CCLISAR
The Canadian Centre for Legal Innovation in Sexual Assault Response

CCLISAR
Research Brief
October 2020 | No. 05

The *Mens Rea* of Sexual Assault: How Jury Instructions Are Getting It Wrong

New research from **Kelly De Luca** and **Paul M. Alexander** raises the concern that juries in some sexual assault trials are routinely being misinstructed on the law, causing some accused to be incorrectly acquitted.

CONTEXT

Juries rely on trial judges to tell them the "essential elements" of an offence that must be found for a conviction. Trial judges, in turn, commonly rely on published "standard" form jury instructions, such as those published in "Watt's Manual of Criminal Jury Instructions." Over the last few decades, the law of *mens rea* for sexual assault has changed, importantly focusing on active consent, rather than passive consent. We now ask if there was a communicated "yes," rather than whether there was a communicated "no." This paper examines standard form jury instructions to see if they have changed with the law, and concludes that they have not.

OVERVIEW

Available standard form jury instructions all tell the jury that, to convict, they must find beyond a reasonable doubt that the accused knew the complainant was not consenting. Alexander and De Luca argue that this instruction is no longer correct in all cases. In a recent article, they undertake statutory interpretation and a detailed examination of Supreme Court of Canada jurisprudence, particularly *R. v. Ewanchuk*, the lead case on the issue following the 1992 amendments to the *Criminal Code*. They conclude that standard form jury instructions on *mens rea* are correct in cases where the accused claims to have had an honest but mistaken belief in the complainant's communicated consent. Unless that defence is in issue, however, the only *mens rea* for sexual assault is the intent to touch. In cases where the accused is not using a mistaken belief defence, standard form jury instructions are not consistent with the law; they establish a more demanding *mens rea* than the law requires, and will result in incorrect acquittals.

KEY FINDINGS

- The *Criminal Code* changed in 1992, refocusing the law of consent as a positive rather than a negative one. *Ewanchuk*, released in 1999, had significant implications for the *mens rea* of sexual assault but the standard form jury instruction in this area did not change in response.
- The standard form jury instructions ask if the accused knew the complainant did *not* consent. This misconceives the nature of consent. Intentional sexual contact is only non-criminal where the person touched *does* consent, or the accused honestly believes, even wrongly, that the complainant communicated consent.

- *Mens rea* exists in our law to protect the morally innocent. The defence of honest mistaken belief in communicated consent fulfills that role. Where that defence is not in issue, a conviction based only on the basic *mens rea* of the intent to touch does not risk offending s. 7 of the *Charter*.
- The defence of honest mistaken belief in communicated consent has limitations, such as the need for reasonable steps on the part of the accused and the need for some words or conduct by the complainant that have an air of reality of communicating the consent. The *mens rea* identified in standard form jury instructions for cases *not* involving mistaken belief does not include such limitations. Incoherently, this makes it harder for a jury to find the necessary *mens rea* when honest mistaken belief is not an issue. That is, the jury is instructed to meet a higher, more complicated *mens rea* standard as to consent in such cases, when the law sets no standard at all on this point.
- Decisions from the Supreme Court of Canada and Ontario Court of Appeal have found that, in cases in which honest but mistaken belief is not in issue, there is no error in leaving out the instruction that to be found guilty the accused must know the complainant did not communicate consent. Logically, if there is no error in leaving that element out, it cannot be an essential element. And, therefore, it must be an error to tell a jury that it is an essential element. This incoherence has never been directly examined by the courts.

QUESTIONS AND IMPLICATIONS

This analysis demonstrates that, even when the Supreme Court of Canada rejects sexist myths and stereotypes that historically have been woven into our law, day-to-day courtroom practices are slow to change, with commonly-used standard form instructions lagging decades behind. Some people who should properly on our law be convicted of sexual assault are, inevitably and wrongly, being acquitted as a result. Why do the authors of standard form charges resist change? Why do courts accept them without challenge? When will jury instructions catch up with current legal reality?

AUTHOR

Kelly De Luca is Associate Professor in the Department of Law and Politics at Algoma University. Paul M. Alexander has been a practising criminal lawyer in Ontario for 19 years.

FOR MORE INFORMATION

The author and CCLISAR welcome enquiries about this research.

Kelly De Luca
kelly.deluca@algomau.ca

Paul M. Alexander
paul.m.alexandee@gmail.com

Elaine Craig CCLISAR Research Director
Elaine.Craig@dal.ca

Kelly De Luca & Paul M. Alexander, "The *Mens Rea* of Sexual Assault: How Jury Instructions are Getting it Wrong" (2019) 43:3 Manitoba Law Journal 39.

ABOUT CCLISAR

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. **www.cclisar.ca**