WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2)

of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (*a*)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 **(1)** Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

CITATION: R. v. J.A., 2010 ONCA 226
DATE: 20100326
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COURT OF APPEAL FOR ONTARIO

Simmons, Juriansz and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

J.A.

Appellant

Howard L. Krongold for the appellant

Christine Bartlett-Hughes for the respondent

Heard: September 28, 2009

On appeal from the conviction entered by Justice Dianne M. Nicolas of the Ontario Court of Justice on April 24, 2008, with reasons reported at 2008 ONCJ 195 (CanLII).

Simmons J.A.:

I. OVERVIEW

[1] Following a trial before Nicholas J., the appellant was acquitted of aggravated assault and of attempting to render the complainant unconscious to enable him to sexually assault her but convicted of sexual assault and breach of probation.

[2] The complainant on all of the charges was the appellant's intimate partner and the mother of the couple's son. She testified that she consented to the appellant choking her into unconsciousness, tying her up and penetrating her anally with a dildo while she remained unconscious. She explained that she complained to the police about the incident about a month and a half after it happened as a result of an argument with the appellant.

[3] During the course of the trial, the trial Crown abandoned an application to have the complainant's videotaped statement to the police, in which she claimed that she did not consent to the sexual activity, admitted for the truth of its content. Instead, the trial Crown took the position that choking the complainant into a state of unconsciousness constituted bodily harm and vitiated any consent she may have given to erotic asphyxiation. The trial Crown also argued that, as a matter of law, it was not open to the complainant to consent to sexual activity while unconscious.

[4] The trial judge dealt with the issue of bodily harm in the context of the aggravated assault charge, specifically in relation to the included offence of assault causing bodily harm. She concluded that the unconsciousness experienced by the complainant was transient and therefore rejected the Crown's submission that choking the complainant into unconsciousness constituted bodily harm. However, in convicting the appellant of sexual assault, the trial judge found that the complainant did not consent to being penetrated anally with a dildo. Rather, the trial judge concluded that the complainant and the appellant had merely discussed the possibility that that would occur. In addition, the

trial judge held that the complainant could not legally consent in advance to sexual activity while unconscious.

[5] The appellant submits that the trial judge made several legal and factual errors in finding that the complainant did not consent to the sexual activity that occurred while she was unconscious. The appellant also argues that the trial judge erred in law in holding that the complainant could not consent in advance to sexual activity while unconscious.

[6] Although the Crown submits that the appellant's arguments should be rejected, it also contends that the convictions should be upheld in any event because the trial judge erred in law in failing to find that choking the complainant into unconsciousness constituted bodily harm.

[7] For the reasons that follow, I would allow the appeal. [1]

II. BACKGROUND

i) The complainant's testimony at trial

[8] The complainant was the only witness at trial. She testified that she and the appellant had been involved in a relationship for about seven years prior to the incident and had a son who was about 2 1/2 years old at the time of trial.

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[1] In his factum, the appellant abandoned his sentence appeal.

[9] On May 22, 2007, the complainant and the appellant were alone at home having a romantic evening together. According to the complainant, both she and the appellant drank a couple of beers but they were not drunk.

[10] The couple watched a movie downstairs on the couch. They became amorous and went upstairs to the bedroom, where they undressed and became intimate. After about 10 minutes, “the kinky behaviour” began.

[11] While the complainant was lying on her back with the appellant on top of her, the appellant put his hand around her throat. The complainant described this conduct as “a fetish”. She believed that it was called “anaspholexia”, but agreed with the trial judge that it may also be referred to as sexualized asphyxiation. The complainant described anaspholexia as conduct that involves one person choking the other to the point of unconsciousness to heighten the sexual experience.

[12] Both in her examination-in-chief and in cross-examination, the complainant acknowledged that the appellant had choked her in this way on prior occasions. In her examination-in-chief, the complainant said they had experimented with it on a couple of previous occasions and that she believed she had been choked into unconsciousness once before. In cross-examination, she said they had engaged in the behaviour somewhere between three and ten times and she lost consciousness on more than one occasion.

[13] The complainant also agreed in cross-examination that, on the evening in question, she knew what was coming once the appellant got his hands around her throat and she knew there was a possibility, even a probability, that she would lose consciousness. The complainant confirmed that she was consenting to this behaviour and that she did, in fact, lapse into unconsciousness.

[14] When asked in chief how long she was unconscious, the complainant said:

> I'm not entirely sure, obviously. I know it wasn't for very long though, and by that I mean like less than three minutes it would have had to have been.

[15] The complainant awoke to find herself on all fours on the edge of the bed, with her hands tied behind her back and the appellant penetrating her "in the butt" with a dildo. This conduct continued for about 10 seconds and then the couple began having vaginal intercourse. Once they were finished, the complainant said her "safe word" to have her ties cut; the appellant complied with her request.

[16] The complainant confirmed that having her hands tied behind her back was not uncommon; the couple had experimented with bondage on several prior occasions.

[17] Concerning being penetrated in the anus with a dildo, the complainant said, in examination-in-chief, that that was something new they were trying. When asked in-chief if she had given the appellant permission to do this, the complainant testified as follows:

Q. *Did you at any time give him permission to do this* [penetration in the anus with a dildo]?

A. *I had*, when we were doing all this kind of experimenting, I mean, we had basically laid out beforehand what was allowed and what was not allowed. There are certain things that are just not to happen and all of the rest of it.

Q. Okay. Well, let me just delve a little bit deeper into what is allowed and not allowed. Any of the things that he did here, where it is the choking, the bondage or the dildo, were any of them discussed prior to the events that happened?

A. Well, as I had said before, we had done the choking before, so yes, that had already been discussed. The tying up, that was almost common routine at the time, so yes, that was also discussed, and we had discussed other – yes, that other final point matter with the butt, and *we had both expressed, I guess, a certain interest in what it would be like*.

Q. Okay. When you said you discussed what was allowed and what was not allowed, what did you indicate to him was not allowed?

A. That was something we had discussed long before the events in question, so it wasn't like we sat there that night and stated what was going to happen and what was not going to happen. I mean, it was quite spontaneous what happened that evening. *Certain things not allowed, just silly things like, when I say let me go or we are done, then we're done. Just certain things like that, basically stating ground rules*.

Q. And how would he know when you said, “We are done”? Was that the words....

A. We had a safe word.

Q. You had a safe word, and what was the safe word that you used?

> A. Tweety bird. The reason for that word is it’s not something you would say in the bedroom under normal circumstances, therefore it would stand out.
>
> Q. And at any time on May 22nd, 2007, did you say the word “Tweety Bird”?
>
> A. Yes.
>
> Q. When did you say tweety bird?
>
> A. After we had finished, I guess, the butt part of the evening, he began – we began to have actual intercourse, and once he was finished and I was finished, I said it and he let me go, well, went to get scissors to cut the ties and let me go.
>
> ...
>
> Q. *While he was doing these things to you, how did you feel?*
>
> A. *I was fine. I mean, I wasn't, you know, like scared or anything if that is what you were trying to get at. The whole – I mean, like I said, the butt thing was a new thing, so there was curiosity involved in that and a certain sense of adventure.* [Emphasis added.]

[18] In cross-examination, the complainant initially confirmed that the appellant had never previously inserted a dildo in her anus, but indicated she did not object to it:

> Q. In terms of having ... a dildo inserted ... in your butt, is that something that had happened before?
>
> A. No, we hadn't done that. We discussed the possibility of it. At the moment I just went with it in the spirit of experimentation.

[19] However, after being confronted with a portion of her evidence at the appellant's bail hearing, she adopted her prior testimony that anal penetration with a dildo had happened once before and confirmed that she consented. She explained it had happened a while ago and that she had been drunk.

[20] Concerning how these events came to the attention of the police, the complainant explained that she and the appellant were at a difficult point in their relationship and having regular arguments. Following a particularly heated argument in which the appellant threatened to take their son and obtain sole custody of him, the complainant went to the police on July 11, 2007. According to the complainant, she gave a videotaped statement under oath in which she described what happened on May 22, 2007 but said she had not given her consent to sexual activity.

ii) The Aborted *K.G.B.* Application

[21] After the complainant described how the incident came to the attention of the police, the Crown applied to have the complainant declared adverse with a view to having her videotaped statement to the police introduced for the truth of its content if she did not adopt it: See *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 9 and *R. v. K.G.B.*, [1993] 1 S.C.R. 740. However, following a lunch break, and after the videotaped statement had been played and a ruling was made that the Crown could cross-examine the complainant on her statement, Crown counsel at trial (not Ms. Bartlett-Hughes) indicated

that he had taken the opportunity to speak to senior Crown counsel and was now abandoning the *K.G.B.* application.

[22] In response to a question from defence counsel, the trial Crown also confirmed that he was not seeking to adduce the complainant's statement for the truth of its content. He said, "[i]n fact, it's as if the statement was never put."

iii) Relevant Statutory Provisions

[23] Two statutory definitions are relevant for the purposes of this appeal. The first is the definition of consent as set out in ss. 265(3) and 271.1 of the *Criminal Code*.

[24] Section 265(3) describes certain circumstances in which consent is not obtained:

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

[25] Section 273.1(1) sets out a definition of consent for the purposes of the sexual assault provisions in the *Criminal Code* and s. 273.1(2) and (3) address circumstances in which no consent is obtained:

> **273.1** (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273 [sexual assaults], the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> > (a) the agreement is expressed by the words or conduct of a person other than the complainant;
> >
> > (b) the complainant is incapable of consenting to the activity;
> >
> > (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
> >
> > (d) the complainant expressed, by words or conduct, a lack of agreement to engage in the activity; or
> >
> > (e) the complainant, having consented to engage in sexual activity, expressed, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[26] The second relevant statutory definition is the definition of bodily harm as set out in s. 2 of the *Criminal Code*:

> "bodily harm" means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature;

iv) The Positions of the Parties at Trial

[27] Following the complainant's testimony, defence counsel at trial applied for directed verdicts of acquittal on the basis that the complainant consented to the conduct in issue. In response, the trial Crown submitted that choking another person into a state of unconsciousness constitutes bodily harm and that, pursuant to *R. v. Jobidon*, [1991] 2 S.C.R. 714, bodily harm vitiates consent. In the trial Crown's submission, this was a case of sado-masochistic sexual activity, and no exception to the *Jobidon* principle ought to apply.

[28] After a discussion about the legal issues raised, the parties agreed that further written submissions would be required. In order to avoid an unnecessary re-attendance, defence counsel abandoned his directed verdict application and elected not to call evidence. The matter was then adjourned for written submissions.

[29] In his written argument, the trial Crown relied on *R. v. Jobidon*, *supra*, *R. v. Welch* (1995), 25 O.R. (3d) 665 (C.A.) and *R. v. Robinson* (2001), 53 O.R. (3d) 448 (C.A.), and argued that in a sexual context, consent is vitiated where bodily harm is intended and caused. The trial Crown submitted that choking the complainant into a state of unconsciousness constituted bodily harm as defined in the *Criminal Code*. He relied, in part, on the dissenting reasons of Lamer C.J. in *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 150 that "[i]ntentionally and consciously choking someone for only a few seconds might or might not constitute the infliction of bodily harm."

[30] The trial Crown submitted that "unconsciousness interferes with the health and comfort of a person in a manner that is not trifling." While not conceding that the injury was transient, the Crown urged the trial judge to convict in any event on the basis that, where one person intentionally chokes another person into unconsciousness, it is objectively foreseeable that bodily harm will occur.

[31] The Crown then argued that, regardless of whether any prior consent to sexual conduct was given or vitiated, the complainant was incapable of consenting to sex while unconscious. Without the capacity to know what was being done to her, or to revoke any previously given consent, the complaint could not have validly consented during any period of unconsciousness.

[32] Defence counsel's written submissions noted the absence of evidence called by the Crown to support the proposition that the choking in this case constituted bodily harm. No expert evidence was called on the dangers of choking or unconsciousness. No evidence was led as to the mechanism of unconsciousness (e.g. venal or arterial versus tracheal) or to the amount of force that was applied. Further, there was no reliable evidence as to the duration of the complainant's unconsciousness.

[33] Similarly, defence counsel noted that the Crown did not produce any case law showing that choking to unconsciousness constitutes bodily harm. With respect to *Cooper*, the defence noted that stating that choking may or may not be bodily harm is unhelpful as it is a tautology.

[34] Faced with this dearth of evidence or case law, defence counsel urged the trial judge not to find bodily harm.

[35] Responding to the Crown’s submissions about the effect of unconsciousness on the complainant’s prior consent, defence counsel submitted that the evidence showed that the complainant was consenting before, during, and after the sexual conduct. She had been rendered unconscious in the past, and foresaw the likelihood that she would lose consciousness again. Her consent was therefore fully informed and valid.

IV. The Trial Judge's Reasons

[36] In convicting the appellant of the sexual assault charge, the trial judge concluded that “there had been discussion only of anal penetration”, but never any consent. Although the complainant’s evidence at trial was essentially unchallenged and uncontradicted, in reaching her factual conclusion, the trial judge described the complainant's cross-examination as “a typical cross-examination of a recanting complainant in a domestic matter” and rejected two aspects of the complainant’s testimony.

[37] First, the trial judge rejected the complainant’s evidence that she used the safe word after she and the appellant were finished having intercourse. In the trial judge’s view, there would have been no need to use the safe word at that point.

[38] Second, the trial judge rejected the complainant's evidence that she and the appellant had engaged in anal penetration with a dildo previously. On this point, the trial judge accepted the complainant's unprompted answers that they had not done so previously rather than her testimony adopting evidence she gave at the appellant's bail hearing. The trial judge concluded that the complainant would not realistically have forgotten about an earlier incident.

[39] The trial judge's second credibility finding is particularly important because she appears to have used it as at least part of the basis for her finding that the complainant did not consent to anal penetration with a dildo:

> The sexual activity which forms the subject of the sexual assault charge is the anal penetration with a dildo... On that issue, *I accept as credible evidence the answer she freely and voluntarily gave to both the Crown in the examination and to defence when originally questioned on this issue; namely this was a first and only the possibility of it had been discussed.* Although defence was fully entitled to suggest the answers to this complainant, it is a matter of weight and credibility for the trial judge to assess and weigh answers that do not come from leading and/or suggestive questions. It is also not open to defence to suggest to her that the evidence I should rely on is the one that was given at bail. She was clearly a witness "on side" with the defence. I accept her initial response as being truthful and give little weight to the answer she gave when confronted with incompatible evidence given at the bail hearing where she testified for the defence. Human experience would dictate that she would not have to be reminded that anal penetration had occurred on other occasions. *I find that she did not at any time consent to this penetration by the dildo in her anus.*

> In my view, defence confuses the issue of whether loss of consciousness constitutes "bodily harm" to which she cannot consent with the notion of consent in sexual assault cases as referred to in *Ewanchuk* by our Supreme Court. It is not open to defence to rely on earlier authorities such as *R. v. Stanley* (1977), 36 C.C.C. (2d) 216 (B.C.C.A.) which is no longer good law. *I have made a finding with respect to the credibility of the complainant on that issue; the evidence I accept and believe based on her own recital of the events is that there had been discussion only of anal penetration. As such it cannot be said that what happened while she was unconscious had been consented to*; as mentioned above *Ewanchuk* mandates that there be consent to all sexual activity and we do not have a doctrine of implied consent even for situations such as this one based on my extensive review of the case law. The decision in *Pedden* makes that plain, earlier consent to sexual activity, in that case fellatio, does not carry over to acts that occur while the complainant is unconscious. The *Ashlee* decision resolves any doubt on the issue. In any event, even if this act occurred previously with her consent that consent cannot carry over to this event and particularly can never carry over to a situation where she is unconscious. [Emphasis added.]

[40] The trial judge gave lengthy and detailed reasons addressing the legal issues raised by counsel.

[41] Concerning the issue of whether bodily harm vitiated any consent that may have been given, the trial judge reviewed a number of decisions addressing this question in the context of both assaults in general and sexual assaults: *R. v. Jobidon*; *R. v. Welch*; *R. v. Donovan*, [1934] 2 K.B. 498 (C.A.); *R. v. Boyea* (1992), 156 J.P. 505 (C.A.); *R. v. Brown*, [1994] 1 A.C. 212 (H.L.); *R. v. Robinson*; *R. v. Amos*, 1998 CanLII 2814 (ON C.A.); and *R. v. Quashie* (2005), 198 C.C.C. (3d) 337 (Ont. C.A.).

[42] In particular, the trial judge noted that in *R. v. Jobidon*, the Supreme Court of Canada "concluded that the common law has created a body of law which illuminates the meaning of consent, and places limitations on the 'legal effectiveness' of consent". Although *Jobidon* dealt with consensual fights, the Supreme Court of Canada expressly contemplated that further limitations would be found in other types of cases. The trial judge concluded that loss of consciousness is an injury and that the legal test for vitiating consent to an assault has two components:

i) whether the injury reached the level of bodily harm as that term is defined in the *Criminal Code*, namely, any hurt or injury to a person that interferes with their health or comfort and is more than merely transient or trifling in nature; and

ii) whether such harm was both intended and caused.

[43] In relation to sexual assault cases, she referred in particular to this court's decisions in *Welch* and *Robinson*, and adopted Griffiths J.A.'s comments in *Welch*, at p. 688, which were approved in *Robinson*[2]:

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

[2] See *Robinson*, at para. 61.

...

> Quite simply it is suggested that hurting people is wrong and this is so whether the victim consents or not, or whether the purpose is to fulfil a sexual need or to satisfy some other desire.

[44] However, in the absence of expert evidence, the trial judge indicated she was "ill equipped... to decide the medical mechanism of unconsciousness, the degree of force required, the duration of force required, the duration of force required to cause loss of consciousness, and likely injuries associated with choking, strangulation or unconsciousness." Nonetheless, she expressed the belief that "the reasonable man would conclude that choking someone to the point of unconsciousness [interferes] with that person's 'health or comfort'". In addition, she said:

> If this were a case of domestic assault and the accused had choked his partner and rendered her unconscious in a physical dispute, I have no doubt a conviction for bodily harm could ensue.

[45] In the end, albeit in relation to the aggravated assault charge, the trial judge concluded that the unconsciousness that occurred in this case constituted bodily harm but did not vitiate the complainant's consent because it was transient:

> *Assault bodily harm is an included offence of aggravated assault*. In this case I find that choking her to the point of unconsciousness does constitute bodily harm. *The lack of consciousness,* which I find to be bodily harm, *had been consented to on this occasion and in the past. In this case my finding is that the consent was not vitiated because the bodily*

> *harm inflicted was "transient" based on the only evidence I have.* [Emphasis added.]

[46] Concerning the issue of whether the complainant could legally consent in advance to sexual activity while unconscious, once again, the trial judge reviewed a number of authorities relating to this issue: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Pedden*, 2000 BCPC 13 (CanLII), aff'd (2003), 186 B.C.A.C. 260 (C.A.); and *R. v. Ashlee* (2006), 212 C.C.C. (3d) 477 (Alta. C.A.) leave to appeal refused 2006 S.C.C.A. 415, which in turn referred to the decisions in *R. v. A.(A.)* (2001), 155 C.C.C. (3d) 279 (Ont. C.A.); *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Humphrey* (2001), 43 C.R. (5th) 258 (Ont. C.A.); and *R. v. Stanley* (1977), 36 C.C.C. (2d) 216 (B.C.C.A.).

[47] Although acknowledging that it was not binding on her, the trial judge adopted the reasons of the majority of the Alberta Court of Appeal in *Ashlee*. In *Ashlee*, the accused was charged with fondling a woman who was unconscious on the street. The woman did not testify and the issue was whether the Crown had to prove the absence of prior consent.

[48] The majority set out a number of principles relating to consent in sexual assault cases. They observed, at para. 13, that s. 273.1(1) of the *Criminal Code* defines consent and that s. 273.1(2) defines statutory non-consent, and stated, "[t]here is no consent to sexual activity when the complainant is incapable of consenting to the activity."

[49] Relying on *Ewanchuk*, the majority noted that consent must be given to particular sexual activity at the time of the activity and that there is no defence of implied consent to sexual assault. Further, under s. 273.1(2)(e) of the *Criminal Code* consent is an ongoing state of mind and is not irrevocable once given. As consent must be given at the time of the activity and is an ongoing state of mind, it ends as soon as the complainant falls unconscious and is no longer capable of consenting. As such, there is no defence of "prior" consent to sexual activity that takes place while the complainant is unconscious.

[50] Relying on this authority, the trial judge held that the complainant could not legally consent in advance to sexual activity that takes place while she is unconscious. The trial judge concluded:

> With respect to the s. 271 charge the Crown has met its burden. *The evidence of prior consent is not determinative in any way of the issue*. Firstly, I find that she did not at any time consent to anal penetration of any kind, she merely discussed the possibility of such activity. *Even if she had consented previously, or on that night, she cannot legally consent to sexual activity that takes place when she is unconscious. I find that the binding of her hands and the forceful insertion of the dildo to be degradation and dehumanizing acts in the circumstances of this case.* [Emphasis added.]

[51] A conviction on the breach of probation charge flowed from the conviction on the sexual assault charge.

[52] Concerning the remaining charges, the trial judge noted that “[t]he complainant's own evidence is completely unchallenged to the effect that choking was common practice for [the couple] and meant to heighten their sexual experience.” She therefore acquitted the appellant of attempting to render the complaint unconscious to enable him to commit a sexual assault.

[53] With respect to the aggravated assault charge, the trial judge held that there was not sufficient evidence to permit her to find that the loss of consciousness had endangered the complainant's life. Further, although she found that “choking [the complainant] to the point of unconsciousness does constitute bodily harm”, the trial judge concluded that the complainant had consented to this conduct on this and other occasions and that her consent was not vitiated “because the bodily harm inflicted was ‘transient’”. The trial judge therefore acquitted the appellant of aggravated assault and of the included offence of assault causing bodily harm.

IV. Analysis

i) Did the trial judge err in holding that the complainant did not consent in advance to the sexual activity that occurred while she was unconscious?

[54] The appellant makes three complaints about the trial judge’s finding that the complainant did not consent in advance to the sexual activity that occurred while she was unconscious. First, he says the trial judge relied improperly on the complainant’s videotaped statement to the police, which was never admitted into evidence, to formulate

the view that she was "a typical recanting complainant" and tailoring her evidence to favour the defence. Second, he submits that the trial judge's efforts to distinguish between discussion and consent have no solid foundation in the evidence. Finally, he says the trial judge misapplied *R. v. W.(D.)*, [1991] 1 S.C.R. 742 by failing to consider whether, even if she disbelieved the complainant, the complainant's unchallenged and uncontradicted evidence that she consented raised a reasonable doubt as to the absence of consent.

[55] In my opinion, the evidence that was led at trial was simply not capable of supporting a finding that the complainant did not consent on a standard of proof beyond a reasonable doubt.

[56] Concerning her factual finding of no consent, the trial judge said:

> The sexual activity which forms the subject of the sexual assault charge is the anal penetration with a dildo... On that issue, *I accept as credible evidence the answer she freely and voluntarily gave to both the Crown in the examination and to defence when originally questioned on this issue; namely this was a first and only the possibility of it had been discussed*. [Emphasis added.]

[57] The difficulty with this conclusion is that it appears to focus on what the complainant said in response to questions about whether anal penetration with the dildo had happened before and to ignore what the complainant said in-chief about whether she was consenting.

[58] The starting point of the complainant’s evidence in-chief on the consent issue was that she had previously given her consent to anal penetration with a dildo when the parties had discussed what was allowed and not allowed and laid out ground rules. When the complainant later said in-chief that she and the appellant both expressed interest in the particular conduct, it was in the context of having already testified that she consented. She was not asked to provide more detail about this aspect of the couple’s conversation. The gist of the complainant’s evidence in-chief was that she consented.

[59] The complainant’s statement in cross-examination that she and the appellant had discussed the possibility of anal penetration with a dildo was given in response to a question about whether that conduct had happened previously. Although it was open to the trial judge to reject the complainant’s subsequent evidence in cross-examination that she and the appellant had previously engaged in anal penetration with a dildo, that finding did not alter the gist of the complainant’s evidence in-chief.

[60] The trial judge did not make a specific credibility finding about the complainant’s evidence that she consented. Even assuming that she rejected that evidence what remained was a lacuna in the evidence on the subject of consent. The Crown had the opportunity at trial to clarify the complainant's evidence on this issue and failed to do so. Viewed in context, the complainant’s evidence that she and the appellant discussed the possibility of such conduct does not translate into evidence capable of supporting a finding on a standard of proof beyond a reasonable doubt that she did not consent.

ii) Did the trial judge err in law in holding that the complainant could not consent in advance to sexual activity while unconscious?

[61] On appeal, the appellant relies on the trial judge's finding that the complainant did not suffer bodily harm as that term is defined in the *Criminal Code* and submits that the criminal law does not prohibit consensual sexual activity while unconscious where a person gives their consent in anticipation of becoming unconscious. According to the appellant, none of the decisions of this court that have addressed the issue of sexual activity while unconscious have involved a situation where the complainant consented in advance to sexual activity expected to occur while unconscious.

[62] Further, the appellant points out that s. 273.1(1) of the *Criminal Code* defines consent as “the voluntary agreement of the complainant to engage in the sexual activity in question” and argues that there is nothing novel about the suggestion that consent can be given to touching which is intended to occur while a person is unconscious.

[63] For example, a competent person can consent to surgery which is to occur while the person is unconscious even though he or she will not be conscious or be able to revoke consent once anesthetised. Similarly, no one would suggest that an intoxicated person who asks a friend to help him get home and then passes out and is carried home by the friend was assaulted or kidnapped.

[64] The appellant submits that no provision of the *Criminal Code* prohibits a person from providing consent in advance to touching that is anticipated to occur while the

person is unconscious. Section 273.1(2) of the *Criminal Code* prohibits obtaining consent to sexual activity from a person who is unconscious and provides that no consent is obtained where the complainant, having expressed by words or conduct a lack of agreement to continue to engage in the activity. It does not prohibit a person from consenting in advance to sexual touching anticipated to occur while the person is unconscious.

[65] The appellant concedes that unless a person gives consent in advance to sexual contact anticipated to occur while the person is unconscious, sexual activity occurring after the person loses consciousness exhausts the prior consent because unconsciousness changes the nature of the sexual activity.

[66] However, relying on the minority decision in *Ashlee* as well as the language of s. 273.1, the appellant contends that permitting a person to consent to sexual activity in anticipation of unconsciousness is not prohibited by the express language of the *Criminal Code*. Moreover, it is entirely consistent with the important goal of the criminal law of protecting the personal integrity of individuals and providing them with control over who touches their body.

[67] The appellant also argues that prohibiting sexual touching which occurs while one's partner is unconscious would have the unwanted effect of criminalizing the behaviour of a person who touches their partner in a sexual way while their partner is sleeping. This is one of the arguments that was made in *Ashlee* and the dissenting judge,

at p. 489, adopted the view that “an individual can, while capable of consenting, consent in advance to being sexually touched while he or she is *unconscious or asleep* (emphasis added).”

[68] By way of response, the Crown contends that various authorities have made it clear that consent to sexual contact is legally valid only where a person subjectively consents to the sexual activity at the time it occurs. In support of its position the Crown relies on *R. v. Ewanchuk*; on comments made by McLachlin J. in *R. v. Esau*; and on this court's decisions in *R. v. Humphrey*, *R. v. J.R. and J.D.*, [2008] O.J. No. 1054, leave to appeal denied [2008] S.C.C.A No. 231, and *R. v. Bell*, [2007] O.J. No. 1725.

[69] I would not accept the Crown's submissions. On my review of the authorities and the relevant provisions of the *Criminal Code*, I see no basis for holding that, as a matter of general principle, a person cannot legally consent in advance to sexual activity expected to occur while the person is either unconscious or asleep. If anything, in my view, the relevant caselaw supports the opposite conclusion.

[70] As a starting point, I agree with the appellant that there is nothing novel about the proposition that a person can consent in advance to touching expected to occur while the person is unconscious. At para. 128 of *Jobidon*, the Supreme Court of Canada expressly acknowledged that nothing stated in that case “would prevent a person from consenting to ... appropriate surgical interventions.”

[71] The primary authority relied on by the Crown is *R. v. Ewanchuk*. At paras. 25 and 26 of *Ewanchuk*, Major J., speaking for the court, explained that the *actus reus* of sexual assault is established by proof of three elements: i) touching, ii) the sexual nature of the contact, and iii) the absence of consent. Although the first two elements are objective and can be established by proof that the accused's actions were voluntary, the absence of consent "is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, *at the time it occurred* (emphasis added, citations omitted)."

[72] At para. 31 of *R. v. Ewanchuk*, Major J. concluded that there is no defence of implied consent to sexual assault in Canadian law. He said:

> The trier of fact may only come to one of two conclusions: the complainant either consented or did not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. No defence of implied consent to sexual assault exists in Canadian law.

[73] The Crown submits that these passages conclusively establish that a prior consent is not effective as a matter of law because unconsciousness deprives the person consenting of the ability to experience consent or know whether they are consenting *at the time the sexual activity occurs*.

[74] In my opinion, the Crown's argument ignores two important points. First, *Ewanchuk* involved a conscious complainant and the issue in the case was whether the trial judge erred in concluding that the defence of implied consent to sexual activity exists as a matter of law.

[75] The specific question in *Ewanchuk* was whether a complainant's conduct could give rise to a doubt concerning whether she was consenting where the trier of fact accepted her evidence that she was not consenting. At para. 27 of that decision, Major J. explained that confusion has sometimes arisen concerning the meaning of consent as an element of the *actus reus* of sexual assault. Although, as a matter of common parlance, the word "consent" often connotes some form of active behaviour, in dealing with it as an element of the *actus reus* of the offence of sexual assault, the approach is purely subjective and the complainant's internal state of mind is determinative.

[76] The statements in *Ewanchuk* on which the Crown relies can only be properly understood when considered in context. The statements are not directed at the issue of whether a person can consent in advance to sexual activity anticipated to occur while unconscious; rather, they are directed at resolving the question of whether a conscious complainant's conduct can give rise to a reasonable doubt on the issue of consent where the trier of fact accepts the complainant's evidence that she was not consenting. The fact that the defence of implied consent to sexual assault does not exist does not resolve the

question of whether a person can consent in advance expressly to sexual activity expected to occur while unconscious.

[77] Second, the Crown's argument ignores the fact that its obligation in a sexual assault case is to prove absence of consent. Where a person consents in advance to sexual activity expected to occur while unconscious and does not change their mind, I fail to see how the Crown can prove lack of consent. The only state of mind ever experienced by the person is that of consent.

[78] In this regard, I note that at para. 28 of *Ewanchuk*, Major J. observed that "[h]aving control over who touches one's body, and how, lies at the core of human dignity and autonomy" and that protecting individuals' security of the person lies at the heart of "[t]he inclusion of assault and sexual assault in the [*Criminal*] *Code*". Permitting a person to consent in advance to sexual activity expected to occur while unconscious or asleep is entirely consistent with this principle.

[79] The Crown also relied on the following comments made by McLachlin J. at para. 73 of her dissenting reasons in *Esau* as supporting its position that a person cannot legally consent in advance to sexual activity expected to occur while unconscious:

> The complainant in this category [unconscious or incoherent complainants] lacks the capacity to communicate a voluntary decision to consent. Such lack of capacity would be obvious to all who see her, except the wilfully blind. This makes any suggestion of honest mistake as to consent implausible. To put it another way, the necessary (but not sufficient) condition

> of consent--the capacity to communicate agreement--is absent. *The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent*. [Emphasis added.]

[80] Contrary to the Crown's submission, if anything, in my opinion, these comments support the conclusion that a person can consent in advance to sexual activity expected to occur while unconscious.

[81] The issue in *Esau* was the availability of the defence of honest but mistaken belief in content. At this point in her reasons, McLachlin J. was addressing categories of situations in which the defence would be available. She concluded that the defence would not be available where the fact situation involved unconscious or incoherent complainants. However, in making the italicized comments, McLachlin J. was not opining that a person cannot consent in advance to sexual activity expected to occur while unconscious. Rather, she was indicating that the defence of honest but mistaken belief in consent would not be available to an accused who acted on a prior consent where the complainant later testified about a change of mind.

[82] In my view, McLachlin J.'s statement that the defence of honest but mistaken belief in consent would not be available where the complainant later changes her mind

suggests that the consent remains valid so long as the complainant does not change her mind, whether immediately prior to lapsing into unconsciousness or after she wakes up.

[83] Finally, this court's decisions in *Humphrey*, *J.R. and J.D.* and *Bell* are not helpful to the Crown. None of these cases involve situations where it was alleged that the complainants consented in advance to sexual activity anticipated to occur while they were unconscious.

[84] Further, I see nothing in s. 273.1 of the *Criminal Code* that would prohibit a person from consenting in advance to sexual touching expected to occur while the person is unconscious.

[85] I will repeat the relevant portions of s. 273.1 for ease of reference:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), *"consent" means,* for the purposes of sections 271, 272 and 273 [sexual assaults], *the voluntary agreement of the complainant to engage in the sexual activity in question*.
>
> (2) *No consent is obtained*, for the purposes of sections 271, 272 and 273, *where*
>
> ...
>
>> (b) the complainant is incapable of consenting to the activity;
>
> ...
>
>> (e) *the complainant, having consented* to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

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

[86] I agree that s. 273.1(2)(e) demonstrates that consent reflects an ongoing state of mind because it recognizes that consent can be withdrawn and that s. 273.1(2)(b) makes it clear that an unconscious person cannot consent to sexual activity. However, I do not read these provisions as prohibiting a person from expressing in advance their consent to sexual touching expected to occur while unconscious.

[87] Section 272.1(1) defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question." Where a person consents to sexual activity anticipated to occur while unconscious and does not change their mind, I fail to see how s. 273.1(2)(b) somehow invalidates the consent. The person is consenting and no further consent needs to be "obtained". To hold otherwise would be to deprive individuals of a significant aspect of their personal autonomy by limiting their ability to make choices about who can touch their body and in what circumstances.

[88] Based on the foregoing reasons, in my view, the trial judge erred in reaching the broad conclusion that a person cannot legally consent in advance to sexual activity expected to occur while unconscious. In my opinion, depending on the offence charged, a more appropriate inquiry would be whether the complainant's consent given in advance to sexual acts performed while unconscious was vitiated in the particular circumstances of the case.

[89] In this case, the trial judge found that “the binding of [the complainant’s] hands and the forceful insertion of the dildo to be degradation in the humanizing acts in the circumstances of this case.” However, the trial judge’s conclusions regarding the sexual assault charge were premised, at least in part, on the trial judge’s finding that the complainant did not, at any time, consent to anal penetration of any kind. As I have explained, in my opinion, the record in this case is not capable of supporting that finding of fact.

[90] Further, although the Crown alleged at trial that strangling the complainant into unconsciousness endangered the complainant’s life and constituted bodily harm, it did not make the same allegations concerning the sexual acts performed while the complainant was unconscious.

[91] In these circumstances, even assuming the appellant had been charged with aggravated sexual assault or sexual assault causing bodily harm, I see no basis for the holding that the sexual acts performed with the complainant’s consent while the complainant was unconscious were themselves degrading or dehumanizing.

iii) Did the trial judge err in law in failing to find that choking the complainant into unconsciousness constituted bodily harm and therefore vitiated any consent that may have been given?

[92] The trial judge confined her analysis of the sexual assault charge to the appellant's conduct in penetrating the complainant anally with a dildo while the complainant was unconscious. She dealt with the issue of bodily harm in relation to the aggravated assault

charge and acquitted the appellant of the included offence of assault causing bodily harm based on a conclusion that the unconsciousness experienced by the complainant was transitory.

[93] On appeal, the Crown submits that the trial judge erred in law in failing to find that choking the complainant into unconsciousness in the course of erotic asphyxiation constituted bodily harm that vitiated the complainant's consent to that sexual activity. Although the Crown did not appeal the acquittal on the aggravated assault charge, the Crown argues that it is entitled to rely on uncontroverted evidence to support the conclusion that on a proper legal analysis the appellant was guilty of sexual assault causing bodily harm and, therefore also of the included offence of sexual assault.

[94] While I agree that the trial judge erred in law her approach to the bodily harm issue, I do not agree that the Crown is entitled to rely on bodily harm to support a conviction for sexual assault *simpliciter*.

[95] In my opinion, the trial judge erred in her approach to the bodily harm issue by concluding that the complainant did not suffer bodily based on a finding that the unconsciousness experienced by the complainant was transitory, and without making a specific finding concerning whether the unconsciousness experienced by the complainant was more than merely trifling.

[96] As I interpret the statutory definition of bodily harm, it permits a finding of bodily harm where a hurt or injury that interferes with the health or comfort of the person is either more than merely transitory or more than merely trifling.

[97] I repeat the definition of bodily harm as set out in s. 2 of the *Criminal Code* for ease of reference:

> "bodily harm" means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

[98] This definition is ambiguous because of the use of the word "or" in the phrase "more than merely transient or trifling". One can read this phrase positively, treating it as establishing alternative criteria, satisfaction of either one of which will qualify a hurt or injury as bodily harm. Read that way, the definition indicates that a hurt or injury that interferes with the health or comfort of a person will constitute bodily harm if it is more than merely transient or if it is more than merely trifling.

[99] On the other hand, one can read this phrase negatively, treating it as establishing the categories of hurt or injury that are excluded from bodily harm. Read that way, the definition indicates that a hurt or injury will not meet the threshold for bodily harm if it is either merely transient or merely trifling.

[100] The modern rule of statutory interpretation requires that the provisions of an act be interpreted "in their entire context and in their grammatical and ordinary sense

harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26, citing Elmer Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p. 83.

[101] Adopting this approach, I conclude for three reasons that that a hurt or injury that interferes with the health or comfort of a person and that is more than merely transient or more than merely trifling is sufficient to support a finding of bodily harm.

[102] First, on a plain reading of the definition of bodily harm, the focus of the section is on what constitutes bodily harm and not on what is excluded from the definition.

[103] Second, the legislative history of the definition supports this interpretation.

[104] The definition of bodily harm was introduced into the *Criminal Code* in 1983: See *An Act to Amend the Criminal Code in relation to sexual offences and other offences against the person*, S.C. 1980-81-82-83, c. 125, s. 19. Prior to 1983, the definition was a matter of common law. Canadian courts adopted the English definition set out in *R. v. Donovan*, [1934] 2 K.B. 498 (C.A.), at p. 507:

> For this purpose we think that bodily harm has its ordinary meaning and includes any hurt or injury calculated interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient *and* trifling. [Emphasis added.]

See also *R. v. Maloney* (1976), 28 C.C.C. (3d) 323 (Ont. Co. Ct.), at p. 326.

[105] In adding a statutory definition to the *Criminal Code*, Parliament changed the common-law formulation from transient *and* trifling to transient *or* trifling. However, there is no indication in the legislative debates that Parliament intended to change the meaning of the common-law formulation. On the contrary, the legislative committee that considered the predecessor to the 1983 Act was expressly told by senior Department of Justice officials that the new definition merely followed the common law: See Canada, House of Commons, 32nd Parl., 1st Sess., *Proceedings of the Standing Committee on Justice and Legal Affairs,* No. 97 (June 15, 1982), at p. 56.

[106] In my opinion, the common law formulation of the definition does not share the same ambiguity as the statutory formulation. Read positively, in order to constitute bodily harm under the common law formulation, a hurt or injury that interferes with the comfort or safety of a person constitutes bodily harm if it is more than either merely transient or more than merely trifling. Similarly, focussing on what is excluded from bodily harm under the common law formulation, a hurt or injury must be transient *and* trifling to be excluded.

[107] Third, this interpretation is consistent with case law that has recognized that injuries of short duration may still be of significant gravity. For example in *R. v. Garrett* (1995), 169 A.R. 394, the Alberta Court of Appeal allowed an appeal on the basis that the trial judge appeared in finding that injuries had healed within one week were of insufficient duration to constitute bodily harm. The court noted that a "life-threatening

injury may indeed be of short duration but nevertheless constitute bodily harm." It makes sense that such injuries cross the threshold of "bodily harm".

[108] The appellant argues that in the absence of expert evidence it was not open to the trial judge to find that the unconsciousness experienced by the complainant amounted to bodily harm. I agree that it may have been preferable for the Crown to call expert evidence concerning this issue. However, even assuming that it was open to the trial judge to make a finding of bodily harm based on the record before her, I am not persuaded that the Crown is entitled to rely on bodily harm to support a conviction on the sexual assault charge.

[109] The trial judge found that the complainant consented to the appellant choking her into unconsciousness. However, the appellant was charged with sexual assault *simpliciter* and not with sexual assault causing bodily harm. Bodily harm is not an element of the offence of sexual assault. In effect, the Crown did not formally allege that the complainant suffered bodily harm that would vitiate the complainant's consent to sexual activity. Rather, the Crown alleged that the complainant did not consent to the sexual activity that formed the subject matter of the sexual assault charge.

[110] In the absence of a request to amend the indictment to charge sexual assault causing bodily harm either here or in the court below, I fail to see how the Crown is entitled to rely on bodily harm to vitiate the complainant's consent to erotic asphyxiation.[3]

V. Disposition

[111] Based on the foregoing reasons, I would allow the appeal, set aside the appellant's convictions and dismiss the charges of sexual assault and breach of probation.

"Janet Simmons J.A."

"I agree R.G. Juriansz J.A."

[3] In *R. v. Bruce*, [1995] B.C.J. No. 212, the British Columbia Court of Appeal ordered a new trial of an assault charge based on the trial judge's failure to consider the impact of the complainant's injuries on his finding of inferred consent. However, the court did not specifically address the question of whether the issue properly arises on a charge of assault *simpliciter*. See also *R. v. Shand*, [1997] N.S.J. No. 524 (N.S.S.C.), which adopted the reasoning in *Bruce*.

LaForme J.A. (Dissenting):

[112] My colleague, at para. 69 of her reasons, states that after her review of the authorities and the relevant provisions of the *Criminal Code*, there is no basis for holding that "as a matter of general principle, a person cannot legally consent in advance to sexual activity expected to occur while the person is either unconscious or asleep". She goes on to say that in her view, "if anything … the relevant case law supports the opposite conclusion".

[113] Respectfully, it is only this portion of her thorough and persuasive analysis that I disagree with. Specifically, I take the opposite view of the interpretation of relevant provisions of the *Criminal Code* and relevant jurisprudence. As a consequence, this takes me to a different result on this appeal. In my view the appeal should be dismissed.

[114] For purposes of my analysis, I begin with my agreement of my colleague's holding at para. 55: the evidence that was led at trial was simply not capable of supporting a finding that the complainant did not consent on a standard of proof beyond a reasonable doubt. The only question that remains therefore is whether the complainant's consent is valid in law.

[115] The parties frame the issue as being whether a person can consent in advance to sexual activity expected to occur while the person is unconscious. In the context of this case, however, the issue is more accurately described as whether a person can consent in

advance to sexual activity that is expected to occur after the person has been chocked into unconsciousness by a sexual partner. Regardless, I would answer no to the question.

[116] Ultimately, my opinion is that a person cannot consent in advance to sexual activity after being chocked into unconsciousness because it does not fit within the concept of consent to sexual contact as that concept has been interpreted in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

[117] In my view, the Crown is correct in that *Ewanchuk* conclusively establishes that a prior consent is not effective as a matter of law because unconsciousness deprives the person consenting of the ability to express consent or know whether they are consenting at the time the sexual activity occurs. An examination of some of the relevant jurisprudence, similar to that carried out by the trial judge, supports this.

[118] As the trial judge observed, in *R. v. Jobidon*, [1991] 2 S.C.R. 714 the Supreme Court of Canada made it clear that although the *Criminal Code* provides some definition of the concept of consent, it is not an all-encompassing definition and the common law has a continuing role to play in establishing the legal effectiveness of consent in cases of assault. In particular, she noted that in *Jobidon*, the Supreme Court of Canada "concluded that the common law has created a body of law which illuminates the meaning of consent, and places limitations on the 'legal effectiveness' of consent".

[119] Although *Jobidon* dealt with consensual fights, the Supreme Court of Canada expressly contemplated that further limitations would be found in other types of cases.

[120] Just as the Supreme Court of Canada formulated limitations on the effectiveness of consent in the context of a fistfight, so too it has formulated limitations on the effectiveness of consent in sexual assault cases. In *Ewanchuk*, the Supreme Court of Canada emphasized that the absence of consent as an element of the offence of sexual assault is a subjective question to be "determined by reference to the complainant's subjective internal state of mind towards the touching, *at the time it occurred* (emphasis added)."

[121] As noted by my colleague, the trial judge, at para. 40 of her reasons relied heavily on the Court of Appeal of Alberta's majority decision in *R. v. Ashlee* [2006] A.J. No. 1040. In *Ashlee* the court squarely addressed the following question of law: can a person, while competent, consent to being sexually touched while asleep or unconscious? The majority concluded that a person could not.

[122] The majority in *Ashlee* said that the answer to the question turns on the proper interpretation of s. 273.1 of the *Criminal Code*, specifically, what Parliament intended when it negatived consent under s. 273.1(2)(b) where the complainant is "incapable of consenting". It is useful at this time to restate the relevant *Criminal Code* provisions:

> 273.1(1) Subject to subsection (2) and subsection 265(3), “consent” means, for the purposes of sections 271 [sexual assault], 272 [sexual assault with a weapon, threats to a third person or causing bodily harm] and 273 [aggravated sexual assault], the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> 273.1 (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (b) the complainant is incapable of consenting to the activity;
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

[123] As the majority in *Ashlee* noted, the plain wording of s. 273.1(2)(e) is explicit; consent is revocable once given. That is, the complainant is entitled to withdraw consent at any time. From this it can be implied that consent is an ongoing state of mind, and therefore ends as soon as the complainant falls unconscious and is incapable of consenting. ”Prior” consent is insufficient.

[124] In my opinion, the only possible way to find that a person who is lying unconscious is consenting to sexual activity is to imply this consent from their prior behaviour. Unlike the situation that may exist in other forms of human interaction, implied consent is not a doctrine that can be applied to sexual assault: *Ewanchuk*, at para. 31.

[125] Further, the trial judge in our case correctly noted that the issue of prior consent has been addressed by our courts. For example, McLachlin J. (as she then was) in *R. v. Esau* [1997] 2 S.C.R. 777, at para. 73, identified that:

> Consent involves "capable, deliberate, and voluntary agreement to or concurrence". A person who is unconscious or unable to communicate is incapable of indicating deliberate voluntary agreement. At issue, as elsewhere in dealing with consent, is the social act of communicating consent, not the internal state of mind of the complainant. An accused is not entitled to presume consent *in the absence of communicative ability*. The complainant in this category lacks the capacity to communicate a voluntary decision to consent. … To put it another way, the necessary (but not sufficient) condition of consent -- the capacity to communicate agreement -- is absent. *The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent.* [Emphasis added]

[126] It is true that McLachlin J's. comments were made in respect of an unconscious complainant in the context of the defence of honest but mistaken belief. Nevertheless, there is no reason that I can perceive to confine her comments to that defence, nor is there any reason to conclude she intended such limits.

[127] Indeed, McLachlin J in *Esau* would have excluded the defence of honest but mistaken belief from being put to the jury in that case. Her reasoning was that the complainant was heavily intoxicated at the time the defendant alleged she had consented.

Because she was incapable of consenting, there could have been no mistaken belief in consent. This line of reasoning is dependent on the above definition of consent. Once again, as the majority in *Ashlee* noted, her comments are consistent with s. 273.1(2)(e) of the *Criminal Code* and with the principle recognized in *Ewanchuk* that consent is revocable at any time.

[128] This court in *R. v. Humphrey* (2001), 143 O.A.C. 151 (C.A.), at para. 56, held that it was an error for a trial judge not to remind the jury of his earlier instruction that "consent meant the voluntary agreement of the complainant to engage in the sexual activity in question and that there could be no consent if she was unconscious". The Crown in that case contended that the accused had sexual intercourse with the complainant while she was unconscious; the accused maintained that although the complainant had consented to intercourse, it never took place because the complainant passed out.

[129] Significantly, Charron J.A. writing for the court in *Humphrey*, went on in the same paragraph to make the following comments:

> Hence, even if consent had been given earlier, it would cease at the time the complainant became unconscious. If the sexual activity continued after the complainant was unconscious, there would be no consent, and the focus would shift to the accused's knowledge that consent had ceased.

[130] Furthermore, the meaning of s. 273.1 was also in issue in *Humphry*. In referring to this section, Charron J.A. held at para. 38 that the trial judge correctly instructed the jury when he told them that:

> … consent means the voluntary agreement of the complainant to engage in the sexual activity in question and that no consent is obtained if the complainant is incapable of consenting to the activity. To "clarify things", he told the jury that "you cannot consent if you are unconscious. *The law requires consent that is conscious and continuous, i.e., during all acts. The consciousness must be continuous*." [Emphasis added]

[131] Once again, while the context in which the above comments were made differs from that in this appeal, there is no reason to reject their application in the broader context. The comments are unambiguous and, as in *Esau* and *Ashlee*, they are consistent with s. 273.1(2)(e) of the *Criminal Code* and with the principle recognized in *Ewanchuk*.

[132] It follows that because an unconscious person is incapable of making a rational choice to consent to sexual activity at the time it occurs and because it cannot be implied that a consent previously given continues to be operative while the person is unconscious, a person cannot in law consent in advance to sexual activity expected to occur after the person is chocked into unconsciousness.

[133] My colleague notes in para. 78 that at para. 28 of *Ewanchuk*, Major J. observed that "[h]aving control over who touches one's body, and how, lies at the core of human dignity and autonomy" and that protecting individuals' security of the person lies at the

heart of "[t]he inclusion of assault and sexual assault in the [*Criminal*] *Code*". Consequently my colleague concludes that permitting a person to consent in advance to sexual activity expected to occur while unconscious or asleep is entirely consistent with this principle.

[134] At first blush, there is a superficial appeal to my colleague's assertion that permitting a person to consent in advance to sexual activity that is to take place while unconscious or asleep is consistent with that person's autonomous control over who touches one's body and how. This is especially tempting when considering the illustration my colleague recites; that prohibiting sexual touching which occurs while one's partner is unconscious would have the effect of criminalizing the behaviour of a person who touches their partner in a sexual way while their partner is sleeping.

[135] In my respectful view, however, a closer examination reveals the opposite.

[136] At the heart of this matter are individual autonomy and individual choice to protect the dignity of the individual and the security of the individual's person. Autonomy is the capacity to exercise choice free of restraint, unfettered by control and absent interference. It belongs to the individual and cannot be assumed by or delegated to another. The autonomous operating will of the individual is negated by unconsciousness; there simply is no active operating will while the individual is asleep or unconscious.

[137] In both the common law and statute law applicable to sexual assault, choice and autonomy are active and oriented to the present; to the here and to the now. Consent is the autonomous choice of the individual. Consent ends when the active independent personal operating will ceases. Indeed, this is precisely what is being expressed in the jurisprudence, in my view. Thus, I must respectfully disagree with my colleague when she holds that consent in advance to sexual activity expected to occur while unconscious or asleep is entirely consistent with this principle.

[138] Before concluding, I would make two final brief observations in respect of the principle of autonomy and the example used to illustrate it.

[139] First, Canadian law has long since abolished the notion of differing categories of victims in sexual assault cases. Victims, whether spouses of or strangers to the accused, are entitled to the same protections of the law. I acknowledge that cases such as *Ewanchuk* and *Esau* addressed factual situations that are different from the present case. I concede that the application of these rules may seem unduly harsh in certain hypothetical situations not before this court. However, I believe that these cases nonetheless set down broadly defined rules and principles that are applicable and binding on this court.

[140] Second, in my view Parliament has expressed its clear view of the law regarding consent in the context of sexual activity; a person cannot consent in advance to sexual activity expected to occur while unconscious.

[141] There is no basis, in my view, for departing from the principles enunciated in *Ewanchuk* in the circumstances of this case. The complainant was not in a position to exercise her right of choice – autonomous control over who touches her body and how - at the time the sexual activity of anal penetration with a dildo was occurring. Her consent was negated when she was chocked into unconscious. Accordingly, I would dismiss the appeal.

RELEASED: March 26, 2010 “JS”

“H. S. LaForme J.A.”