



Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law

New research by **Isabel Grant** and **Janine Benedet** finds that the criminal justice system fails to provide adequate protection for adolescent girls who are targeted by older men for sexual activity.

CONTEXT

Adolescent girls are more likely to report being sexually assaulted than females in any other age group, with 14 the peak age for victimization. Adolescent girls whose first sexual activity is with older men have higher rates of suicide, alcohol and drug use and unwanted pregnancy. In 2008, Canada raised the age of consent to sexual activity to 16 years of age. The law makes exceptions for consensual activity with other adolescents or young men who are close in age to the girl in question. It also permits an accused to argue that he did not know the complainant was under the age of 16. In order to assert such a “mistake of age” defence, the *Criminal Code* requires that the accused have taken “all reasonable steps” to ascertain the girl’s age. This article is the first legal examination of this defence in Canada.

OVERVIEW

Our study found that the same stereotypes that have been critiqued in sexual assault cases involving adult women have permeated the cases on sexual offences against adolescent girls. While the stereotypes take a different form, and relate to the girl’s age rather than to whether she consented, the impact is the same: girls are seen as responsible for their own victimization based on their appearance or their risky behaviour.

KEY FINDINGS

- Some judges use language that treats the age of consent as a mere technicality. Even though children under 16 cannot legally consent, these girls are often described as “consenting” participants.
- Evidence that the accused was mistaken about the complainant’s age is often used to obscure evidence that the girl did not want the sexual activity to take place at all, which should have made the mistaken belief irrelevant.
- The defence has been wrongly allowed in cases where the accused was not mistaken because he had no belief in the complainant’s age. Rather, the accused had wrongly guessed that the complainant was “old enough”.
- In some cases judges found that an accused could satisfy the “all reasonable steps requirement” by doing absolutely nothing. Instead, the accused was allowed to rely on stereotypes about the complainant’s

appearance or her behaviour. For example, if a girl dressed in a particular way, smoked or consumed intoxicants, those facts could be used to determine that the accused had no responsibility to do anything to ascertain her age. This problem was heightened for the most marginalized girls, including Indigenous girls, who are more likely to have been targeted for sexual violence in the past or to be living in precarious situations.

- Judges misapplied sexual history evidence in some of these cases and did not consistently require the defence to go through the proper procedures set out in s. 276 of the Criminal Code to determine the admissibility of such evidence.

QUESTIONS AND IMPLICATIONS

The study demonstrates that much work is needed to make visible the impact of stereotypes about adolescent girls on judicial decision-making. These stereotypes make convictions most difficult to obtain in cases involving our most vulnerable girls. The defence of mistake of age needs to be applied only to those cases where the accused has an actual belief that the person with whom he is engaging in sexual activity is 16 years of age or older, and where he has taken active steps to ascertain that age, which amount to all the steps that are reasonable in the circumstances. Courts must recognize that allowing a man to rely on the defence where there were no steps available to ascertain age is akin to acknowledging male entitlement to sexual access to underage girls.

AUTHORS

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FOR MORE INFORMATION

The authors and CCLISAR welcome enquiries about this research.

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The Canadian Centre for Legal Innovation in Sexual Assault Response (CCLISAR) is a non-profit, non-partisan organization working to realize law's potential to respond to sexualized violence.

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