

Case Name	R v Ewanchuk
Topic	No defence of implied consent to a sexual assault
Category	LIBERTY & SECURITY - sexual assault; WOMEN - sexual assault;
Tribunal	Supreme Court
Country	Canada (Americas)
Case Date	25 Feb 1999
Judge(s)	Lamer CJ, L'Heureux-Dube J, Gonthier J, Cory J, McLachlin J, Iacobucci J, Major J, Bastarache J, Binnie J

The complainant, a seventeen year old woman, was interviewed by E for a job in his van. The interview, continued in E's trailer where offered to display some of his products. The complainant, purposely left the door of the trailer open, but E allegedly closed it in a way that made the complainant think it was locked. E then initiated a number of incidents involving touching, each progressively more intimate than the last one, notwithstanding that the complainant plainly said no on each occasion causing E to stop and then shortly after to start again. The complainant claimed that any compliance was done out of fear and that the conversation between the complainant and E indicated that he knew she was afraid and was not a willing participant. The trial judge acquitted E relying on the defence of implied consent and the Court of Appeal upheld that acquittal.

In allowing the appeal and convicting E of sexual assault, it was held that:

1. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The doctrine of implied consent has not been recognised in regard to sexual assault in order to bring a defence of consent.
2. The trial judge determined that the complainant's actual state of mind was that E's touching was unwanted but, instead of finding this conclusive, which he should have done, he treated what he perceived as the complainant's ambiguous conduct as raising a reasonable doubt about consent, which he described as 'implied consent'.
3. Any doubt as to her ambiguous conduct was accounted for by what the trial judge accepted as her honest and pervasive fear. According to s 265(3) of the Criminal Code, the law defines a series of conditions, including fear and the exercise of authority, where an absence of consent will be deemed notwithstanding the complainant's ostensible consent or participation.
4. The accused may challenge the Crown's evidence of mens rea by asserting an honest but mistaken belief in consent. In the context of mens rea, consent means that the complainant must have affirmatively communicated by words or conduct her agreement to engage in sexual activity with E. Once the complainant stated 'no' to continue without ascertaining whether she had changed her mind negates the defence of honest but mistaken belief by acting in a reckless, wilfully blind manner.

Per L'Heureux-Dube

1. Violence **against women** raises the rights to equality guaranteed by s 15 of the Canadian Charter of Rights and Freedoms and to human dignity guaranteed by s 7. These rights have been adopted in international law and developed by the **Convention on the Elimination of All Forms of Discrimination Against Women**.
2. This case is not about consent, since none was given. It is about myths and stereotypes.
3. The trial judge did not take 'no' to mean that the complainant did not consent. This error arose from the mythical assumption denying **women's** sexual autonomy that when a woman says 'no' she is really saying 'yes', 'try again' or 'persuade me'.
4. The majority of the Court of Appeal relied on inappropriate myths and stereotypes such as the referral by McClung JA to the background of the complainant which reinforced the myth that the complainant's sexual experience signals probable consent to further activity. 'Inviting' sexual assault, according to these myths, lessens the guilt of the accused.
5. Furthermore, the comments of the court are plainly inappropriate in that they minimise the importance of E's conduct and the reality of sexual aggression **against women**.
6. Complainants should be able to rely on a judiciary whose impartiality is not compromised by such biased assumptions.

Legal Criminal Code, s 265(3)
Canadian Charter of Rights and Freedoms, 1982, ss 7, 15

Provision Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

Lawyers For the Appellant: Bart Rosborough; instructed by the Attorney General for Alberta, Edmonton
For the Respondent: Peter J Royal QC; instructed by Royal, McCrum, Duckett & Glancy, Edmonton
For the Intervener, the Attorney General of Canada: Beverly Wilton and Lisa Futerman; instructed by the Attorney General of Canada, Ottawa
For the Interveners, the Women's Legal Education and Action Fund and the Disabled Women's Network Canada: Diane Oleskiw and Ritu Khullar; instructed by Oleskiw, Anweiler, Toronto & Dale Gibson Associates, Edmonton
For the Intervener, the Sexual Assault Centre of Edmonton: Paul L Moreau; instructed by Witten, Binder, Edmonton

Citations [1999] 1 SCR 330; [2000] 3 LRC 88