

Canadian law imposes some limits on freedom to consent to violent sexual activity

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Brett Gundlock/National Post
CBC fired radio host Jian Ghomeshi last week.

Jian Ghomeshi has told us that whatever he does in the bedroom with his sexual partners is done with consent.

This assertion invites a legal question: just how does consent work in Canadian law? Consent is generally used to inoculate parties from the adverse consequences of their actions. But it's not a legal answer to everything. The courts

recognize that while you might consent to some risky or dangerous activity, your consent has limits.

“It is not absolute,” says Janet Leiper, a Toronto lawyer who specializes in criminal and administrative law. “In fact, there are limits.”

Defining those limits in law can be tricky. If there is a general rule in Canadian law, it's that courts have said that you can't agree to get seriously hurt.

The big criminal case on this issue is the 1991 Supreme Court of Canada decision *R. v. Jobidon*. The court said consent can't be used to excuse situations where adults intend to cause serious harm to one another. The case involved a brawl that started in a bar and migrated out to the parking lot. The accused struck the victim in the head, causing the victim to fall on the hood of a car. The accused continued to attack the victim, who later died in hospital.

At the same time, Canadian courts recognize that violence alone won't wipe out consent. Some degree of non-trivial harm is allowed. For example, when you play contact sports, such as hockey, football or rugby, your willing participation in the game is evidence of your consent to get roughed up. And this consent isn't just limited to facing some legal body checks, scrums or tackles, but also some moves that might be against the rules, but which are

still risks common to the game, such as slashes or punches.

Rough sex presents unique legal challenges. The parties engaging in the sex may consent at the outset, but that consent isn't carte blanche for everything that might happen afterwards.

"The courts have imposed some limits on the freedom of individuals to consent to violent sexual activity," said Christopher Sherrin, a professor in the law faculty of Western University. "You can't agree to get seriously hurt."

A key case on this is the 1995 Ontario Court of Appeal decision *R. v. Welch*. The court said that although the law must recognize individual freedom and autonomy, "when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another, then the personal interest of the individuals

involved must yield to societal interests which are challenged by such behaviour."

Nor is express consent at the outset of any sexual activity a complete answer for an alleged criminal assault. Ms. Leiper said certain provisions in the Criminal Code describe situations in which consent cannot be properly given. For example, consent is not obtained if the person engages in activity because the other person has taken advantage of a position of authority or trust. Consent is not obtained in law where it is given as a result of threats, fear of force, fraud or actual application of force. Also, consent in sexual cases must be ongoing. A person must be able to revoke consent, by words or conduct, even if initially he or she did consent to sexual activity at the outset. And if a complainant is incapable of expressing consent, the consent is gone.

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Scenario 3: Sarah and Nick - One Night

Nick and Sarah have been dating for a few months and have sex together regularly. This weekend, Nick's parents are going away to their cabin. It's the first time that Nick and Sarah can spend the night together in Nick's parents' house. Around 10 o'clock, they head up to room and start to make out.

Ten minutes later, Sarah and Nick hear his parents walk in the house. They've canceled their trip because of bad weather. Nick closes the door of his bedroom and picks up where he left off. Sarah asks him to stop because she doesn't feel comfortable continuing when Nick's parents are there. The thought that they might be overheard has turned her off completely. Nick doesn't seem to understand and he keeps going. Sarah gently pushes him away telling him that she doesn't feel like it anymore. He answers that he can't stop himself, that he can't control it. Sarah doesn't dare yell and cause a fight because she doesn't want the parents to hear them. They go all the way.



1. Is this considered sexual assault under the law ?
2. How do you think Sarah feels ?
3. Is this a realistic situation ?
4. Is it true that a boy who has started having sex cannot stop himself ?
5. What do you think of this statement: " Once you have started to have sex, you have no right to change your mind " ?
6. How could Sarah have tried to avoid this unwanted sexual activity ?
7. If Sarah told a friend about what happened that night, what could her friend do ? If Nick told a friend about that night, what could his friend do ?

[Scenario 4: Alex and Jessica - One Evening]

« Alex and Jessica meet at a party at Matt's house. They have seen each other before but have never really had a chance to talk. Since the party started, they have been chatting and having a few beers. Jessica does not often drink.

Noticing that Jessica seems interested in him and that she's starting to get drunk, Alex asks Matt if they can use a bedroom. He tells him that after another few beers, he would like to take Jessica into the room.

Two or three beers later, Jessica is wasted. Alex winks at Matt and leads Jessica to the bedroom saying: "Come lie down for a while, you can hardly stand up."

That's the last thing Jessica remembers. She wakes up in the middle of the night and she realizes then that they have had sex. »



1. Is this considered sexual assault under the law ?
2. If Alex says that Jessica led him on because she was wearing sexy clothes, or that he thought Jessica wanted to have sex because she was showing signs of interest, how would you respond ?
3. Since Alex had quite a few beers, is he responsible for what happened ?
4. Since Jessica also had quite a few beers, is she responsible for what happened ?
5. Could Matt be accused of complicity ?
6. How could this scenario be changed to avoid sexual assault ?

Possible Consequences of Sexual Assault **For the person who experiences sexual assault**

An experience that turns your life upside down...

PSYCHOLOGICAL AND SOCIAL CONSEQUENCES

- I feel betrayed
- I feel guilty
- I feel responsible for what happened to me
- I feel bad – I don't like myself
- I feel ashamed
- I'm afraid of my partner
- I don't feel like doing anything
- I feel like quitting school
- I'm sad, depressed
- I'm confused
- I feel like being alone, I don't want to see anyone anymore

SEXUAL CONSEQUENCES

- I'm unable to have sexual contact anymore
- I don't have any sexual desire or pleasure anymore
- I feel sexually frigid
- I have contracted sexually transmitted or blood borne diseases

PHYSICAL CONSEQUENCES

- I don't sleep well, I have nightmares, I have insomnia
- I might be pregnant
- I use a lot of drugs or alcohol

...is an experience you can recover from with support, and with the help of close friends and resource personnel.



Possible Consequences of Sexual Assault

For the person who exerts sexual assault

A feeling of having won for the moment...
but losing out big time later on!

PSYCHOLOGICAL AND SOCIAL CONSEQUENCES

I risk ...
... losing my friends
... losing my reputation
... feeling ashamed, disliking myself
... losing the respect of others
... being feared by my partner

DISCIPLINARY ACTIONS AND LEGAL CONSEQUENCES

I risk ...
... being kicked off sports teams
... being expelled from school
... being sent to court and being sentenced to:
• performing community work
• staying in a group home
• undergoing treatment
• time in prison

SEXUAL CONSEQUENCES

I risk ...
... being rejected by my partner
... living without happiness and mutual affection
... missing out on learning what it really means to make love
... contracting sexually transmitted and blood borne diseases

You can stop behaving abusively! And it's really worth it if you want to experience happy, loving relationships. You need the help of close friends and resource personnel.



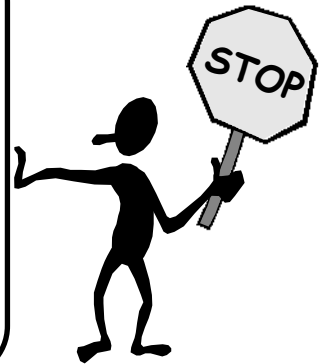
NO means NO!

SEXUAL ASSAULT is any sexual activity **WITHOUT** consent. This includes touching, kissing, oral sex and intercourse.

CONSENT is when you freely give permission through your words and your actions for something to happen. You can not give consent if you are unconscious.

There is **NOT** CONSENT if...

- ⊗ someone is forced to have sex.
- ⊗ threats are used to pressure someone to have sex.
- ⊗ a weapon is used to frighten someone into having sex.
- ⊗ a drunk person is used for sex.



- ☑ Pay attention to what your partner is saying and to their actions. Don't push your partner or pressure them if they are unsure. "I'm not sure" means "No".
- ☑ Notice body language. Someone may say "no" by crying or pushing you away.
- ☑ A person can say "no" at any time, even when you are in the middle of something. You need to listen.
- ☑ Just because someone has done something with you in the past doesn't mean you have their consent to do it again.
- ☑ A person who is drinking alcohol or high on drugs may not be thinking clearly enough to give consent.
- ☑ If someone says "no", believe them. "No" doesn't mean "convince me", "maybe", or "I really mean yes".
- ☑ You **ALWAYS** have the right to say no. It's your body, and you decide for yourself what is "okay" and "not okay".

Sexual Assault Myths and Facts QUIZ

Myths about sexual assault are part of the reason sexual assaults happen. Myths like these may explain why so many people are reluctant to talk about their experience and seek help. Indicate whether the following statements are TRUE or FALSE:

MYTH or FACT

1. Sexual assault is an act of power and aggression. It is not sexually motivated.
2. Only attractive, young women are sexually assaulted.
3. If someone is drunk or high they can not give consent to take part in sexual activity
4. Sexual assault only occurs in dark, isolated places.
5. It's only sexual assault if someone has physical injuries or was threatened with a weapon.
6. It is impossible for women to sexually assault men.
7. Males are only assaulted by gay men.
8. If sexual assault is not reported to the police right away, nothing can be done.
9. Kissing someone who does not want to kiss you can be considered sexual assault.
10. Once a person starts to engage in a sexual activity, he or she cannot change his or her mind.
11. If a person who commits sexual assault is drunk or high they cannot be charged with sexual assault.
12. When sexual assault occurs, it is usually committed by a stranger.