When “Yes” Doesn’t Mean Yes: How Civil Courts Look At Consent In Sexual Assault Cases Differently Than Criminal Courts



Like many, I have been distressed by the news of the world junior hockey sexual assault trial taking place in London, Ontario.

I am particularly dismayed to hear about the complainant “E.M.’s” nine-day ordeal on the stand, being questioned first by the Crown, then cross-examined by each of the lawyers for the five accused hockey players, and then re-examined by the Crown.

It is hard to fathom how a person can survive such a process, where every word spoken or not spoken, word written or not written, and action taken or not taken is put under a microscope years after the fact, and all the defence lawyers have to do is point to reasonable doubt about whether there was no consent in order to secure acquittals for their clients.

The bar is not high, and defence lawyers are given a lot of latitude in their cross-examinations because their clients’ liberty is at stake. And the men who stand accused are under no obligation to get in the witness box themselves to present their side of the story. Again, because their liberty is at stake, they have a right to remain silent.

PUBLICLY SCRUTINIZED

In the meantime, a complainant like E.M. has put their life on hold while they are publicly scrutinized, disbelieved and discredited, all in the name of being a witness for the Crown whose role is to advance society’s interest in ensuring justice is done and criminal conduct is called out and punished.

Because of high-profile criminal cases like the junior hockey case, most of us think in criminal terms about what consent means in a sexual assault case. This ignores the fact that survivors do have options. They do not have to go to the police and have their attackers charged criminally, which then requires them to submit to a hostile criminal process over which they have no control. Many survivors choose, instead, to sue their attackers in civil court.

CONCEPT OF “CONSENT”

Although the concept of “consent” is used in both criminal and civil sexual assault cases, judges approach it differently when the case is about money damages (civil) rather than time in prison (criminal). Understanding the differences in approach can help demystify headlines and news reports, and clarify why a civil lawsuit can succeed where a criminal charge fails.

In criminal law, the Crown must prove, beyond a reasonable doubt, three things:

1. that sexual touching happened,
2. that it was not consented to, and
3. that the accused knew or should have known there was no consent.

In other words, Crown prosecutors must show a clear “No” to sexual touching.

Civil law flips the burden. There is no Crown prosecutor acting in the public interest, and the alleged perpetrator has no right to remain silent. A civil lawsuit is a private dispute where the person who sues (the plaintiff) is asking to be compensated for a wrong inflicted on them. The plaintiff only has to show, on a balance of probabilities (meaning more likely than not), that the touching happened and was intended.

Once the plaintiff also alleges the touching was non-consensual, the legal onus for consent shifts to the defendant (the alleged attacker) to prove that genuine consent existed, or they reasonably believed it did.

This switch makes civil claims easier to win than criminal charges. This makes sense: in civil court a wrongdoer’s wallet is at risk, not their liberty, so it follows that a sexual assault will be easier to prove in the civil context.

LEGALLY (IN)VALID CONSENT

Be aware too that, no matter whether it is criminal or civil court, not every “Yes” counts as legally valid consent. Consent has to be free and informed. Classic examples of legally invalid consent include minors, people facing threats, or situations involving force or deception.

The law is more nuanced when alcohol or drugs are involved. Being drunk does not automatically erase the ability to choose; courts use a sliding scale. Someone who is so impaired they cannot understand what is happening clearly cannot consent. But someone who is merely intoxicated, even to the point of poor judgment, may still provide a legally effective “Yes.” Where the line falls depends on the facts of each individual case.

Civil courts add another important consideration: The impact of unequal relationships. In a landmark Supreme Court of Canada decision involving a doctor who traded prescriptions for sex with his drug-dependent patient, the court found that consent obtained through the exploitation of an overwhelming power imbalance is no consent at all.

Judges in civil cases ask two key questions.

- First, is there a special relationship — such as teacher/student, employer/employee, clergy/parishioner — where one side clearly holds sway?
- Second, did the more powerful party use that position for their own sexual gratification?

If both answers are “Yes,” any supposed consent to sexual activity is effectively eliminated. The law views it as coerced consent, even if no threats were uttered and the weaker party seemed to go along willingly, or was even the one who initiated sexual contact.

RELATIONSHIP DYNAMICS

Because defendants in civil cases are the ones who have to prove there was real consent, their lawyers must be alive to a relationship’s dynamics: relative ages or education levels, emotional or financial dependence, and any vulnerabilities such as addiction, are all things that matter. They must also consider whether other claims – like breach of fiduciary duty – might still succeed even if assault and battery claims are defensible.

Courts have sometimes ruled that a relationship was “consensual” for one purpose yet still unlawful for another, such as where a professional engages in sexual contact with a client, thereby betraying that client’s trust.

The takeaway is simple but profound. In civil sexual assault cases, consent is not merely a word uttered in the moment; it is a legal conclusion built on context, capacity, and equality. A nod or a whispered “okay” can unravel once the power structures behind the gesture or word spoken are considered.

Civil law aims to safeguard true autonomy so survivors have a realistic path to justice when their supposed “consent” was, in law, really no consent at all.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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