

7-15-2021

## An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints

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### Citation Information

Hastie, Bethany. "An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints." *Osgoode Hall Law Journal* 58.2 (2021) : 419-452.

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### Abstract

The legal definition of sexual harassment was set down thirty years ago in the Supreme Court of Canada decision of *Janzen v. Platy Enterprises* as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victim of the harassment.” Remarkably little has changed in the interpretation and application of these elements since *Janzen* was decided. However, both legal and social norms concerning sexual misconduct and consent have substantially developed in that time. This article unpacks the problematic consequences flowing from the treatment of consent in sexual harassment complaints under human rights law and argues for a shift in the legal principles governing sexual harassment complaints. It draws support from criminal law and tort law, each of which has shifted towards an affirmative consent standard due to similar problems and concerns regarding reliance on gender-based myths and stereotypes.

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# An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints

BETHANY HASTIE\*

The legal definition of sexual harassment was set down thirty years ago in the Supreme Court of Canada decision of *Janzen v. Platy Enterprises* as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victim of the harassment.” Remarkably little has changed in the interpretation and application of these elements since *Janzen* was decided. However, both legal and social norms concerning sexual misconduct and consent have substantially developed in that time. This article unpacks the problematic consequences flowing from the treatment of consent in sexual harassment complaints under human rights law and argues for a shift in the legal principles governing sexual harassment complaints. It draws support from criminal law and tort law, each of which has shifted towards an affirmative consent standard due to similar problems and concerns regarding reliance on gender-based myths and stereotypes.

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\* Assistant Professor, Peter A. Allard School of Law, University of British Columbia. I would like to thank Emily Porter and Meredith Shaw for their research assistance, Victoria Tortora for her editorial assistance, and Janine Benedet for her helpful review and feedback in preparing this article. I would also like to thank the anonymous reviewers and editorial board at Osgoode Hall Law Journal for their helpful feedback and guidance in preparing this article for publication. This article is based, in part, on research funded by the CBA Law for the Future Fund.

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**THE LEGAL DEFINITION OF SEXUAL HARASSMENT** was set down over thirty years ago in the Supreme Court of Canada decision of *Janzen v. Platy Enterprises* as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”<sup>1</sup> This definition has been interpreted as requiring three essential elements to establish a complaint of sexual harassment under human rights law: (1) conduct of a sexual nature; (2) that is, or ought reasonably to be known to be, unwelcome;<sup>2</sup> (3) that produces adverse consequences for the complainant. Remarkably little has changed in the interpretation and application of these elements since *Janzen* was decided. However, both legal and social norms concerning sexual misconduct and consent have substantially developed in that time. In particular, the #MeToo movement in 2017 initiated a new wave of social, political, and legal attention to the issue of sexual harassment. These events have created heightened awareness and sensitivity to this pervasive issue that is known to affect many Canadians. A 2014 Angus Reid poll found that forty-three per cent of women and twelve per cent of men in Canada reported experiencing sexual harassment in their workplace.<sup>3</sup> Further, evidence suggests that legal claims concerning sexual harassment are increasingly pursued through human rights

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- [1989] 1 SCR 1252 at 1284 [*Janzen*]. For further elaboration on the conduct element of the definition, see *Mahmoodi v UBC and Dutton*, 1999 BCHRT 56 at para 136 [*Mahmoodi*].
  - Mahmoodi*, *supra* note 1 at para 140. Concerning the elements of the test for sexual harassment as a whole, see *Janzen*, *supra* note 1 at 1284; *Mahmoodi*, *supra* note 1 at para 135.
  - Angus Reid Institute, “Three-in-ten Canadians say they’ve been sexually harassed at work, but very few have reported this to their employers” (5 December 2014) at 2, 11, online (pdf): <angusreid.org/wp-content/uploads/2014/12/2014.12.05-Sexual-Harassment-at-work.pdf>.

tribunals rather than civil litigation, due to relaxed evidentiary standards and a less adversarial atmosphere.<sup>4</sup>

This article argues for a shift in the law of sexual harassment, in order to bring the legal principles in line with contemporary social and legal understandings of consent. In earlier research, I considered how the presence of the “unwelcome” element in sexual harassment law in Canada facilitates the introduction of gender-based myths and stereotypes.<sup>5</sup> I found that these myths and stereotypes may operate to undermine a complainant’s credibility and to influence the reasoning and outcome of the complaint.<sup>6</sup> This research builds on existing scholarship that problematizes the “unwelcome” element of sexual harassment law.<sup>7</sup> It also presents similarities to issues that are known to plague victims of sexual violence in the criminal justice system.<sup>8</sup> Noted issues regarding the historical treatment

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4. Sean Fine, “Ontario Human Rights Tribunal gains steam as alternative route for sexual assault cases” (3 April 2018), online: *Globe and Mail* <[www.theglobeandmail.com/canada/article-workplace-sexual-assault-survivors-claim-victory-at-human-rights](http://www.theglobeandmail.com/canada/article-workplace-sexual-assault-survivors-claim-victory-at-human-rights)>. Note that civil courts do not independently provide a basis for a legal claim of discrimination to be brought. Such a claim must be tied to, for example, a constructive or wrongful dismissal claim. It is also worth noting that few complainants take formal legal action when faced with workplace harassment, and fewer of those proceed to a full hearing.
  5. Bethany Hastie, “Workplace Sexual Harassment: Assessing the Effectiveness of Human Rights Law in Canada” (August 2019), online: *Peter A Allard School of Law* <[commons.allard.ubc.ca/fac\\_pubs/500](http://commons.allard.ubc.ca/fac_pubs/500)> [Hastie, “Workplace Sexual Harassment”]; Bethany Hastie, “Workplace Sexual Harassment and the “Unwelcome” Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016” (2020) 32 *CJWL* 61 [Hastie, “Unwelcome Requirement”].
  6. Hastie, “Unwelcome Requirement”, *supra* note 5 at 63.
  7. See e.g. Arjun P Aggarwal & Madhu M Gupta, *Sexual Harassment in the Workplace*, 3rd ed (Butterworths, 2000) at 120-37; Janine Benedet, “Book Review of *Sexual Harassment in the Workplace* by Aggarwal and Gupta” (2001) 39 *Osgoode Hall LJ* 843 at 846 [Benedet, “Book Review”]; Janine Benedet, “Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law” (1996) 3 *Mich J Gender & L* 125; Hastie, “Unwelcome Requirement”, *supra* note 5 at 69.
  8. Hastie, “Unwelcome Requirement”, *supra* note 5. For examples of similar issues in the criminal justice system, see Lise Gotell, “Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women” (2008) 41 *Akron L Rev* 865 [Gotell, “Rethinking Affirmative Consent”]; Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22 *CJWL* 397; Isabel Grant, “Intimate Partner Criminal Harassment through a Lens of Responsibilization” (2015) 52 *Osgoode Hall LJ* 552; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, 2018) [Craig, *Putting Trials on Trial*]; Elaine Craig, “Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada’s Rape Shield Provisions” (2016) 94 *Can Bar Rev* 45; Lise Gotell, “When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History

of consent in relation to sexual offences, and the ways in which gender-based myths and stereotypes have operated to place the burden of establishing a lack of consent with the victim, led to the adoption of an affirmative consent standard in criminal law. Similar reasoning, evidencing a concern for the problematic consequences that would flow from a requirement for a plaintiff to establish a lack of consent, led the Supreme Court of Canada to affirm that consent is a defence to the tort of battery in the case of *Non-Marine Underwriters, Lloyd's of London v. Scalera*.<sup>9</sup>

Affirmative consent standards have produced their own set of challenges.<sup>10</sup> Scholars have critiqued the ways in which the emphasis on a binary consent standard in law, in relation to sexual conduct, problematically oversimplifies and reduces narratives and experiences about sexuality and sexual encounters. These critiques disrupt traditional (conservative) assumptions that conceive of sexual violence as centrally about power.<sup>11</sup> Scholars have further critically examined how the norm of affirmative consent in criminal law may lay the foundation for a repressive moral order and instill a narrative of weakness and helplessness in those meant to be protected.<sup>12</sup> Common to the concerns raised about the legal construction of consent is an attentiveness to the ways in which a binary “yes or no” approach to consent to sexual conduct is unreflective of reality,<sup>13</sup> and imposes a gendered lens on sexual interactions that entrenches notions of women’s vulnerability. Moreover, scholars in the United States, especially, have been vocal about the sexual “sanitization” of the workplace, in light of the advent and spread

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Evidence and the Disclosure of Personal Records” (2006) 43 Alta L Rev 743; Susan Ehrlich, “Perpetuating—and Resisting—Rape Myths in Trial Discourse,” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice, and Women’s Activism* (University of Ottawa Press, 2012) 389.

9. *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24 [*Scalera*]. Unlike the criminal law context, which has seen a series of cases develop and interpret the relevant legal principles and provisions relating to affirmative consent, *Scalera* presents the sole, leading authority on consent as a defence to (sexual) battery in tort law.
10. See Aya Gruber, “Consent Confusion” (2016) 38 Cardozo L Rev 415 at 430 for a review of contemporary challenges and debates surrounding the concept of affirmative consent. See also Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006) [Halley, *Split Decisions*].
11. See e.g. Heidi Matthews, “#MeToo as Sex Panic” in Bianca Fileborn & Rachel Loney-Howes, eds, *#MeToo and the Politics of Social Change* (Palgrave Macmillan, 2019) at 267.
12. See e.g. Janet Halley, “The Move to Affirmative Consent” (2016) 42 J Women in Culture & Society 257 [Halley, “Affirmative Consent”].
13. See e.g. Gruber, *supra* note 10.

of prohibitive policies regarding workplace sexual conduct and relationships.<sup>14</sup> The formulation of sexual harassment law, it is argued, has resulted in repressive workplace policies and their implementation at the organizational level.<sup>15</sup> These policies operate to suppress sexuality and intimacy in the workplace, to discipline, and to control workers for a broad range of behaviour, giving rise to similar concerns about overbreadth that have arisen in the context of criminal laws and affirmative consent.<sup>16</sup>

The introduction of the “unwelcome” element in *Janzen* may have been intended to guard against the very kind of “sanitization” that Vicki Schultz critiques, by excluding consensual or “welcomed” sexual interactions.<sup>17</sup> In practice, however, it has produced significant obstacles for complainants, most often women, to establish their complaint of sexual harassment against (most often) men. This article unpacks the problematic consequences flowing from the “unwelcome” element in sexual harassment complaints under human rights law, as governed by provincial human rights legislation,<sup>18</sup> and argues for a shift in legal principles that would require respondents to establish “welcomeness” rather than requiring complainants to demonstrate “unwelcomeness.” I draw on the comparisons of criminal and tort law to illustrate the significance of considering *who* bears the burden of establishing consent (or lack thereof) and why that matters. In other words, I draw on these comparisons to advance a structural critique: requiring a complainant in a sexual harassment complaint to establish a lack of consent requires her to shoulder an unfair burden and creates inappropriate space for gender-based stereotypes to influence the arguments, analysis, and outcome of legal complaints. As such, I take, as a starting point, that the law currently relies on consent-based elements, and my critique focuses on who ought to bear the burden of establishing (non)consent in the context of sexual harassment complaints under human rights law. Nonetheless, the broader consequences and normative values communicated by a continued reliance on consent and by continued regulation of sexual behaviour in the workplace, as documented by existing scholars, must be borne in mind.

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14. See e.g. Vicki Schultz, “The Sanitized Workplace” (2003) 112 Yale LJ 2061 at 2090; Vicki Schultz, “The Sanitized Workplace Revisited” in Martha Albertson Fineman, Jack E Jackson & Adam P Romero, eds, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2009) at 65 [Schultz, “Sanitized Workplace Revisited”].

15. *Ibid.*

16. *Ibid.*

17. See e.g. *Basic v Esquimalt Denture Clinic and another*, 2020 BCHRT 138 at para 98 [*Basic*].

18. For examples from British Columbia and Ontario, see e.g. *Human Rights Code*, RSBC 1996, c 210 [BC Code]; *Human Rights Code*, RSO 1990, c H-19 [Ontario Code].

In Part I, I review the development and doctrinal interpretations of sexual harassment law under human rights legislation in British Columbia and Ontario. I discuss how the “unwelcome” element allows for the problematic introduction of gender-based myths and stereotypes, through which a complainant’s credibility may be undermined and her lack of consent questioned. I draw on human rights decisions from British Columbia and Ontario to illustrate these claims.<sup>19</sup> In Part II, I review how the tort of battery as well as criminal laws addressing sexual offences have each adopted an “affirmative consent” standard in order to respond to similar noted issues concerning reliance on gender-based myths and stereotypes in assessing legal claims. I conclude in Part III by drawing together these analyses to argue for a similar shift in the legal principles governing sexual harassment complaints under human rights law, establishing how existing principles of human rights law are sufficient to properly assess complaints of sexual harassment as a form of sex discrimination.

## I. SEXUAL HARASSMENT LAW AND THE “UNWELCOME” ELEMENT

Sexual harassment complaints under human rights law are governed by a test that includes the requirement to establish that the respondent knew or ought to have known that their conduct was “unwelcome.”<sup>20</sup> This “unwelcome” element has been critiqued as improperly responsabilizing women for harassment-avoidance, placing an undue burden on complainants, focusing the inquiry on a complainant’s own behaviour and conduct, and implying that sexual conduct in the workplace is presumptively welcome.<sup>21</sup> My existing research has illustrated

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19. These decisions were retrieved as part of a larger study examining the trajectory of sexual harassment law from 2000 to 2018 in British Columbia and Ontario. See Hastie, “Workplace Sexual Harassment”, *supra* note 5.

20. *Mahmoodi*, *supra* note 1 at para 140.

21. See *e.g.* Aggarwal & Gupta, *supra* note 7 at 131-32; Benedet, “Book Review”, *supra* note 7 at 846; Kaitlyn Matulewicz, “Law and the Construction of Institutionalized Sexual Harassment in Restaurants” (2015) 30 CJLS 401 at 402-403 [Matulewicz, “Institutionalized Sexual Harassment”] citing Marlene Kadar, “Sexual Harassment: Where We Stand; Research and Policy” (1983) 3 Windsor YB Access Just 358; Sandy Goundry, “Sexual Harassment in the Employment Context: The Legal Management of Working Women’s Experience” (1985) 43 UT Fac L Rev 1; Fay Faraday, “Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse” (1994) 32 Osgoode Hall LJ 33; Kathleen Gallivan, “Sexual Harassment after *Janzen v Platy*: The Transformative Possibilities” (1991) 49 UT Fac L Rev 27; Judy Fudge, “Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy” (1996) 60 Sask L Rev 237; Colleen Sheppard, *Inclusive Equality*:



that this element facilitates the introduction of, and reliance on, gender-based myths and stereotypes to undermine a complainant's credibility and raise consent as an issue for a complainant to disprove.<sup>22</sup> This Part reviews the evolution and contemporary doctrinal interpretations of sexual harassment law, with a focus on the "unwelcome" element, and examines how this element manifests the above-noted issues in contemporary case law. This demonstrates the problems attending the "unwelcome" element, providing a foundation from which to argue for a shift in legal doctrine.

#### A. SEXUAL HARASSMENT COMPLAINTS: LEGAL ELEMENTS AND DOCTRINAL INTERPRETATIONS UNDER HUMAN RIGHTS LAW

Sexual harassment as a form of discrimination was first defined by the Supreme Court of Canada in the 1989 *Janzen* decision and can be broken down into three primary elements: (1) conduct of a sexual nature; (2) that is, or ought reasonably to be known to be, unwelcome; (3) that produces adverse consequences for the complainant.<sup>23</sup> In the thirty years since *Janzen* was decided, case law has continued to interpret and refine these elements.

Conduct falling within the definition of sexual harassment may be physical or psychological, overt or subtle, and may include verbal innuendoes, affectionate gestures, repeated social invitations, and unwelcome flirting, in addition to more blatant conduct such as leering, grabbing, or sexual assault.<sup>24</sup> While physical conduct, such as unwanted touching, is blatant and often readily recognizable as sexual harassment, various kinds of verbal conduct are also recognised as sexual harassment. Verbal sexual harassment can include sexual innuendo, jokes, taunts, and comments about a person's appearance or sexual habits, as well as quid pro quo harassment, where a supervisor or person in a position of authority makes sexual advances, invitations, or demands against a subordinate employee.<sup>25</sup> However, as the British Columbia Human Rights Tribunal most recently affirmed in *Eva*,

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*The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press, 2010); Hastie, "Workplace Sexual Harassment", *supra* note 5 at 25; Kathryn Abrams, "The New Jurisprudence of Sexual Harassment" (1998) 83 Cornell L Rev 1169 at 1221.

22. See Hastie, "Workplace Sexual Harassment", *supra* note 5.

23. *Janzen*, *supra* note 1 at 1284.

24. See Aggarwal & Gupta, *supra* note 7 at 14-18.

25. Gallivan, *supra* note 21 at 30. For an analysis of the conduct element in sexual harassment complaints at the British Columbia Human Rights Tribunal, see also Bethany Hastie, "Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions in 2010-16" (2019) 31 CJWL 293 [Hastie, "Tribunal Decisions"]. For a comparative analysis between Ontario and British Columbia, see Hastie, "Workplace Sexual Harassment", *supra* note 5.

not every negative incident or incident connected to sex constitutes harassment.<sup>26</sup> Moreover, a single comment or instance of verbal conduct is generally insufficient to establish harassment. A single comment may only be sufficient to ground a complaint where that comment is particularly egregious in nature.<sup>27</sup> Often, this means that where verbal conduct is at issue, a pattern of conduct or repeated instances of conduct will be needed to establish the complaint.

Tribunals and courts have come to understand the legal test for determining whether conduct was “unwelcome” as “taking into account all the circumstances, would a reasonable person know that the conduct in question was not welcomed by the complainant?”<sup>28</sup> The test thus asks whether the harasser knew, or *ought to have known*, that the conduct was not welcomed. The burden is on a complainant to establish this element of her complaint. However, this does not require a complainant to establish that they actively protested the conduct, such as through verbal communication.<sup>29</sup> This has been affirmed in many cases, including recently in Ontario in *Bento v. Manito’s Rotisserie & Sandwich*: “[A] complaint, protest, or objection by an applicant is not a pre-condition to a finding of harassment and it does not mean that the behaviour or conduct wasn’t unwelcome.”<sup>30</sup> Further, *Mahmoodi* makes clear that conduct may be both “tolerated and yet unwelcome at the same time.”<sup>31</sup> Nonetheless, in some cases, issues arise where a complainant is unable to marshal some evidence of protest or objection, whether verbal or through more subtle physical gestures or facial expression.<sup>32</sup>

In response to shifting legal and social norms, recent case law from British Columbia suggests a trend towards increasing reliance on an objective assessment of whether the respondent *ought to have known* that their conduct would be “unwelcome”. This is most evident in the recent British Columbia Human Rights Tribunal decision in *Basic v. Esquimalt Dental Clinic*, where the Tribunal Chair formulated the test as: “[W]hat would reasonable people, who have taken the trouble to inform themselves on the topic of gender myths and stereotypes, know

26. *Eva Obo Others v Spruce Hill Resort and Another*, 2018 BCHRT 238 at para 80 [*Eva*], citing *Hadzic v Pizza Hut Canada (cob Pizza Hut)*, 1999 BCHRTD No 44 at para 33.

27. *Pardo v School District No 43*, 2003 BCHRT 71 [*Pardo*]. See Hastie, “Workplace Sexual Harassment”, *supra* note 5 at 20.

28. *Mahmoodi*, *supra* note 1 at para 140.

29. *Ibid* at paras 140-41.

30. 2018 HRTO 203 at para 108, citing *SS v Taylor*, 2012 HRTO 1839 at para 72.

31. *Mahmoodi*, *supra* note 1 at para 141.

32. See *e.g.* Hastie, “Workplace Sexual Harassment”, *supra* note 5 at 26-30; Hastie, “Unwelcome Requirement”, *supra* note 5 at 75-78.

about the type of interactions that occurred?”<sup>33</sup> Moreover, in *The Employee v. The University and another (No. 2)*, the British Columbia Human Rights Tribunal directly acknowledged the disproportionate burden the unwelcome element places on complainants, stating,

[i]t has been thirty years since *Janzen* was decided, and it may be time to revisit whether this requirement unfairly places the burden of establishing a lack of consent on a complainant. Some argue there is support for moving to an affirmative consent standard that shifts the burden of proof to the respondent.<sup>34</sup>

The requirement that the complainant establish that the alleged harasser knew or ought to have known that the conduct was “unwelcome” has been widely criticized for the inappropriate burden it places on complainants, predominantly women, to avoid harassment and protest harassing conduct.<sup>35</sup> The individual and transactional focus of the test also minimizes the systemic nature of sexual harassment and gender-based discrimination in the workplace, as with other contexts.<sup>36</sup> Moreover, as the next section will demonstrate, this element of sexual harassment law has further provided an entry point for gender-based myths and stereotypes to influence the legal analysis. The reliance on these myths and stereotypes is not unlike similar problems that have been widely documented in the context of sexual offences and gender-based violence in the criminal justice system.<sup>37</sup>

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33. *Basic*, *supra* note 17 at para 102.

34. 2020 BCHRT 12 at para 175.

35. See *e.g.* Hastie, “Workplace Sexual Harassment”, *supra* note 5; Hastie, “Unwelcome Requirement”, *supra* note 5; Matulewicz, “Institutionalized Sexual Harassment”, *supra* note 21 at 403 citing Marlene Kadar, “Sexual Harassment: Where We Stand; Research and Policy” (1983) 3 Windsor YB Access Just 358; Aggarwal & Gupta, *supra* note 7 at 123-28; Gallivan, *supra* note 21 at 36; Fudge, *supra* note 21 at 244; Faraday, *supra* note 21 at 50; Sheppard, *supra* note 21 at 83; Kaitlyn Matulewicz, “Law’s Gendered Subtext: The Gender Order of Restaurant Work and Making Sexual Harassment Normal” (2016) 24 Fem Legal Stud 127.

36. See *e.g.* Hastie, “Tribunal Decisions”, *supra* note 25 at 299.

37. See Gotell, “Rethinking Affirmative Consent”, *supra* note 8; Craig, *Putting Trials on Trial*, *supra* note 8; Randall, *supra* note 8. Myths regarding victim behaviour and women’s sexual availability have been used to undermine the credibility of female complainants of sexual assault in the criminal justice system.

## B. ESTABLISHING “UNWELCOME” CONDUCT IN SEXUAL HARASSMENT COMPLAINTS: THE INTRODUCTION OF GENDER-BASED STEREOTYPES AND IMPLICATION OF CONSENT

The issues examined in this article are grounded by an in-depth case law analysis of sexual harassment complaints under human rights law.<sup>38</sup> This study reviewed 191 identified substantive decisions on the merits for workplace sexual harassment at the British Columbia and Ontario Human Rights Tribunals from 2000 to 2018.<sup>39</sup> In this study, I found that numerous cases raised concerns about the introduction of gender-based myths and stereotypes, particularly in relation to understandings of consent and establishing that the impugned conduct was “unwelcome.” This section discusses three ways in which the “unwelcome” element invites scrutiny of a complainant’s lack of protest or objection in assessing the complaint:<sup>40</sup> first, where a lack of protest or objection is relied upon directly in determining that the conduct was not reasonably understood as “unwelcome”; second, where a lack of protest or objection is used to undermine the complainant’s credibility or version of events; and, third, where a lack of protest or objection is suggested to function akin to implied consent in settings where the alleged conduct is normalized in the workplace.

In some cases, a lack of protest or objection was directly considered as a factor in assessing whether it was reasonable for impugned conduct to be understood as “unwelcome”. For example, in *Gibbons v. Sports Medicine Inc.*,<sup>41</sup> while finding that certain physical conduct constituted sexual harassment,<sup>42</sup> the Tribunal denied other aspects of the application. In particular, in assessing conduct that included a statement that commented on the complainant’s body and invited her to “a boat ride without her bikini top,” the adjudicator found that “in the absence of any protest by [the complainant], they did not in my view constitute sexual

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38. Hastie, “Workplace Sexual Harassment”, *supra* note 5. As a form of discrimination, human rights law and human rights tribunals are the central legal arena involved in adjudicating complaints of sexual harassment. Complaints of sexual harassment may be brought before a civil court where they relate to an independent legal claim subject to that jurisdiction, such as wrongful or constructive dismissal. Cases involving physical misconduct may also give way to criminal charges.

39. Hastie, “Workplace Sexual Harassment”, *supra* note 5 at 10.

40. See also *ibid* at 25-26. The “unwelcome” element also functions in ways that create obstacles for a complainant to establish her case and which raise doubts concerning her credibility based on related gender myths beyond the issue of protest or objection. These include issues related to normalizing sexual behaviour in the workplace, and participation by a complainant in prior or related behaviour in the workplace.

41. 2003 HRTO 26.

42. *Ibid* at para 32.

harassment.”<sup>43</sup> Here, the lack of express objection or active protest to conduct appeared instrumental in finding that such conduct was not sexual harassment. Similarly, in *Wollstonecroft v. Crellin et al.*,<sup>44</sup> the fact that the complainant did not object to the respondent’s discussion of sexual topics with her, and did not bring allegations until months later, was specifically mentioned by the adjudicator,<sup>45</sup> although the complaint was ultimately found justified.

In *Anderson v. Law Help Ltd*, the adjudicator appeared to rely on active protest as the pivotal point at which the respondent knew, or ought to have known, that his conduct was “unwelcome”.<sup>46</sup> That case revolved substantially around a series of text messages. The applicant had not been “completely blunt in rejecting his sexual advances” in the beginning of the text exchanges.<sup>47</sup> However, when she later attempted to end their exchange and “clearly explained why she was not interested in having a relationship with him,”<sup>48</sup> the adjudicator found that, “[a]t that point, a reasonable person would have known that any further sexual advances would be unwelcome.”<sup>49</sup> This suggests an interpretation of the “unwelcome” element that relies on active protest or objection.

These cases illustrate how a lack of active protest or objection may negatively influence the assessment of whether the conduct in question was understood to be “unwelcome”. This, in turn, impacts the complainant’s ability to establish the prima facie complaint, despite legal principles which suggest that active protest or objection is not required to meet this element of a complaint. Moreover, this focuses the inquiry on the complainant’s own behaviour in assessing the complaint. Though these analyses are not framed as whether or not the complainant consented to the conduct, requiring the complainant to establish the impugned conduct as “unwelcome,” and relying on evidence of active protest or objection in order to do so, effectively responsabilizes the complainant to clearly communicate non-consent. In other words, the “unwelcome” element, where it relies on some indicia of protest or objection, presumes, as a default, that such conduct would be “welcomed” and consented to, requiring the complainant to bear the burden of establishing a departure from this presumption or default position.

A lack of protest or objection may also function to undermine a complainant’s credibility. This may be especially so where a complainant’s character or

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43. *Ibid* at para 33.

44. 2000 BCHRT 37.

45. *Ibid* at para 84.

46. 2016 HRTO 1683.

47. *Ibid* at para 77.

48. *Ibid*.

49. *Ibid*.

narrative does not “fit” with assumptions about victim behaviour and the wider gender-based stereotypes to which they attach. For example, in *Han v. Gwak and Nammi Immigration*,<sup>50</sup> while the adjudicator found that the individual respondent made comments of a sexual nature, it was also determined that the complainant was “a person with strong opinions, who is entirely capable of making her thoughts and feelings known,” and therefore that it was “unlikely that she would not have spoken to [the respondent] had his comments made her uncomfortable.”<sup>51</sup> The adjudicator further surmised that it was therefore unlikely that the complainant had found the comments to be “unwelcome”.<sup>52</sup> In this case, the complainant’s character may have influenced how her lack of protest or objection was interpreted and understood. Similarly, in *Woods v. Fluid Creations*, the tribunal member noted perceived inconsistencies in the complainant’s response to the alleged conduct, which negatively impacted her credibility.<sup>53</sup> Specifically, the tribunal member remarked that “the complainant’s assertion that she did not protest because she was a probationary employee does not explain why she said nothing to any co-worker. This alleged meekness seems inconsistent with the statement in her affidavit that she ‘spun around to face [Mr. McPhee] about to freak out on him and tell him off.’”<sup>54</sup>

As *Han* and *Woods* illustrate, the search for, and reliance on, explanations for a lack of protest or objection that fit assumptions being drawn about the complainant’s personality or character, or about victim behaviour, may provide another entry point for the use of gender-based myths or stereotypes to influence the adjudication of the “unwelcome” requirement. This is particularly problematic given the many reasons why individuals are known not to complain or speak out when faced with sexual harassment, such as a fear for job security or of not being believed.<sup>55</sup> These examples also point to the potential for implicit bias and assumption-based reasoning to influence the analysis and outcome of the complaint. These cases further entrench a link between the “unwelcome” element and a presumption of consent. They illustrate how an adjudicator’s own perspective or expectations about how an individual would or should react in similar circumstances may influence an assessment about whether and how that individual would communicate non-consent in particular settings. This

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50. 2009 BCHRT 17.

51. *Ibid* at para 35.

52. *Ibid* at para 70.

53. 2012 BCHRT 110.

54. *Ibid* at para 50; Hastie, “Workplace Sexual Harassment”, *supra* note 5 at 77.

55. See e.g. Sheryl L Johnson, *Sexual Harassment in Canada: A Guide for Understanding and Prevention* (LexisNexis Canada, 2017) at 195.

may similarly operate to create a presumption of consent absent a compelling explanation and evidence to counter it.

A lack of protest or objection may also influence the understanding of whether the impugned conduct was “unwelcome” where a work environment is sexualized or particular conduct within it is normalized. In *Dix v. The Twenty Theatre Company*,<sup>56</sup> the application included numerous incidents of alleged harassment. The Tribunal dismissed part of the application, which dealt with allegations of hugging and kissing in the workplace. The applicant alleged that two board members solicited hugs and kisses on the cheek from her.<sup>57</sup> The adjudicator found that, in the context of this workplace, such behaviour was not uncommon, and as such, it was not reasonable for the respondents to know that their conduct was “unwelcome” absent express objection or active protest.<sup>58</sup> In this analysis, the adjudicator acknowledged that there are “many work environments in the corporate world where hugging and cheek kissing are not the norm.”<sup>59</sup> However, the adjudicator took the complainant’s particular work environment as a neutral backdrop, which suggests that the applicant would have had to actively protest this conduct in order for it to be understood as “unwelcome”. In that case, the applicant also raised an argument that an affirmative consent standard ought to be applied, which was rejected.<sup>60</sup>

Similar to *Dix*, the complaint in *Sleightholm v. Metrin and another (No. 3)*<sup>61</sup> revolved around a workplace in which certain conduct was normalized. In that case, part of the complaint related to the sharing of a dream in which the complainant was in a bath. While the adjudicator acknowledged that “[t]he sharing of the ‘bath dream’ might easily be construed as amounting to sexual harassment” in another context, the fact that “dreams and the interpretation of them were frequently the subject of conversation” in this workplace, and that the complainant was “the instigator of many of these conversations,” changed things.<sup>62</sup> In addition, the complainant also described conduct that included hugging and blowing kisses. However, the adjudicator found that this did not constitute a breach of the *Code*, and that such behaviour “was normal for the office they were in and was not protested by her or any other employee.”<sup>63</sup> While the adjudicator

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56. 2017 HRTO 394 [*Dix*].

57. *Ibid* at para 26.

58. See *ibid* at paras 32-36.

59. *Ibid* at para 33.

60. *Ibid* at para 35.

61. 2013 BCHRT 75.

62. *Ibid* at para 56.

63. *Ibid* at para 73.

took issue with the complainant's credibility for numerous other reasons, these passages suggest some reliance on indicia of protest or objection in assessing whether the conduct in question ought to have reasonably been understood as "unwelcome" in light of the particular organizational culture and behaviour. Like *Dix*, the workplace environment was taken as neutral backdrop, despite a recognition that such behaviour might otherwise constitute sexual harassment. As a result, both *Dix* and *Sleightholm* suggest that, where a respondent is able to lead evidence that the conduct complained of is "normal" in the particular work environment, there may be greater reliance on indicia of protest or objection in order to ground a finding that the conduct was "unwelcome".

The "unwelcome" element of sexual harassment law creates potential for many problematic interpretations associated with consent and credibility to influence the arguments, analysis, and outcome of a complaint. Most directly, the "unwelcome" element invites decision-makers to scrutinize a lack of active protest or clear objection to the impugned conduct in assessing whether the conduct was, or ought reasonably to have been, understood as "unwelcome". This effectively places the burden of establishing a lack of consent with the complainant, and indirectly suggests that active protest or objection may, in fact, be required in order to establish a lack of consent in some circumstances. Indirectly, the "unwelcome" element also invites scrutiny of a complainant's credibility, calling into question whether the impugned conduct occurred, and if it did, whether it was, in effect, consented to. For complainants who do not conform to perceived expectations of victim behaviour or gender-based stereotypes, the "unwelcome" element may create additional obstacles to establishing their complaint. Finally, the "unwelcome" element can function to create a presumption of consent in workplaces where particular conduct is normalized. In such cases, the "unwelcome" element may require a complainant to actively communicate non-consent, even where that conduct would be understood as presumptively "unwelcome" in another context.<sup>64</sup> The emphasis placed on a lack of active protest or objection in establishing the "unwelcome" element creates a context in which complainants bear the burden of both communicating non-consent and marshalling evidence to that effect. Where they are unable to do so, they risk an interpretation that the impugned conduct will not reasonably be understood as "unwelcome", that their credibility will be called into question, and that their complaint will possibly be dismissed.

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64. This has been particularly critiqued in relation to work in the restaurant industry. See Matulewicz, "Institutionalized Sexual Harassment", *supra* note 21.



## II. CONSENT AND SEXUAL CONDUCT IN CRIMINAL AND TORT LAW

Both criminal and tort law have incorporated elements of affirmative consent for legal claims and offences concerning sexual misconduct. The shift towards affirmative consent in each of these legal arenas has been grounded by concerns about reliance on gender-based myths and stereotypes, and on the impropriety of requiring a complainant to prove a lack of consent in certain circumstances. Examining the shifts towards affirmative consent in criminal and tort law provides important points of comparison in arguing for a similar shift for sexual harassment complaints under human rights law. In particular, I focus on how similar substantive problems support a structural shift in terms of *who* bears the burden to establish (non-)consent. Nonetheless, there are two obvious differences in the relevant laws under criminal and tort law, as opposed to human rights law, relating to the nature of the impugned conduct, and to the requisite element of intent.

First, unlike human rights complaints, sexual offences under criminal law and the tort of battery are each limited to physical misconduct. Human rights complaints, including sexual harassment, encompass a wider range of misconduct, both in nature and degree of severity. However, this broader ambit does not detract from the purpose of the comparison made in this article, which is about *who* bears the burden of (dis)proving consent, and *why* that matters in light of identified concerns regarding reliance on gender-based myths and stereotypes in the assessment of legal complaints in each of these arenas.

Second, while intent features prominently in the criminal law governing sexual offences, and in relation to the tort of battery, it is not a required element for establishing a complaint in human rights law.<sup>65</sup> However, this operates in a manner not dissimilar to the way in which intent is understood in tort law. Under intentional torts, like battery, a person must intend to bring about the material consequences of their conduct, but this does not necessarily require an intent to harm, or in other words, a malicious motive. Incidents of discrimination, particularly of sexual harassment, may be similarly understood in that the impugned conduct is a product of the respondent's conscious mind, even if they do not understand it as discriminatory or harmful conduct. Further, as with the differences regarding impugned conduct, while the differences in relation to intent speak to the different purposes and functions of these areas of law,

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65. See e.g. BC Code, *supra* note 18, s 2.

it does not impact significantly on the purpose of the comparison being made in this article.

### A. AFFIRMATIVE CONSENT UNDER CRIMINAL LAW

Sexual offences in criminal law shifted to an affirmative consent standard in the mid-1990s.<sup>66</sup> Widely documented issues regarding the propagation of rape myths and gender-based stereotypes in sexual assault trials were a motivating factor for this change. These myths included the “hue and cry” stereotype (the notion that “real victims” will fight back or immediately cry for help); the “real rape” stereotype (sexual assaults are committed by a stranger on an unsuspecting victim); and the “party girl” stereotype (that “bad girls” are more likely to consent).<sup>67</sup> A number of changes to the criminal law have aimed to negate reliance on such myths and stereotypes in sexual assault trials, including the removal of the “recent complaint” requirement (which had allowed for an adverse inference on credibility to be drawn where a complainant did not disclose the assault at the first reasonable opportunity following the assault);<sup>68</sup> the introduction of rape shield provisions (which restricted the ability to examine a complainant about their past sexual history in a sexual assault trial);<sup>69</sup> the pronouncement in *R v. Mills* that the accused’s right to make full answer and defence does not permit counsel to use myths and stereotypes to “distort the truth-seeking goal of the trial process”;<sup>70</sup> and the shift to affirmative consent.<sup>71</sup>

The essential elements of establishing a sexual offence, such as sexual assault, under the *Criminal Code* requires the Crown to establish that the complainant did not consent.<sup>72</sup> The adoption of affirmative consent under criminal law does

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66. For a detailed review of relevant changes to criminal law as it relates to sexual assault, see Janine Benedet, “Judicial Misconduct in the Sexual Assault Trial” (2019) 52 UBC L Rev 1 at 7-18. As Benedet explains, these included changes to evidentiary rules in the 1980s, and subsequent changes to consent law in the 1990s.

67. See Craig, *Putting Trials on Trial*, *supra* note 8 at 37; Ehrlich, *supra* note 8 at 391, citing Susan Estrich, *Real Rape* (Harvard University Press, 1987); Elaine Craig, “The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence” (2011) 36 Queen’s LJ 551 [Craig, “Relevance of Delayed”]. See also Randall, “Ideal Victims”, *supra* note 8 at 398; Gotell, “Rethinking Affirmative Consent”, *supra* note 8; Rakhi Ruparelia, “Does No ‘No’ Mean Reasonable Doubt? Assessing the Impact of *Ewanchuk* on Determinations of Consent” (2006) 25 Can Woman Studies 167.

68. *Criminal Code*, RSC 1985, c C-46, s 275 [*Criminal Code*].

69. *Ibid*, ss 276(1)(a)-276(1)(b).

70. [1999] 3 SCR 668 at para 90.

71. *Criminal Code*, *supra* note 68, s 273.1(1).

72. *Ibid*, s 271; *R v Ewanchuk*, [1999] 1 SCR 330 at para 23 [*Ewanchuk*].

not operate to shift the burden of proof to an accused.<sup>73</sup> Like any criminal offence, sexual offences are composed of both an *actus reus* and a *mens rea*, and the Crown must prove each beyond a reasonable doubt. For the purposes of *actus reus*, “consent” in cases of sexual offences means “that the complainant in her mind wanted the sexual touching to take place.”<sup>74</sup> The focus is solely on what the complainant believed in her mind at the time. This creates space in which a complainant’s credibility and version of events can continue to be challenged, and in which gender-based myths and stereotypes may be introduced and relied upon in order to do so.

For the purposes of *mens rea*, and whether the accused raises the defence of honest but mistaken belief in communicated consent, “consent” means that “the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused.”<sup>75</sup> The focus here shifts to what the accused believed at the time the incident occurred, and whether the accused honestly believed that the complainant *communicated* consent—*i.e.*, that the “complainant effectively said ‘yes’ through her words and/or actions.”<sup>76</sup> This formulation gives way to the defence of honest but mistaken belief, where evidence of affirmative consent is required for the accused to establish the defence.

The *Criminal Code* adopted and first codified affirmative consent standards in 1992 when Parliament introduced Bill C-49,<sup>77</sup> which defined and limited consent in sections 273.1(1) to 273.1(3), requiring that affirmative consent be given before engaging in sexual activity. Affirmative consent requires active and continuing communication of consent.<sup>78</sup> Silence and passivity do not constitute consent; neither does ambiguous conduct.<sup>79</sup> Contemporaneous, affirmative consent must be given for each and every sexual act regardless of the relationship.<sup>80</sup>

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73. The state is responsible for proving each element of a criminal offence. This burden lies with the Crown and never shifts to the accused. This is because every individual who is accused of a crime is entitled to be presumed innocent until proven guilty as guaranteed by the *Charter*. See *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (describing a presumption that can only be displaced upon proof of the constituent elements beyond a reasonable doubt).

74. *Ewanchuk*, *supra* note 72 at para 48.

75. *Ibid* at para 49.

76. *Ibid* at para 47.

77. *Criminal Code*, *supra* note 68, s 265(4).

78. *Ewanchuk*, *supra* note 72 at paras 49, 51; *R v Barton*, 2019 SCC 33 at para 90 [*Barton*]; *R v Goldfinch*, 2019 SCC 38 at para 44 [*Goldfinch*]; *R v JA*, 2011 SCC 28 at paras 34, 47 [*JA*]; *R v Hutchinson*, 2014 SCC 19 at para 27.

79. *Ewanchuk*, *supra* note 72 at para 51.

80. *Goldfinch*, *supra* note 78 at para 44; *JA*, *supra* note 78 at para 34.

Nonetheless, as mentioned above, the Crown must still prove beyond a reasonable doubt that the complainant did not consent to the impugned conduct. While this does not require establishing active protest or objection, the complainant's credibility and state of mind may continue to play a role in assessing this element of the offence, providing space in which gender-based myths and stereotypes may continue to be introduced and relied upon.

An accused may raise the defence of honest but mistaken belief in communicated consent. This is a mistake of fact defence. A mistake of fact defence “operates where the accused mistakenly perceived facts that negate, or raise a reasonable doubt about, the fault element of the offence.”<sup>81</sup> In order for the defence of mistaken belief to apply, the evidence must show that the accused “believed the complainant communicated consent to engage in the sexual activity in question.”<sup>82</sup> In other words, the defendant must establish that he honestly believed that the complainant *communicated* consent, that she “said ‘yes’ through her words and/or actions.”<sup>83</sup>

In order to avail himself of this defence, an accused must also show that he took “reasonable steps” to ascertain consent (section 273.2(b)).<sup>84</sup> The reasonable steps requirement has both objective and subjective dimensions: The accused must take steps that are objectively reasonable to ascertain the consent of the complainant, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time.<sup>85</sup> The purpose of the “reasonable steps” requirement was recently set out in *Barton*:

The purpose of the reasonable steps requirement has been expressed in different ways. The authors of *Manning, Mewett & Sankoff: Criminal Law* state that s. 273.2(b) of the *Code* seeks “to protect the security of the person and equality of women who comprise the huge majority of sexual assault victims by ensuring as much as possible that there is clarity on the part of both participants to a sexual act” (M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 1094 (footnote omitted)). Abella J.A. (as she then was) wrote in *Cornejo* that the reasonable steps requirement “replaces the assumptions traditionally — and inappropriately — associated with passivity and silence” (para. 21). Professor Elizabeth Sheehy puts it this way: “Bill C-49’s ‘reasonable steps’ requirement was intended to criminalize sexual assaults committed by men who claim mistake without any effort to ascertain the woman’s consent or whose belief in consent relies on self-serving misogynist beliefs” (p. 492). The common thread running through each of these descriptions is

81. *Barton*, *supra* note 78 at para 95, citing *Pappajohn v the Queen*, [1980] 2 SCR 120 at 148.

82. *Ewanchuk*, *supra* note 72 at para 46 [emphasis in original].

83. *Ibid* at para 47.

84. *Criminal Code*, *supra* note 68.

85. *Barton*, *supra* note 78 at para 104.

this: the reasonable steps requirement rejects the outmoded idea that women can be taken to be consenting unless they say “no”.<sup>86</sup>

In *Barton*, Justice Moldaver noted that any steps taken that are “based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps.”<sup>87</sup> The reasonable steps requirement buttresses the shift to affirmative consent by explicitly removing the ability for an accused to rely on silence, passivity, or perhaps even “mixed signals,” as well as gender-based stereotypes, in order to justify their conduct. This requirement thus clearly and finitely rejects any continued reliance on express rejection or communications of non-consent as relevant, let alone pivotal, in determining consent in the context of sexual assault. This is an important mechanism to better ensure that affirmative consent is effective as a legal principle.

Further buttressing the shift to affirmative consent is the principle that the defence of mistaken belief will not apply where the mistake is one of law, including in relation to “what counts as consent.”<sup>88</sup> Mistakes of law include: that unless a woman says “no,” she has implicitly given her consent (*i.e.*, “implied consent”);<sup>89</sup> that because a woman consented once, she will always consent again (*i.e.*, “broad consent”);<sup>90</sup> and that because a woman is sexually active, she is more likely to have consented to the sexual activity in question (*i.e.*, “propensity to consent”).<sup>91</sup>

The legal principles surrounding affirmative consent in sexual assault law—including that mistaken belief can only form a valid defence where the accused took reasonable steps to ascertain consent, and that it does not apply in cases of mistake of law (including what counts as consent)—evidence a clear rejection of reliance on gender-based myths and stereotypes, as well as an acknowledgment of the ways in which these myths and stereotypes have previously arisen and have been used problematically in relation to sexual assault trials and the issue of consent. As noted above, however, the requirement under criminal law for the Crown to prove that the complainant did not consent as part of its *prima facie* case continues to facilitate the introduction of gender-based myths and stereotypes.

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86. *Ibid* at para 105.

87. *Ibid* at para 107.

88. *Ibid* at para 96.

89. *Ibid* at para 98.

90. *JA*, *supra* note 78.

91. *R v Seaboyer*, [1991] 2 SCR 577.

## B. CONSENT AS A DEFENCE IN TORT LAW

In *Scalera*, the Supreme Court of Canada considered the nature of the relationship between sexual battery and consent in the context of an insurance indemnification and duty to defend dispute.<sup>92</sup> At the time of this decision, it was well established that the intentional tort of battery treated consent as a defence that it was incumbent on a defendant to establish in order to alleviate themselves of liability. In *Scalera*, the arguments put forth required the Court to determine whether sexual battery was distinct in ways that justified a departure from the general treatment of consent in intentional torts.<sup>93</sup> The majority and dissenting opinions disagreed on the issue of consent, and specifically on whether it should continue to operate as a defence in the context of sexual battery, or whether it should form part of the prima facie case that the plaintiff has the burden to prove.<sup>94</sup> In other words, the question before the Supreme Court was whether to treat sexual battery distinctly from battery, and whether, in turn, to depart from the established principle that consent is a defence for the defendant in an intentional tort claim to establish.

The majority concluded that there was no principled reason to depart from the ordinary legal principles governing battery and the defence of consent. The majority relied on four arguments in this respect: first, maintaining consent as a defence makes sense given the relative positions of the parties;<sup>95</sup> second, the underlying objectives and purposes of tort law, and of battery, are best served by maintaining consent as a defence;<sup>96</sup> third, the requirement for contact to be “harmful or offensive” does not equate with it being prima facie non-consensual (and thus, part of the plaintiff’s case to prove);<sup>97</sup> and, fourth, shifting the burden of proof to the plaintiff for sexual battery would give rise to potential issues around “victim-blaming” known to exist in criminal law.<sup>98</sup>

Writing for the majority, Justice McLachlin drew on well-established principles governing the intentional tort of battery to ground the conclusion that consent is a defence to the intentional tort of sexual battery, and that the plaintiff need only prove direct and intentional physical contact or interference

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92. *Scalera*, *supra* note 9. *Scalera* remains the sole leading authority on this issue.

93. *Ibid* at paras 1-36, 53, 95-109.

94. *Ibid* at paras 1-36, 103-109.

95. *Ibid* at para 13.

96. *Ibid* at paras 8-11.

97. *Ibid* at paras 17-26.

98. *Ibid* at paras 28-34.

with her person to make out the *prima facie* claim.<sup>99</sup> In the majority's view, the tort of battery "is based on protecting individuals' right to personal autonomy."<sup>100</sup> The tort of battery "starts from the presumption that apart from the usual and inevitable contacts of ordinary life, each person is entitled not to be touched.... The sexual touching itself, absent the defendant showing lawful excuse, constitutes the violation...."<sup>101</sup> As such, a direct interference with an individual's physical integrity, whether of a sexual nature or otherwise, constitutes the *prima facie* tort and, as the majority notes, "the onus shifts to the person who is alleged to have violated the right to justify the intrusion."<sup>102</sup>

While part of the majority's reasoning relies on the direct and immediate nature of the conduct in relation to the injury,<sup>103</sup> the reasons also focus on the relative positions between the parties. As Justice McLachlin notes, "the defendant is likely to know how and why the interference occurred....[I]f the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him."<sup>104</sup> These reasons are particularly compelling in considering who should bear the burden of establishing consent. This approach focuses attention on the defendant to justify their conduct and explain the reasons underlying their behaviour. Notably, this aligns with the requirements and purpose of the honest but mistaken belief defence in criminal law.

While the dissenting opinion would have imported a fault-based requirement, such that the plaintiff would be required to establish that the defendant knew or ought to have known that she was not consenting to the conduct, the majority rejects this, noting that such an approach would "subordinate the plaintiff's right to protection from invasions of her physical integrity to the defendant's freedom to act."<sup>105</sup> In other words, making the plaintiff prove fault—in this case, a lack of consent—privileges and prioritizes the defendant's "freedom to act" over the plaintiff's right to physical integrity. In areas of law, like torts and human rights, where the central focus is on remedying wrongs and harms caused to persons, the interests of the person who has experienced the harm or wrong (the plaintiff under tort law, or complainant under human rights law) should be prioritized.

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99. *Ibid* at para 7.

100. *Ibid* at para 10.

101. *Ibid* at para 22.

102. *Ibid* at para 10.

103. *Ibid* at para 11.

104. *Ibid* at para 13, citing Ruth Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987) 19 *Ottawa L Rev* 533 at 563.

105. *Scalera, supra* note 9 at para 10, citing Sullivan, *supra* note 104 at 546.

A fault-based approach that requires the plaintiff to establish a lack of consent would create the opposite situation and thus depart in unjustifiable ways from the underlying objectives and functions of the law. Rather, where the plaintiff can establish the interference, and therefore the violation of their autonomy “[t]he law may then fairly call upon the person thus implicated to explain, if he can.”<sup>106</sup> Similar justifications exist in human rights law, given its core purpose of remedying discrimination experienced by individuals.

Turning to the issue of consent and gender-based stereotyping, the majority summarizes the main argument against treating consent as a defence in respect of sexual battery:

The proposition that the law should require a plaintiff in an action for sexual battery to prove that she did not consent, is supported, it is suggested, by a requirement that the contact involved in battery must be harmful or offensive. The argument may be summarized as follows. The plaintiff must prove all the essential elements of the tort of battery. One of these is that the contact complained of was inherently harmful or offensive on an objective standard. Consensual sexual contact is neither harmful nor offensive. Therefore the plaintiff, in order to make out her case, must prove that she did not consent or that a reasonable person in the defendant’s position would not have thought she consented.<sup>107</sup>

This argument relies on the “non-trivial” threshold of contact that constitutes battery. In other words, battery generally provides a legal claim for “non-trivial” contact, which this argument suggests should be equated with “harmful or offensive” contact. While the majority agrees that contact meeting the threshold for the tort of battery must be “harmful or offensive,” this does not equate with “non-consensual.”<sup>108</sup> The assertion that battery requires “harmful or offensive” contact “reflects the needs to exclude from battery the casual contacts inevitable in ordinary life”;<sup>109</sup> it does not seek to communicate a requirement that “the contact was physically or psychologically injurious or morally offensive.”<sup>110</sup>

The majority reminds that “[i]f one accepts that the foundation of the tort of battery is a violation of personal autonomy, it follows that all contact outside the exceptional category of contact that is generally accepted or expected in the course of ordinary life, is *prima facie* offensive.”<sup>111</sup> From that, then, the question

106. *Scalera*, *supra* note 9 at para 15.

107. *Ibid* at para 17. A version of this argument is also relied upon in the dissenting opinion. See *ibid* at para 53.

108. *Ibid* at para 18.

109. *Ibid* at para 22.

110. *Ibid*.

111. *Ibid* at para 18.



becomes whether sexual conduct comes within the “exceptional category” of generally accepted or expected conduct. The majority finds that clearly it does not.<sup>112</sup> As the majority concludes:

The sort of conduct the cases envision is the inevitable contact that goes with ordinary human activity, like brushing someone’s hand in the course of exchanging a gift, a gratuitous handshake, or being jostled in a crowd. Sexual contact does not fall into this category. It is not the casual, accidental or inevitable consequence of general human activity and interaction.<sup>113</sup>

The majority opinion in *Scalera* explicitly addressed issues regarding victim-blaming and the inappropriate shift in inquiry that would result from requiring a plaintiff to prove a lack of consent to sexual battery.<sup>114</sup> It further drew on established lessons from criminal law in this regard. In particular, the majority notes, quoting Bruce Feldthusen, that “enquiries into alleged consent have allowed the focus of the criminal trial to shift from the actions of the defendant to the character of the complainant. *The same potential exists in tort law.*”<sup>115</sup> The majority articulates what this would look like in the context of requiring a plaintiff to prove a lack of consent in the prima facie claim for sexual battery:

[b]y requiring the plaintiff to prove more than the traditional battery claim requires, we inappropriately shift the focus of the trial from the defendant’s behaviour to the plaintiff’s character. *Requiring the plaintiff to prove that a reasonable person in the position of the defendant would have known that she was not consenting requires her to justify her actions. In practical terms, she must prove that she made it clear through her conduct and words that she did not consent to the sexual contact.* Her conduct, not the defendant’s, becomes the primary focus from the outset. If she cannot prove these things, she will be non-suited and the defendant need never give his side of the story.<sup>116</sup>

This is significant as the very same issue and result can, and does, appear in sexual harassment complaints, as demonstrated earlier. The majority further buttresses this conclusion through express reference to Parliament’s views in amending criminal law to adopt an affirmative consent model for sexual offences, which the

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112. *Ibid* at paras 18-22.

113. *Ibid* at para 21.

114. *Ibid* at paras 28-34.

115. *Ibid* at para 28 [emphasis in original], citing Bruce Feldthusen, “The Canadian Experiment with the Civil Action for Sexual Battery” in Nicholas J Mullany, ed, *Torts in the Nineties* (LBC Information Services, 1997) 274 at 282.

116. *Scalera*, *supra* note 9 at para 30 [emphasis added].

majority states as a move to “counteract the historic tendency of criminal trials for sexual assault to focus unduly on the behaviour of the complainant.”<sup>117</sup>

As Part III takes up in greater detail, the analysis and conclusion that consent is properly viewed as a defence in sexual battery claims under tort law, coupled with the shift towards an affirmative consent standard in criminal law, provide a firm foundation to argue for a similar shift in sexual harassment law, one which would be adequately effected by removing the “unwelcome” element.

### III. SHIFTING THE BURDEN OF (DIS)PROVING “UNWELCOME” CONDUCT IN SEXUAL HARASSMENT LAW

As seen in the criminal law and tort law contexts, where a complainant bears the burden of proving a lack of consent, this inevitably shifts the focus of the inquiry towards her character and conduct, rather than focusing on the defendant’s conduct and its impact on the complainant. Part I of this article illustrated how the “unwelcome” element of the test for sexual harassment may operate to effectively require a complainant to establish a lack of consent, and how that has manifested in ways which scrutinize the complainant’s own character and behaviour rather than focusing on the respondent’s conduct. The “unwelcome” element, both in principle and in practice, produces problematic consequences for complainants of sexual harassment under human rights law. Specifically, the “unwelcome” element allows for the introduction of gender-based myths and stereotypes that may negatively influence the analysis and outcome of the complaint. These stereotypes arise where there is a presumption of consent, where a complainant is required to disprove her consent, or where her response is less than a clear and unequivocal rejection of sexual advances, and they may be used to cast suspicion on the complainant’s credibility.

The shift towards affirmative consent in criminal law and the affirmation of consent as a defence to sexual battery in tort law were each grounded in response to the problematic consequences associated with gender-based stereotyping in relation to instances of sexual misconduct. The examinations of criminal and tort law’s approaches to consent provide support for rejecting the “unwelcome” element in sexual harassment complaints. The comparison functions to illustrate, first, that similar problems concerning gender-based stereotyping arise when the burden of disproving consent rests with a complainant in legal complaints

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117. *Ibid* at para 32.

involving sexual misconduct across an array of bodies of law and, second, that consistent approaches to the burden for establishing consent across these legal arenas can similarly work to ameliorate those problems.

The boundaries created by strict conduct and intent elements in both criminal and tort law supported the courts' and legislatures' legal approaches to consent in those arenas. Nonetheless, while criminal and tort law have narrower boundaries in defining legal claims and offences, these are inherently connected to their purposes and functions within the larger legal system. Human rights law similarly creates appropriate boundaries around what constitutes discrimination in a manner consistent with advancing its purpose and function. As such, it can readily provide sufficient boundaries around sexual harassment as a form of discrimination without continued reliance on the "unwelcome" element in establishing the prima facie complaint.

To begin, it is important to explain that the test for sexual harassment deviates from the general test for discrimination under human rights law. In a discrimination complaint, a complainant must generally establish: (1) that they have a protected characteristic (such as, for the purposes of a sexual harassment complaint: sex, sexual orientation, gender identity or expression, marital or family status);<sup>118</sup> (2) that they experienced an adverse impact or treatment; and (3) that their protected characteristic was a factor in the adverse impact or treatment.<sup>119</sup> Unlike the test for sexual harassment, the general test for discrimination does not require a complainant to establish that the adverse impact or treatment they experienced was "unwelcome," nor is consent raised as an issue in other indirect ways in the prima facie complaint. Rather, a respondent may be excused from liability where they can establish justification for the impugned conduct, such as where a job criterion is a "bona fide occupational requirement" or where the respondent can establish that they accommodated the complainant to the point of undue hardship.<sup>120</sup>

These existing legal principles governing discrimination complaints, coupled with existing constraints on defining relevant conduct in sexual harassment

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118. For a list of relevant protected grounds in the employment context, see *e.g.* *BC Code*, *supra* note 18, s 13; *Ontario Code*, *supra* note 18, ss 5(1)-5(2), 7(2).

119. *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*].

120. See *e.g. ibid* at para 49; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 37 [*Bombardier*].

complaints,<sup>121</sup> are sufficient to respond to sexual harassment complaints without a continued reliance on the additional burden of establishing that the impugned conduct (or “adverse treatment”) was “unwelcome”. In a case of sexual harassment, the protected characteristic factor does not raise unique concerns. Similarly, establishing a nexus between the protected characteristic and the adverse treatment is unlikely, in the context of sexual harassment, to create distinct issues, given the sexual nature of the misconduct typically at issue.<sup>122</sup> The crux of the uncertainty in incorporating sexual harassment under the general test for discrimination is located within the second element, identifying what constitutes “adverse treatment.” This is where the “unwelcome” element has historically served as a boundary or threshold element. However, as human rights law and the test for discrimination have evolved significantly in the past few decades, existing principles and interpretations are sufficient to operate as a boundary or threshold without the “unwelcome” element, and in a manner that arguably better advances the underlying purposes of human rights law.

The above proposal, that sexual harassment complaints can be properly dealt with under the general test for discrimination, will inevitably raise concerns, similar to those seen in criminal and tort law, about whether such a proposal improperly expands the ambit or reach of the law, or would open the “floodgates” of litigation. I offer four responses. First, the underlying purposes of human rights law justify a broader ambit of conduct that may be captured as discrimination, making the wider scope compatible with the nature and function of human rights law. Second, existing principles setting out the threshold of what constitutes discriminatory conduct and “adverse treatment” function to create sufficient boundaries in light of the purposes of human rights law. Third, concerns about opening the floodgates of complaints and false complaints by consenting sexual partners are unwarranted, both because existing legal and procedural principles attending human rights law sufficiently guard against such claims and because such concerns, to an extent, propagate gender-based stereotypes. Finally, insofar as consent and “welcomed” conduct will remain an aspect of sexual harassment complaints, it can and should be treated as a justification, the burden of which is on the respondent to establish.

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121. As described in Part I of this article, above. See *Pardo*, *supra* note 27 (the requirement for persistent conduct in cases of verbal complaint); *Eva*, *supra* note 26 (the principle that not all negative interactions will constitute a sufficient adverse impact).

122. For a discussion of this element of sexual harassment law in British Columbia, see *Hastie*, “Tribunal Decisions”, *supra* note 25. See also *Hastie*, “Workplace Sexual Harassment”, *supra* note 5 (discussing this element in British Columbia and Ontario case law from 2000 to 2018).

Turning first to the underlying purposes of human rights law, this body of law is seen as “quasi-constitutional”<sup>123</sup> and derived from the guarantee of equality under section 15 of the *Canadian Charter of Rights and Freedoms*. Human rights codes, as statutory instruments, typically set out a variety of purposes, including to foster equality and inclusion, promote human dignity, prevent discrimination, and address inequality.<sup>124</sup> Human rights complaints, as a vehicle through which individuals may seek redress for discriminatory or unequal treatment, are focused squarely on the *impact* to the complainant,<sup>125</sup> reflecting a core remedial purpose for human rights law. Focusing on the impact to the complainant in assessing a discrimination complaint, as reflected in the requirement for a complainant to establish that they experienced adverse treatment, properly focuses the inquiry on the discriminatory treatment and its consequences for a complainant. In light of this, legal principles like the “unwelcome” element under sexual harassment law, which invite scrutiny of a complainant’s own behaviour, not only detract from, but risk undermining, this core purpose. Further, given that human rights law is centrally concerned with the impact on the complainant, it makes sense that intent to discriminate is not a requirement, only the effect of discrimination. Finally, the core remedial or compensatory focus of human rights law, as focused on the complainant, necessitates a broad ambit of misconduct to be captured, which itself reflects the reality that discrimination takes myriad and often insidious forms.

In light of the underlying core remedial purpose of human rights law, existing legal principles have developed to properly identify the boundaries of what misconduct constitutes discrimination and what falls below that threshold. These existing legal principles can, and already do, apply to sexual harassment complaints. Sexual harassment law has developed to create unique and, as I have argued, heightened standards for establishing discrimination. This heightened standard is unnecessary in light of the general legal principles that apply to discrimination complaints. Moreover, the heightened standard is harmful, given the ways in which the “unwelcome” element invites a reliance on gender-based myths and stereotypes, and improperly focuses the inquiry on the complainant’s own conduct.

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123. See *e.g.* *Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Care Centre)*, [1996] 2 SCR 3 at para 20.

124. See *e.g.* *BC Code*, *supra* note 18, s 3; *Ontario Code*, *supra* note 18, preamble.

125. See *e.g.* *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at paras 87-90, Abella J.

In general, it is a well-established principle under human rights law that not all negative remarks, comments, or conduct constitute discrimination.<sup>126</sup> Thus, human rights law already sets boundaries around conduct in a manner not dissimilar to the tort of battery's threshold for "non-trivial" contact. Second, the requirement for a complainant to establish adverse treatment or an adverse impact means that only misconduct that has a demonstrable negative impact on a complainant will constitute discrimination. This "adverse treatment" or "adverse impact" element often takes the form of a penalty, exclusion, or differential treatment.<sup>127</sup> This element of the general test for discrimination sets an important boundary and threshold around complaints of all kinds, guarding against "floodgates" concerns without inappropriately shifting the focus of the inquiry onto the complainant's own behaviour or conduct.

When assessing sexual harassment complaints, and examining the alleged discriminatory conduct, physical conduct is unlikely to generate significant ambiguity or concern, as it is more readily understood as presumptively inappropriate.<sup>128</sup> The challenge in advancing an argument to reject the "unwelcome" element is more likely to arise in assessing verbal conduct. As with other forms of verbal misconduct, there is a presumption of persistence required to meet the threshold of sexual harassment under human rights law. This means that, absent exceptional circumstances (set out in *Pardo*), for verbal misconduct or harassment to constitute discrimination (whether based on sex or other protected characteristics), it must generally be repeated behaviour.<sup>129</sup> In other words, not all negative comments will automatically constitute discrimination or sexual harassment, whether assessed under current sexual harassment law or under the general test for discrimination. Importantly, this legal principle maintains an established threshold in establishing discriminatory conduct, including verbal sexual harassment, without the need to require a complainant to also establish that such conduct was "unwelcome." This approach aligns with the core remedial purpose of human rights law and its focus on impact, while also maintaining a threshold that guards against frivolous claims and preserves administrative resources.

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126. See *e.g. Eva*, *supra* note 26 at para 80. *Eva* held that "not every negative incident that is connected to sex will be discriminatory" (citing *Hadzic v Pizza Hut Canada (cob Pizza Hut)*, 1999 BCHRT 44).

127. See *e.g. Bombardier*, *supra* note 120 at para 42.

128. See Hastie, "Tribunal Decisions", *supra* note 25.

129. See *Eva*, *supra* note 26 at para 80, citing *Pardo*, *supra* note 27 at para 12.

The greatest objection to removing the “unwelcome” element from sexual harassment complaints under human rights law is likely to come in the form of the “floodgates” concern. In one iteration or another, this objection essentially boils down to concerns that, without this element, human rights tribunals will be flooded with an unmanageable number of claims; the removal of this requirement would unreasonably enlarge the legal definition of what constitutes sexual harassment; or the removal of this element will generate an increased number of frivolous or unmeritorious claims.

The removal of the “unwelcome” element and incorporation of sexual harassment under the general test for discrimination is unlikely to unreasonably enlarge the legal definition of sexual harassment. This is because, as I have discussed above, the existing legal principles governing what misconduct constitutes discrimination (including sexual harassment), coupled with the requirement for a complainant to demonstrate adverse treatment or impact, creates sufficient boundaries around what is, and is not, discrimination under human rights law, including in respect of sexual harassment. The “unwelcome” element, which represents the key departure in sexual harassment law from general anti-discrimination law, does not create further boundaries around what constitutes sexually harassing conduct, nor on what constitutes an adverse impact. It effectively requires a complainant to establish, in addition to those elements, a lack of consent. This is an element that individuals bringing other discrimination complaints are generally not required to establish.<sup>130</sup> There is no principled reason to be concerned that the proposed shift would substantially enlarge the definition of what constitutes sexual harassment. There is also no evidentiary basis to be concerned about an unmanageable volume of complaints. Again, discrimination complaints outside of sexual harassment have well-developed processes and legal principles, and they have not produced these issues. Thus, there is no principled reason to treat sexual harassment complaints differently from other discrimination complaints—a conclusion similarly reached in *Scalera* in rejecting differential treatment of sexual battery from the general tort of battery.

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130. See Ontario *Code*, *supra* note 18. The Ontario *Code* defines “harassment” under section 10 and includes the “unwelcome” element. Under the Ontario *Code*, harassment is prohibited in a number of contexts and individuals claiming harassment in other contexts may be similarly required to establish that the impugned conduct was “unwelcome.” See *Janzen*, *supra* note 1. Racial harassment, specifically, has historically adopted this definitional element from *Janzen* and would similarly benefit from its removal. For an analysis of racial harassment claims, see *e.g.* Michael Hall, “Racial Harassment in Employment: An Assessment of the Analytical Approaches” (2006) 13 CLEJ 229.

Second, regardless of the potential volume of complaints, the “floodgates” argument often centres on the specter of frivolous and unmeritorious complaints in relation to sexual misconduct and sex equality. This is particularly troubling as such arguments implicitly propagate the very gender-based stereotypes that legal and policy reforms aim to ameliorate. As the Court in *Scalera* noted, when faced with a similar argument,

[f]ew plaintiffs to consensual sex or in situations where consent is a reasonable inference from the circumstances, are likely to sue if they are virtually certain to lose when the facts come out. Moreover, the rules of court provide sanctions for vexatious litigants. There is no need to change the law of battery to avoid vexatious claims.<sup>131</sup>

Similarly, concerns that vindictive (female) colleagues will bring frivolous or false discrimination complaints against their (male) counterparts are unwarranted. First, as with civil courts, most individuals are not likely to bring frivolous or unmeritorious claims to a human rights tribunal; they are likely to lose such claims and expend considerable resources in the process. Second, the suggestion that sexual harassment complainants are more or uniquely likely to bring frivolous or false complaints, as compared with other complainants of discrimination, implicitly relies on problematic gender-based stereotypes of women as vindictive and vengeful, not dissimilar to the historical stereotyping relied on in the criminal justice system and other contexts. Third, as with civil courts, there are well-developed procedures in place to address frivolous, vexatious, and unmeritorious complaints in the human rights system.<sup>132</sup> There

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131. *Scalera*, *supra* note 9 at para 24.

132. In direct access jurisdictions like British Columbia and Ontario, complaints may be screened at a preliminary stage, and may be dismissed on preliminary application where they have “no chance of success”: see *BC Code*, *supra* note 18, s 27(1)(c); “Human Rights Tribunal of Ontario Rules of Procedure” (2017) online (pdf): *Tribunals Ontario* <tribunalsontario.ca/documents/hrto/Practice%20Directions/HRTO%20Rules%20of%20Procedure.html> at Rule 19A. Further, direct access jurisdictions typically adopt an early intervention approach where adjudicators oversee a complaint from the early stages and may further advise on the matter: see “Applicant’s Guide to Filing an Application with the HRTO”, online (pdf): *Tribunals Ontario* <tribunalsontario.ca/documents/hrto/Guides/Applicants%20Guide.html#8e>; “Steps in the Human Rights Complaints Process”, online (pdf): *BC Human Rights Tribunal* <www.bchrt.bc.ca/complaint-process/steps.htm>. In other jurisdictions, a Human Right Commission similarly functions to screen applications at an early stage, providing opportunity for dismissal of a complaint following a preliminary investigation: see e.g. “The Complaint Process”, online (pdf): *Manitoba Human Rights Commission* <www.manitobahumanrights.ca/v1/complaints/complaints-filing-a-complaint.html>; “How the Commission Intervenes”, online (pdf): *Commission des Droits de la Personne*



is, as above, no principled reason to be concerned uniquely or differently about sexual harassment complainants so as to justify the imposition of an additional legal burden in establishing their complaint on this basis.

Overall, there is no principled basis upon which to continue to treat sexual harassment complaints distinctly from other discrimination complaints under existing human rights legislation. Moreover, to maintain a distinction will be to maintain a higher threshold for establishing sexual harassment as a form of discrimination, as compared to other forms of discrimination. Eliminating such a distinction would further advance sex equality in the workplace. As Schultz has noted, for example, the distinct legal treatment of sexual harassment has encouraged a narrow construction of workplace issues as centred on sexual misconduct, diverting attention away from broader and deeper recognition of sex inequality in the workplace.<sup>133</sup> Eliminating this distinction may, in turn, broaden the focus of sex-based discrimination issues in the workplace, and complaints under the human rights law system. This would, in turn, work towards greater sex equality in the workplace.

Finally, turning to the issue of where and how consent should be dealt with under human rights law, existing legal principles that allow a respondent to provide justification for their conduct afford a more appropriate space in which to consider this issue. If a complainant establishes a *prima facie* claim of discrimination, the onus shifts to the defendant to justify their conduct based on exemptions under relevant legislation and principles developed by the courts.<sup>134</sup> Courts have historically developed justification principles related to bona fide occupational requirements and accommodation issues in the context of employment.<sup>135</sup> Nonetheless, courts and tribunals could similarly develop principles that would allow a respondent to justify their conduct on the basis of a reasonable belief that the conduct was “welcomed” or consented to in the context of sexual harassment. For example, tribunals could adopt and adapt a test similar to the defence of honest but mistaken belief in criminal law. This would allow a respondent to justify their conduct where they took reasonable steps to ascertain the consent of the complainant or had a reasonable basis to believe their conduct was welcomed. The primary change in law proposed here is about *who* bears the burden of establishing consent vis-à-vis the “unwelcome” element.

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*et des Droits de la Jeunesse* <[www.cdpcj.qc.ca/en/file-a-complaint/complaints-process/how-commission-intervenes](http://www.cdpcj.qc.ca/en/file-a-complaint/complaints-process/how-commission-intervenes)>.

133. See Schultz, “Sanitized Workplace Revisited”, *supra* note 14 at 66.

134. See *e.g. Bombardier*, *supra* note 120 at para 37.

135. See *e.g. Moore*, *supra* note 119 at para 49.

Similar to the approaches in criminal and tort law, respondents in a sexual harassment complaint should bear the onus of establishing consent or “welcomeness” in relation to their conduct. The burden of proof under this approach is placed with the defendant (or, in the human rights context, the respondent) who is, as the Court in *Scalera* noted, in the best position to explain their conduct and the motivations behind it. Importantly, shifting claims regarding consent to the justification stage minimizes the space in which gender-based stereotypes and myths can be introduced and relied upon as a way to directly undermine the prima facie claim. This is not a perfect solution, however, and criminal law scholars in particular have noted the ways in which gender-based stereotypes continue to surface in sexual assault cases.<sup>136</sup>

Affirmative consent-like principles come with their own set of challenges and critiques.<sup>137</sup> Concepts of affirmative consent, as examined especially in criminal law contexts, risk oversimplifying experiences of sexual encounters and behaviour.<sup>138</sup> As such, these concepts risk being both over- and under-inclusive in regulating sexual activity,<sup>139</sup> and may communicate troubling moral judgments, both about women’s sexuality and about ideas of women as vulnerable subjects.<sup>140</sup> In similar ways, human rights law must be attentive to the normative judgments it communicates and the ways in which these may pre-emptively shape social behaviour, such as behaviour in the workplace.<sup>141</sup> However, in light of the documented problems arising from the current formulation of sexual harassment law and the ways it impacts women, in particular, who do bring forward legal complaints, the structural shift of *who* bears the burden of establishing “welcomeness” is an important one to undertake. This would help alleviate the focus of the inquiry from the complainant’s own conduct and credibility and shift it towards the respondent’s conduct and motivations. This shift may work towards minimizing the use of and reliance on gender-based stereotypes in a discrimination complaint. It would also alleviate the heightened burden that complainants of sexual harassment face as compared to those bringing discrimination complaints on other bases. Finally, such a shift may create larger space, both within and beyond the human rights law and adjudication

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136. See *e.g.* Ruparelia, *supra* note 67; Craig, *Putting Trials on Trial*, *supra* note 8; Hastie, “Unwelcome Requirement”, *supra* note 5.

137. See *e.g.* Gruber, *supra* note 10 at 430; Halley, *Split Decisions*, *supra* note 10; Halley, “Affirmative Consent”, *supra* note 12 at 259; Matthews, *supra* note 11 at 275.

138. See *e.g.* Matthews, *supra* note 11 at 275.

139. See *ibid* at 275-80.

140. See *e.g.* Halley, “Affirmative Consent”, *supra* note 12 at 259.

141. See *e.g.* Schultz, “Sanitized Workplace Revisited”, *supra* note 14 at 66-67.

system, to engage in dialogue about appropriate workplace boundaries, sexual behavior, and regulatory approaches to this, for which existing scholarship has highlighted a need.<sup>142</sup>

Moreover, as “welcomeness” might be construed as a more flexible concept than consent, the cautionary lessons to be learned from existing scholarship that critique affirmative consent should be borne in mind. For example, some critiques highlight the problems associated with establishing consent under a binary “yes or no” formulation.<sup>143</sup> Similarly, others draw attention to the ways in which individuals may hold different understandings of what evidence or behaviour constitutes consent.<sup>144</sup> Requiring a respondent to establish that they had a reasonable belief that their conduct was “welcomed” may allow for a more nuanced consideration of evidence or facts, as it does not necessarily require a binary approach to analysis, and provides space for a respondent to communicate their subjective understanding of the situation and motivation for their behaviour. Human rights law also operates more flexibly regarding evidentiary standards, which may allow for a more flexible approach to the analysis in this regard. However, while these factors may provide a partial response to critiques of affirmative consent as it has operated in criminal law contexts, it is not a perfect solution. Yet, insofar as a consent-like factor will remain a feature of sexual harassment law, the burden ought to rest with the respondent, rather than the complainant, to establish this.

#### IV. CONCLUSION

This article has argued for a shift in sexual harassment law that removes the requirement for a complainant to establish that the impugned conduct was “unwelcome.” The “unwelcome” element has been critiqued for placing an inappropriate burden on women to avoid harassment in the workplace, for inviting improper scrutiny into a complainant’s own conduct in a complaint, and for facilitating the use of gender-based stereotypes and myths in assessing a sexual harassment complaint. The use of, and reliance on, gender-based myths and stereotypes to undermine the credibility of sexual harassment complainants, and to question their consent to sexual conduct in the workplace, is troubling. The requirement that a complainant must establish that the impugned conduct

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142. See *e.g.* Matthews, *supra* note 11 at 280-81; Halley, “Affirmative Consent”, *supra* note 12 at 271-73; Schultz, “Sanitized Workplace Revisited”, *supra* note 14 at 90.

143. See *e.g.* Matthews, *supra* note 11 at 275; Gruber, *supra* note 10 at 449-50.

144. Gruber, *supra* note 10 at 417.

was “unwelcome” improperly requires her to establish a lack of consent and directly facilitates reliance on gender-based myths and stereotypes.

Similar problems concerning a reliance on gender-based myths and stereotypes led to shifts towards affirmative consent standards in criminal and tort law. As such, a similar shift ought to be undertaken in human rights law, which would position the issue of consent or “welcomeness” as a justification, rather than as part of the prima facie complaint. This would ameliorate existing problems that women, in particular, face in bringing sexual harassment complaints forward, and would create greater consistency between the treatment of sexual harassment and other forms of discrimination under human rights law.

As social and legal understandings and expectations concerning consent and sexual misconduct evolve, human rights law must keep pace. The principles governing sexual harassment complaints were decided over thirty years ago, and much has changed in that time. It is urgent that sexual harassment law also evolve to keep pace with contemporary understandings and expectations, particularly in light of the central purpose of human rights law as remedying discrimination for individual complainants, and in protecting and promoting equality, including in the workplace. While much more is needed to achieve greater sex equality in the workplace,<sup>145</sup> a reconfiguring of sexual harassment law as proposed above is one important step towards this goal.

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145. See Schultz, “Sanitized Workplace Revisited”, *supra* note 14 at 67.