Ewanchuk and the (debunked) Myth of Implied Consent by J Poe

Over the past decade the law of sexual assault and legislative changes governing this section of the law has evolved considerably, but this does not mean that the results are being shown in the courtroom. It has been over ten years since *R v Ewanchuk*, and a positive note to come out of the decision in this case is that the Supreme Court of Canada cemented that there is no defence of implied consent to sexual assault in Canadian law.

Ewanchuk is a leading case concerning the defence of consent to a charge of sexual assault. In this case the complainant, a 17 year old woman, was interviewed by the accused, Mr. Ewanchuk, for a job interview that took place in his van. The complainant did not feel safe and Mr. Ewanchuk repeatedly made advances that involved touching, with each more intimate than the last. The complainant relayed to the court that any compliance that was done was out of fear, and that Mr. Ewanchuk knew that she was afraid and was not a willing participant. The trial judge acquitted the accused of sexual assault, relying on the defence of implied consent and unfortunately the Court of Appeal also upheld that acquittal.

The trial judge in the lower courts acquitted the accused on the defence of "implied consent" on the basis that the complainant's conduct was such that it could be objectively construed as constituting consent to sexual touching of the type performed by the accused.[1] At trial Mr. Ewanchuk successfully argued that although the woman had initially said "no" to his sexual touching, but since he continued and she did not object to every single continued and persistent advance after that this constituted "implied consent". The rational behind "implied consent" is that the trier of fact may believe the complainant when they say they do not consent, but acquit the accused on the basis that their conduct raised a reasonable doubt.[2]

The trial judge cannot accept the complainant's testimony that she did not want the accused to touch her, but then treat her conduct as raising reasonable doubt about consent, which he described as "implied consent". The trier of fact may only come to one of two conclusions: that the complainant either consented or did not, there is no third option.[3] When the trial judge accepted the complainant's testimony that she did not consent then the absence of consent is established and the third component of the *actus reus* of sexual assault is proven and there is no defence of implied consent.

Section 265(3) of the *Criminal Code* sets out a series of conditions under which the law will deem an absence of consent in assault cases, and the complainant made it clear in court that she only complied because she feared for her safety. While the fear does not need to be reasonable, it is clear in this case that the complainant had very legitimate reasons to be afraid for her safety and to be afraid of Mr. Ewanchuk. It is also important to keep in mind that consent is subjective, and that when the complainant told the court that she did not consent to the touching that the trial judge should have accepted that instead of making the issue of whether she consented an objective one.

The trial judge erred in a major way in applying the law of sexual assault in this case, since he cannot find that the complainant did not want or consent to the sexual touching and have this co-

[1] *R v* Ewanchuk, (1999), 3 SCR. at 16.
[2] *Ibid* at 31.
[3] *Ibid.*

exist with a finding that reasonable doubt exists on the question of consent.[4] The accused in this case submitted that the complainant clearly articulated "no" on several occasions, and therefore he knew that the complainant was not consented on atleast four separate occasions during their encounter.[5]

In the Supreme Court's view this case was about myths and stereotypes rather than consent and I agree. It is highly concerning that a judge can give no legal effect to a conclusion that the complainant submitted to an activity out of fear that the accused would apply force to her, but then come to the conclusion that the accused believed the absence of "no" in a series of advances could lead to implied consent. The Supreme Court in their decision outlined that in sexual assault cases which centre on differing interpretations of similar events, as is the case in many of them, that the trial judges should first consider whether the complainant in their mind wanted the sexual touching in question to occur.[6] Once the complainant has asserted that she did not consent then the trier of fact must take into account the totality of the evidence and shift into an inquiry of the accused's state of mind, which lends itself to the defence of mistaken but honest but mistaken belief in consent.

Although the defence of implied consent has been recognized in the Canadian common law in a variety of contexts, sexual assault is not one of them. It is clear in this case that the trial judge did not take the complainant's subjective mind into account when assessing the fact that she consented out of fear, and that this therefore mitigates any defence of the complainant "implying" that she was consenting to the behaviour at hand. Although the trial judge found the evidence that the complainant was putting forward as credible, he decided to conclude that she was implicitly consenting and that the Crown had failed to prove lack of consent.[7] This error in law implies that when a woman is saying "no" she is in reality playing coy or hard to get and that further advances will result in a sexual encounter, with the logic of the trial judge being in this case being that the woman is implying consent. I am proud of the Supreme Court of Canada and specifically Justice Claire L'Heureux-Dube on how they handled and remedied this clearly sexist decision from the lower courts.

[4] *Ibid* at 34.
[5] *Ibid* at 53.
[6] *Ibid* at 61.
[7] *Ibid* at 87.