Sexual Assault in Canada
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Published by University of Ottawa Press

Sheehy, Elizabeth A.
Sexual Assault in Canada: Law, Legal Practice and Women’s Activism.

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Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women

Elizabeth A Sheehy

In this section, Elizabeth A Sheehy’s contribution focuses on one important feature of the 1992 feminist-inspired law reforms — the new “reasonable steps” requirement for the “mistaken belief in consent” defence. Her paper picks up on the themes of resistance to rape law reforms, evocation of rape mythologies, and the misuse of “expert” evidence. She reviews the legal interpretation of the revised “mistake of fact” defence, identifying judicial resistance to its implementation and the subtle re-emergence of rape myths in judges’ willingness to accept “mistake” defences when the complainant is unconscious. Like Lucinda Vandervort in Part I, Elizabeth urges Crown prosecutors to exercise vigilance to ensure that sexual assault law is interpreted consistently with its aims. To do so, they must challenge “expert” evidence introduced by defence on the question of women’s states of consciousness, remind judges of the “reasonable steps” requirement, expose rape myths embedded in defence arguments, and appeal decisions where judges mistakenly apply or fail to apply the requirement.

The prosecution of sexual assault cases where the complainant has no memory because she was unconscious at the time of the attack presents a paradox. On the one hand, these are cases which, to the lay person, might seem dead easy: of course this is criminal conduct — the woman assaulted could not possibly consent while unconscious! For activists who work with raped women, this is a familiar form of male sexual violence, as men have always preyed upon women who are drunk, drugged, or asleep.1 However, to police, lawyers, and judges, these cases seem extraordinarily complicated. When a woman is unconscious, she becomes a blank page on which a phallocentric script can be easily written. Did she secretly enjoy the sexual contact and is now lying to cover her shame?2 How do we know that she did not consent before becom-

2 See for example R v JB (2003), 60 WCB (2d) 132 (Sup Ct Just) at para 33 where the tri-
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ing unconscious and has no memory of that agreement?3 Perhaps she imagined or dreamed the assault?4 What if she ostensibly “agreed” by participating while unconscious?5 Did she seduce the man by her bodily movements as she slept?6

Underneath such questions lurk judgments about fault and responsibility: Was the woman unconscious through her own drug or alcohol abuse? Did she make unwise decisions about whose company to keep or where to lay her head down to sleep? Perhaps she was the author of the “mistake,” having erroneously believed that the man touching her was her husband or boyfriend?

In 1992, the provisions of the Criminal Code underwent substantive reform.7 The Criminal Code now defines consent as “voluntary agreement,” which suggests that the complainant must be capable of decision-making and have agreed to the sexual contact without threat or coercion.8 Further, by virtue of common law developments, a man who proposes that a woman consented must now be able to specify how she communicated her consent, since acquiescence or passivity alone will not amount to consent.9 And finally, a man who says that even if she did not actually agree, he thought she did, must be able to show, pursuant to Criminal Code s 273.2(b), that he took reasonable steps to ascertain the woman’s consent in order to be exculpated for his “mistake.”10

al judge described the complainant’s memory gap as “too convenient.” Justice Bruce Glass acquitted the accused because he disbelieved the complainant’s testimony that she blacked out and held a doubt about whether she had consented. The complainant was the girlfriend of the accused’s best friend. After a night at a bar, the complainant’s boyfriend had gone to bed but she and the accused had stayed up to watch television. She had overindulged in alcohol, and awoke in the morning with pain in her vagina and no memory of intercourse with anyone. She testified that she did not consent and was unconscious when intercourse was pursued by JB.

3 See the dissenting opinion of Madam Justice Conrad at paras 83–86 in R v Ashlee, [2006] ABCA 244, 391 AR 62 at para 27.
5 R v Millar, [2008] OJ No 2350 (Sup Ct Just).
7 An Act to Amend the Criminal Code (sexual assault), SC 1992, c 38 [Criminal Code].
8 Ibid s 273.1(1).
10 Criminal Code s 273.2(b): “It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where:
   (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.”

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Seemingly, these reforms should make it easier to obtain a conviction in sexual assault cases where the complainant was unconscious. In an earlier publication in 2000, I examined cases in which judges interpret s 273.2(b), focusing on a category of decisions where the prosecutions were failing: those cases where the woman was unconscious as a result of sleep, in/voluntary drug use, and/or alcohol, and the accused man was able to raise a doubt in the mind of the judge as to whether he mistakenly believed that the woman had consented. In this paper, I examine the case law on what reasonable steps are required of men who seek sexual contact with semi-conscious and unconscious women, to see what, if any, guidance the superior and appeal courts have provided to trial judges, prosecutors, and police.

Cases reported in the law reports represent only a fraction of the cases decided: it is chilling to contemplate the numbers of men, young and old, who sexually assault unconscious women. While we cannot know with certainty how many women are attacked in these circumstances, we do know that this is a far more prevalent form of male violence than any official statistics convey. Women raped while drunk, drugged, or asleep doubt themselves and doubt the criminal justice response: the vast majority of women do not report their rapes. They are told by hospitals that it is too late to detect drugs that may have tainted their drinks; they know, if they drank too much or used drugs, that they will be blamed and disbelieved if they attempt to claim the terrain of “innocent victim.” And if they are as brave as to report, they face formidable barriers to their cases being prosecuted at all, let alone successfully.

A surprising number of cases involve men who are charged with having sexually assaulted several unconscious women in one night, conduct that suggests deliberate and opportunistic predation by men. These cases also reveal a cowardly practice: men who commit rape

12 Bonnie S Fisher et al, “Reporting Sexual Victimization to the Police and Others: Results From a National-Level Study of College Women” (2003) 30 Crim Just & Behav 6 at 10, 14–15. See also R v Seaboyer, [1991] 2 SCR 577 at para 145 per L’Heureux-Dubé J, dissenting: “Although all of the reasons for failing to report are significant and important, more relevant to the present inquiry are the numbers of victims who choose not to bring their victimization to the attention of the authorities due to their perception that the institutions, with which they would have to become involved, will view their victimization in a stereotypical and biased fashion.”
13 In an overview of studies from Great Britain, Canada, and America, the unfounding rates ranged from 1%-43%: Teresa DuBois, “Police Investigation of Sexual Assault Complaints: How Far Have We Come Since Jane Doe?” Chapter 9 in this book.
against unconscious women engage in an attack without risk, without looking their victims in the eye, or giving them a chance to defend themselves. The notion that young men on university campuses or local bars distribute rape drugs to other men, plan together to supply alcohol to young women, or organize to isolate from her friends and assault a woman who falls asleep at a party, raises the spectre of rape as “sport,”14 if you could call shooting fish in a barrel “sport.”

These cases are particularly disturbing because even though we cannot know the race of the women, we can be sure that racialized women’s rapes form a significant portion of the cases where prosecution is not even pursued or acquittals result. Canadian legal decisions often erase or fail to mention the race of the parties, submerging the role of racism in litigated conflicts.15 In sexual assault cases, where the complainant’s name and identifying information are concealed to guard her privacy, it is impossible to know the race of the women who have been raped.

We must assume, however, that many of these cases involve Aboriginal women, given the rate at which Aboriginal women experience sexual assault.16 The early work by authors such as Teressa Nahane
on judicial sentencing practices regarding sexual assault against unconscious Inuit women suggests that police and prosecutors see sexual assaults against unconscious Aboriginal women as low in criminality. Recall, for example, the remarks made to the press by Judge Michel Bourassa in 1989 wherein he attempted to explain what he saw as the difference between sexual assault in the north, where “a woman is drunk and passed out and a man comes along and helps himself to a pair of hips” versus sexual assault in the south, where “a dainty co-ed is jumped from behind.”\textsuperscript{18} Although these words prompted an outcry and a judicial inquiry into Judge Bourassa’s behaviour, he was vindicated by Madam Justice Conrad who, in a convoluted ruling, found that “Bourassa did not say that sexual assault is less violent in the North than in the South, but that rapes in southern Canada were frequently accompanied by more violence before the act of rape occurs.”\textsuperscript{19}

Jennifer Temkin and Barbara Krahé’s 2008 book, \textit{Sexual Assault and the Justice Gap: A Question of Attitude}, reports several studies that show that sexual assaults against racialized women are particularly difficult to prosecute.\textsuperscript{20} One study suggests that when black women have been raped, their rapes are perceived as less serious than rape committed against white women;\textsuperscript{21} another study indicates that acquaintance rape against black women is less recognizable as criminal by jurors than acquaintance rape against white women or stranger rape against either group of women.\textsuperscript{22} A final study found that it is harder for subjects to assess perpetration by white men against black women as criminal than white male perpetration against white women or black male perpetration against either group of women.\textsuperscript{23}
Other women whose victimization is rarely recognized by the criminal justice system include female partners and ex-partners — where, as Melanie Randall has described in a recent publication, men can exploit past sexual history and mistaken judicial beliefs about what reasonable steps are/not required if the woman is a wife, girlfriend, or former partner.24 Women with disabilities are also vulnerable to having their rapes decriminalized because they may be unable to offer an account of the assault to challenge the accused’s version.25

Similarly, where the woman is unconscious, a man’s “mistake” argument can succeed if the woman cannot counter or deny a man’s version of events. These men claim that women fall asleep in the middle of consensual sexual contact; or they protest that they were unaware that the women had passed out; or they ask us to believe that women “come on” to them while unconscious by rubbing their sleeping bodies against them, moaning, co-operating in allowing their clothing to be removed, and so on. These men may be complete and utter strangers to the women they assault; some of these men have been rejected by the women while awake; and others are friends of the women’s boyfriends or husbands, for example, who have bided their time for the opportunity to assault their friend’s female partner.

Men’s stories can aspire to “reasonableness” not only because the women assaulted have been silenced by sleep, alcohol, drugs, or some combination, but also because these stories tap into phallocentric beliefs. Such beliefs condition our willingness to disregard women’s accounts of rape and instead to accept that their bodies have betrayed them, and that honest men, bewildered by what Carol Smart calls the unknowability of women’s sexual desires and consistent with male pornographic imagination, have been seduced by unconscious women.26

In this chapter, I situate the reformed law in its historical context cited ibid at 46.

and discuss its rhetorical significance as well as its proof obligations. I examine the jurisprudence of the Supreme Court of Canada, mapping the boundaries of men’s criminal responsibility for their claimed “mistakes.” I look at recent case law to identify the guidance provided by provincial appellate and superior courts to the lower courts.

I conclude that the “reasonable steps” reform is applied unevenly by Canadian courts and is also misinterpreted, to the detriment of the public interest and women’s rights to equality and security of the person, protected by Charter ss 7 and 15. Although there are positive developments in some appellate decisions that set parameters around the availability of the reformed mistake defence, many other decisions ignore the larger policy and equality implications of the issues before them and have, through narrow, fact-based judgments, failed to articulate principles that would guide lower courts and educate the public. The result is that men in Canada today remain relatively free to assault unconscious women, because these “mistakes” are rarely condemned.

THE NEW “REASONABLE STEPS” REQUIREMENT
In 1992, Bill C-4927 passed into law, marking the first time that Canadian rape law had been reformed in a truly democratic fashion, from the grassroots up, rather than from the politicians down.28 The 1992 reforms aimed to address the overwhelmingly negative public response to the Supreme Court’s decision in R v Seaboyer.29 This case struck down s 276 of the Code, part of an earlier reform30 aimed at preventing the cross-examination of women testifying in rape trials on their prior sexual experience. As a result of principled feminist coalition work that relied on the expertise of women who worked in crisis centres and shelters as well as Aboriginal and racialized women and women with disabilities, a wholesale reform of rape law was effected to respond to the damage to trial fairness and women’s equality rights caused by the Supreme Court’s decision.

A significant and radical feature of this reform is Criminal Code s 273.2(b), which modified the so-called “mistake of fact” defence available to men accused of rape in Canada. Section 273.2(b) overturned

27 Supra note 7.
28 Sheila McIntyre, “Redefining Reformism: The Consultations that Shaped Bill C-49,” in Roberts & Mohr, supra note 17 at 293 at 294–95.
29 Supra note 12.
30 RSC, 1985, c C46, ss 276 and 277.
the long-standing rule from 1980 in the *R v Pappajohn* decision that allowed a man to be acquitted of rape if he can raise a doubt that he honestly, even if unreasonably, believed that the woman consented. It is perhaps not coincidental that the *Pappajohn* litigation arose at the same time as the women’s liberation and anti-rape movement was gaining steam across Canada. In fact, this man’s rape trial was followed by feminists and the Vancouver media on a daily basis. When one digs even an inch below the judicially cleansed version of the facts in this case, one finds so much evidence of George Pappajohn’s moral culpability for his vicious attack on his real estate agent that it is shocking to see the lengths our highest court went to use his case to pronounce a new defence for men accused of rape.

The *Pappajohn* rule took the “rapist” out of rape, so to speak. The prosecution may be able to prove that the woman did not in fact consent and therefore experienced rape, but if the man can raise a doubt that he was honestly — albeit unreasonably — mistaken as to her non-consent, then the crime was not perpetrated by a man who could be criminally condemned as a rapist. This rule functioned to release judges and jurors from the implications of their judgments in rape prosecutions. No longer required to decide between two versions of what happened, and relieved therefore from women’s pressing claims to autonomy over their bodies and credibility in the public sphere, judges and juries could acquit based on the “mistaken belief in consent” defence, but without calling women liars.

Another function of the “honest mistake” defence was to sanitize and immunize from criminalization self-serving and misogynist beliefs used by men to claim their moral innocence. Lucinda Vandervort has shown how this defence of mistake of fact is really not about factual error at all. These are not mistakes about what a woman said or did; these are not perceptual mistakes caused by bad vision, poor hearing, language barriers, or other conditions that impair communication. Rather, the defence involves interpretive conflict. The man claims that her words or her bodily movement or her passivity or her sexual

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32 Andrea Maitland, “Accused at Rape Trial Admits Threatening to Kill Witness” *The Vancouver Sun* (17 August 1977) 1. Detailed how Pappajohn threatened to kill a Crown witness because “he only wanted her to tell the truth.” See also Pappajohn’s response to the Crown’s question under cross-examination, which asked whether the complainant had resisted. Pappajohn replied, “not violently”: *R v Pappajohn*, [1978] 5 CR (3d) 193 at 205 (BCCA).
past meant to him that she consented, even if she did not. His “error,” as pointed out by Lucinda Vandervort, is as to our legal norms — what predatory conduct can he get away with? The “mistake of fact” defence permitted pernicious beliefs to remain submerged under the cover of “honest mistake,” and thereby operated as legal reinforcement for women’s inequality by failing to condemn rape by “honest” men.

The upshot of Pappajohn, Anne Derrick and Elizabeth Shilton observe, is that “sexual assault is only sexual assault in the eyes of the law if the man who is doing it thinks it is.” If men individually, collectively, and honestly believe women “want it,” regardless of what women say, or that “bad” women are outside the law’s protection, then all women are endangered by this legal rule.

Canadian women were exposed to the frightening implications of the purely subjective test for “mistake” in cases like R v Sansregret. There, a violent ex-partner was given a first “free” rape by virtue of the Pappajohn defence. The accused had twice broken into his former girlfriend’s home and so terrorized her that she engaged in “make up sex” in order to save her own life by pretending to consent. She had reported the crime to his parole officer the first time he did it, who had in turn told Sansregret about her report. When he repeated his crime, he was charged for the second attack. The trial judge accepted that Sansregret unreasonably but honestly believed the complainant consented, based on the woman’s own testimony. She acquitted him accordingly.

In overturning the acquittal and substituting a conviction, the Supreme Court held that Sansregret was morally culpable for the second rape on the narrow reasoning that he was on notice from his parole officer that the complainant considered the first attack to be rape:

> If the evidence before the Court was limited to the events of October 15 [the second rape], it would be difficult indeed to infer wilful blindness. To attribute criminal liability on the basis of this one incident would come close to applying a constructive test to the effect that he should have known she was consenting out of fear. The position, however, is changed when the evidence reveals the earlier episode and the complaint of rape which it caused, knowledge of which, as I have said, had clearly reached the accused.

Never mind that Sansregret broke into the woman’s home, stripped

36 Ibid at para 23.
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her, tore the telephone out of the wall, and plunged a knife into the wall behind her head. Even a man who deployed this amount of violence was legally entitled to rely on “honest mistake,” according to the Supreme Court, as long as he was not formally on notice that the woman’s sexual acquiescence was not the product of his deliberate terrorizing behaviour.

*R v Osolin*37 also showed Canadian women just how much male violence is immunized by the “honest mistake” doctrine. The accused in this case was convicted at trial for a violent rape. The undisputed facts included that he had torn the complainant out of the bed of another man, ripped off her underwear, driven her some distance away, tied her spread-eagled to a bed, had sexual intercourse with her, shaved her pubic area, and then dumped her, naked and hysterical, on a highway. Because she had made self-blaming statements to a therapist afterwards, Osolin was granted a new trial where he was to be permitted access to the complainant’s counselling records to show an “air of reality” to his claimed mistaken belief in consent defence. As Annalise Acorn has persuasively argued, this case again shows intolerable judicial tolerance for high levels of violent coercion by men who propose that they were “mistaken” as to women’s consent.38

Bill C-49’s “reasonable steps” requirement was intended to criminalize sexual assaults committed by men who claim mistake without any effort to ascertain the woman’s consent or whose belief in consent relies on self-serving misogynist beliefs. “Mistake” can only be advanced where the accused took “reasonable steps, in the circumstances known to the accused at the time, to ascertain consent.”39 The provision assesses the culpability of the accused by reference to subjective and objective standards. The accused is judged subjectively in that the steps required of him will be those emerging from “the circumstances known to the accused at the time.” This aspect of the test emphasizes the accused’s actual knowledge, as opposed to what he should have known. At the same time, he cannot use his own drunkenness or reck-

39 *Criminal Code* s 273.2(b), *supra* note 10.
lessness to excuse his “mistake” in such circumstances. The accused is also judged on the objective standard of the steps a reasonable person would have taken to ascertain consent.

The “reasonable steps” rider must be read in the larger context of the 1992 reforms, which have been interpreted by the Supreme Court of Canada. For example, the Supreme Court ruled in *R v M (ML)* that it is an error for a judge to rule that “a victim is required to offer some minimal word or gesture of objection and that lack of resistance must be equated with consent.” Thus in *R v Ewanchuk*, it stated that a man’s mistaken belief that a woman’s silence, or passivity, or ambiguous conduct amounts to consent is an error of law, not one of fact, which is no defence in law. *Ewanchuk* also stated that an accused must be able to identify by what words or actions the woman communicated her voluntary agreement:

> In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused’s speculation as to what was going on in the complainant’s mind provides no defence [emphasis in original].

For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said “yes” through her words and/or actions.

*R v Ewanchuk* emphasized that the reformed law states clearly that no consent is obtained if a woman expresses by her words or conduct a lack of agreement. Therefore a man must, if rejected, desist from further sexual contact unless and until the woman changes her mind. It constitutes a sexual assault to escalate sexual contact once a woman has expressed non-consent, and the accused cannot pursue more

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40 *Criminal Code* s 273.2(a): “It is not a defence … where … the accused’s belief arose from the accused’s … self-induced intoxication.”
41 *Supra* note 9.
43 *Ibid*.
44 *Ibid* at paras 46, 47.
45 *Criminal Code* s 273.1(2)(d).
sexual contact in an effort to secure “consent” without facing criminal consequences.\(^\text{46}\)

The beauty of the reasonable steps requirement is that by changing the substance of the defence of “mistake,” the law has placed an obligation on the accused to identify the steps he took to ascertain the woman’s consent. In turn, judges must rule — and thereby take a public stance — on whether the accused has brought forward sufficient evidence to put the defence of “mistake” before the jury. More importantly, perhaps, given that most sexual assault charges are prosecuted as summary conviction offences before a judge alone without a jury,\(^\text{47}\) judges across Canada are themselves required to rule, as a factual matter, on what steps they consider reasonable for men to take to ascertain women’s consent.

Between the law’s emphasis on the need to seek women’s actual and active agreement and the “reasonable steps” requirement, it ought to be relatively easy to prosecute men who perpetrate against unconscious women. Yet much of the case law is disappointing. There is clear judicial avoidance of the interpretive task demanded by s 273.2(b). My review of the case law below includes decisions of the Supreme Court of Canada, the provincial courts of appeal, and the superior courts of criminal jurisdiction (the Court of Queen’s Bench in the Prairies, or the Superior or Supreme Court of the other provinces), who serve both as trial courts for more serious offences and first level appeal courts for decisions of the lower courts across the country.

Virtually no guidance has been offered by the Supreme Court on s 273.2(b). In consequence, perhaps, Canadian courts have floundered in coming to grips with the reformed mistake of fact defence in cases involving unconscious complainants. As will be shown below, some courts and judges persist in ignoring the reasonable steps requirement or in misinterpreting it. Where lower court trial judges have relied upon the reasonable steps limitation to bar a mistake defence and convict an accused, many appellate courts have overturned these convictions, asserting that the judge failed to assess the evidence properly as to the complainant’s non-consent before turning to the mistake defence.\(^\text{48}\)

\(^{46}\) *Ewanchuk, supra note 42 at para 52.*


\(^{48}\) For example, in *R v Butler* (1998), 107 OAC 306, the Court of Appeal for Ontario set aside a conviction of an accused who had sexual contact with his female friend, who
This pattern of judicial resistance to a reformed rape law is neither new nor surprising. Prior reforms to Canada’s rape law have also been undone by judicial interpretation, as painstakingly demonstrated by Justice L’Heureux-Dubé in her dissent in *R v Seaboyer*. More recently, had allowed him to stay at her apartment provided he sleep in another room. Gregg Allen Butler entered the complainant’s room while she slept: the evidence differed as to what took place before he proceeded to sexual contact. At trial the judge had ruled that the accused had failed to take sufficient steps to ascertain consent in these circumstances, but the accused successfully appealed because the judge had not first clearly ruled that the Crown had proven her non-consent beyond a reasonable doubt.

In *R v Plesh* (1996), 74 BCAC 278, the accused arrived at his ex-girlfriend’s home in the middle of the night, entered an unlocked door, and proceeded to have intercourse with her. The accused and complainant agreed they had spoken on the telephone that night, but he claimed a second call in which he asked if he could come over and was told “yes” by her. She testified there was no such second call, and testified that she awoke to find herself being penetrated by Gregory Wayne Plesh. The problem here, according to the appellate court, was that the judge prefaced her analysis by stating that both the accused and the complainant were credible. The court of appeal held that the judge here failed to explain how she concluded guilt beyond a reasonable doubt having earlier found the accused “credible.” In *R v Baril* (1999), 182 Sask R 272 (QB), André Baril was twenty-three years old and the complainant was fifteen. He came to her babysitting job where they played a drinking game whereby the loser of the card game, manipulated by him, would drink glasses of beer. The complainant quickly became incapacitated and passed out. She awoke to find herself being kissed and responded by kissing the accused back. She passed out again and this time woke up with her pants down and the accused on top of her engaged in intercourse. The trial judge found that the accused knew the young woman was very drunk and might have passed out, and that she was substantially younger than he. Even if she responded somewhat to his kisses, the judge found the accused did not take reasonable steps to ascertain consent to intercourse. The accused succeeded on appeal because there were some minor inconsistencies in the complainant’s testimony (ie she went from being “positive” she had passed out to “pretty sure”) and the judge failed to analyze the whole of the evidence and to resolve the issues on a standard beyond a reasonable doubt.

In discussing judicial interpretation of the amended s 142 of the *Criminal Code*, RSC 1970 c C-34, Justice L’Heureux-Dubé wrote: “Though the motives of Parliament were commendable, judicial interpretation of the section thwarted any benefit that may have accrued to the complainant. In fact, the provision, as judicially interpreted, provided less protection to the complainant than that offered at common law, surely a surprising result considering the obvious mischief Parliament intended to cure in enacting it.” She identified the impact of judicial interpretation on s 142 in *Forsythe v R*, [1980] 2 SCR 268, stating: “Not only was the complainant held to be compellable at the instance of the accused at the *in camera* hearing, but, contrary to the position at common law, this Court held that, due to the wording of s 142(1)(b), credibility was elevated to the status of a material issue. Thus, as regards questions about a complainant’s sexual ‘misconduct’ with individuals other than the accused, the complainant could no longer refuse to answer these questions, and, further, the accused could lead evidence to contradict the complainant’s testimony”: *Seaboyer, supra* note 12 at paras 183–90.
an impressive study by Jennifer Temkin and Barbara Krahé documents a similar pattern in the UK after several decades of rape law reform by the legislature. Temkin and Krahé report a manifest failure of law reform, buttressed by comments from judges who frankly acknowledge that they disagree with reforms aimed at protecting women from discriminatory practices, such as those limiting the cross-examination of women on their sexual history or the disclosure of their personal records. The judges simply refuse to apply these laws. And it is not just judges who resist rape law reform: even prosecutors fail to invoke reformed rules of evidence and express fundamental disagreement with the laws.

I have organized my discussion of the Canadian decisions using the questions that the courts have been called upon to decide in sexual assault cases involving the mistaken belief defence as it applies to unconscious complainants. Many of these questions overlap and are logically dependent on each other. I nonetheless separate them in order to attempt clarity in this murky area of law. First, do our courts recognize that indeed the law has changed such that purely “honest mistakes” as to consent without more are no longer exculpatory? Second, does the accused have to present an evidentiary foundation to show his reasonable steps before he can ask a judge or jury to rule on his claimed “mistake”? Third, are trial judges legally obligated to address themselves to the “reasonable steps” requirement as part of providing reasons for judgment? Fourth, can the Crown prove that a complainant was incapable of consent when the woman has no memory of the sexual assault? Fifth, can an accused engage in assaultive behaviour as part of meeting his “reasonable steps” obligation when a complainant is unconscious? And sixth, what steps are required of an accused when a woman is semi-conscious or unconscious — must he wake her up?

HAS THE MISTaken BELIEF IN CONSENT DEFENCE BEEN SUBSTANTIVELY ALTERED BY S 273.2(B)?
The Supreme Court of Canada was urged by Crown counsel to apply the new reasonable steps requirement in R v Esau in 1997 and in R v Ewanchuk in 1999. Yet only once, in R v Daigle, discussed below, has

50 Temkin & Krahé, “Rape, Rape Trials and the Justice Gap: Some Views from the Bench and Bar,” supra note 20 at Chapter 6, and “Judges, Barristers and the Evidential Law in Action in Rape Cases”, supra note 20 at Chapter 7.
51 Ibid.
our highest court ventured, albeit briefly, into the terrain on a substantive basis to refer to the “reasonable steps” requirement. In *R v Esau*, also discussed in detail in a later section, the majority decision authored by Major J simply ignored the reform. In *R v Ewanchuk*, Major J overtly refused to apply the reasonable steps requirement, stating that it was not a live issue in the case.53

But *Esau* and *Ewanchuk* were not merely lost opportunities for the Supreme Court to interpret s 273.2(b). In both decisions the male justices of the Supreme Court continued to describe the “mistake” defence as if nothing had happened in terms of legislative change. In *Esau* Major J stated: “The defence of honest but mistaken belief is mandated by both common law and statute.”54 Nowhere in his judgment is there any recognition that the 1992 reform changed the law. In *Ewanchuk*, Major J repeated his mistake by describing the defence as one of “honest mistake,” again ignoring the significant reform represented by s 273.2(b). He stated: “we are concerned only with the facial plausibility of the defence of honest but mistaken belief.…”55

In contrast, the women justices of the Supreme Court preferred to decide both cases on the basis of the law as it had been enacted by Parliament. In *Esau*, Justice McLachlin found that the “reasonable steps” requirement barred a potential “mistake” claim by the accused. In *Ewanchuk* L’Heureux-Dubé J again reminded the male majority that the law had changed such that the defence of mistake of fact is no longer to be tested on a purely subjective basis when the charge is sexual assault:

Major J … relies on this Court’s decision in *Pappajohn v The Queen* to describe the nature of the defence of honest but mistaken belief. In *Pappajohn*, the majority held that this defence does not need to be based on reasonable grounds as long as it is honestly held. That approach has been modified by the enactment of s 273.2(b) which introduced the “reasonable steps” requirement. Therefore, that decision no longer states the law on the question of honest but mistaken belief in consent.56

53 *Ibid* at para 60: “In view of the way the trial and appeal were argued, s 273.2(b) did not have to be considered.”
56 *Ibid* at para 100.
Equivocation on the substance of the mistaken belief defence post-reform is, not surprisingly, evident in other appellate court decisions. For example, the Ontario Court of Appeal in *R v Conn*\(^57\) rendered an almost incomprehensible decision on the reasonable steps requirement in 1996. The trial judge had instructed the jury on consent and on the defence of mistaken belief in consent. The accused argued on appeal that the instructions conveyed “the impression that the defence of honest but mistaken belief would only be available if the jurors were otherwise satisfied that the appellant had taken reasonable steps to ascertain consent.”\(^58\)

The Court of Appeal upheld the conviction, but its reasoning left much to be desired. Instead of stating clearly that the alleged error in instructing the jury actually represents the law, the Court of Appeal said that the judge had properly instructed the jury that the accused’s belief need not itself be reasonable, which is accurate and clear. Unfortunately, it went on to say that it was “open” to the jury to consider whether the accused took reasonable steps in deciding whether his belief was honestly and genuinely held. This interpretation is misleading and legally incorrect. The reasonable steps requirement is not optional, and failure to take such steps bars the defence regardless of the honesty of the claimed belief.

In 1998, in *R v Darrach*,\(^59\) the Ontario Court of Appeal was clearer on the fact that the defence has been reformed. In this case it was called upon to adjudicate the constitutionality of several aspects of the 1992 reforms, including the new objective test and the evidentiary burden on the accused in s 273.2(b). The accused argued that by importing an objective rider into the defence of mistake of fact, the section unfairly impinged upon his constitutional rights to be judged by a purely subjective standard because the crime of sexual assault is highly stigmatized and its penalties severe.

The Ontario Court of Appeal rejected this argument, holding that sexual assault is not one of those crimes requiring proof of a pure, subjectively assessed state of mind on the part of the accused. In any event, the court said, the test for the mistaken belief defence remains mainly subjective. Section 273.2(b) assesses the reasonableness of the steps taken by reference to “the circumstances known to the accused at the


\(^{58}\) Ibid at para 1.

\(^{59}\) *R v Darrach* (1998), 38 OR (3d) 1 (CA).
time.” It requires only that an accused take some reasonable steps, not all reasonable steps. And, in the end, the accused’s belief is ultimately judged on a subjective standard. In other words, an accused may take reasonable steps but still arrive at an unreasonable belief in consent, which would exculpate him with respect to a subsequent sexual assault charge.60

The court also rejected Darrach’s argument that the provision placed an obligation on him to testify in his own defence if he wishes to argue “mistake:”

There is no testimonial compulsion … It may be that this provision … will … have the effect of placing a tactical or evidential burden on an accused person to adduce some evidence capable of raising a reasonable doubt. This does not involve any constitutional infringement.61

This case was appealed to the Supreme Court of Canada by the accused, but not on this issue. Darrach therefore stands as the highest authority we have regarding the fit between the objective and subjective branches of the reformed mistaken belief in consent defence.

MUST THE ACCUSED FIRST SHOW AN AIR OF REALITY THAT HE TOOK REASONABLE STEPS BEFORE A MISTAKE DEFENCE CAN BE CONSIDERED?

Before any defence is considered by the trier of fact, whether a judge sitting alone or a jury, a judge must first make a determination as a matter of law whether the accused has presented sufficient evidence to give the defence an “air of reality.” This rule is intended to keep the trier of fact focused on the real issues of a case and prevent them from straying to consider fanciful claims. In sexual assault cases, this rule is particularly important because triers of fact are highly prone to judging these cases based on myths and stereotypes about women who report rape rather than on the law or the proven facts.62

For the mistaken belief defence, the “air of reality” test has meant that there must be some evidence, whether in the testimony of the accused or other evidence about how the complainant communicated consent, to support the accused’s claim that he honestly but mistakenly

60 Ibid at paras 88, 89, 90.
61 Ibid at para 94.
62 Temkin & Krahé, supra note 20 at Chapter 3, “The Problem of the Jury in Sexual Assault Trials.”
believed she voluntarily agreed to the sexual contact. Now that the defence has been altered such that it is barred unless the accused took reasonable steps, the question has become whether the judge’s evaluation of the “air of reality” test must include consideration of whether there is any evidence that the accused took reasonable steps to ascertain consent.

Unfortunately, the Supreme Court has not developed a jurisprudence that filters out myths and stereotypes that are detrimental to women. *R v Esau,* 63 decided in 1997, offered the Supreme Court of Canada the opportunity to interpret the reasonable steps requirement for the first time since its enactment. It was also the first time that the Court was called upon to address how the law governing sexual assault and mistaken belief in consent should be applied when the complainant has no memory of the assault. Significantly, with the exception of dissenting judgments written by the two women justices McLachlin and L’Heureux-Dubé, JJ, the Supreme Court missed the mark in terms of addressing these two opportunities.

Able Joshua Esau was convicted at trial by a jury in the Supreme Court of the Northwest Territories when the jury rejected his story (beyond a reasonable doubt) that the complainant was an active and consenting participant in sexual intercourse. She testified that she would never have agreed to sex with her second cousin, but she had no memory of what had occurred at the party she held at her own home after a certain point in the evening. She woke up with a chipped tooth and soreness indicating intercourse had occurred. Esau denied sexual contact to police, but when the DNA came back implicating him, he changed his story and claimed consent in his criminal trial. On appeal to the Northwest Territories Court of Appeal, 64 counsel for Esau argued that the trial judge erred in failing to charge the jury on the defence of mistaken belief, in spite of the fact that counsel at trial had not advanced this defence. The appeal court agreed and ordered a new trial.

At the Supreme Court, the Crown argued that the accused would have been barred from this defence at trial in any event because he did not take reasonable steps to ascertain consent. Yet the majority of the Supreme Court of Canada said that the trial judge was obliged to put “honest mistake” to the jury because there was an air of reality to the defence:

The defence of honest but mistaken belief is mandated by both common law and statute. My colleague, Justice McLachlin, in her reasons in this case, narrows the defence to where it practically ceases to exist. The trial judge’s role in evaluating the legal standard of “air of reality” as a question of law is a limited one. The strictures placed on the defence by my colleague would expand the role of the trial judge and deny the jury the ability to apply its wisdom to issues that arise in these cases by removing nearly all questions of fact from them.\(^65\)

In the later *Ewanchuk* decision, Major J stated that if the judge finds an air of reality to the claim that the accused was honestly mistaken as to consent, then it would be up to the jury to determine whether he took reasonable steps as a question of fact: “Whether the accused took reasonable steps is a question of fact to be determined by the trier of fact only after the air of reality test has been met.”\(^66\) He stated that judges “should avoid the risk of turning the air of reality test into a substantive evaluation of the merits of the defence.”\(^67\)

Justice L’Heureux-Dubé took issue with this aspect of the majority decision. She said that, logically, mistaken belief as a defence should not be put before the jury in rape cases unless there is an air of reality not just to “honest belief,” but also to the accused having taken “reasonable steps to ascertain consent.”\(^68\) If the substance of the defence itself has changed, then surely the legal question for the judge charged with determining whether the defence is available must be whether there is an air of reality that the accused took reasonable steps and yet was honestly mistaken as to consent.

L’Heureux-Dubé J went on to demonstrate why the defence of mistake had no air of reality on Ewanchuk’s facts by reference to the law in s 273.2(b). Her effort in this regard is crucial for lower court judges seeking examples of the application of the new law:

In this case, the accused proceeded from massaging to sexual contact without making any inquiry as to whether the complainant consented. Obviously, interpreting the fact that the complainant did not refuse the massage to mean that the accused could further his sexual intentions is not a

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\(^{65}\) *Ibid* at para 21.

\(^{66}\) *Ewanchuk*, supra note 42 at para 60.

\(^{67}\) *Ibid* at para 57.

\(^{68}\) *Ibid* at para 100.
reasonable step. The accused cannot rely on the complainant's silence or ambiguous conduct to initiate sexual contact. Moreover, where a complainant expresses non-consent, the accused has a corresponding escalating obligation to take additional steps to ascertain consent. Here, despite the complainant's repeated verbal objections, the accused did not take any step to ascertain consent, let alone reasonable ones. Instead, he increased the level of his sexual activity. Therefore, pursuant to s 273.2(b) Ewanchuk was barred from relying on a belief in consent.69

In decisions released in 2003 and 2007 respectively, the Ontario Court of Appeal and the Saskatchewan Court of Appeal have treated Major J’s discussion of the evidentiary burden in Ewanchuk as obiter dicta and instead adopted the position of Justice L'Heureux-Dubé. According to these judgments, before the judge or jury should even consider the “mistake” defence, there must be an air of reality that the accused took reasonable steps to ascertain consent. In R v Cornejo70 the appeal court unanimously held that the trial judge was wrong to leave the defence with the jury because there was no evidence of reasonable steps. In R v Despins71 the same conclusion was reached unanimously by the three justices deciding the case. These rulings are important because they keep alleged “honest mistakes” away from the jury or judge unless there is some evidence to support the accused having taken reasonable steps. This filter should prevent the trier of fact being misled by rape myths and sex stereotypes about men’s “mistakes” and instead focus their minds on the facts of what the accused did or did not do to ascertain consent. Further, because the evidentiary burden is a question of law, the position taken in Cornejo and Despins facilitates appeals and the development of legal principles in an area where discriminatory beliefs have masqueraded as “facts” for far too long.

Not all courts are following this approach. For example, in R v Aitken,72 the reviewing court overturned the conviction in part because the trial judge had first found that the accused had not taken reasonable steps to ascertain consent and then concluded there was therefore no air of reality to the defence, contrary to the majority’s suggested approach in Ewanchuk. The appeal court believed that this error resulted in the judge unfairly rejecting the mistake argument without carefully

69 Ibid at para 99.
70 R v Cornejo (2003), 68 OR (3d) 117 (CA) at paras 2–3, 19.
71 R v Despins, 2007 SKCA 119, 299 Sask R 249 at paras 12, 47.
72 R v Aitken, 2007 BCSC 1975, BCJ No 2973 (Sup Ct).
reviewing the accused’s evidence in detail. The court did not order a new trial, leaving this accused without even the risk of criminal sanction for his actions.

**MUST THE TRIAL JUDGE AVERT TO THE REASONABLE STEPS REQUIREMENT?**

Are judges required to refer to the new requirement in s 273.2(b) when they adjudicate sexual assault cases that involve claimed “mistakes”? If not, then the reform can become a dead letter, readily ignored by police, lawyers, and judges. On the other hand, if it must be addressed, then not only will some mistake defences be barred, but the law will become more transparent as judges explicitly rule on what reasonable steps are required in given circumstances.

At the level of the Supreme Court, only the women justices have recognized the importance of requiring that judges address the new law in clear terms. In *R v Esau*, as already noted, Major J for the Supreme Court of Canada said that the trial judge was obliged to put “honest mistake” to the jury because there was an air of reality to the defence where the accused testified as to consent, where the complainant had no memory of the assault and was unable to provide a counter-narrative, and where there was no evidence of force or violence. He made no mention whatsoever of the new law.

Justice McLachlin dissented on the question of whether the reasonable steps requirement could be ignored by the court:

Major J [for the majority] does not consider s 273.2. This may be because it was not argued on the appeal or in the proceedings below. With respect, I do not believe that the force of s 273.2 may be avoided on that ground. Parliament has spoken. It has set out minimum conditions for the defence of mistaken belief in consent. If those conditions are not met, the defence does not lie.

Her insistence that the new Code provision be addressed is particularly important because some judges have taken the position that whenever an accused claims “consent,” he is implicitly also raising the alternative defence of “mistaken belief in consent.” If this is indeed the case, then

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73 *Esau*, *supra* note 64 at paras 15, 29.
74 *Ibid*.
75 *Ibid* at para 50.
76 *R v Bulmer*, [1987] 1 SCR 782 at para 24, per Lamer J: “I should, in passing, add that in my view the issue of mistaken belief in consent should also be submitted to the jury in all
judges must avert to the reasonable steps limit in every decision to ensure that any appeal court reviewing the record has the benefit of factual findings on all the issues that arise.

The majority opinion in R v Ewanchuk refrained from analyzing the reasonable steps requirements because it was not argued on appeal and there were no facts in evidence to support the defence of mistake.\(^7\) Yet a court still ought to address the issue to resolve the case appropriately and to guide lower courts. As Justice L’Heureux-Dubé put it:

[S] 273.2(b) precludes the accused from raising the defence of belief in consent if he did not take “reasonable steps” in the circumstances known to him at the time to ascertain that the complainant was consenting. This provision and the defence of honest but mistaken belief were before the trial judge and it should have been given full effect. The trial judge erred in law by not applying s 273.2(b) which was the law of the land at the time of the trial, irrespective of whether the case proceeded on that basis.... I agree entirely with Fraser CJ that, unless and until an accused first takes reasonable steps to assure that there is consent, the defence of honest but mistaken belief does not arise.\(^7\)

In spite of the Supreme Court’s rulings in Esau and Ewanchuk that seem to suggest that s 273.2(b) can be ignored, several courts have held that trial judges must avert to the reasonable steps requirement in adjudicating mistake of fact defences. R v Malcolm,\(^7\) decided by the Manitoba Court of Appeal in 2000, was an appeal against acquittal where the Crown argued that the judge erred in giving the accused the benefit of the mistake of fact defence. Here Randy Malcolm returned to the complainant’s home after a New Year’s Eve party, when the complainant had gone to bed and her husband had left the house. Malcolm’s claim was that she had kissed him and made a suggestive remark earlier

\(^7\) Ibid at para 60: “Whether the accused took reasonable steps is a question of fact to be determined by the trier of fact only after the air of reality test has been met. In view of the way the trial and appeal were argued, s 273.2(b) did not have to be considered.”

\(^7\) Ibid at paras 98, 99.

\(^7\) R v Malcolm, 2000 MBCA 77, 148 ManR (2d) 143 (CA).
at the party. When he returned to her home and entered her bedroom some time later, his story was that she grabbed his arm, pulled him to her bed, and fondled him. It was only later — inexplicably according to him — that she jumped up and ordered him out of the house.

The complainant denied that she had made a suggestive remark earlier at the party. She testified that she awoke to find herself “being humped.” She thought it was her husband and said, “I love you Moise,” before realizing that it was her husband’s friend Malcolm who was penetrating her. The trial judge’s decision to acquit the accused made no reference to the legal requirement that the accused take reasonable steps to ascertain consent and made no factual findings that would have allowed the appeal court to address this legal requirement imposed by Parliament. The appeal court criticized this failure:

Parliament introduced s 273.2(b) to address those situations which may well be few in number but which may arise when the accused’s conduct does not amount to recklessness or wilful blindness as to consent, but when the circumstances preceding the sexual activity cry out for the accused to take positive steps to assure himself that the complainant is knowingly consenting to that activity. The case at bar is surely such a circumstance. After a night of partying and drinking, without any invitation to do so, the accused entered the complainant’s bedroom while she was sleeping, knowing that she was married to a close friend. He did not engage in any conversation with her. He states that by her conduct, he believed she wanted to have sexual intercourse with him. Surely in such a situation, the court must be satisfied that the accused took reasonable steps to ascertain that the complainant was consenting to that sexual activity.80

The unanimous decision of the appeal court found that it constitutes an error of law for a judge to fail to turn his or her mind to s 273.2(b) where the facts demand that the accused take reasonable steps to ascertain consent. The defence had argued that the trial judge is presumed to know the law, had referred to other parts of s 273.2, and thus must have rendered judgment consistent with the reasonable steps requirement. The appeal court rejected this submission and instead generated a principle with respect to s 273.2(b):

Where a case depends not upon a review of the evidence … but rather upon the application of a fairly new or infrequently applied principle of law, one

80 Ibid at para 36.
that is not firmly established and one which has not been subject to close analysis or comment, then it is my view that a trial judge’s failure to refer to that principle may very well give rise to appellate intervention.81

Randy Malcolm was therefore ordered back for a new trial.

For similar reasons, the New Brunswick Court of Appeal in *R v DIA*82 granted the Crown’s appeal against acquittal and ordered a new trial for a man who was charged with sexually assaulting his wife. The accused had testified that he and his wife regularly had sexual intercourse two and three times a day. Since they had only had intercourse twice that day, he claimed to have believed his wife wanted to engage in this activity a third time, even though she was sound asleep. He stated that he stopped his sexual pursuit of his wife when she woke up and said no. In contrast, she testified that she awoke in bed with her newborn baby to find the accused on top of her attempting to penetrate her vagina. She repeatedly said no, but then he attempted to penetrate her anus with his penis. The accused only stopped when her screaming woke the baby, who also began to scream and cry.

The trial judge had acquitted on the first charge on the basis that the accused had an honest belief in consent based on reasonable steps, but did not specify what those steps were; with respect to the second charge, he simply said he found the accused not guilty. The appeal court was unable to review the decision because the judge had not made findings of credibility with respect to the contradictory evidence. The appeal court repudiated the reasoning of the judge below to the extent that he may have relied on some notion of “implied consent,” which was rejected by the Supreme Court in *Ewanchuk*. Further, the appeal court stated: “the trial judge’s failure to give adequate reasons as to why the defence should apply leaves this court in a quandary as to whether he understood the defence of mistaken belief as explained in *Ewanchuk*.83 A new trial on both counts was therefore ordered because the court was unable to determine whether the accused should have been found guilty but for the judge’s error of law.

The Ontario Court of Appeal has not yet ruled that a trial judge commits legal error by failing to evoke s 273.2(b), but has overturned acquittals where judges have overtly failed to account for circumstances

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81 Ibid at para 34.
82 *R v DIA* (1999), 215 NBR (2d) 330 (CA).
83 Ibid at para 15.
that cry out for “reasonable steps.” *R v Girouard* 84 involved a Crown appeal against acquittal where the judge at trial had a doubt as to whether the accused held a mistaken belief regarding consent in light of “the previous night’s ‘consensual’ sexual activity” and “the complainant’s failure to express her lack of consent more forcefully, either by words or gestures.”85 The reviewing court ordered a new trial because the judge had failed to consider the effect of the accused’s admission that the complainant had asked in the morning, before further sexual contact occurred, whether they had had sex the night before and he had answered her, “Yeah, a couple of times.” According to the court, this interchange indicated equivocal conduct from the complainant at best, suggesting that the accused had failed to take appropriate steps to ascertain consent.

In *R v DWH* 86 the Ontario Court of Appeal held that it is a question of law permitting appellate intervention whether that judge has taken into account the relevant circumstances known to the accused that bear on the reasonable steps needed to ascertain consent. The accused was convicted at trial of sexually assaulting his wife by inserting a dildo into her vagina while she was heavily medicated with sleeping drugs after an operation. The court refused to rule that a judge must marshal and review all of the evidence in this regard, but specifically rejected the argument that the judge should have considered the prior sexual activity between the accused and the complainant because “the circumstances had changed significantly”: “the complainant had undergone serious surgery and was in considerable pain.”87 Importantly, the court of appeal also held that the complainant’s credibility was not significant to the “crucial” issue of whether the accused took reasonable steps to ascertain consent. The appeal against conviction was therefore dismissed.

Finally, *R v Miyok*, 88 a decision of the Nunavut Court of Appeal, also supports the idea that judges must avert to s 273.2(b) in their judgments. Unfortunately, it is a weaker decision because the reviewing court did not require the judge to rule specifically on whether the accused took reasonable steps. The Crown appealed an acquittal by a judge sitting alone on the basis that the judge found an air of reality to the accused’s “mistake” defence, but did not explicitly address which

84 *R v Girouard* (2003), 18 CR (6th) 135 (Ont CA).
85 Ibid at para 1.
87 Ibid at para 6.
reasonable steps he had taken to ascertain consent. The accused, Jimmy Miyok, was the complainant’s income support worker. During an appointment with the complainant in his office, he suggested that he would come to her home for a sexual liaison. He acknowledged that she seemed “scared and nervous,” but since she did not unequivocally reject his proposition, he showed up at her home the next day, entered her home when she opened the door, and proceeded to kiss and touch her breast. At trial, the prosecutor had argued that the power imbalance between the accused and the complainant required that he take further steps or make further inquiries before showing up on her doorstep. In rebuttal, the defence suggested that the complainant had returned the kiss, making further steps unnecessary.

On appeal, the court ruled that because of the submissions of Crown counsel before the trial judge and the fact that the judge quoted from a portion of Ewanchuk where the Supreme Court referred to “reasonable steps” as a question of fact, it could be inferred that the judge had turned his mind to this requirement. The court concluded that he must nonetheless have had a reasonable doubt about whether the accused mistakenly believed the complainant consented. The Crown appeal was dismissed.

CAN THE CROWN PROVE THAT THE COMPLAINANT WAS INCAPABLE OF CONSENT?

Although it is undisputed law that an unconscious woman is incapable of consent, it is difficult for the Crown to prove that a complainant was incapable of consent beyond a reasonable doubt. This is because, as Janine Benedet demonstrates in her work,\textsuperscript{89} the standard for incapacity is very high — the complainant must be virtually unconscious to be deemed “incapable of consent.” It is not necessarily enough for a woman to testify that she was unconscious, that she experienced blackout, or that she has a memory gap. In these circumstances, a court may find that the complainant is truthful, such that her incapacity is established beyond a reasonable doubt. It is also open to a judge or jury to have a reasonable doubt as to whether she is honest with respect to her incapacity,\textsuperscript{90} or indeed mistaken.

Worse, however, is that most judges are prepared to accept a third possibility, which is that the complainant was arguably incapacitated such that she has no memory, but yet she may have been sufficiently

\textsuperscript{89} Janine Benedet, “The Sexual Assault of Intoxicated Women” (2010) 22 CJWL 435.
\textsuperscript{90} See \textit{JB}, supra note 2.
capable to have validly “consented.” In fact, defence lawyers have found experts willing to testify as to the plausibility of this scenario. In *R v Dumais*, the defence presented only one witness. The complainant’s evidence was that she had five drinks, then went to sleep, only to be awakened by the accused penetrating her. Dr John Steven Richardson testified in support of two possible defence theories. One was that the complainant was capable and did consent. The other defence theory was that the accused was honestly mistaken as to consent. The expert testified that:

[A] person can reach a state where he or she is too drunk to remember exactly what happened, but not too drunk to participate in an activity such as sexual intercourse. He stated that the brain often “rationalizes” these events and may come to a wrong conclusion as to issues like whether or not the activity was consensual … This witness speculated that it is possible that a person would have consumed enough alcohol to feel tired but not yet being at a state where brain cells would be shutting down and amnesia would be produced….

On cross-examination, this witness confirmed that it is possible to be in an intoxicated state and appear to be giving consent without knowing it.

The trial judge’s finding that the complainant lacked the capacity to consent evinced the judge’s rejection of this hypothesis; the conviction was upheld on appeal.

Justice McLachlin, in her dissenting opinion in *Esau*, refuted the plausibility of the scenario whereby the complainant had sufficient capacity to “consent” but insufficient capacity to have any memory whatsoever of the event. She argued that the issue remains a credibility contest between the accused and the complainant, and does not admit of some third, “mistaken belief” explanation. Either the complainant, who says she would never have consented and was unconscious when assaulted, will be believed, or the accused, who claims active and conscious agreement by the complainant, will be believed. She flatly refused to accept a third scenario, in which the complainant, though unconscious, appeared to be acting consciously and voluntarily:

Drunkenness cannot constitute evidence of a situation in which the complainant might appear to be consenting when in fact she was not. If this

92 *Ibid* at paras 15, 16.
were so, the defence would be available in every case where the complainant was drunk at the time of intercourse. If the complainant is so drunk that she is unable to communicate (the Crown’s position at trial), she is incapable of giving consent, and no question of honest mistake can arise. If she is less drunk, and able to communicate (the defence’s position at trial), the question is what she communicated.93

[T]he assertion that the complainant’s drunkenness and lack of memory raise the defence of honest but mistaken belief depends not on the evidence but on speculation. It depends, moreover, on dangerous speculation, based on stereotypical notions of how drunken, forgetful women are likely to behave.94

One judge has called upon Crowns in such cases to present expert evidence to prove the complainant’s incapacity or her non-consent where she has no memory of the assault. In his judgment of the Ontario Supreme Court, R v R(J),95 Justice Todd Ducharme suggested that where the Crown seeks a ruling that the woman was incapable of consent, or seeks to rely on the woman’s complete lack of memory of the sexual assault to prove non-consent, “while not required as a matter of law, for such evidence to be probative, some expert evidence will almost always be essential.”96

However, the judge also said that evidence of blackout or memory loss can, along with other circumstantial evidence, support the inference either that the woman was incapable of consent or that she did not in fact consent. On the facts in this case, which involved a woman who was raped by three men while unconscious, the judge convicted both co-accused. Ducharme J accepted the complainant’s evidence that she had undergone an abortion two days earlier and would not have consented to intercourse with anyone because she had been advised by the doctor to abstain for at least two weeks for her own health and safety. Further, she testified that she was in love with the man who had impregnated her and hoped to meet up with him at the party where she was raped.

In support of the claim that she was incapable of consent and would not have consented if conscious, the complainant testified as to her own

93 Esau, supra note 64 at para 94.
94 Ibid at para 95.
95 R v R(J) (2006), 40 CR (6th) 97 (Ont Sup Ct).
96 Ibid at para 20.
racism. She claimed that she was not in the least attracted to either accused. Specifically, she was not attracted to JR because he was black: “I am a person who believes in, say, being with your same race…. I have just never been attracted to a black man before.” She explained that “she had lost her virginity to a black man” and “it was that experience that made me against them.” Although the other accused, JD, was Aboriginal, she said she would not have had sexual relations with him because he was just a “good friend.”

There are many ways to read the complainant’s invocation of racism as evidence of her non-consent. This woman was raped by three men in one evening while unconscious, and must have experienced great suffering and anxiety about being believed. Given that she admitted that her first sexual liaison was with a black man, it seems improbable that she never experienced attraction to men of other skin colours due to her proclaimed racist views. It may be that this complainant seized upon a persuasive device that accords with our “common sense” racism. It certainly worked for Justice Ducharme, who commented, “While I find these views distasteful, they are also a very powerful reason that KP would not agree to have sex with JR.”

While missing the opportunity to dispel racist myths and stereotypes that women do or do not consent based on the race of another, Justice Ducharme did refute another misogynist myth. In response to the defence suggestion that because the complainant was drunk she may have had consensual, unprotected intercourse with three men over a period of hours, he said: “While such a belief in the aphrodisiacal powers of alcohol might find a home in some works of pornographic fiction, it does not accord with common sense, common experience or the evidence in this case.” He found that the complainant was incapable of consent beyond a reasonable doubt based on toxicology evidence regarding her blood alcohol levels, the absence of injuries or sign of struggle, her many reasons for not being interested in either of the accused sexually, and her evidence that had she been willing, she would have insisted on condom use.

97 Ibid at para 34.
98 Ibid.
100 R(J), supra note 95 at para 38.
101 Ibid at para 39.
The judge also considered the availability of the mistaken belief in consent defence. JD did not testify, so there was simply no evidence to give an air of reality to any claim that he believed the complainant communicated consent. And, because the judge rejected JR’s evidence wholly, he too was denied the defence. The convictions were upheld against appeal.102

In R v BSB103 the judge referred to R(J) above and noted that the Crown in the case before him had not introduced expert testimony to demonstrate that the complainant’s memory loss was indicative of her lack of capacity to consent. This Crown had presented an expert toxicologist to testify as to the manifestations of different types of drugs used to rape women. The evidence of the other witnesses in this case described the behaviour of the complainant that night as extremely bizarre, dramatically out of character, hyper-sexual, and shockingly inappropriate. The complainant said that she began to fade in and out of consciousness soon after accepting a mixed drink prepared by the accused, and had no memory of the words and actions ascribed to her. The judge observed that the woman before him was painfully shy, and that the behaviour described by the witnesses seemed completely out of character for her.

While his reasoning is unclear, the expert apparently testified that the complainant’s symptoms were consistent with a drug other than GHB, which would have been undetectable because too much time had passed from ingestion to testing. Yet the expert also said that the tests did not reveal the presence of any of these other drugs. Thus the judge was forced to conclude, “I have no evidence before me that that type of drug was consumed by the complainant…”104

Nonetheless, Romilly J convicted the accused for sexually assaulting the woman, whose body was covered in nineteen bruises and whose vagina showed lacerations caused by blunt trauma. He considered her absence of memory along with the evidence of two other witnesses who observed her state, and drew the inference that she was incapable of consent at the time of the attack. He went on to find non-consent, even had she been capable, based on the accused’s fabricated lies to police, the complainant’s injuries, and the fact that she vomited just before the assault. Finally, Romilly J rejected a claimed mistaken belief in consent

102 R v R(J), 2008 ONCA 200.
103 R v BSB, 2008 BCSC 917, BCJ No 1319 (Sup Ct).
104 Ibid at para 31.
because there was no evidentiary basis to support it in light of the complainant’s vomiting and the injuries that suggested her resistance.105

In some cases, other witnesses provide testimony that proves the complainant’s incapacity.106 For example, in R v Jesse,107 the British Columbia Supreme Court relied upon non-expert evidence to find that the complainant was incapable of consent at the time the accused assaulted her. First, the court relied on similar-fact evidence that the accused had been convicted of attacking another unconscious woman. In both cases, he had inserted objects into the women’s vaginas when they were passed out due to alcohol consumption. In the case at hand, the accused denied that he was the perpetrator, but he had been witnessed by two others fleeing the crime scene. The past assault persuaded the judge beyond any doubt as to his guilt. Second, counsel for the accused also attempted an alternate defence of “consent.” This defence was rejected because the judge did not accept the possibility that the complainant had voluntarily agreed to have various household objects inserted in her body. Given how hard it was for the police and witnesses to rouse her when she was discovered post-assault, the judge found that the complainant was incapable of consent at the time.

Yet in some of these cases, judges’ decisions on complainants’ incapacity may suggest that adherence to rape mythologies is more determinative than the evidence at hand. For example, Justice McKinnon, in a perplexing decision acquitting the accused David William Millar,108 first relied on the evidence of the complainant’s friend to find that the complainant was incapable of consent, but then went on to speculate

105 Ibid at para 98.
106 See also R v Bell (2007), 223 OAC 243 and R v Zarpa, 2009 NLTD 145. In Bell, the trial judge and the Ontario Court of Appeal reviewed the evidence and found that the accused had drugged the male and female complainants with a stupefying substance and that neither was capable of consent in consequence. Although no drugs were detected in testing of the complainants two days later, the evidence of the two complainants as to their experiences of coming in and out of consciousness and other symptoms, including hallucinations, and that of a doctor who testified as to his view that they had been drugged, supported a guilty verdict. In Zarpa, the intoxicated complainant was asleep in her parents’ bed; they were awakened by the realization that a fourth person was in the bed, on top of their daughter. Upon turning on the light they found their daughter still passed out but naked from the waist down, as was the accused. The Newfoundland and Labrador Supreme Court had no difficulty convicting Samuel Thomas Zarpa of sexual assault on the basis of the complainant’s incapacity.
107 R v Jesse, 2007 BCSC 1355, 74 WCB (2d) 802 (Sup Ct).
108 Supra note 5.
on the (unconscious) complainant’s motives. The witness had helped put the extremely intoxicated complainant to bed, noting that she was speaking in “baby talk,” could not chew properly (when the witness encouraged her to eat something), and later vomited in a basket beside her bed. The complainant testified that she was awakened by being penetrated, but the accused testified that he had turned on the light, she had said “hey” to him, and had not objected when he switched the light back off and climbed into bed with her. McKinnon J remarked on the complainant’s rejection of the accused at the point of penetration: “I find it to be quite possible that the complainant at that stage was feeling guilty because she had a boyfriend and was overcome by guilt.” Did the judge mean that the complainant was unconsciously participating and “enjoying” the accused’s actions? It seems that the judge’s indulgence in the myths that women secretly enjoy sexual assault or that they “cry rape” to hide their promiscuity overrode his own finding that she was incapable of consent.

In *R v Correa*, the rape myths that posit women as ready for intercourse with any man, at any time and in any place, and as responsible for their own rapes, emerge from the judicial analysis. The complainant had consumed four drinks over the course of five hours, and shared a joint of marijuana with Keith Correa, a co-worker to whom she was not the least attracted. She testified that the joint must have been laced with some other drug because she immediately became incapacitated to the extent that she could not recall how she exited the accused’s car. She was found on the ground in the parking lot with her pants around her ankles, her lower half naked and exposed, and she was unable to stand up. She threw up repeatedly and was taken to hospital in a highly distressed state. The accused had also taken photographs of her with her pants off. A toxicologist testified that the state described by the complainant was not consistent with the drugs allegedly consumed that night.

Justice Arthur M Gans concluded, relying on the toxicologist’s testimony, that he had a reasonable doubt as to whether the complainant had been incapable of consent: “In my opinion, while Ms HR probably was incapacitated, or at least thought she was, I am nevertheless left with a reasonable doubt that she, in fact, was at the relevant time.” He went on to say: “there was a period, albeit but brief, where she may have consented, or implicitly consented, to the actions or advances of Mr

109 *Ibid* at para 34.
110 *R v Correa* (2005), 64 WCB (2d) 233 (Ont Sup Ct Just).
Correa and not recalled the details of such complicity on an after-the-fact basis.”112 These judicial statements reveal confusion about the law, since our courts have firmly rejected “implied consent” as a defence to sexual assault.113 The notion that the complainant may have consented in the five to ten minutes she was in the accused’s car in a parking lot behind a club where she was working, and in light of the state in which she was found, crawling half-naked in a parking lot and unable to stand, is highly implausible. The judge’s reference to the complainant’s “complicity” communicates both scepticism and victim-blaming.

Further, Gans J also supported the acquittal of Correa on the basis that he may have mistakenly believed the complainant consented, without regard to any “reasonable steps.” It seems that the accused did not testify or lead evidence regarding “mistake.” However, the trial judge said he found the air of reality in other evidence, which must have been the complainant’s testimony or that of the toxicologist: “the evidence of her condition up to the moment that they shared the joint and the events immediately preceding the picture taking, sometime after they shared the joint, do not satisfy me beyond a reasonable doubt that he was reckless or wilfully blind to her sudden state of incapacity, if it existed.”114 “Nor would this same constellation of pre-occurrence circumstances put a reasonable person on notice that it would be necessary to make further inquiries or take further steps before proceeding with the relevant sexual activity.”115

One argument advanced by the Crown in response to defence claims that the complainant consented in the twilight between consciousness and unconsciousness is that consent terminates upon unconsciousness. Sensibly, several courts have accepted this position, and have also ruled that there is no such doctrine as prior or advance consent for unconscious sex: R v Ashlee116 and R v Tookanachiak.117 These precedents ought to assist Crown prosecutors whose primary witness has no memory due to unconsciousness, for this strongly suggests that by the time the sexual contact occurred any possible consent had been vitiated by sleep or blackout experienced by the complainant.

112 Ibid at para 15.
113 Ewanchuk, supra note 42.
114 Ibid at para 18.
115 Ibid at para 19.
116 Ashlee, supra note 3. The court was not unanimous on this point: Madam Justice Conrad dissented at paras 83–86.
117 R v Tookanachiak, 2007 NuCA 1, 412 AR 42 (Nu CA) at para 5.
However, the Ontario Court of Appeal in *R v JA*¹¹ eight held, in a 2:1 decision, that nothing in law prevents a woman from providing “advance consent” to sexual contact while unconscious. In reaching this decision, the court drew upon the dissenting opinion of Justice Carole Conrad in *Ashlee*, where she argued that the *Code* does not prohibit advance consent and instead is aimed at respecting a woman’s right to choose how and when she will be touched. The Ontario appeal court rendered its decision in a highly contentious factual context, where the complainant had first been strangled into unconsciousness before being bound and then penetrated anally with a dildo. The accused had been previously convicted three times of assaulting a female partner, two such charges having involved the complainant, and so perhaps it was not surprising that at trial she recanted her allegation of non-consent. While the trial judge followed the majority in *Ashlee* and held that the law does not recognize “advance consent” to unconscious sexual contact, the Court of Appeal disagreed, likening it to consent to surgery while unconscious and framing it as consistent with women’s autonomy rights.

This decision was reversed by the Supreme Court of Canada in a 6:3 decision.¹¹ ninety Justice McLachlin wrote the majority decision on behalf of herself, the three other women justices, and two of the men justices. In rejecting “advance consent,” they decided that consistent with the *Criminal Code* consent must be voluntarily given by a person capable of consent and must be ongoing, subject to revocation by the complainant.

Any other result would have had a profoundly negative impact on the criminal prosecution of men who sexually assault unconscious women, who would have been placed in the difficult position of disproving “advance consent.” It would have furthered the vulnerability of women with disabilities, Aboriginal women, and of course intimate partners, who are all subject to discriminatory credibility assessments and whose experience of harm from non-consensual sexual contact is often minimized.¹²

Most importantly, for the purpose of this analysis, the reasonable steps requirement would be rendered meaningless if “advance consent” were to be recognized, as the accused would then have no obligation to take reasonable steps “in the circumstances known to him at the time” of the sexual contact, but could instead rely on earlier events. The ma-

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¹¹ R v JA, 2010 ONCA 226.
¹¹ ninety 2011 SCC 28.
ajority decision in *JA* recognized the conflict that such an interpretation would pose to the law of consent:

How can one take reasonable steps to ascertain whether a person is consenting to sexual activity while it is occurring if that person is unconscious? …[B]y requiring the accused take reasonable steps to ensure that the complainant “was consenting”, Parliament has indicated that the consent of the complainant must be an ongoing state of mind.121

Another route defence lawyers have taken when complainants are incapacitated is to argue that the accused was unaware of the woman’s state. They have thus countered that even if the complainant was in fact incapacitated, the accused may be morally innocent because he may not have realized that the woman was unconscious. *Tookanachiak* demonstrates, I would argue, the brazen implausibility of such an argument.

Here the Crown proved that the accused sexually assaulted an unconscious complainant because a witness came upon the assault in progress and then woke the complainant. In spite of the fact that the accused did not testify in his own defence, the prosecution failed because the trial judge was not satisfied that the complainant had not consented before she fell asleep. On appeal, the Nunavut Court of Appeal followed the Alberta Court of Appeal’s decision in *Ashlee* and held that even if she had consented, consent disappeared once she fell asleep. Yet it refused to disturb the acquittal because the Crown failed to prove that the accused was aware that the complainant was asleep: “The evidence and the findings of the trial judge allow for the possibility that the sexual activity began with consent and that the appellant continued this activity without awareness that the complainant had fallen asleep…”122

This appeal decision is deeply troubling. If the witness who came upon the complainant was immediately aware that she was indeed unconscious, how could the accused have failed to be aware of this fact? He cannot use his own recklessness or intoxication to explain his “mistake” regarding consent as per s 273.2(a) of the *Code*, which bars the defence where the accused’s intoxication or recklessness caused his error. How then could he, consistent with these principles, be lawfully mistaken as to her capacity? It makes no sense to bar a man from a mistake defence if he was reckless as to a woman’s non-consent, but give him free reign to pursue sexual contact with reckless disregard as to her unconscious state. Further, to show that the accused was not morally

121 *Ibid* at para 42.
122 *Supra* note 117 at para 12.
culpable because he was unaware that the complainant was incapable of consent, the court should be looking for evidence to provide an "air of reality" to such a mistake.

If the evidence of the witness for the Crown who came upon the accused in the act of sexual assault is not enough, then how can the Crown ever prove culpable awareness on the part of an accused who does not testify and therefore cannot be cross-examined on what he did or did not know? Such cases require a judge willing to draw the inference of guilty knowledge beyond a reasonable doubt, based on the obvious condition of the complainant. Ultimately, this willingness may well depend on unarticulated beliefs about what is "normal" sexual conduct on the part of men, or "normal" female behaviour in a sexual context. Are our judges saying that men cannot be expected to discern whether their sexual partners are conscious or not?

Tookanachiak also reinforces systemic racism in subtle ways. This case clearly involved an Inuit accused, and one might speculate that the complainant shared this background. While the identity of the complainant is speculative, one might nonetheless wonder whether the decision is partly dependent on its social context. Might the message be that this is normal behaviour, at least in Nunavut, or at least if the accused is Inuit?

CAN PHYSICAL OR SEXUAL CONTACT CONSTITUTE A REASONABLE STEP?

While it would seem to be trite that a reasonable step to ascertain consent cannot itself be an assault, especially when the woman is unconscious, only one appellate court has stated and applied this rule. In R v Despins, discussed in more detail below, the court sent the accused back for a new trial where he would be denied a "mistake" defence on the basis that he "attempted to base his belief in consent by seeking signs of apparent responsiveness in eye contact and bodily movement after initiating and engaging in sexual contact...."¹²³

In contrast, there are several cases in which it is apparent that even on the evidence of the accused, he engaged in initial physical contact while the complainant was semi-conscious at best. Rather than labelling this behaviour as assault or sexual assault, some judges seem willing to view touching as "reasonable steps," on the assumption perhaps that men are entitled to try and wake up sleeping women to see if they will agree to engage in sexual intercourse. Some courts are even

¹²³ Despins, supra note 71 at para 10.
willing to accept sexual touching as “reasonable steps.”

For example, the Nunavut Court of Appeal in *R v Tessier*\(^{124}\) reviewed a trial judge’s decision to acquit Darrell Francis Tessier of one of the two charges he faced for sexually assaulting two complainants on a certain evening. Tessier was convicted of assaulting the other complainant, JE, that same night, arguably showing a pattern of deliberate predation.

The accused testified that “the evening was charged with all types of sexual conversations,” including “sexual content in terms of explicit talk.”\(^{125}\) He testified as to “the manner in which [MR] dressed and went jogging,” “her stripping right in front of him.”\(^{126}\) After much alcohol consumption, both complainants had gone to bed. Some time thereafter the accused entered MR’s room while she slept, took off his clothing, and shook her shoulders to wake her up. He claimed she opened her eyes briefly and moaned. He then started to touch her back, which was facing towards him, and he claimed she rolled over: “I thought well, that’s very provocative, that’s very, very positive feedback…” “she looked like she was enjoying it and she was conscious.”\(^{127}\) She must have woken up soon after and thrown him out because the appeal judgment reads, “as soon as the complainant said no, that was the end of it.”\(^{128}\)

The trial judge, Judge Foisy, found that the accused’s actions in attempting to wake the complainant by shaking her while he was naked and touching her constituted “reasonable steps.” He accepted that the accused believed the complainant had “come to” and was amenable to sexual contact. He acquitted the accused on the basis of mistaken belief regarding her consent. The Crown appealed the acquittal, but the Nunavut Court of Appeal dismissed the appeal on the basis that there was no error of law in the judge’s ruling on “reasonable steps”:

> The fact that [the accused] wanted to have sexual congress with her and the fact that he had prepared himself by having no clothes on for this purpose does not in my view change the nature of the question. There is nothing in s 273.2(b) … which specifically requires that reasonable steps be taken before any ability to carry out sexual activity occurs [italics in original].

> [The judge] found, in effect, that the physical acts that he had done up to

\(^{124}\) *R v Tessier*, 2007 Nu CA 5, 422 AR 84.

\(^{125}\) *Ibid* at para 14.

\(^{126}\) *Ibid* at paras 20, 23.

\(^{127}\) *Ibid* at paras 37, 38.

\(^{128}\) *Ibid* at para 49.
this point, while perhaps running up against the border of going a little too far, were not of the category or quality of conduct … of being persistent or increasingly serious advances absent consent.

Those findings … are within the scope of a trial judge's capacity to make findings of fact about what constitutes reasonable steps in law.

I am not suggesting that in another context there might not be a different trial judge who might actually disbelieve the respondent on this point or that he finds the respondent was in fact engaging in experimentation and not actually a genuine honest effort to try and wake up the person.129

This decision is clearly wrong in law. For a man to touch a sleeping woman while he is naked, with the intention of pursuing sexual intercourse, amounts to a sexual assault. It is a non-consensual touching in circumstances that any reasonable observer would find to be “sexual.”130 Failure to identify the so-called “reasonable steps” of the accused as in and of themselves a sexual assault should surely have qualified as an error of law justifying appellate intervention, consistent with the ruling by the Supreme Court in Ewanchuk.

R v Aitken, mentioned earlier for the BC Supreme Court’s ruling that the trial judge must first ask whether the “mistake” has an “air of reality” and only then consider “reasonable steps,” is another case that makes the error of treating sexual contact with a sleeping woman as “reasonable steps.” In this case, the BC Supreme Court was critical of the trial judge for focusing on the fact that the accused had entered the room and bed of a woman he did not know after a party, and had proceeded to sexual touching while she slept: “the trial judge appears to have moved directly to the conclusion that in the absence of a conversation between them which would indicate the appellant had taken reasonable steps to ascertain she was consenting to the touching or had invited any touching, it could not possibly be said the touching was consensual.”131

The accused had first begun stroking the complainant and tried to kiss her. He acknowledged in his testimony that she had pushed him away and told him to stop. She testified that she thought it was her roommate, and decided to tolerate his presence in her bed until the morning when she would confront him. He claimed to have fallen

129 Ibid at paras 43, 44, 45, 46 respectively.
130 This is the test for what makes an assault a “sexual” assault: R v Chase, [1987] 2 SCR 293.
131 Aitken, supra note 72 at para 29.
asleep, and woke with his arms around her, “cuddling” her. The accused then began sexual touching in earnest, waking the complainant a second time and bringing her to the realization that it was not her roommate sharing her bed. She testified that she attempted to get away, but could not escape the accused’s aggressive sexual assault that continued, despite her objection, until he left to go to the bathroom. The accused claimed in contrast that he stopped immediately on the second occasion after twenty seconds of sexual touching when the complainant realized he was not “Paul.”

The Crown defended the conviction, arguing that pursuant to Ewanchuk, once the accused was rebuffed the first time, he could not attempt further sexual touching without first ensuring that the complainant had changed her mind. The BC Supreme Court took a completely different view of the facts, suggesting that since the complainant did not force the accused to leave her bed after the first contact and since she must have tolerated some physical contact in light of the fact that the accused woke up with his arms around her, the accused may have made an honest mistake as to consent. Justice Mary-Ellen Boyd concluded:

> I am unable to find that a reasonable man in the circumstances in which the accused found himself would necessarily have taken further steps to ascertain the complainant’s consent before attempting the limited sexual touching which he did following a second wakening.132

This decision is troubling on many levels. Although the complainant’s evidence was that the sexual assault went far beyond “limited sexual touching,” including penetration and the use of force to hold her in the bed, because the trial judge had elsewhere said he found the accused’s version of events to be “reasonably true,” the appeal judge based her decision on the accused’s account of the facts.

More importantly, the court refused to apply Ewanchuk to these facts, suggesting that it was not clear what the complainant’s “no” meant to the accused, “where he and the complainant continued to sleep together through the balance of the night.”133 This decision appears to repudiate the intent and substance of the reform effected by Bill C-49, often referred to as the “no means no” law. What else could her “no” have meant in these circumstances?

Finally, this case again supports the misapprehension that sexu-

132 Ibid at para 43.
133 Ibid at para 40.
al touching can be a lawful reasonable step to ascertain consent. If a man who is a stranger to a complainant is entitled in law to touch her sexually while she sleeps for the purpose of ascertaining whether she might consent to a sexual activity not of her making, then the criminal law elevates male sexual prerogative over women's bodily integrity and equality to the discredit of our legal system.

In *R v Murphy*, the PEI Supreme Court also failed to condemn physical contact with a sleeping woman as unreasonable steps. Here the trial judge had convicted Gerard Patrick Murphy when she disbelieved his account of how he came to engage in sexual intercourse on a living room couch with a sleeping woman after a party. The complainant hardly knew the accused, having only had a brief conversation with him that night at the party. Like many complainants, she testified that she awoke to find herself being penetrated on a couch where she had gone to sleep alone; she grabbed her clothes and fled the room. In contrast, Murphy claimed she placed herself on his couch and then began to press her bottom against his crotch fifteen minutes later. He described half an hour of increasing sexual activity that culminated in consensual intercourse. The PEI Supreme Court overturned the conviction, stating that the trial judge had made numerous errors by failing to deal with contradictions in the evidence and failing to apply the criminal standard of proof beyond a reasonable doubt.

Most worrying, the appeal judgment refuted the trial judge's ruling that Murphy was precluded from the mistake defence because he took no reasonable steps to ascertain consent. The trial judge had found that even if she accepted the accused's claim that the complainant had placed herself on the couch beside the accused, he had initiated physical contact by first rubbing her arm and leg. Only thereafter did she allegedly press her body against his crotch. The trial judge held that he failed to take reasonable steps to ascertain consent prior to intercourse given that the complainant was asleep. She stated:

> It seems that the myth here is that everyone who goes out to a party, has too much to drink and sleeps on a friend's sofa at a friend's place is looking for sexual action. No questions need be asked. Just assume that when you find someone on your sofa that consent has been given for anything or for everything, even if the person doing so is intoxicated or asleep or under the effects of one or both.  

134 *R v Murphy*, 2004 PEISCTD 31, 237 Nfld & PEIR 312 (Sup Ct).
The appeal judge ignored the findings of fact and focused instead on the accused’s narrative, which described escalating sexual activity between them: “There was more than one point when the accused observed GB as being awake, and more than one point when he was satisfied that she had communicated consent.”136 Since consent can be communicated by actions, the accused was entitled to rely on the complainant’s “movements, gestures and sounds” as manifesting her consent. The court said there was evidence of some reasonable steps to ascertain consent requiring the trial judge to resolve the issue on the evidence, beyond a reasonable doubt. Yet it is arguable that stroking a woman’s arm and leg while she sleeps is itself a sexual assault from the perspective of a reasonable observer; it is, at the very least, an assault because this woman, to the knowledge of the accused, did not communicate consent at this point. All other so-called “reasonable steps” by Murphy were indisputably sexual touching. In the end, the appeal court ruling arguably supports the “myth” described by the trial judge as a male prerogative immune from the criminal law.

DO REASONABLE STEPS REQUIRE MEN TO WAKE WOMEN UP?

These cases bring us to the heart of what the law says when unconscious women are approached by men who seek sexual intercourse. What are reasonable steps to ascertain consent when women are asleep or unconscious for any reason? The answer seems simple: at the very least the law must require men to ensure that their partners are conscious before proceeding. Reasonable steps might require that the accused wait some period of time to ensure that the woman is truly awake and giving her unequivocal agreement, rather than embarking on sexual contact while the woman is still prone in her bed, hazy and half-conscious. To proceed without ascertaining that the woman knows who the accused is and what his intentions are — when the most an accused can say is that the sleeping woman moved her body or murmured something in her sleep — is surely predatory conduct that the criminal law should forbid. If a woman is intoxicated by alcohol and or drugs, then further steps must include waiting until the next day when she will have recovered from her incapacity. Yet the courts have been uneven in setting clear parameters for non-criminal sexual contact.

The only Supreme Court pronouncement on the reasonable steps requirement as a substantive matter came in 1998 in *R v Daigle*. Here the Court unanimously upheld the Quebec Court of Appeal, which had substituted a conviction for an acquittal where the accused had admit-

tedly used a “date rape drug,” PCP, to rape and humiliate the complain-ant. Justice L’Heureux-Dubé added one sentence to a terse judgment dismissing the appeal: “We would simply add that the appellant could not rely on the defence of honest but mistaken belief since he had not taken reasonable steps to ascertain that the victim was consenting.”

To its credit, the Court was attempting to remind the courts below that s 273.2(b) now represented the law of the land and must be applied in these cases. But what on earth would reasonable steps to ascertain consent be when the accused had deliberately deprived the complain-ant of agency by drugging her with a substance that causes loss of in-hibition, sexual acting out, and unconsciousness? Unfortunately, this cryptic statement fails to convey that nothing short of waiting thirty-six hours until a drug has passed through the complainant’s system will suffice as a reasonable step to ascertain consent.

Lower courts, police, and Crown attorneys require specific guidance on “reasonable steps,” for without it, they will be left with “common sense” or worse — unexamined myths and stereotypes. Indeed, the trial judge in Daigle described the drugged complainant as “responsible for her own actions.” Both the abject criminality of deliberately drugging a woman so as to be able to prey upon her as if the accused were a star in a pornographic movie, and the misogynist victim-blaming by the presiding judge need to be resoundingly repudiated by our courts. As Justice L’Heureux-Dubé commented in R v Ewanchuk, “It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.”

Not surprisingly, perhaps, in light of the Supreme Court’s failure to lead, some of the lower courts have had trouble answering what ought to be an easy question. R v Osvath, the Ontario Court of Appeal’s first take on the reasonable steps requirement, remains one of the most appalling judgments to date on the reasonable steps requirement. It also squarely raised the question of the availability of a “mistake” defence when the complainant is unconscious. At trial, the judge rejected the accused’s testimony that the complainant had actually consented to sexual intercourse. The complainant had fallen asleep on a couch in the living room during a party where she had become intoxicated. The complainant testified that she awoke on the couch to find a complete

137 Ibid at para 3.
138 Ewanchuk, supra note 42 at para 95.
139 Osvath, supra note 6.
stranger — Csaba Osvath — penetrating her. She testified that at first she thought it must be her boyfriend who had accompanied her to the party, but was shocked when she turned around to look at who it was.

Three other witnesses all testified that they saw Osvath pursue contact with a sleeping woman. Two men testified that they saw Osvath slide down onto the couch behind her while she slept: one observed Osvath roll around until they were face to face; the other heard creaking noises come from the couch once Osvath had positioned himself there. Another man saw a male begin to touch the sleeping woman and saw her push him away before returning to sleep. In contrast, Osvath claimed that he went to sleep on the couch where the complainant slept only because there was no room elsewhere and that she woke him by rubbing her buttocks against him. He testified that he asked her if she wanted sex, she replied “yes,” and then removed her own clothing.

The trial judge found the accused to be culpable on the basis that he was wilfully blind to the non-consent of the complainant and failed to take reasonable steps to ascertain consent:

He most presumptuously lay down with the complainant without her consent. He took sexual advantage of a young woman who he had never spoken to and knew virtually nothing of. He compromised her when he knew she had been drinking and was in a very deep sleep. I find also that … [t]he accused took no steps to ascertain that the complainant was consenting to sexual intercourse with him. I find that in these circumstances known to the accused at the time, that the complainant was not acquainted with him, that it would have been reasonable to ascertain by direct conduct that the complainant wished to have sexual intercourse with a man she had never spoken to and, on the basis of the accused’s own knowledge, had absolutely no interest in.\textsuperscript{140}

Two of the three members of the court of appeal who heard Osvath’s appeal against conviction decided that he deserved a new trial because the trial judge had failed to consider an alternative version that could have exculpated the accused:

If the trier of fact believed the complainant initiated the sexual activity, or even participated in it, whether or not she realized what she was doing at the time, it would be too onerous a test of wilful blindness to require an accused to stop the activity and, in effect, say, “Wait a minute; do you know

\textsuperscript{140} Ibid at para 25.
Judges and the Reasonable Steps Requirement

who I am?” after having already obtained her consent.141

The majority did not address the reasonable steps requirement, leaving the impression that no further steps are required in such circumstances. Worse, this judgment also seems to suggest that the woman could have consented even though the factual findings of the trial judge were that the complainant was in a “deep sleep.”

Justice Rosalie Abella dissented, pointing out that Osvath had failed to take even the most minimal of steps: “Anyone seeking sexual activity in these circumstances could hardly fail to know that he was obliged, at a minimum, to let the person from whom permission was sought for such activity, know who was seeking the consent.”142 The Supreme Court refused to hear the Crown’s appeal on the basis that it did not involve a question of law alone.143 Justice L’Heureux-Dubé and two others dissented on this refusal to give leave.

Fortunately, some appeal courts are setting limits on the use of the mistake defence when a sleeping or unconscious woman is the target of the assault through their interpretation of the reasonable steps requirement in this context. Justice Abella was in the majority the next time a case raising the issues from Osvath came before Ontario’s highest court.

In R v Cornejo the complainant woke up to find Luis Cornejo attempting to penetrate her: she had no memory of even speaking to him that night, let alone of his entering her apartment while she slept. He was an acquaintance of the complainant who had attempted, in the past, to start a sexual relationship with her. She had rebuffed him. After a company golf tournament at which he and the complainant had had no contact, he made repeated phone calls to her home. He admitted in his testimony that she had told him that she wanted to free the telephone line for an incoming call from her boyfriend. During his third call to her she told him her boyfriend was not coming over and he testified that when he asked if he could come over, her response was “mm-hmm,” which he took to be “yes.”

Cornejo entered her unlocked door at 1:30 am and found her asleep on her couch. Although he admitted she said “what the hell are you doing here?” he did not leave. Instead he began caressing her and kissing her. He also acknowledged that told him not to kiss her on the mouth.

141 Ibid at para 22.
142 Ibid at para 29.
When he asked why, she responded, “because I don’t love you.” He also admitted that she never touched him in return and remained lying on the couch with her eyes closed throughout. He removed her jeans and underwear but claimed she lifted her hips; he then proceeded to attempt to penetrate her until she woke up in great confusion and ordered him out of her home.

The trial judge had ruled that there was an air of reality to the accused’s mistake of fact defence so as to send it to the jury. He found that, if believed, Cornejo’s testimony that the complainant had lifted her pelvis could have led him to think he had her “unambiguous consent.” In ordering Cornejo back for a new trial, Abella J ruled:

The complainant’s prior rejections of his sexual advances, his apology to her in the past for his inappropriate sexual advances, her request to him that he hang up so she could speak to her boyfriend, her ambiguous response to his third phone call, her failure to answer the door, his entering the apartment without permission and finding the complainant sleeping and shocked by his presence, all required that he take reasonable steps to clarify whether she was consenting to sexual activity. She never touched him, her eyes were closed, he knew she had been drinking that day, and every rejection by her that evening, even according to his own evidence, resulted in more aggressive sexual conduct on his part.

No reasonable person … when being told that someone was uninterested in being kissed because she did not love him, would assume that she would, in the alternative, be interested in having her clothes removed and engaging in sexual intercourse.

Similarly, in R v Despins, the Saskatchewan Court of Appeal issued a strong ruling to the effect that an accused who makes sexual advances towards a sleeping woman must wake her up before he can access a “mistake” defence. The complainant, this time with her boyfriend lying beside her and both of them fully clothed, fell asleep after drinking at a party. She woke up to find David Despins penetrating her with his penis. At first she believed it to be her boyfriend, but when she saw her partner asleep beside her, she realized that a complete stranger was on top of her. Despins claimed active participation by the complainant — ie, kissing, hugging, moaning — but was unable to recall how he came

144 Cornejo, supra note 70 at para 7.
145 Ibid at para 30.
146 Ibid at para 34.
to be on the mattress with her, how his own clothing was removed, or how his sexual interaction with the woman began. The trial judge left the defence of mistake of fact regarding consent with the jury, and it returned an acquittal.

On appeal, two of the three judges on the panel ruled that there was no air of reality to his defence and that it should not have been put before the jury. Despins was unable to offer any evidence as to reasonable steps taken by him to ascertain consent given his complete lack of memory as to events that preceded his sexual touching of the woman. Madam Justice Jackson, for herself and Chief Justice John Klebuc, held that Despin’s claimed mistake could not be divorced from the actual context: “It must be assessed in light of the fact that the accused has no recollection of what transpired that led him to remove his clothes and move to the bed of a woman he did not know — with whom he had no prior exchanges, and who is lying asleep on a single mattress next to her boyfriend — and engage in sexual relations with her.”

The judges relied on Supreme Court jurisprudence for the proposition that “it is simply not enough for an accused to say that he thought a complainant was consenting where the circumstances include advances from an intoxicated stranger towards a sleeping complainant.” A new trial was ordered because the Crown was able to persuade the majority of the judges that the verdict would not have been the same had the judge not made this error. Madam Justice Smith dissented on the basis that the jury’s acquittal must have been based on a reasonable doubt as to whether the complainant had consented, since there was no rational basis for it to have found that the accused took reasonable steps to ascertain consent.

In GAL, the Nova Scotia Court of Appeal upheld a trial judge’s conviction of an accused whose modus operandi was to attempt intercourse from behind sleeping women. The trial judge and the judges on appeal resisted the defence lawyer’s efforts to invoke discriminatory practices and reasoning. This man waited outside the bedroom the complainant shared with her partner, where she had earlier retired to sleep after a party. GAL watched television with her partner until he fell asleep, and then went into the bedroom, lay down behind the woman, and proceeded to have intercourse with her. He claimed that she

147 Ibid.
148 Ibid at para 12.
149 Ibid at para 48.
150 R v GAL, 2001 NSCA 29, 191 NSR (2d) 118.
participated willingly, but she testified that she woke up to being penetrated from behind, and said, “hon don’t, go to sleep, leave me alone.” She only realized it was not her boyfriend afterwards, when she got up to use the washroom, saw GAL’s coat on the floor, then moments later heard his truck leave and realized that her partner was fast asleep outside the bedroom. She woke her partner to tell him what happened and they phoned police.

The trial judge permitted two other women to testify that the accused had similarly attempted to penetrate them while they slept “some years previous,” as relevant to the complainant’s credibility and to rebut a defence of mistaken belief in consent. At the same time, the judge refused leave to the defence to introduce evidence from the accused, refuted by the complainant, that she had had sexual contact with him in the past.

On appeal, the defence lawyer argued that the judge should have admitted evidence of an alleged prior sexual contact between GAL and the complainant, in order to discredit her. Kenneth Fiske, QC, suggested that this evidence if admitted would show a “quickness in pattern” that would in turn support the proposition that “it would be impossible for [the complainant] to mistake GAL for her boyfriend RW.” In turn, Fiske proposed, that evidence would suggest that she had “consented” to GAL’s acts of predation. He also proposed that the complainant was motivated to fabricate the allegation and hide her “consensual” participation because she had just resumed living with her partner and did not want to lose her home or her relationship.

The court of appeal upheld the judge’s rulings on admissibility and agreed that the accused’s prior assaults upon sleeping women were more probative than prejudicial to the accused:

[H]is method bears unique and distinctive qualities. In each incident the woman was asleep. In each incident GAL, in varying degrees, attempted to have sexual intercourse from behind and in silence. In each incident there was no indication of any prior sexual overtures between the woman and GAL…. by any objective standard, the method GAL adopted in attempting to have sexual intercourse with each woman … is clearly unique and, therefore, highly probative and relevant …

With respect to defence counsel’s argument that the accused’s alleged

151 Ibid at para 25.
152 Ibid at para 23.
prior sexual history with the complainant was relevant, the appeal court found no evidence supporting his claim that somehow, his sexual “approach” would have allowed her to differentiate him from her boyfriend. In any event, the court rejected the proposed “motive to fabricate” as implausible, given that the complainant woke her boyfriend to tell him she had been raped. It noted that, in any event, she had not consented to “her boyfriend” either, given the clear rejection in her words “hon, don’t….leave me alone.”

Yet in spite of these appellate rulings, the obligations trial judges are willing to impose on men bent on sexual contact with sleeping women are few and weak. For example, in *R v Millar*, David William Millar and his friend met the complainant and her friend for the first time when they danced at a bar. The four went to the complainant’s friend’s home after; the complainant went upstairs to sleep because she was extremely intoxicated. She was so intoxicated that she vomited in a waste basket in the room. Downstairs, Millar expressed interest in the complainant to her friend, who informed him she had a boyfriend. Some time later, the accused went upstairs in search of the complainant. As is typical in these cases, her evidence was that she awoke to find herself being penetrated by the accused. She screamed and fled the room, seeking refuge in the kitchen where she grabbed a corkscrew, inflicted some puncture marks upon the accused and called 911, sobbing hysterically. The accused in contrast claimed that he entered the bedroom, turned on the light briefly. He said that she looked him in the face and said “hey.” He turned the light off, climbed into bed with her and proceeded from “spooning” to massaging to sexual touching, which he claimed she responded to by moaning. Millar told police that he stopped when she told him to, upon penetration. He claimed she was upset because she was “feeling guilty about fooling around on her boyfriend.”

In acquitting the accused, Justice MacKinnon commented negatively upon the complainant’s demeanour at trial, but accepted her testimony that she did not consent in fact and that she lacked the capacity to consent. However, he acquitted the accused on the basis that he took reasonable steps to ascertain consent by turning the light on so the complainant could identify him. Further:

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153 Ibid at para 36.
154 Supra note 5.
There was no resistance made to his joining her in the bed. There was no ag-
gressive, urgent or violent activity on the part of the accused. His approach
was slow and progressive, in accordance with her reactions. No force was
applied at any time. She co-operated in the removing of her jeans and un-
derwear and accepted oral sex by shifting her pelvis and moaning. 155

Justice McKinnon distinguished this case from Cornejo on the basis that
Cornejo had previously been rejected by the complainant where-
as here the complainant had met the accused that evening, danced with
him, accepted drinks from him, and continued socializing after they
left the bar: “At no time did the complainant rebuff the accused prior to
the point of penetration.” 156 Yet if the complainant was passed out and
incapable of consent, as the judge found, how could she have been cap-
able of demonstrating non-consent?

This case squarely raises the issue of what indeed are reasonable
steps to secure consent to intercourse when a man has met a woman for
the first time; she has gone to bed intoxicated; and he decides to pur-
sue her. She did not invite him to her room; she did not sit up in bed
and talk with him; she did not initiate sexual contact. She bore no ob-
ligation to “resist.” Flicking on a light briefly when a woman is sound
asleep does not even come close to the steps needed to ascertain con-
sent. Common sense tells us that a momentary disturbance in one’s
sleep often will not result in a return to consciousness: indeed, this is
what many such men seem to count on. Slipping into bed with a sleep-
ing woman and proceeding to “spoon” or rub against her sleeping body
is a sexual assault and ought to preclude any “mistake” argument.

Justice Anne Molloy in R v Williams 157 also accepted that the com-
plainant did not consent, but acquitted the accused on the basis of the
accused’s honest belief in consent. Here the complainant was emo-
tionally upset about problems with her boyfriend, and spent an after-
noon hanging out with a male friend, drinking beer and playing video
games and commiserating. At one point he was trying to distract her
and grabbed her breasts. She told him immediately to stop and he did.
Some time later she blacked out from the beer and awoke with the ac-
cused on top of her. She testified that she said no repeatedly, tried to
push him off her, cried, begged and struggled, but that he managed to
get her pants down and penetrate her. He testified that she remained

155 Ibid at para 35.
156 Ibid at para 38.
157 [2009] OJ No 1356 (Sup Ct Just).
awake on the bed but never said a word as he proceeded to remove her clothing and touch her sexually: she only protested when he started to penetrate her because she did not want to get pregnant. The judge had this to say about the complainant’s evidence that she fought back:

I believe Ms C does not clearly recall what happened between her and Mr Williams. However, I do not believe this lack of memory is attributable to alcohol impairment. She simply was not that drunk. She was vague about some key details such as whether she had passed out, whether Mr Williams performed oral sex on her and how he managed to get her pants and underwear off. Given her belief that she did not consent to sex and her vague recollection of details, it is entirely possible, that she has a genuine belief she screamed, struggled and repeatedly told Mr Williams to stop. However, I do not believe that actually happened. Whether it was because of shock, or disgust, or panic, or fear, or some other emotional reaction, Ms C did nothing overt to communicate her lack of consent to Mr Williams.\(^\text{158}\)

Justice Molloy found the accused’s version of events plausible, using the complainant’s body against her: “Ms C is a very large woman, by her own estimation in excess of 300 pounds. I believe Mr. Williams when he says he would not be able to lift her or get her pants and underwear off without any injury to her or the clothing unless she provided the minimal co-operation he described.”\(^\text{159}\) The justice also concluded that the complainant was neither asleep nor incapacitated by alcohol, presumably rejecting that aspect of her testimony as well.

But the most worrisome aspect of this case is the judge’s analysis of the reasonable steps requirement, where, like the courts in Osvath and Correa, the context is used to relieve the accused of any obligation to take steps to ascertain consent. Noting that the accused conceded that he had taken no steps, the justice found that the circumstances did not require that he do so:

Within the context of two adults of equal standing who know each other very well and are good friends, the absence of any indication of unwillingness to participate is significant. When this passivity or acquiescence is accompanied by an overt act of assistance by facilitating the removal of clothing, Mr Williams’ belief that Ms C was consenting is completely understandable. I do not see his conduct as reckless in this regard, nor do I see any

\(^{158}\text{Ibid at para 45.}\)
\(^{159}\text{Ibid at para 39.}\)
circumstances to give rise to the doctrine of wilful blindness. He believed she was consenting, based not only on her failure to object but also on her positive actions to assist him. In all of the circumstances as he knew them, his belief was reasonable and honest.160

As Janine Benedet comments, “Looking at it from another perspective, why should a man assume that a woman who is close friends with his girlfriend, upset about her own boyfriend’s infidelity, has earlier rebuffed his attempt to grab her breasts while horsing around and is tipsy from alcohol consumption and not eating, would be interested in sexual activity with him? She might be, but arguably some sort of active agreement would be expected.”161 This decision wrongly puts the onus on the complainant to object or resist, rather than on the accused to take reasonable steps. It effectively creates a different legal standard for complainants and accused who know each other,162 and reinforces the myth that rape is committed by men who are strangers, not those men who women know and trust.

At the superior court level, there are some cases in which a trial judge has clearly set parameters for men who approach sleeping women. Madam Justice Silja S Seppi of the Ontario Superior Court convicted Lyndale Nigel Graham of sexual assault163 perpetrated against one of the two complainants in the case before her, ruling that nothing less than waking up a sleeping woman will suffice as “reasonable steps.” She acquitted him with respect to the allegation made by a second complainant, his then girlfriend, on the basis that she had a reasonable doubt as to whether he desisted when she expressed non-consent.

The accused and another man, whom he did not know, had been called in the middle of the night to Graham’s girlfriend’s home. Each couple headed to separate bedrooms. The accused’s attempt at intercourse with his girlfriend was halted by her objections. He claimed he stopped right away; she testified that he persisted. He then went downstairs to where the first complainant was sleeping, her partner having left the house. This complainant testified that she was awakened by pain caused by being penetrated by the accused. His statement to police acknowledged that the complainant was “in and out of sleeping,” but he claimed he asked her and she said “yeah, yeah.” He also explained him-

160 Ibid at para 69.
162 This decision resonates strongly with those discussed involving spouses, as discussed by Randall, supra note 24.
163 R v Graham (2008), 77 WCB (2d) 578 (Sup Ct Just).
self by claiming that the complainant had seen his penis a few days before and therefore wanted to have sex with him, and that the plan for the evening included a “threesome.” The judge rejected his explanations and found beyond a reasonable doubt that the complainant was asleep, did not consent, would not have consented if awake, and that the accused knew she did not consent. Further, “[e]ven if he spoke to her and believed she was ‘in and out of sleeping’ … that would not have constituted reasonable steps by him to ascertain her consent. Reasonable steps in these circumstances would have been to wake her up, speak to her and ensure she was wide awake, aware of what he wanted to do and voluntarily agreeing to have sex with him.”

There are several other superior court decisions where trial judges have used common sense to reject “mistake” defences where complainants have been unconscious, even if they have not explicitly delineated the reasonable steps needed in these circumstances. For example, Justice Glass in *R v PD* clearly understood that the accused was engaged in deliberate, predatory conduct and convicted him accordingly. Here the twenty-one-year-old complainant testified that her forty-five-year-old uncle climbed on top of her in the night and that she pushed him away and went back to sleep. She awoke again to find him penetrating her, but passed out again, due to over-consumption of alcohol. In the morning, she found herself naked from the waist down and wet in the area of her vagina. She went to the hospital and was medically examined. The judge rejected mistake of fact by applying *Ewanchuk* to the effect that the accused did not take reasonable steps to ensure that the complainant had changed her mind after a clear rejection — “He simply continued and got what he wanted.” His actions thus showed recklessness or wilful blindness.

Finally, although Justice Gans in *R v Baynes* did not refer to the reasonable steps requirement in convicting the accused for one of two sexual assaults alleged against the seventeen-year-old niece of his girlfriend, he did use an analysis that shows attention to the law of sexual assault as well as practical wisdom. Sean Baynes was found to have entered the young woman’s room at night, intending “to engage in sexual touching from the get go,” including unprotected intercourse. The judge rejected the accused’s claim that he relied upon her body lan-

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164 *Ibid* at para 38.
165 [2002] OJ No 3593 (Sup Ct Just).
166 *Ibid* at para 35.
guage as indicative of consent: “Mr. Baynes had little or no track record with Ms S by which he could read her wakeful body language let alone her motions while sleeping or while groggy from sleep … at worst he acted recklessly or was wilfully blind.” The judge said that her bodily movements could at best be described as “ambiguous,” not giving rise to a defence of mistaken belief in consent.

CONCLUSION
This review of the case law has shown that our higher level courts have an uneven record interpreting the “reasonable steps” limitation to the mistake of fact defence for sexual assault. These cases are also haunting because of what they tell us about our culture of masculine entitlement and our disregard for the safety and autonomy of women. To the extent that our judiciary remains wilfully blind to the systemic perpetration by men against unconscious women, we will fail to develop legal principles that serve the public interest by condemning predatory male violence against women. The Supreme Court of Canada took an important first step in rejecting the proposed doctrine of “advance consent” in JA. The effect of this decision is to affirm women’s equal rights to security of the person and to sexual autonomy when they are unconscious.

It is particularly important that judges of the superior courts demonstrate for the lower courts the application of the law in this area in light of its extraordinary complexity and the frequency of men’s sexual assaults against unconscious women. The credibility of our criminal justice system is seriously undermined when such a large category of cases is so difficult to prosecute successfully.

Proof issues for sexual assaults where the complainant was unconscious remain complex. Unfortunately, expert testimony is unlikely to assist the Crown in proving that the complainant was incapable of consent because most drugs used to rape women are so rapidly metabolized that they escape detection. Further, the speculative nature of scientific evidence about the likely effects of drug or alcohol ingestion upon the complainant’s capacity means that using expert evidence as proof of a complainant’s incapacity beyond a reasonable doubt is prob-

168 Ibid at para 22.
169 However, the three justices who dissented took the opposite view, arguing that the majority decision undermined women’s sexual autonomy by depriving women “of their freedom to engage by choice in sexual adventures….” JA (SCC), supra note 119 at para 73.
lematic. In fact, it seems more likely that expert testimony will, in this context, be used by defence to generate a reasonable doubt.

Crown attorneys are thus forced to rely on the probative value of complainants’ testimony that since they have no memory of the attack, they must have been unconscious and therefore legally incapable at the time. In this context, it is important for Crowns to argue that to be believed, women should not have to provide reasons, as did the complainants in *Esau* and *R(J)*, as to why they would not have consented to sexual contact with the accused had they been conscious. Women’s rights to equality and autonomy require that we reject the proposition that women are presumptively consenting, or that they consent based on “such extraneous circumstances as the location of the act, the race, age or profession of the alleged assaulter.” It would be powerful for a judge to affirm women’s unqualified right to choose their sexual partners without couching their choices in racist claims to credibility.

Crown prosecutors will also need to ask judges to reject expert testimony such as that presented in *Dumais*, where the defence witness proposed that “people” who engage in sexual activity while extremely intoxicated “often insert inappropriate conclusions into their breaches of memory to help them make sense of what has happened to them.” The sex discriminatory assumptions buried in propositions like this must be aired and repudiated. This “scientific” opinion is simply a more polite and de-gendered restatement of the old adage that women “cry rape” in the morning, when they come to regret their poor judgment of the night before. In this regard, prosecutors may draw upon judicial statements such as that of Justice Ducharme in *R(J)*, who attributed the belief that women are more likely to consent while under the influence of alcohol to “pornographic fiction.” Justice McLachlin in *Esau* also warned that giving men access to the “mistake” defence where women are unconscious “depends … on dangerous speculation, based on stereotypical notions of how drunken, forgetful women are likely to behave.”

In prosecutions involving women who testify that they were unconscious, Crowns should continue to insist on a rigorous application of the law governing the “mistake” defence. This is necessary not only to breathe life into the law on “reasonable steps,” but also to develop

170 Fraser, CJ, dissenting in *R v Ewanchuk* (1998), 57 Alta LR (3d) 235 at para 67 (CA).
171 *Seaboyer*, supra note 12 at para 209 per L’Heureux-Dubé J.
172 *Dumais*, supra note 91 at para 32.
173 *Esau*, supra note 64 at para 95.
a strong jurisprudence that attends to the public interest by respecting the will of Parliament and women’s constitutional rights to security of the person. Thus the “reasonable steps” limit should be argued in every case where the accused claims consent or “honest mistake” as his defence. Judges who preside over sexual assault prosecutions must be aware that judicial failure to address s 273.2(b) explicitly has been held to be an error of law by appeal courts in DIA and Malcolm, making their judgments vulnerable to appeal.

Cornejo and Despins can be used to persuade judges that they must be able to find an “air of reality” that some reasonable steps were taken before a “mistake” defence can be considered by the jury or themselves, if it is a judge sitting alone. To hold otherwise, that an “honest mistake” defence should be entertained even though there is no evidence supporting a critical component of the defence, would once more position sexual assault as an anomalous crime where special, discriminatory rules are imposed, to the detriment of women. When considering this evidentiary burden, women’s equality demands that the mistake defence be barred where the defence is solely based on conjecture as to “mistake” as opposed to evidence of actual reasonable steps. For example, the reasoning of the trial judge and the appeal court in Dumas demonstrate what it means to attend seriously to the reasonable steps requirement: “The postulations by the expert that it is possible for one to appear to consent when they do not actually have capacity are simply that. No evidence was placed before this trial judge to suggest that any steps had been taken to determine reasonable consent.”

In the context of adjudicating both the “air of reality” test for mistaken belief, where the accused claims reasonable steps to ascertain consent, and the factual question of whether the accused in fact took reasonable steps in the circumstances known to him, judges ought to take a strong and consistent position that men cannot “test the waters” by touching unconscious or semi-conscious women. Too many of the cases reviewed show sloppiness in attending to the facts, and disregard for women’s bodily security. What social interest can possibly justify allowing men to shake, stroke, or straddle unconscious women in order to pursue their own sexual desires? Women’s security of the person in-

174 See for example R v Stone, [1999] 2 SCR 290 at paras 182–92 where the Court tailored the evidentiary burden or “air of reality” test to align with a reformed defence of automatism.
175 See generally L’Heureux-Dubé J’s dissent in Seaboyer, supra note 12.
176 Ibid.
terests should be protected while they sleep or recover from drug or alcohol ingestion. Self-serving, non-consensual touching of women by men they do not know and in whom they have no sexual or romantic interest cannot be condoned. It is imperative that we ask why we should de-criminalize non-consensual sexual touching where, for example, a man strips naked and begins touching an unconscious woman. Why should judges call this conduct “reasonable steps to ascertain consent”? What is so special about men’s interest in sexual gratification that the law should not require them to wait until the woman is not in the vulnerable position of being startled awake? And if we are not prepared to insist that men wait to proposition unconscious women until they are conscious, then reasonable steps should surely require that men wake women without touching them in any way. There is a fundamental question underlying this jurisprudence: do women matter?

The position taken by the courts in Cornejo, Despins, and Graham that nothing short of waking an unconscious woman will suffice to constitute reasonable steps must be adopted by all appellate courts as the minimum that the law requires. Judges should also insist that men ensure that their prospective partners do indeed “know who they are,” contrary to the Ontario Court of Appeal’s judgment in Osvath. In fact, when one considers how disorienting and frightening it is to be awakened from a deep sleep, at least by one who is not an intimate partner, it would not be at all unreasonable to require men who seek intercourse with unconscious women to wait until consciousness returns. Ewanchuk needs to be followed in cases where semi-conscious women express their non-consent. Cases like Aitken should be appealed on this basis. Reasonable steps after “no” has been communicated cannot include further physical or sexual contact without risking criminal responsibility. Further, men whose conduct reveals a predatory intent — such as the accused in Daigle who drugged the woman — should be absolutely barred from their disingenuous claim to “mistake.” There are no steps that are reasonable after a woman has been deliberately rendered helpless by the accused or by others to his knowledge, or where he has waited, in a calculating manner, until she has gone to sleep to begin his assault.

The reasonable steps requirement should also be read as making necessary more onerous steps when there are additional inequalities between the accused and the woman. Some Crown attorneys have argued that differences in age, the relationship of the accused as a person who is or was in a step-parent relationship to the complainant, or in some position of authority over the complainant, such as Miyok where
the accused was the complainant’s income support worker, heighten the obligation to take reasonable steps. These features are part of the “circumstances known to him at the time,” and therefore shape the kinds of steps needed to ensure lawful consent.

Should similar arguments be made where the complainant preyed upon is an Aboriginal woman or a racialized woman? Given the important role played by colonization in rendering Aboriginal women “prey”177 and by systemic racism in emboldening perpetrators who target racialized women, should the lived experience of oppression based on racial identity be named as part of articulating the reasonable steps needed to ascertain consent? After all, perpetrators count on the shame and silence of women who have been raped, or at least they count on our disbelief of racialized women’s accounts of their rapes. Would it challenge systemic racism and white privilege to articulate the race of complainant and accused in the context of the rape of unconscious women, or would it instead reinforce harmful stereotypes and the vulnerability of these women to male violence? I do not have an answer, and look for leadership from Aboriginal and racialized women’s groups as to when and how we must articulate the role of racism in the criminal process. At the same time, it is deeply disturbing to read these cases knowing that many of the women must surely be Aboriginal or racialized, and yet our legal response in terms of “reasonable steps” remains oblivious to what “everybody knows.”178

Much work lies ahead for Crown attorneys who prosecute rape every day and for judges tasked with interpreting a law that requires attention to uncomfortable truths about male sexual violence and their ability to exploit the inequalities generated by sexism, racism, colonialism, and disabilityism. I believe that the reform accomplished by s 273.2(b) holds potential for social change and disruption of men’s relative immunity from criminal liability for sexually assaulting unconscious women. But it will take many more brave women prepared to come forward as complainants, the pressures exerted by a feminist movement, and prosecutors and judges able to identify and repudiate discriminatory myths masquerading as legal argument together to realize the potential of the

177 Mary Eberts, “Surviving Non-Citizenship” (Paper presented to the Sexual Assault Law, Practice, and Activism in a Post-Jane Doe Era Conference, University of Ottawa, 7 March 2009) [unpublished].

JUDGES AND THE REASONABLE STEPS REQUIREMENT

“reasonable steps” requirement.