling interest at stake:

"The general notion of submission to an "authority" figure indicates an inequality of power between parties such that the existence of genuine consent is questionable. Section 265 (3)(d) is an expression of the fact that, in certain circumstances, considerations of public policy will negate the legal validity of consent as a defence to a charge of assault."\(^{399}\)

\(^{399}\) Op. Cit., Norberg v. Wynrib Footnote 391 at 461-e
Elements Necessary To Establish Voluntary Consent

1) The Power to Refuse to Consent

One of the most important elements of genuine consent is the power to refuse to consent. For consent to be validly given, the decision-maker must have the ability to prevent the other party from engaging in the proposed activity by withholding consent. The apparent consent cannot be said to be genuine, and it has no meaning, if a refusal to consent would not have prevented the proposed acts.

The law operates under the basic presumption that individuals are free to consent or not to consent to matters which relate to them. Consequently, the consentor must be aware of the right to refuse to permit the requestor to engage in the conduct requested. The significance of this is repeatedly emphasized by the courts because, without the power to refuse to consent, a consent lacks the element of choice. A genuine consent must represent a true choice; the notion of exercising a choice obviously entails the chooser having more than one option available to him or her. As Mr. Justice Doherty explains in R. v. Wills, a consent cannot be considered to be voluntary without this element of choice because:

"The exercise of a right to choose presupposes a voluntary informed decision to pick one course of conduct over another. Knowledge of the various options and an appreciation of the

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401 Ibid.
402 Op. Cit., Norberg v. Wynrib Footnote 391 at 457-g
potential consequences of the choice made are essential to the making of a valid and effective choice." 404

The consent must represent the fact the chooser made an actual decision to consent; a lack of protest cannot not constitute consent. This power to refuse to consent is a key factor to what separates genuine consent from mere submission and acquiescence:

"Co-operation must, however, be distinguished from mere acquiescence in or compliance with a police request. True co-operation connotes a decision to allow the police to do something which they could not otherwise do. Acquiescence and compliance signal only a failure to object; they do not constitute consent." 405

The Supreme Court explains the power to consent is rendered meaningless without the power to refuse to consent:

"It follows that 'knowledge and consent' cannot exist without the co-existence of some measure of control over the subject-matter. If there is power to consent there is equally power to refuse and vice versa. They each signify the existence of some power or authority which is here called control, without which the need for their exercise could not arise or be invoked." 406

Consent is clearly not genuine where the person who apparently consented is psychologically compelled by the consequences of refusing. It is necessary, therefore, to consider whether the average person, in the chooser's shoes, would acquiesce and reasonably feel he or she had no power to refuse. The apparent consent is not valid where the person submits or acquiesces and reasonably believes that the choice to do otherwise does not exist:

404 Ibid., at 542-e
405 Op. Cit., R. v. Wills Footnote 13 at 540-h
"The elements of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the [consent] restraint of liberty involuntary."\[407\]

2) Consent as an Expression of Free Will and Individual Autonomy

Although the concepts of free will and autonomy seem intangible on some levels, the courts emphasize the importance of considering these notions to assess whether an apparent consent represented merely a submission to an apparently inevitable situation\[408\]. The validity of consents is crucial to the justice system because genuine consents, "reinforce the principle of individual autonomy which underlies the rights set out in the Charter"\[409\].

Free will relates to the other elements of consent because, "A man cannot be said to be 'willing' unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will"\[410\]. Further, consent is legally ineffective where it is based on coerced will\[411\]. As the Supreme Court explains:

\[408\] Ibid., R. v. Stanley at p. 234
\[409\] Op. Cit., R. v. Wills Footnote 13 at 541-e
\[410\] Op. Cit., Norberg v. Wynrib Footnote 391 at 457-f, see also 458-e
\[411\] Ibid., at 461-a, see also Op. Cit., R. v. Meyers Footnote 390 at 189
"The concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will. It is presumed that the individual has freedom to consent or not to consent. This presumption, however, is untenable in certain circumstances. A position of relative weakness can, in some circumstances, interfere with the freedom of a person's will. Our notion of consent must therefore, be modified to appreciate the power relationships between the parties." 412

Finally, the court must ensure the consent is an expression of autonomy in order to ensure the consent represents the intent of the consentor:

"The consent ... must be voluntary in the sense that it is free from coercion. A consent...is a valid and effective consent if it is the conscious act of the consentor doing what he intends to do for reasons which he considers sufficient. If the consent he gives is the one he intended to give and if he gives it as a result of his own decision and not under external coercion the fact that his motives for doing so are selfish and even reprehensible by certain standards will to vitiate it." 413

3) Capacity to Consent

Aside from the statutory Criminal Code requirements that the complainant have the capacity to consent, the Supreme Court confirms a consent is only effective where it is given by a consentor with the capacity to consent. It is clear that the court has an obligation to carefully examine the position of the consentor to appreciate whether there was a capacity to consent414.

4) The Nature of the Relationship - Power / Authority Dynamics Between the Parties

Because a position of relative weakness can, in some circumstances, interfere with the freedom of a person's will, "our notion of consent must, therefore, be modified to appreciate the power relationships between the parties". It is essential that the consent remain voluntary in the sense that it must not be the product of coercion or oppression or other external conduct which negates the freedom to choose. Power relations are relevant to consent because there is a single thread that runs through involuntary agreements: the unfair operation of power imbalances.

Unconscionable transactions depend upon the inequality of bargaining power for their strength. As a result, courts must ensure that any power imbalance do not impact upon the voluntariness of the apparent consent. Not all power imbalances will render a consent to be ineffective. The key is that the consent will be ineffective if the power imbalance operates unfairly. Thus, there must be more than a mere power imbalance; the imbalance must contribute unfairly to the apparent consent so that the vulnerability of the weaker party is exploited. For example, there is a,

"...two step process involved in determining whether or not there has been legally effective consent to a sexual assault. The first step is undoubtedly proof of an inequality between the parties which will ordinarily occur within the context of a special "power dependency" relationship. The second step is proof of exploitation. A consideration of the type of relationship at issue may provide a strong indication of

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exploitation. Community standards of conduct may be of some assistance...If the type of sexual relationship at issue is one that is sufficiently divergent from community standards of conduct this may alert the court to the possibility of exploitation." 418

Where there is a power differential between the parties in question, the power dynamics are relevant for two reasons. First, the courts must ensure the apparent consent did not arise as a result of the stronger party using the strength of the position to obtain consent by direct or indirect inducement, threat or intimidation or manipulation419. Second, the power dynamics may create a situation in which the weaker party feels compelled, thereby producing an apparent consent which is not genuine: "...in certain circumstances, consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely."420.

For example, the reality of how a person feels when confronted with a "police request" cannot be underestimated:

"The dynamics which operate when a police officer "requests" the assistance of an individual cannot be ignored...The very nature of the policing function and the circumstances which often bring the police in contact with individuals introduce an element of authority, if not compulsion, into a request made by a police officer."421

It is important to note that the law distinguishes between a consent that is motivated by an unfair power imbalance and a consent that is motivated by the consentor's own personal motivation:

418 Ibid., at 464 b-c
420 Op. Cit., Norberg v. Wynrib Footnote 391 at 460-d
421 Op. Cit., R. v. Wills Footnote 13 at 541-a
"The consent ... must be voluntary in the sense that it is free from coercion... If the consent he gives is the one he intended to give and if he gives it as a result of his own decision and not under external coercion the fact that his motives for doing so are selfish and even reprehensible by certain standards will to vitiate it."\textsuperscript{422}

5) Failure to Object Does Not Equate Genuine Consent

Since the Supreme Court's 1994 decision in \textit{R. v. M. (M.L.)} \textsuperscript{423}, it is clear that lack of resistance cannot be equated with consent. The court decided it is not necessary for the party who is alleged to have consented to offer some minimal word or gesture to prove a lack of genuine consent. Where the issue is whether an apparent consent constitutes genuine consent, there must be \textit{some} evidence of an apparent consent in the first place; consequently, where there is no evidence of consent, evidence of a lack of resistance cannot logically constitute evidence to show consent.

Mr. Justice Doherty warns us of the need to be cognizant of the fact that failure to object does not transform apparent consent into genuine consent. This barrier is significant because it ensures that genuine consent will not be confused with mere submission:

"When the police rely on the consent of an individual as their authority for taking something, care must be taken to ensure that the consent was real. Otherwise, consent becomes a euphemism for failure to object or resist and an inducement to the police to circumvent established limitations on their investigatory powers by reliance on uninformed and sometimes

situationally compelled acquiescence in or compliance with police requests." 424

Elements Necessary to Establish Informed Consent

1) An Awareness of the Opportunity to Refuse

Genuine consent requires more than that the power and the opportunity to consent; genuine consent also requires that the consentor be aware of that opportunity to refuse. Obviously, the power to refuse consent is rendered meaningless without the knowledge of the opportunity to refuse to consent. The law is clear that the consentor must make an informed consent, "based upon his awareness of his rights to refuse..."425. A person cannot be said to have agreed to do something or to allow something to be done unless the individual knew that he or she had a right to refuse to comply426.

2) Awareness of the Consequences of providing Consent

In order for a consent to be informed, the consentor must be aware of the potential effects and consequences of giving the consent427. This element represents an essential element of consent because consent will be legally ineffective where it is based on ill-informed will428. Knowledge of

424 Op. Cit., R. v. Wills Footnote 13 at 541-c
428 Op. Cit., Norberg v. Wynrib Footnote 390 at 461-a, also see 462-3
the various options available and an appreciation of the potential consequences of the choices made are essential to the making of a valid and effective choice. This means the consentor must be aware of the significance of his act and the use which may be made of the consent, this includes the fact that the consentor must be aware of who he or she is dealing with.

The requirement that the consentor be aware of the consequences obviously raises questions about the extent of the knowledge of the consequences that is necessary. The knowledge of the consequences that is required will depend upon the degree of the impact that will result from the consent. As a result, "The force of the consent given must be commensurate with the significant effect which it produces." This will clearly vary depending upon the facts of the case.

While the understanding of the consentor should often include the intended purpose of the request and the plan for what will occur if the consent is obtained, this will vary depending on the context. In order to decide this, the courts will look to the context to determine the extent of the consequences to which the consentor must be informed:

"The degree of awareness of the consequences...in a given case will depend on its particular facts. Obviously, it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent."

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430 Op. Cit., R. v. Meyers  Footnote 390 at 187 citing from R. v. Goldman (1980), 51 C.C.C. (2d) 1 at 23-24, see also R. v. Meyers  at 188. This clearly gives rise to questions surrounding the effectiveness of consent given by suspects to undercover police. For example, there is some suggestion in R. v. Stillman (1997), 113 C.C.C. (3d) 321 (S.C.C.) that a person may abandon bodily substances to an undercover police officer if he does not feel compelled to do so. However, according to this reasoning, surely there is some question as to whether such a consent may be seen to be genuine when the suspect has no idea of the use to be made of such an abandonment.
3) The Scope of the Consent and the Awareness of the Nature of the Action To Which Apparent Consent was Provided - Did the consentor possess the requisite informational foundation necessary to make an informed decision

It is important to note that this element is distinguishable from the need to be aware of the consequences. Whereas awareness of consequences requires an awareness of the effect that will be produced by the consent or the use to be made of the consent, on the other hand it is also necessary for the consentor to be aware of the nature of the action to which she consents. A good example of a situation where the apparent consent lacked an awareness of the nature of the act may be found in the Alberta Court of Appeal decision in *R. v. Love*[^433]. In that case, the accused thought he was consenting to rough horseplay with his friends; in fact, the undercover police posed as his friends in order to engage in the rough play to obtain body samples. A consent to one activity, namely horseplay with friends, cannot be said to constitute genuine consent to a completely different activity, namely giving DNA samples.

The consentor must clearly be aware of the nature of the conduct to which he or she is being asked to consent[^434]. Consent is not genuine where there is fraud or deceit as to the nature of the conduct for which the consent is requested[^435]. For consent to be genuine, it must be made knowingly in that the consentor must be aware of what he is doing and he must be aware of the significance of the act[^436].

Another aspect of the need to be aware of the nature of the acts to which the consent applies includes the need to possess sufficient information to make an informed decision. The consentor must be,

"...possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only a volition to prefer one option over another but also sufficient available information to make a preference meaningful."437

The cases consistently assess whether the party giving consent had sufficient information to truly relinquish control to another, or whether there was inadequate information as to the nature of the acts in question438:

"Consent ... can be limited to a taking for a certain purpose only. This concept reveals a link between the scope of valid consent and the scope of the accused’s knowledge in relation to the consequences of the consent."439

CHAPTER 8 DISCUSSION OF QUESTIONS THAT REMAIN UNANSWERED BY THE CASES THUS FAR AND CONCLUSION

Although the first portion of Part Two demonstrated these cases give rise to a coherent test for assessing whether apparent consent constitutes genuine consent, this portion shows this caselaw raises unanswered theoretical questions that call for resolution.

The caselaw related to the nullification of consent for public policy reasons shows that there are two basic presumptions in law. First, decision-makers are presumed to be autonomous, and the principle of individual autonomy and self-rule requires that citizens be given the freedom to make their own decisions, free from state control. Second, decision-makers are presumed to possess self-worth and make decisions to promote their own best interests. It is presumed to be in one’s best interest to not engage in activities that tend towards self-destruction.

This creates a central conflict: if the law is based on the presumption that people are self-respecting, how does the law deal with a decision-maker who appears to be self-destructive? People who agree to allow bodily harm to themselves have the potential to represent a challenge to the notion that people act in their own best interests. If we accept that permitting bodily harm to oneself may not be in one’s self-interest, then we are faced with a direct conflict between these two notions, both of which are basic to our approach to legal problems.

When the law is confronted with a person who is alleged to have consented to have bodily harm inflicted upon himself, the conflict occurs between the principle of self-rule and individual autonomy on the one hand and the presumption that people will use their autonomy to make decisions
that promote this self-respect and self-preservation, for lack of a better
term. One may question whether the law vitiates agreements to permit
bodily harm because choices that allow the infliction of bodily harm are
seen to be inherently suspect. Perhaps where a decision does not objectively
promote self-worth and self-respect then the law may be concerned that if
it condones that decision it is unwittingly participating in the process of
degradation of the person and in further stripping the esteem from the
individual. This would appear to be the exact opposite of the goal to which
individual autonomy is aimed. This causes us to question, is individual
autonomy an end in itself, or is a means to self-preservation?

Perhaps the reason the law promotes autonomy is out of respect for
individuals; and if an individual exercises her ability to self-govern by
agreeing to activity that will lead to self-destruction, then the law may be
seen to be participating in the degradation of the person rather than respect
for the person.

As Jobidon stated, autonomy is not the only value that the law serves
to protect. Unfortunately, it did not clarify what the other principles are.
This leads one to ask what the other principles are. In light of this case law,
we must consider whether there is an evolving notion that people are not
entitled to do things that interfere with their own self-preservation. Just as
the Supreme Court of Canada has adopted the principle promoted by legal
theorists that, "it is wrong to hurt people", the case law in this area calls
upon us to ask whether there may be a competing principle that, "it is
wrong to hurt oneself". And just as the law will generally not permit
activities that allow one person to hurt another, this body of law appears to
show that the law will also not permit us to engage in activities that hurt
ourselves unless there are special public policy reasons to do so.
If the law is based on the unspoken expectation that people will, if left alone, act in a manner that benefits themselves, we must resolve how to respond when people act in a manner that appears to harm themselves. On the one hand, we may have a primitive gut reaction that no right-thinking person would do such a thing and therefore if a person is acting in a self-destructive manner then that person must be acting without the proper skills needed to preserve himself. On the other hand, there are obvious dangers associated with permitting the law the power to decide whether our decisions are self-interested or not.

It is also interesting that courts vitiate consent to cause bodily harm regardless of whether the consent is genuine. In fact, the courts do not even ask themselves whether consent to bodily harm is genuine. Could this be because the law does not accept that a consent to cause bodily harm could be truly genuine, regardless of how genuine it appears? It appears the laws sees consent to bodily harm as so counter-intuitive that there is an unspoken disbelief that consent to bodily harm could be genuine. Perhaps when people makes decisions that are self-destructive there is a legitimate concern that if the state permits this harm then the state is participating in an indignity to a person and an unfairness to a person with less developed self-preservation skills. If we accept that some people are not given adequate skills in life to protect themselves, it may constitute a moral wrong for the law to allow others to take advantage of that.

In life, it may be that people have different opportunities and people are given differing opportunities to develop self-respect. If people are given differing chances to learn how to self-rule, and if we know that some people’s self-esteem is such that they self-hate, then perhaps the law has
chosen to not afford decisions with self-destructive consequences the same respect as other decisions.

All of this calls into question the very meaning of autonomy. We must ask and try to clearly answer why it is that suicide cults are outlawed. We must ask whether autonomy is somehow connected to the notion of psychological integrity to be free to choose the path for your own advancement. But in the same breath do we presume that individuals believe they deserve a better life or that one is possible. We can conceive of a person who has no such belief, a person who is taught in life that he deserves nothing but hatred and violence. And if this person grows up to make choices that self-destruct, is it right for the law to grant them the same self-rule to agree to inflict pain on himself?

If so, how do we stop this from becoming a tool of oppression by the state? How do we stop the state from using this argument to tell people how to live their lives? Or, conversely, how do we ensure the principle of autonomy is not used as an excuse for abandoning vulnerable groups and neglecting them? Is there not some basic caring (perhaps paternalistic) idea that we do not like to see fellow people destroyed, even at their own hands. Is this not what is behind the social state? Is this not why we care for drug addicts and prostitutes in the clutches of pimps, because some people do not get a fair chance from the start. If we as a community were not able to give a person self-respect from the start, it seems wrong to then abandon the person and hide behind the principle of autonomy as an excuse to not care and not help when that person goes on to act out the lessons learned in the community that she is a worthless individual.

This thesis has shown there is clearly a legal distinction between genuine consent and acquiescence. The distinguishing feature is the validity
of the consent; apparent consent is found to be valid when the consent is genuine, whereas apparent consent to acquiescence is not valid. However, this thesis also asks whether there truly is a logical distinction between the concerns that arise in each area.

Part One of this thesis reviewed the case law in this area and established there are two rationales upon which apparently genuine consent may be rejected as invalid. First, apparent consent will be rejected as not genuine, and thus invalid, where it is not voluntary or not informed. Second, apparent consent will be vitiated when it gives rise to bodily harm, regardless of whether it appears to be a genuine consent, for public policy reasons.

Part Two of this thesis pulled together the case law and identified a set of factors upon which the courts consistently rely to assess the validity of an apparent consent. This part identified a test, with factors to be taken into consideration, to determine whether apparent consent constitutes genuine, valid consent.

The second portion of Part Two turned to a question that remains unanswered by the courts. This thesis calls upon the courts to answer this unresolved issue. This matter must be addressed for two reasons: to identify the organizing set of principles which support the meaning of genuine consent and the public policy reasons for nullifying consent and to allow for predicatability in law. Part Two calls into question whether there is truly a stark theoretical distinction between vitiating consent for public policy reasons and not recognizing consents which are not genuine. Perhaps the law does not enforce consents which cause bodily harm because the law does not accept that a person would truly, genuinely consent to her own bodily harm. The following question must be carefully considered and
answered by the courts: is the nullification of one’s apparently genuine consent to cause bodily harm to oneself related to a principle that it is wrong to hurt oneself?