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Ten Years After Ewanchuk The Art of Seduction is Alive And Well: An
Examination of The Mistaken Belief in Consent Defence
Elaine Craig\textsuperscript{1a}

It has been a decade since the Supreme Court of Canada released its controversial decision in R. v. Ewanchuk\textsuperscript{1}. One of the central doctrinal issues raised by critics of Ewanchuk was a concern that it would not sufficiently allow for the mistaken belief defence in cases involving ‘morally innocent’ accused engaged in typical sexual overtures or in cases where the accused and complainant were in an ongoing sexual relationship at the time of the offence. A review of the reported cases, since 1998, demonstrates that the Ewanchuk analysis, properly interpreted, does not unjustly criminalize the progression of intimate behavior between genuinely consenting adults. Less promisingly, the post-Ewanchuk case law also suggests that in circumstances involving intimate partners or spouses, trial judges may be more likely to wrongly rely on the assumption that as between spouses the doctrine of implied consent still exists. Ewanchuk, it seems, has achieved better respect from the law for the sexual integrity of the intoxicated party-goer. The trial decisions discussed in the last section of this paper suggest Ewanchuk has been less able to achieve this with respect to the sexual integrity of wives and girlfriends.

Introduction

It has been a decade since the Supreme Court of Canada released its decision in R v Ewanchuk\textsuperscript{1}. Ewanchuk, which remains the leading precedent on the interpretation of consent in the context of sexual assault, was a controversial decision\textsuperscript{2} and has been the

\textsuperscript{1a} JSD(c) and Trudeau Scholar. Thank-you to Stephen Coughlan and Ronalda Murphy for invaluable assistance in the preparation of this paper.

\textsuperscript{1} [1999] 1 SCR 330 [hereinafter Ewanchuk].

\textsuperscript{2} Ewanchuk was controversial not simply for its doctrinal implications but also due to reactions stemming from Justice L’Heureux-Dube’s concurring opinion responding to Justice McLung’s decision in the case at
subject of some scholarly debate. Given the degree of controversy that surrounded the *Ewanchuk* decision, and in particular the suggestion that the Supreme Court of Canada had swung the pendulum too far towards the ‘radical feminist agenda’ and away from the rights of the accused, it seems prudent to revisit the decision to determine whether these concerns have been born out.

As will be discussed below, *Ewanchuk* adopted a subjective notion of consent under the *actus reus* analysis for sexual assault, in conjunction with a communicative or performative notion of consent under the *mens rea* analysis. One of the central doctrinal issues raised by critics of *Ewanchuk* was a concern that it would not sufficiently allow for the mistaken belief defence in cases involving ‘morally innocent’ accused engaged in typical sexual overtures or in cases where the accused and complainant were in an ongoing sexual relationship at the time of the offence.

However, a review of the reported decisions addressing the mistaken belief in consent defence since *Ewanchuk* indicates that while sex may be complex, and while it

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4 Stuart, “*Ewanchuk*: Asserting "No Means No”, supra note 3.

5 For example Criminal Review.CA R v Ashlee (http://criminalreview.ca/index.php/2006/08/24/r-v-ashlee accessed January 30, 2009); see also Justice Thomas’s decision in *R v R.V.*, [2004] O.J. 849 (varied [2004] O.J. 5136 (C.A.) stating that in cases involving spouses the doctrine of implied consent should still be considered; see *R v Went*, [2004] B.C.J. No. 190 where the British Columbia Supreme Court also suggested this – but then went on to apply the principles of *Ewanchuk* regardless.

6 In “*Ewanchuk*: Asserting “No Means No”, supra note 3, Stuart cites several decisions recognizing the “complex and diverse nature of consent” to sexual touching.
may well be difficult for courts to wade into the morass of ongoing sexual relationships, judges do appear able to apply the definition of consent adopted in *Ewanchuk* (a definition which better protects complainants) in a manner which recognizes the complexity and diversity of sexual dynamics without resulting in the sort of injustices to the accused that were once suggested by the decision’s critics. The jurisprudence since *Ewanchuk* demonstrates that, despite fears to the contrary, the ‘art of seduction’ has not yet been criminalized in Canada. In fact, a review of the post-*Ewanchuk* case law suggests that in cases involving allegations of sexual assault by an accused against a long-term intimate partner *Ewanchuk* has not swung the pendulum far enough. The trial decisions discussed in the last section suggest that in circumstances involving intimate partners or spouses, trial judges may be more willing to resort to reasoning that wrongly relies on the assumption that as between spouses the doctrine of implied consent still exists. *Ewanchuk*, has provided a definition of consent which offers hope for the better protection of the intoxicated party goer. It seems *Ewanchuk* has been less able to achieve this with respect to the sexual integrity of wives and girlfriends.

The discussion below will be broken into three parts. The first part will consist of a brief review of the doctrinal implications flowing from the *Ewanchuk* decision. To follow that will be a discussion addressing the concern that the *Ewanchuk* definition of consent risks criminalizing harmless sexual overtures by convicting individuals lacking a sufficiently guilty mind. It will demonstrate that this concern has not been realized both because the types of cases envisaged by critics have not appeared before the courts and because even if they did arise a proper application of *Ewanchuk* would not result in the conviction of a morally innocent accused.
The third part will address the fear that *Ewanchuk’s* rejection of the doctrine of implied consent could unjustly convict accused who were involved in an ongoing sexual relationship with the complainant at the time of the alleged offence. This part will demonstrate that lower courts have applied the definition of consent established in *Ewanchuk* in a manner that acknowledges that consent is communicated differently in different types of sexual relationships. It will also reveal that in some cases where the complainant and the accused had been engaged in a long-term intimate relationship, trial judges have either refused to apply or, failed to properly apply, *Ewanchuk*.

I. **The *Ewanchuk* Decision**

The Supreme Court of Canada’s decision in *Ewanchuk* affirmed two significant and interrelated conceptual changes to the doctrine of consent in sexual assault law. The first was the rejection of any notion of implied consent. *Ewanchuk* determined that in any sexual interaction, either there is or there is not consent to the sexual touching and this will be determined based on direct and/or indirect evidence of the complainant’s state of mind at the time of the alleged assault.

The second principle affirmed in *Ewanchuk* was the characterization of consent in the affirmative rather than the negative - the stipulation that consent means indicating yes rather than not indicating no. Prior to the Court’s decision in *Ewanchuk* the consent

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8 *Ibid. at para. 31.*

9 Both at common law (*Ewanchuk, supra* note 1 at para. 36) and under s.273.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, consent must be freely given in order to be legally effective. Duress, abuse of trust, and coercion all vitiate consent to sexual touching.

10 *Ewanchuk, ibid.* Justice Major in *Ewanchuk* quotes from para. 39 of Justice L’Heureux-Dube’s concurring opinion in *R v Park, supra* note 7: “the mens rea of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no”, but is
element of the *mens rea* for sexual assault required that the accused believe that the complainant was not consenting. In other words a guilty mind was a mind that knew that (or was reckless or willfully blind as to whether) the complainant had withheld consent. *Ewanchuk* established that the accused, to be morally innocent, must have believed that the complainant indicated consent through words or conduct. For the purposes of determining *mens rea*, consent is now established based on the accused’s perception of the complainant’s words or actions and not on the accused’s perception as to the complainant’s desire for sexual contact. It is a communicative definition of consent. This means that the accused’s belief that a complainant did not say no will not exculpate the accused nor will his belief that she said no but meant yes. It also means that a complainant’s passivity is not a defence. In other words, it is only a mistaken belief that the complainant communicated consent that will raise a reasonable doubt as to *mens rea* - not a mistaken belief that the complainant was consenting.

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11 See *R v Pappajohn*, [1980] 2 SCR 120 at 140: “the essence of the crime consists in the commission of an act of sexual intercourse where a woman's consent, or genuine consent, has been withheld”. See also *Sansregret v. The Queen*, [1985] 1 SCR 570; *R v Robertson*, [1987] 1 SCR 918.

12 *Ewanchuk*, supra note 1 at para. 46. “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.”

13 For a description of the distinction between communicative (or performative) notions of consent and attitudinal notions of consent see Nathan Brett, “Sexual Offenses and Consent” (1998), 11 Can. J. Law. & Juris. 69. Note that Brett endorses adopting a communicative notion of consent in terms of establishing both the *mens rea* and the *actus reus*. The Court in *Ewanchuk* did not adopt a communicative notion of consent with respect to the *actus reus*.

14 The Court had earlier affirmed the rather significant point that passivity or silence did not constitute consent in an unremarkable one paragraph decision overturning the Nova Scotia Court of Appeal. (*R v MLM* [1994] 2 SCR 3.) In addition, section 265(3) of the *Criminal Code* defining consent as a defence to assault (including sexual assault) stipulates that no consent is obtained where the complainant submits or does not resist by reason of the application of force, threats or fear of the application of force, fraud or the exercise of authority. As noted by Justice L’Heureux-Dube in *Ewanchuk*, at para. 86, this supports the finding that passivity or silence does not constitute consent. In addition, as established by section 273.2(b) of the *Criminal Code*, the defence will not be available where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain consent.
II. Preserving the Art of Seduction – A Kiss Is Still A Kiss

There were two main critiques regarding the doctrinal implications of the Court’s decision in *Ewanchuk*. Both stemmed from the proposition that the Court’s interpretation of consent would overly restrict the defence of mistaken belief in consent. The first relates to Justice Major’s determination that an accused’s reliance on silence or ambiguous conduct as an indication of consent is a mistake of law, and therefore not a defence. The concern was that this could result in the criminalization of harmless sexual overtures in ambiguous cases where “there is a real issue of whether a sexual assault occurred”. This concern is well illustrated by the hypothetical situations Professor Stuart suggested could problematically result in conviction post-*Ewanchuk*:

**Situation 1**: Two teenagers, Jack and Jill, have their first date at the movies. After the movies they go to Jack's apartment for coffee. They talk. Jill tells Jack that she has a boyfriend but also that she is an open, friendly, and affectionate person; and that she often likes to touch people. Jack tells her that he is an open, friendly, and affectionate person; and that he often likes to touch people. They talk more. They touch each other; they hug. At some point Jack kisses Jill. Jack thinks she has responded positively to his sexual advance although nothing was said. Jill did not welcome the kiss and felt she did nothing to encourage Jack. She was not scared of him. She admits that at that point she opened two buttons of her blouse but this was because she felt claustrophobic and nothing else. Jack felt he was being encouraged by her action and touched her breasts. Jill slaps him.

**Situation 2**: The same as situation 1, except that it was Jill who kissed Jack.

In the first situation, the concern was that under *Ewanchuk*, “since the complainant did not communicate her consent to be kissed or for her breasts to be touched, it would appear that the accused has no defence whatever he thought”. Additionally, “there could be no defence of mistaken belief even in the second hypothetical since the opening of the blouse was ambiguous conduct and belief that ambiguous conduct constitutes consent is a

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15 Stuart, “*Ewanchuk*: Asserting “No Means No”, *supra* note 3.
16 *Ibid*.
mistake of law.” Critics suggested that if the Court’s proposition in *Ewanchuk* that the presence of consent is determined solely on the subjective perspective of the complainant and if mistaking silence, passivity or ambiguity for consent is a mistake of law and therefore not a defence, an accused could be convicted of sexual assault simply for pursuing a sexual encounter in a manner in which sexual encounters are quite commonly pursued and innocently carried out. In other words, the Court will have criminalized seduction in Canada.\textsuperscript{19}

However, the decade worth of case law that has applied *Ewanchuk* in cases involving claims of honest but mistaken belief in consent demonstrates that i) the types of situations with which *Ewanchuk*’s critics were concerned have not actually been brought before the courts; and ii) were a truly ambiguous situation of this nature to come before a court a proper interpretation of *Ewanchuk* would not result in a conviction.\textsuperscript{20}

The following offers a hypothetical that much more aptly reflects the type of ambiguous situations that have come before the courts in mistaken belief cases post-*Ewanchuk*:

*Situation 1*: Two teenagers, Jack and Jill, both attend a mutual friend’s house party. Jill, an inexperienced drinker, consumes a great deal of alcohol. Jack also consumes alcohol. As the party progresses, Jill becomes increasingly intoxicated to the point where her friends take her upstairs and put her to bed in one of the host’s bedrooms. Jill passes out. After the party has wound down, Jack heads upstairs, finds Jill in bed and proceeds to roll her over, and remove her pants. As Jack is pulling Jill’s pants down he notices Jill lift her hips slightly. Jack interprets this as an indication of her willingness. Jack begins to fondle Jill’s breasts and then her genitals. Jill fades in and out of consciousness as this is occurring. At one point Jill moans. Jill awakens to find that Jack has inserted his

\textsuperscript{18} Ibid.

\textsuperscript{19} Ibid.

\textsuperscript{20} Searches were conducted on both the Quicklaw database and Westlaw database using the following search terms: “Ewanchuk” and “mistaken belief”. All reported decisions that included both of these search terms were reviewed. Quicklaw produced 165 cases (last accessed January 23, 2009). Westlaw produced 156 cases (last accessed January 23, 2009).
penis into Jill’s vagina. Jill immediately passes out again. Shortly thereafter Jack ejaculates.

**Situation 2:** The same as situation 1 except, earlier in the evening before Jill passes out, Jack and Jill flirt and Jill kisses Jack.

A remarkably (and disturbingly) high number of the post-*Ewanchuk* reported decisions involving cases where a claim of mistaken belief in consent was denied closely resemble the factual circumstances highlighted in the hypothetical situation just described. In fact, situations quite similar to those I have just described constitute the most common factual circumstances in all of the reported decisions where the mistaken belief defence is raised and rejected. In these cases, the silence or passivity of the complainant stems from unconsciousness not coyness or indecisiveness. ‘Ambiguity’ arises in these cases not from a pubescent and gendered confusion over the complainant’s (lack of) sexual interest but rather from a sleeping or barely conscious complainant who moans, rolls over, or lifts her hips slightly while the accused is disrobing, fondling or penetrating her. It is not that critics of *Ewanchuk* suggested that denying the defence of mistaken belief in consent in these types of cases posed a problem. However, the practical reality is that these are the types of cases in which the principle in *Ewanchuk*

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22 Ibid.


that silence, passivity and ambiguity do not connote consent has most commonly been applied.

The counter argument to this practical observation regarding the types of cases that actually do come before the courts is that it does not matter whether the type of case critics feared has yet come before the courts; the significance of the critique is established simply by the possibility that an accused could be convicted without the degree of fault required by fundamental criminal law principles. This counter argument raises the second point demonstrated by the post-\textit{Ewanchuk} cases. Under a proper interpretation of \textit{Ewanchuk}, were a truly ambiguous situation in which an accused relied on a complainant’s conduct as an indication to proceed incrementally to come before the court, it would not result in a conviction.

It may be that some of the concerns raised by critics of \textit{Ewanchuk} involved a misapprehension of the test established in \textit{Ewanchuk}. As noted above, Professor Stuart suggested that in his first hypothetical situation “since the complainant did not communicate her consent to be kissed or for her breasts to be touched, it would appear that the accused has no defence whatever he thought”.\footnote{Stuart, \textit{Ewanchuk}: Asserting “No Means No”, \textit{supra} note 3.} \textit{Ewanchuk} does not require that the complainant communicated consent in order to allow the defence of honest but mistaken belief in consent. To do so would remove entirely the subjective component of the \textit{mens rea} for sexual assault. Rather, \textit{Ewanchuk} determined that in order to establish the defence there must be evidence to lend an air of reality to the suggestion that the accused believed that the complainant communicated consent.
The belief that consent was communicated can be based on the complainant’s words or actions.\textsuperscript{27} \textit{Ewanchuk} has not been taken to stand for the proposition that an individual engaged in sexual activity with a genuinely consenting partner can never rely on a kiss as evidence of an honest but mistaken belief that consent for further kissing had been communicated, or rely on further consensual kissing as evidence of a mistaken belief that consent to some initial intimate touching was communicated through conduct and so on.... In cases where a complainant has consented to some sexual touching, courts have allowed the accused to rely on this as evidence of a mistaken belief that consent to progress (incrementally) was communicated. This is provided there was not some affirmative indication that consent had been withdrawn nor behavior on the part of the accused that was not incremental nor some other factor that the accused should have reasonably known suggested the complainant was no longer consenting -which would then require him to take further steps to ascertain consent. The concern that \textit{Ewanchuk} would result in the unjust conviction of an accused who has commenced consensual sexual touching that unbeknownst to him at some point becomes unwanted (but unexpressed) by the complainant has not been realized. In those seemingly rare circumstances where an actual and reasonable ambiguity existed courts have adopted an approach that most certainly favours the accused. Unfortunately, in some such cases

\textsuperscript{27} So for example, applying this aspect of \textit{Ewanchuk}’s reasoning to Professor Stuart’s hypothetical, in the first situation, evidence that Jill hugged and touched Jack would be evidence that Jack could rely upon to lend an air of reality to the belief that Jill communicated consent for the kiss (regardless of whether Jill intended the hug and touching to communicate consent for the kiss). In both situations, evidence that subsequent to the kissing Jill then unbuttoned her blouse would be evidence that Jack could rely upon to establish a belief that Jill communicated consent for the touching of her breasts (regardless of whether Jill intended the unbuttoning of her blouse to communicate consent for the breast touching). These facts would potentially raise an air of reality such that the defence could be put to the jury. Again, it should be emphasized that, to date, the circumstances in which individuals are prosecuted for sexual assault much more closely resemble the ugly hypothetical that I described earlier- not the one described by Professor Stuart.
courts have even required evidence that the complainant indicated a withdrawal of consent before rejecting the possibility of an honest but mistaken belief in consent – a requirement that is inconsistent with Ewanchuk.

The case of R v Kuryluk, is an example of such unfortunate reasoning. In R v Kuryluk, the Nova Scotia Supreme Court acquitted the accused after finding that there was a reasonable doubt as to whether the complainant had communicated her withdrawal of consent to further sexual activity. In Kuryluk the complainant and the accused, former lovers, returned to the accused’s apartment after having been re-acquainted at a bar. Once at the apartment the two engaged in consensual kissing and fondling which then progressed to mutual oral sex. After the oral sex, vaginal intercourse occurred. Kuryluk testified that he believed the complainant consented to all activity short of ejaculation during intercourse. The complainant testified that the mutual oral sex was not consensual but that she had not indicated this to the accused and that she had said no to the vaginal intercourse. The Court found that “[a]lthough his belief may have been mistaken, Mr. Kuryluk's evidence that he believed the complainant consented to engage in the sexual activity performed, albeit without ejaculation, supports the defence of honest but mistaken belief”. The evidence raised “a reasonable doubt that lack of consent was communicated to the accused with respect to any act other than accidental ejaculation, which alone does not amount to a sexual assault”. There was conflicting evidence as to whether the complainant said no to the intercourse. Justice Murphy found the accused credible on this point.

29 Ibid. at para. 32
30 Ibid. at para. 35.
Based on the consensual kissing, fondling and disrobing that preceded it, and her testimony that she went along with it, the Nova Scotia Supreme Court found that the evidence did not indicate that the oral sex was a sexual assault. In doing so the court noted that the Crown had acknowledged that the complainant did not communicate to the accused that she was not consenting to oral sex. ³¹ It was the fact that she had not communicated non-consent for the oral sex that was highlighted. While the incremental aspect of the court’s analysis is promising – as discussed below in the context of other cases – in Kuryluk the court wrongly applied the law. According to Ewanchuk and section 273.2(b) of the Criminal Code an accused’s mistaken belief in consent cannot be based on a complainant’s failure to withdraw consent to oral sex or sexual intercourse. Having wrongly applied the law, the court’s analysis regarding the complainant’s credibility was, as a result, also misguided. Inconsistencies in her testimony as to whether or not she communicated non-consent are less relevant under a proper application of Ewanchuk and section 273.2(b).

In R v Anderson, the accused and the complainant met in a bar where they hugged and kissed briefly. The Ontario Court of Justice found that this was consensual hugging and kissing. ³² The accused and the complainant then exited the bar and while outside continued kissing and touching. The Court found that this too was consensual. The two then went around to the side of the building and lowered themselves onto the ground where kissing and some fondling ensued. The Crown conceded that the complainant

³¹Ibid. at para. 25 ³²[2005] O.J. No. 5381. The complainant’s and the accused’s versions of events after having left the bar were different. The complainant testified that she had said no. Justice Brophy found both witnesses to be reliable and as is required by the presumption of innocence, gave the benefit of the doubt to the accused (R v. W.(D.), (1991), 63 C.C.C. (3d) 397). Presumably, had he been convinced beyond a reasonable doubt that the complainant had indicated ‘no’ to further sexual touching he would not have acquitted Anderson.
consented to the initial kissing and hugging that occurred outside the bar. The accused was acquitted on the basis that the Crown had not proven lack of consent. The Court further held that even had the Crown established lack of consent beyond a reasonable doubt the accused would have been entitled to rely on a mistaken belief in consent. Justice Brophy stated that

if the complainant then changed her mind (which I find the Crown has not proven beyond a reasonable doubt), there is obviously a transitional period where that change of mind is going to have to be communicated in some fashion to the accused. In that transitional period, it is quite possible for the accused to have held an honest but mistaken belief that the complainant was still consenting to his actions. I am of the view that the accused stopped his actions when it became clear that the complainant wished to leave. At that point there was a message being sent that she wished to stop and the accused did in fact end his sexual advances.\(^{33}\)

The court in *Anderson* also erred in its approach to the law of consent. Like in *Kurlyuk* the court wrongly assumed that a defence of mistaken belief could be made out on the basis that the complainant had failed to communicate a withdrawal of consent. However, also as in *Kurlyuk* there is an element of the reasoning – its incremental analysis of the facts surrounding consent – that is promising. Setting aside purportedly ambiguous factual circumstances where the court wrongly applied *Ewanchuk*, what happens in ambiguous factual circumstances where the post-*Ewanchuk* law is properly applied?

In the Supreme Court of Nova Scotia’s decision in *R v MacIsaac* the appellant’s conviction for sexual assault was overturned on the basis that the trial judge had erred by not considering the defence of honest but mistaken belief in consent.\(^{34}\) The appellant testified at trial that he had visited the home of a woman with whom he was acquainted.

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\(^{33}\) *R v Anderson*, supra note 32 at para. 38.

\(^{34}\) [2005] N.S.J. No. 126 [hereinafter *MacIsaac*].
While there he hugged the complainant twice; the second time he followed the hug with a brief kiss on the lips. The following day she made a complaint of sexual assault to the police. The appellant testified that he did not ask permission to hug her or to kiss her.

Presumably given the trial verdict, the trial judge had made a finding of fact that the complainant did not consent to the hug or kiss. On appeal, the Supreme Court of Nova Scotia found that the trial judge had failed to properly apply *Ewanchuk* and that the evidence clearly raised the defence of honest but mistaken belief in consent. The evidence the Court was referring to included the appellant’s testimony that after he put his arm around the complainant, as they were walking to the door, she responded by putting her arms around him. It included the appellant’s evidence that when he hugged her she took her shoulders and titled them forward, burying them into his chest. It included his evidence that the kiss on the lips lasted approximately one second, that he did not use tongue and that when she broke off the kiss and informed him she “didn’t want to go through with this” he did not engage in any further overtures.  

Applying *Ewanchuk*, the Supreme Court of Nova Scotia found that the mistaken belief in consent defence was available based on this evidence. A returned hug and a tilting of the shoulders, regardless of what the complaint meant to communicate, was sufficient evidence, if believed, to establish a mistaken belief that the complainant had communicated consent for the kiss. That is to say, presuming his evidence was believed, Mr. MacIsaac’s sexual overtures were not criminalized.

The key in cases of the type just discussed is the notion of incremental conduct and the possibility of consent through words or conduct. *Ewanchuk* established that there must be an affirmative unequivocal indication of consent to sexual touching. It

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35 *Supra* note 34 at para. 14.
established that *any* adverse indication requires an accused to cease all sexual advances until a clear and unequivocal affirmative indication is subsequently obtained. It also established that “an unequivocal “yes” may be given by either the spoken word *or by conduct*”. *MacIsaac* demonstrates that it is possible to apply this approach to consent in a way that does not unjustly deny the defence in truly ambiguous cases.

In *Anderson*, reasoning consistent with *Ewanchuk* would have focused on the presence or lack of indication of ‘yes’ during the ‘transitional period’ that the accused might have relied upon, or an examination of steps he should have taken to ensure consent was still present. Similarly in *Kuryluk*, the court’s analysis regarding the mistaken belief in consent defence for the mutual oral sex, should have focused on what, if any, evidence the accused might have mistakenly relied upon to belief that she had communicated consent. In some cases it might be consistent with *Ewanchuk* to allow the accused (absent any indication by the complainant to the contrary) to rely on the consensual mutual kissing as evidence of a belief that the kissing communicated consent for fondling, on the consensual mutual fondling as evidence of a belief that the fondling communicated consent for the disrobing, and on the consensual mutual disrobing (in conjunction with all of the prior consensual activity) as evidence of a mistaken belief that consent for the mutual oral sex had been communicated. Whether this will be the case will depend on what steps the accused took, given the circumstances known to the accused at the time, at each incremental stage in the progression of sexual intimacy. In a case where the accused and the complainant were not in an ongoing sexual relationship, or where the accused was aware the complainant had been drinking or where they were about to engage in unsafe sex, reasonable steps might require more than mere reliance on
the immediately prior sexual act. It may also be that the more involved the sexual contact
the more steps required. So for example a kiss might well be reasonably relied upon
under section 273.2(b) as evidence of a mistaken belief in consent for further kissing but
mutual oral sex may very well not be enough under section 273.2(b) to establish that
reasonable steps were taken to ascertain that consent to sexual intercourse was
*communicated*.

In the great preponderance of cases dealing with claims of honest but mistaken
belief in consent between strangers and acquaintances the ‘ambiguities’ argued by the
defence stem from severely intoxicated complainants not crossed wires. Cases such as
*MacIsaac* demonstrate that where there is some legitimate confusion stemming from the
transition period between consensual sexual touching and the lack of consent to
incrementally progress to more involved sexual touching courts have not applied
*Ewanchuk* in a manner that unjustly denies the possibility of the defence.

### III. Mistaken Belief in Consent in On Going Sexual Relationships

Having dispensed with the apprehension that *Ewanchuk* would lead to the
criminalization of seduction, it is necessary to turn to the second main doctrinal concern
voiced by opponents of the decision. This was the suggestion that *Ewanchuk*, by
rejecting the doctrine of implied consent to sexual touching, would result in the unjust
conviction of accused who were involved in an on going sexual relationship with the
complainant at the time of the alleged offence. The concern was that the *Ewanchuk*
reasoning would not give adequate recognition to the manner in which consent to sexual
interaction often occurs in the context of on going intimate relationships.
A review of the cases applying *Ewanchuk* in which an accused claims a mistaken belief in consent in defence of sexual assault allegations made by a complainant with whom he was involved in an on going sexual relationship demonstrate that this concern also has not been realized. In fact the post-*Ewanchuk* cases reveal that lower courts are quite able to apply the communicative notion of consent adopted in *Ewanchuk* in a manner that recognizes and accounts for both the fact that consent is often communicated differently between long or longer term sexual partners than it is between strangers or shorter term sexual partners as well as the diverse ways in which consent can be communicated within the context of an ongoing sexual relationship. These cases demonstrate that the communicative definition of consent can be properly applied in cases involving intimate partners.

Unfortunately there are also lower court cases indicating that if anything, the criminal law, despite *Ewanchuk*, has failed to provide the same level of protection for sexual autonomy inside intimate relationships as it has finally begun to provide to the intoxicated party goer.\(^{36}\) As will be discussed, the rejection of the doctrine of implied consent by the Supreme Court of Canada has not been consistently applied by lower courts in cases involving spouses.

The paragraphs to follow will focus on three issues: i) the use of prior sexual history in cases involving intimate partners; ii) cases where the couple had, or the accused claims they had, a history of consensual sado-masochistic or ‘rough’ sex and; iii) cases where the sexual interaction arose in circumstances where the relationship was in jeopardy.

i) Prior Sexual History In Cases of Sexual Assault Between Intimates

Many of the cases in which claims of mistaken belief in consent defences to sexual assault charges in the context of ongoing relationships arise also involve applications by the defence under section 276 of the *Criminal Code* to introduce the couple’s prior sexual history. The first indication that those accused of sexually assaulting an intimate partner will not be unjustly denied the mistaken belief in consent defence is revealed by the courts’ liberal (and at times problematic from the perspective of the crown\(^{37}\)) approach to the use of prior sexual history in these circumstances.

Justice McLachlin (as she then was) noted in *R v Seaboyer* that prior sexual history between the complainant and the accused may be relevant to a claim of mistaken belief in consent.\(^{38}\) To be admitted under section 276 of the *Criminal Code* the prior sexual history must not be introduced as evidence that the complainant was more likely to consent or as evidence of her credibility generally; in addition, it must have significant probative value relevant to an issue at trial.\(^{39}\) In *R v Darrach* Justice Gonthier noted that

> to establish that the complainant's prior sexual activity is relevant to his mistaken belief during the alleged assault, the accused must provide some evidence of what he believed at the time of the alleged assault. This is necessary for the trial judge to be able to assess the relevance of the evidence in accordance with the statute.\(^{40}\)

\(^{37}\) It has been argued that, problematically, “past sexual history seems to figure more prominently and slip in automatically in spousal sexual assault cases” rather than through a proper section 276 process. See Melanie Randall, “Sexual Assault in Spousal Relationships, ”Continuous Consent”, and the Law: Honest But Mistaken Judicial Beliefs”, *supra* note 39.


\(^{39}\) *Ibid*.

In light of the definition of consent adopted in *Ewanchuk*, courts could have taken a strict interpretive approach to the admission of prior sexual history in these cases by finding that it will only have significant probative value where it is evidence of how consent was communicated through words or conduct in the past. In fact such an approach would be a more appropriate interpretation of the interplay between the requirements of section 276 and the *mens rea* definition of consent established in *Ewanchuk*.41 However, courts have tended to interpret the relationship between a mistaken belief in consent defence post-*Ewanchuk* and an application to introduce evidence of a prior sexual history between the accused and the complainant in a manner that favours the accused, such that the prior sexual history, provided it is recent,42 tends to be admitted.43

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41 See Janine Benedet, Case Comment *R v B.(A.J.)* (2007) Carswell Man 300: if the focus of the mistaken belief defence is on whether the complainant communicated her voluntary agreement to the accused, the only past history that is arguably relevant would relate to how voluntary agreement was communicated by the complainant to the accused in the past. See *R. v. Mondesir* (2004), CarswellOnt 6405. In *Mondesir* the Ontario Superior Court did apply this interpretation to deny an application to admit evidence of a prior ‘kinky’ sexual incident on the basis that during the previous ‘kinky’ sexual interaction the complainant had instructed the accused as to what she wanted him to do. During the alleged assault she was silent.

42 See *R v Power* [1999] N.S.J. No. 269; *R v Kynoch* [2002] A.J. No. 1256 at para. 42 where evidence of prior sexual history was not admitted because there had been a lapse in time between the history of sexual touching and the present alleged offence. Even the reasoning in these cases demonstrates how courts have interpreted the interplay between section 276 and *Ewanchuk* in a manner favorable to the accused. The assumption underpinning these rulings is that the prior sexual history – given the lapse in time - is not relevant because it does not support the inference that the accused was reasonable in relying on the fact of prior sexual relations to support a belief in present consent.

43 This observation should be qualified somewhat. In many cases the accused claims that the complainant consented or in the alternative that he had a mistaken belief that she consented. Courts do not always indicate, at the section 276 application stage, whether evidence of prior sexual history is being admitted as relevant to the former or the latter or both. (See for example *R v G.P.* [2008] O.J. No. 5038.) Several courts have suggested that prior sexual history between the accused and the complainant is admissible as part of the context in cases where the accused maintains that she consented (See *R v Strickland* (2007) 45 C.R. (6th) 183). In those cases it is admitted more to show a general history of sexual interaction – the specifics of communication of consent are not necessarily relevant to this (arguably problematic) type of reasoning. As such, those cases where it is admitted, and where the court does not stipulate whether it is relevant only to consent or to mistaken belief in consent, cannot be relied on to support the argument made herein. Of course, neither do they challenge the argument made here.
In *R v. Wilson*, for example, the Ontario Court of Justice admitted evidence of prior sexual history between the complainant and the accused as relevant to the defence of mistaken belief in consent. It was admitted not to demonstrate his perception that consent had been communicated prior to the alleged offence but simply to show that the complainant had in the past consented to ‘unusual sex’:

The sex alleged, as perceived by Mr. Wilson, involves the unusual feature of bondage. Any consent to such sex would necessarily be an exceptional consent. Whether Mr. Wilson had received such consent from Ms. C. previously would be a factor in the consideration of evidence of such a perception.  

Consider also the case of *R v B.J.S.* In *B.J.S.* the accused was charged with sexually assaulting his wife. The accused testified that he believed his wife had given him permission to touch her for the purpose of inspecting her fidelity based on a prior incident that had occurred in 1987. The Alberta Provincial Court admitted the evidence of the 1987 incident — presumably a prior inspection — on the basis that it was significantly probative of his mistaken belief that he had permission nearly twenty years later to again ‘inspect’ his wife. The evidence was as to the fact of the prior supposedly consensual vaginal examination and not as to how consent for that examination was communicated nor as to why the fact of the prior sexual interaction evidenced his belief that consent in the present circumstance was *communicated*.

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46 In *B.J.S.*, *ibid.* the Court found that in determining the admissibility of prior sexual history under a section 276 application, the provisions of section 273.2 of the *Criminal Code* – which stipulate that the defence of mistaken belief is not available where the belief arose from drunkenness, recklessness, willful blindness or unreasonableness in the circumstances – were not relevant. Setting aside whether this is the right approach, it should be noted that it is an approach that broadens admissibility and thus favours the accused.
These cases suggest that as pertains to the interplay between the use of prior sexual history evidence and the application of the definition of consent in *Ewanchuk*, the accused is not being treated unduly; if anything, in this context, courts have failed to properly apply the definition of consent adopted in *Ewanchuk* in a way which favours the accused.

ii) Cases With A History of Consensual ‘Rough Sex’

In cases involving sexual assault charges between sexual intimates, the impact of *Ewanchuk* does not seem to have resulted in a more restrictive approach to the admission of prior sexual history between the accused and the complainant as evidence to establish an honest but mistaken belief in consent. Moving forward then, has the ‘communicative’ definition of consent (and its corresponding rejection of the doctrine of implied consent) adopted in *Ewanchuk* resulted in an approach to consent that fails to accommodate the complexity and diversity of sexual communications between intimate partners? The litmus test to answer this question might be found by examining how courts, post-*Ewanchuk*, have approached cases where the accused bases his mistaken belief in consent on a prior consensual sexual history between the accused and the complainant that featured consensual sado-masochism or the role-playing of dominance and submission.

In fact, the communicative definition of consent found in *Ewanchuk* does not appear to work any injustice to the accused in these types of cases. This is demonstrated by the British Columbia Supreme Court’s appellate decision in *R v Went*.47 (Reliance on these cases should not be taken as an assumption or assertion that these types of factual circumstances represent the norm in spousal or intimate partner sexual assault cases.)

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In *Went* the accused and the complainant had been in a healthy social and sexual relationship for a number of years. The relationship frequently included role-playing “forceful sex” and “insincere verbal exhortations” by the complainant to stop.\(^4\) Their sex play included the accused “grabbing her hair during sex and gently pulling it, engaging in activity which could be characterized as Mr. Went "taking" her, and the initiation of oral sex by one partner pushing the head of the other partner into the initiator's lap”.\(^4\) The Court noted that:

…of some importance in this case and in their relationship, Ms. D. agreed that she, from time to time, would say "no" or "don't" in relation to the initiation of sexual contact by Mr. Went when she did not mean for him to stop. In this context, she agreed that she enjoyed and was aroused by being "taken" in a sexual way.\(^5\)

The complainant testified that on all of these occasions “her use of the words "no", "stop" or "don't" during sexual activity were preceded by a direct or subtle invitation to sexual activity, such as hugs or flirtation”\(^5\)

The charges arose as a result of a sexual interaction that the accused conceded was not consensual; his defence was that he mistakenly believed that the complainant was consenting. On the night of the incident the couple were watching a movie together on her couch. The movie depicted a man having sex with a woman who had a plastic bag over her head. The accused testified that the complainant said “see, she likes it”. The complainant denied making this statement. The trial judge did not make a finding of fact.

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\(^4\) *Ibid.* at HN.


\(^5\) *Went,* supra note 47 at para. 7.

as to whether she made the statement. At some point the accused, as he had done in the past, put his hand over the complainant’s mouth and nose to which she responded by saying “don’t”. There was disagreement as to whether this was preceded by a hug. The trial judge said he was unable to make a finding of fact on this point. The accused then grabbed the back of her head and forced it into his lap to initiate oral sex – again as had occurred in the past. Both parties agreed that she resisted all of this. The accused then got on his knees in front of her and tried to remove her clothing. There was disagreement as to whether she assisted in the removal of her clothing by lifting her bottom. The trial judge did not make a finding of fact on this point either. After this the accused attempted to initiate sexual intercourse at which time, according to him, the complainant’s protestations finally registered with him and he realized that she was actually not consenting. There was as noted above, agreement that the complainant was not consenting; thus the actus reus was established. The sole issue was as to the accused’s claim of mistaken belief in consent. In other words, as to whether there was evidence he could rely upon to establish a mistaken belief that she had communicated consent.

The British Columbia Supreme Court allowed the defence and overturned his conviction because the trial judge had not made a finding of fact as to whether the consensual hug, positive comment about the film or assistance with the removal of her pants had occurred. The benefit of the doubt of course goes to the accused. The accused, then, was permitted to rely on his evidence (of the hug, comment, and hip lifting) to allow the mistaken belief in consent defence. Presumably given all of the other evidence, had the trial judge made a finding of fact that the hug had not occurred, that the complainant had not made the comment about the film or lifted her hips the defence

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52 Ibid. at para. 12.
would not have been allowed. There are two important points to be noted about this case. First, the British Columbia Supreme Court, despite suggesting otherwise, did apply the communicative definition of consent established in *Ewanchuk*. While the Court both misconstrued the definition of consent in *Ewanchuk* (by suggesting that *Ewanchuk* precluded the possibility of relying upon ‘behavioral consent’\(^{53}\)) and wrongly suggested that *Ewanchuk*’s rejection of the doctrine of implied consent only applied in cases involving strangers,\(^{54}\) the Court actually did go on to properly apply the analysis in *Ewanchuk* and in doing so overturned the accused’s conviction.

Second, this was done in a manner that appears to have accommodated the very specific sexual dynamics of the couple at issue in this case. Some courts are able to make assessments as to what constitutes ambiguity in a particular sexual context. It seems that both common sense and the *Ewanchuk* analysis are able to distinguish between relying as an indication of consent on the lifting of one’s hips by a barely conscious and severely intoxicated acquaintance\(^ {55}\) and the lifting of one’s hips by a sexual partner with whom one has a history of consensual dominance/submission sex play.\(^ {56}\)

111) mistaken belief when intimate partners are ‘on the rocks’

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\(^{53}\) *Ewanchuk* did not, as was suggested in *Went*, hold that an accused could not rely on evidence of ‘behavioral consent’ to establish a mistaken belief in consent. The Court in *Ewanchuk* did not even employ the term ‘behavioral consent’. They did, however, establish that it is evidence of a mistaken belief that consent was communicated through words *or* actions that raises an air of reality to the defence. Presumably, *actions* would cover whatever concept the court in *Went* intended by the term ‘behavioral consent’.

\(^{54}\) *Went*, supra note 47 at para. 22. In *R v RV* [2004] O.J. No. 5136 the Ontario Court of Appeal held that the *Ewanchuk* analysis does apply in cases involving spouses.

\(^{55}\) See *R v Cornejo*, supra note 25.

\(^{56}\) Contrast the decision in *Went* with the outcome in *R v J.A.*, [2008] O.J. No. 1583. In *R v J.A* the accused was convicted of sexual assault after inserting a dildo into his partner’s anus while she was unconscious. She had been rendered unconscious by the accused. The couple had on a number of occasions engaged in ‘breath play’ where one partner chokes the other to the point of unconsciousness. Anal penetration had not in the past been a part of their sexual activities. Justice Nicholas convicted on the basis that there is no defence of implied consent and, because the anal penetration was initiated while the complainant was unconscious, it was not possible for her to have communicated consent. There was thus no evidence possible of establishing consent or a mistaken belief in consent.
The concern that *Ewanchuk* would unduly restrict an accused’s access to the defence of honest but mistaken belief in consent in cases where the accused and the complainant had been involved in an ongoing relationship has not been realized in post-*Ewanchuk* decisions. However, some post-*Ewanchuk* cases involving intimate partners do indicate the possibility of a different problematic trend. This involves a failure on the part of lower courts to consistently ascribe to the communicative notion of consent in cases involving sexual assault allegations between long term intimate partners – more specifically, in cases where an accused’s actions appear to be motivated by a desperate attempt to ‘win back’ or ‘re-claim’ his partner.

In *R v T.V.* the accused and the complainant had been married for several years.\(^57\) The complainant wanted to terminate the marriage. In addition to the charge of sexual assault, for which he was acquitted, the accused was also charged with several other offences including assault (for which he was convicted). The complainant had had an affair that according to the judge had left the accused “devastated”, “heart broken” and “angry” but still wanting to continue the marriage.\(^58\)

Justice Baldwin commented that “[w]hat occurred between the parties during the time period in question is a tale of betrayal and revenge”,\(^59\) according to the complainant what occurred between the parties was a tale of violence, threats, sexual extortion and sexual assault.

The incident from which the charge of sexual assault stemmed occurred on the couple’s 16\(^{th}\) engagement anniversary. The complainant testified that the sexual touching was not consensual. She testified that she repeatedly said no, that she told the accused to

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\(^57\) [2006] O.J. No. 4089.
\(^58\) *R v T.V.*, *supra* note 57 at para. 17.
\(^59\) *Ibid.* at para. 19
get off of her and that he ignored her protests. The accused did not testify. His defence was that the sexual interaction was consensual or that he had a mistaken belief that it was consensual. The decision did not advert to any evidence that the accused could rely on to establish his belief that consent was communicated – in fact quite the opposite. However despite this, the Court found that there was an air of reality to the defence and ultimately acquitted on this basis. Justice Baldwin stated that this case was nothing like *Ewanchuk* because the couple here had been “sexually communicating” for years. Taking Justice L’Heureux-Dube’s comment that there was nothing romantic about Ewanchuk’s actions out of context, and distinguishing on the basis of it, he noted that

the accused was desperately trying to save the marriage. It was their engagement anniversary and he had sent his wife flowers at work which she gave away to the cleaning lady. He E-mailed her to come home so that they could have a special dinner. She did not come home for dinner. He was trying to engage his wife romantically throughout the day.⁶⁰

Despite the finding that the complainant said she did not want to have sex⁶¹, and despite there being no evidence that she communicated anything other than an explicit lack of consent, the accused was acquitted on the basis that “the evidence here established that the complainant submitted or did not resist to the sexual activity in question because she was “tired” and “tiredness does not vitiate consent”. This was an error of law. While tiredness may not vitiate consent, submission and a failure to resist do not constitute consent.⁶²

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⁶⁰ *R v T.V.*, *supra* note 57 at para. 153
⁶² *Ewanchuk, supra* note 1.
Finding that the accused just “wanted to show her how much he loved her” the Court noted that “although the complainant did not verbally agree to participate in the sexual activity, her protestations to “let me go” [made while the accused "lightly pinned her wrists to the side and slowly moved her PJ top up”] can be understood to mean let me go from this marriage.” To suggest that this analysis stretches the imagination is to understate the situation.

In *R v D.M.*, another case that involved an intimate couple, the Ontario Court of Justice did acknowledge that *Ewanchuk* was binding authority on the issue of consent. However despite this, the reasoning in *R v D.M.* suggests an implicit rejection of *Ewanchuk* – the recognition of an ‘implied implied consent’, so to speak.

In *R v D.M.* the accused was acquitted of sexually assaulting his girlfriend of two years. A few minutes prior to the sexual touching from which the charges stemmed, the accused had been advised by the complainant that she had been having sex with his roommate. The incident started when the complainant entered his bedroom and lay on the bed. He was upset and almost crying and began to rub the complainant’s stomach. He then proceeded to touch her vagina. At this point she grabbed his wrist and tried to pull his hand away. She was unable to do so. He penetrated her digitally and although she told him to stop, he continued. Next she yelled (or screamed) at him to stop. From here their evidence differed. He said he stopped at this point. She said he did not stop and that she continued to yell and scream and it was only after she pried his fingers out of her and fell off the bed that he stopped. The yelling and screaming was sufficiently loud that the next door neighbors called the police.

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63 *R v T.V., supra* note 57 at para. 80.
64 [2004] O.J. No. 4376
The Ontario Court of Justice cited *Ewanchuk* and noted that “speculation by the accused as to what the complainant may be thinking does not provide the accused with a defence. The accused must believe that the complainant effectively said, "Yes" through her words or a combination of her words and her actions.”

Despite acknowledging this point of law, and despite that, even on the accused’s own testimony, he continued the sexual touching at least until after the first time and up until the second time that the complainant had told him to stop, the accused was acquitted on the basis of an honest but mistaken belief in consent. The evidence the Court relied on in order to establish an air of reality to the accused’s belief that she had communicated consent was the fact that “on at least one prior occasion during an act of sexual intercourse the complainant had uttered the word "no", which had meant she was uncomfortable and was requesting a change of position.”

In terms of evidence capable of supporting the honesty and reasonableness of his belief that her screams (screams loud enough to cause the neighbors to call the police) during this incident were the same as her ‘uttering the word no’ so that the accused might change position during a previous sexual encounter, the Court relied on the following: the fact that the complainant proposed to sleep in his bed; the accused’s calm demeanor both pre and post incident despite having just discovered that his girlfriend had slept with his best friend; the fact that he calmly tried to kiss and hug the complainant after the incident; and his lack of sophistication on the stand.

One cannot help noting that in both *R v T.V.* and *R v D.M.* the female complainants had engaged in sex outside of the relationship and that in both cases the
judges made more than passing reference to these women’s infidelities and the emotional impact that this had on the accused.

In *R v C.M.M* the Nova Scotia Provincial Court found an accused who had broken into his estranged wife’s house, found a gun and threatened her with it before putting it away (*after* it had accidently been fired) and having intercourse with her, had an honest but mistaken belief she was consenting.\(^{66}\) The judge found that the accused entered the house intending only to let his wife know how he felt, that he found the gun after he arrived, and that he intended only to scare her with it. The gun went off accidentally and he laid it aside immediately. Despite finding that the accused intended to scare his wife with the gun, the judge determined that in the accused’s mind, this was not a factor in the sexual assault. He found that the accused’s wife had led him to believe, by her words and conduct, that she was consenting to the sexual intercourse.

It may be that it is trial judges in particular who are less willing to recognize that the doctrine of implied consent to sexual interactions no longer exists, even as between spouses. In addition to the two cases just discussed – which were not appealed – trial judges in *R v MacFie* and *R v R.V.* refused to, or failed to, apply *Ewanchuk*.

The trial judge in *R v R.V.*, in acquitting the accused husband, ignored *Ewanchuk*.\(^{67}\) He held that as between husbands and wives an implied doctrine of consent to sexual touching exists and that even proof that the wife said no and the husband knew she said no was not sufficient.\(^ {68}\) “I am of the view that where a viable marital

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\(^{68}\) *Ibid.* “The law still remains that unless a marriage is consummated, it may be annulled or it may be declared null and void. Therefore, when parties get married, they, by the very nature of the relationship, are consenting to engaging in sexual intercourse and consummating the marriage. Even after consummation, a marriage continues to imply that parties have joined together for various purposes including that of retaining or continuing their sexual relationship. Judge Wolder’s decision was initially
relationship exists, then it is not enough for the Crown to simply prove that the sexual conduct took place without the stated consent of the other party in order to secure a conviction for sexual assault by one marital partner against the other.\textsuperscript{69}

The trial judge in \textit{R v MacFie} also found that an ex-husband who violently abducted his estranged wife and had sexual intercourse with her in the back of his van in a deserted gravel pit had a mistaken belief that she was consenting.\textsuperscript{70} The acquittal was set-aside on appeal on the basis that there is no air of reality to a kidnapper’s claim to have honestly believed his hostage was consenting to the sexual assault.

Recall that the trial judge in \textit{R v Went} also stated that the \textit{Ewanchuk} standard should be applied only between strangers and not intimates (although he went on to adopt an analysis which did properly \textit{Ewanchuk}).

\textbf{Conclusion}

The Supreme Court of Canada’s decision in \textit{Ewanchuk} engendered a great deal of controversy, some of it stemming from the concern that the communicative notion of consent adopted by the Court would unjustly deny the defence of honest but mistaken belief in consent to certain accused. In particular there was concern for those whose harmless sexual overtures were, unbeknownst to them, unrequited. There was also concern that the Court’s explicit rejection of the doctrine of implied consent could not justly be applied to husbands and boyfriends charged with sexual assault.

A review of the reported cases, since 1998, in which the mistaken belief in consent defence arose demonstrates that cases with the types of ambiguity envisaged by

\textsuperscript{69} \textit{Supra} note 67 at para. 14.

\textsuperscript{70} [2001] A.J. No. 152. The accused killed the complainant three days after the abduction and sexual assault.
Ewanchuk’s critics have not come before the courts. The cases also demonstrate that the Ewanchuk analysis, properly interpreted, does not unjustly criminalize the progression of intimate behavior between genuinely consenting adults, and that where a legitimate confusion exists courts appear able to apply a communicative concept of consent that can accommodate the diversity and specificity with which sexual interactions tend to occur. Less promisingly, decisions in cases such as R v T.V.,71 R v R.V.,72 R v D.M.,73 R v C.M.M.74 and R v MacFie75 suggest that in circumstances involving intimate partners or spouses, trial judges may be more willing to resort to reasoning that wrongly relies on the assumption that as between spouses the doctrine of implied consent still exists. Ewan- chuk, it seems, has done much to achieve better respect from the law for the sexual integrity of the intoxicated party-goer.76 The trial decisions discussed in the last section suggest Ewanchuk has been less able to achieve this with respect to the sexual integrity of wives and girlfriends.

71 Supra note 57.
72 Supra note 67.
73 Supra note 64.
74 Supra note 66.
75 Supra note 70.
76 See for example R v H(S.L.), supra note 21; R v J.A., supra note 21; R v Cedeno, supra note 21; R v Despins, supra note 21; R v Dumais, supra note 21; R v B.S.B., supra note 21; R v Doll, supra note 23; R v Bird, supra note 21; R v K.D., supra note 21; R v Cornejo, supra note 25.