Sexual Assault Law: The Interaction between *mens rea* and the defence of "Honest but Mistaken Belief in consent"

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Overview

Though it would seem to be a fundamental aspect of resolving sexual assault cases, determining what the Crown must prove to establish guilt with respect to *mens rea* is not easy to do.

There are three different pressure points that complicate this problem:

1. The relationship between consent (AR) and the *mens rea* of consent.
2. The relationship between the *mens rea* of consent and the "defence" of honest mistaken belief in consent.
3. Is current structure constitutional, in that it punishes for acts that have a sufficient mental state?

The Relationship Between the *Actus Reus* and *Mens Rea* of Consent

The relationship between consent (AR) and belief in consent (MR) seems to be getting increasingly confused. One could argue that this confusion was cleared up in *Ewanchuk*, when the Supreme Court held:

> "The absence of consent is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred."
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> *R. v. Ewanchuk*, [1999] 1 SCR 330.

Ewanchuk arguably had two important objectives: (1) to ensure that questions of misunderstanding surrounding whether a complainant consented are ***exclusively*** addressed when measuring the mental element; (2) to reduce the possibility of raising *mens rea* defences by narrowing the nature of what *mens rea* is.

This second point reached its apex in *R. v. Barton*, 2019 SCC 33 at para 92, when the Court stated that:

> It is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in *communicated* consent". This refinement is intended to focus all justice system participants on the crucial

> question of *communication* of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.

To state the obvious, *Ewanchuk* is not all negative for the accused, and does not leave the question of consent exclusively to the complainant's mind. Paragraph 29 states:

> While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

Ewanchuk clarified the relationship between the *actus reus* and *mens rea* aspects of consent. The difficulty is that *Ewanchuk* does not stand alone. Although consent is supposed to be measured exclusively by resort to the complainant's state of mind (using all available proof), the Supreme Court often lapses into language that suggests otherwise:

> Today, an accused may no longer argue that consent was implied by a relationship; *contemporaneous, affirmatively communicated consent* must be given for each and every sexual act. Today, not only does no mean no, but only yes mean yes. *Nothing less than positive affirmation is required*.
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> *R. v. Goldfinch*, 2019 SCC 38

This does not sound like *Ewanchuk*, which focuses on state of mind, and not "positive affirmation". While the Supreme Court has re-affirmed the more conventional *Ewanchuk* definition on numerous occasions, lower courts are not always so discerning. Many seize on these types of statements to suggest that without positive affirmation, there is in fact no consent. Consider *R. v. NJ*, 2023 BCPC 152 at para 17:

> [17] Consent is defined as a "voluntary agreement", being the conscious agreement of the complainant, to engage in the sexual activity in question. Consent must exist at the time the sexual activity occurs. It must be affirmatively communicated and it must be given for each and every sexual act: *R. v. Goldfinch*, 2019 SCC 38 at para. 44.

This is not only wrong, it conflates the *actus reus* and *mens rea* of consent, which is exactly what *Ewanchuk* was trying to avoid. To be clear, for the *actus reus* there is no need for consent to be affirmatively communicated for each sexual act. *It needs to be present for each sexual act*. That is a critical distinction that trial judges don't seem to be understanding, mainly because the Supreme Court keeps muddying the waters, but it is essential. Lack of communication is not the issue. Lack of consent is.

Here's another:

> "The record shows that at no point in his testimony does the accused state that the complainant told him "yes", she wanted to engage in sexual activity—in other words, that she contemporaneously, affirmatively communicated her consent for any sexual acts."
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> *R v Langan*, 2020 SCC 33

The relationship between the *mens rea* of consent and the "defence" of honest mistaken belief in consent

One of the biggest difficulties in sexual assault law lies in determining what the *mens rea* of sexual assault actually is. Though this seems straightforward, it is not, because of the language of the *Criminal Code*.

Consider the following question:

> It is a jury case. The accused wishes to show that he believed the complainant was consenting. The trial judge finds that the accused has not met the evidentiary burden of establishing that he took reasonable steps to ascertain whether consent was present. Intention to touch is admitted. In these circumstances:
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> 1) Judge cannot give any kind of *mens rea* or honest but mistaken belief instruction.
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> 2) Judge cannot give an honest but mistaken belief in consent charge, but must still give a *mens rea* instruction.
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> 3) Judge can still provide a *mens rea* and/or honest but mistaken belief in consent instruction if there is evidence that the accused believed consent was present.

There is no clear answer to this question, despite more than 20 years of case law fighting over the details of the honest but mistaken belief in consent defence, and whether it should be put to the jury.

What is clear is that jury instructions are given in cases of this sort, sometimes in addition to jury instructions on the honest mistaken belief in consent.

The problem boils down to this. On one hand, the whole point of the defence of honest but mistaken belief in consent is to demonstrate an absence of *mens rea*. The whole point of the reasonable steps provision was to limit the applicability of a person's ability to say, "I didn't know she was not consenting".

On the other hand, courts are uncomfortable dispensing with *mens rea* altogether – not surprisingly. Can they really just say "well, it's all about the *actus reus* only" any time there is insufficient proof of reasonable steps?

The case law is erratic. The Supreme Court often implies that honest but mistaken belief in consent and the absence of *mens re*a are the same thing but never say it directly. Look how cryptic they can get:

> For purposes of the *mens rea*, and specifically for purposes of 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" (*Ewanchuk*, at para. 49). Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" (*ibid.*, at para. 47).
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> *R. v. Barton*, 2019 SCC 33 at para 90

Good luck deciphering this. The first sentence screams "separate". After all, it uses the word "and". But the next sentence says "mental state" is about "honest belief". It's maddening.

The British Columbia Court of Appeal, in contrast, has had no hesitation in saying that honest but mistaken belief in consent and *mens rea* are the same thing. The court states in *R. v. Capewell*, 2020 BCCA 82: "While consent at the *mens rea* stage shifts the focus to the accused's mental state, his belief that the complainant was consenting must be based on his reasonable steps to ascertain consent". If this is correct, no *mens rea* instruction should be given where the evidentiary burden on reasonable steps is not met.

The Ontario Court of Appeal has been more reticent, especially after the Supreme Court rendered its decision in *R. v. Morrison,* 2019 SCC 15:

- Child luring provisions of the *Code*
- Concluded that the reasonable steps provision there had no impact on the Crown's need to prove **belief that person online was underage**.
- Absence of reasonable steps NOT an "independent pathway to conviction".
- It is an alternative "defence".

That led to *R. v. Carbone*, 2020 ONCA 394

- *Morrison* impacts sexual interference provision.
- "Rejection of the mistaken belief defence would not, from a legal perspective, inevitably lead to a conviction."
- Crown must prove at least recklessness to age.
- "An accused who never turns his mind to the complainant's age can properly be described as reckless with respect to the complainant's age."

It also led to *R. v. HW,* 2022 ONCA 15:

- "SCC in *Morrison* established that negativing a defence is not legally synonymous with the Crown discharging its positive burden to prove its case."
- "The legal burden remains, even if displacement makes conviction a "practical certainty" and if in most cases there is little distance between negativing a defence and proving the required *mens rea*".
- "In *Ewanchuk*, the knowledge element is expressed in terms that come close to suggesting it is the mirror image of the defence… the Supreme Court consistently describes the burden on Crown to show knowledge, wilful blindness or recklessness of absence of consent".
- Knowledge of non-consent can still be an issue even if belief in consent is not.
- A state of "reckless indifference" to consent remains culpable.

This is extremely messy, and made messier by the fact that the BCCA rejects it:

R. v. Jerace, 2021 BCCA 94

- Considers the Ontario jurisprudence and rejects it
- Prefers to approach child sexual offending as "strict liability", with independent pathway to conviction.
- Appears there are now different rules in Ontario and BC.
- I look forward to SCC case in the future.

Is the current structure constitutional, in that it punishes for acts that have a sufficient mental state?

This is the problem at the core of the whole mess. No one wants to admit that the *Jerace* approach gets rid of *mens rea* altogether. So the ONCA creates some leeway in extreme cases. But ultimately, the question is pretty clear. Do we wish to punish offenders who don't know and are not reckless about whether the complainant is consenting? They either don't care, or don't read signs well.

Ultimately there are two options:

- (1) At least recklessness towards absence of consent is required (conflicts with multiple cases including *Goldfinch*);
- (2) independent pathway to conviction (conflicts with *Morrison/Carbone*); THEN constitutional challenge against independent pathway.

The path forward continues to be muddled and unclear. Ultimately, there needs to be a clear decision from the SCC stressing how *mens rea* and honest but mistaken belief in consent

interact. That will determine how the constitutional challenge will need to be addressed. Given that the Supreme Court has repeatedly suggesting that criminal negligence is the bare minimum for criminal liability under the Charter, it seems difficult to accept that the BCCA's approach to the matter is constitutional.

R. v. Beatty, 2008 SCC 5

When can you raise the defence of honest but mistaken belief in consent?

Before the defence of honest but mistaken belief in communicated consent can be raised, the defence must establish an air of reality. An air of reality arises where there is evidence upon which a properly instructed jury, acting reasonably, could acquit.

R. v. Cinous, 2002 SC 29 at para 49

Essentially, for there to be an "air of reality" to the defence of honest but mistaken belief in consent, the totality of the evidence for the accused must be reasonably and realistically capable of supporting the defence. There will not be an air of reality from a mere statement that "I thought he/she was consenting" not supported to some degree by other evidence or circumstances arising in the case.

R v Park, [1995] 2 SCR 836 at para 20

Speculation by an accused about what's going on in the complainant's mind is not a defence. Nor is it a defence that the accused believed that silence, passivity or ambiguous conduct constitutes consent.

R. v. M. (M.L.), [1994] 2 S.C.R. 3; *R. v. Ewanchuk*, [1999] 1 SCR 330 at paras 46, 51; *R. v. Orwin*, 2017 ONCA 841 at para 22

The defence of honest but mistaken belief in consent is one that is rarely invoked.

R . v. Choudhary, 2023 ONCA 467 para 39; *R. v. Park*, [1995] 2 SCR 836 at para 21

There are a number of circumstances in which the defence would not be available. Section 273.2 of the *Criminal Code* limits when belief in consent is not a defence by stating that it is not a defence where

- the accused's belief arose from
    - (i) the accused's self-induced intoxication,
    - (ii) the accused's recklessness or wilful blindness, or
    - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;

        - s. 265(3) - no consent is obtained whether the complainant submits or does not resist because of use of force, threats or fear, fraud, the exercise of authority,
        - s.273.1 (2) - no consent is obtained where the complainant is unconscious, the complainant is incapable of consenting, agreement to the sexual activity is expressed by someone else other than the complainant, the accused induces the complainant by abusing a position of trust or authority, the complainant expresses a lack of agreement to engage in the activity.
- the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

The defence of honest but mistaken belief in consent is typically not put to the jury where this is a considerable divergence between the evidence of the accused and that of the complainant i.e., diametrically opposed stories. The fact that stories are diametrically opposed, as well as the degree to which they are opposed, is a factor in the air of reality determination. It is possible where there are diametrically opposed stories but there is corroborative evidence that the defence of honest mistaken belief can be put to the jury.

> *R. v. Park*, [1995] 2 SCR 836 at para 21-22

Where there are two versions of events, from the complainant and accused, the question to determine whether there is an air of reality to the defence of honest but mistaken belief in consent is, can a reasonable jury cobble together some of the complainant's evidence and some of the accused's evidence to produce a sufficient basis for such a defence? Would the acceptance of one version necessarily involve the rejection of the other? Can you splice some of each person's evidence with respect to the encounter, and settle upon a reasonably coherent set of facts, supported by the evidence, that is capable of sustaining the defence of mistaken belief in consent? If the stories cannot realistically be spliced together, then the issue really is purely one of credibility/consent and the defence of mistaken belief in consent should not be put to the jury.

> *R. v. Davis*, [1999] 3 SCR 759 at para 85; ***R v Park***, [1995] 2 SCR 836 at para 25.; *R. v. E.B.*, 2021 ONCA 875 at para 54

When the complainant and the accused give similar versions of the facts, and the only material contradiction is in their interpretation of what happened, then the defence of honest but mistaken belief in consent is made out and can be put to the jury.

> *R. v. Park*, [1995] 2 SCR 836 at para 26

If the accused testifies that the complainant was an active and willing partner, whereas the complainant testifies that she vigorously resisted, the question is generally simply one of credibility and consent.

R. v. L.T., 2019 ONCA 535 at para 5; *Park* para 26

There would be no air of reality to the defence of honest but mistaken belief in consent where the complainant's behavior was passive or neutral and no reasonable steps were taken by the accused to ascertain consent.

R. v. Gagnon, 2018 CMAC 1, affirmed [2018] 3 SCR 3

The defence of honest but mistaken belief in consent is most commonly successful where there is a pattern of interaction between the parties which, if accepted, could lay the foundation for the defence. It would be more difficult in cases where there is no history or such pattern i.e., the prior sexual encounters between the parties fails to establish a custom or practice that can establish legitimate expectations of how consent was to be communicated between the parties, or where the prior sexual encounters are simply too remote in time from the offences.

R. v. R.S., 2020 ONSC 1328 paras. 30-32

The defence may also arise in cases involving role-playing or dominant/submissive scenarios where "no" actually means "yes" to explain why the accused believed the complainant consented where factually it may appear non-consensual.

Evidence required to raise the defence of honest but mistaken belief in consent

The trial judge is required to consider the totality of the evidence to determine whether there is an air of reality to the defence of honest but mistaken belief in consent. Evidence to support the defence of honest but mistaken belief in consent can be drawn from the complainant's evidence, the accused's evidence, or the testimony of any other person. In many cases, there won't be sufficient evidence to put the defence of mistaken belief to the jury where an accused does not testify. Real evidence can also be used to support the defence – for example, photographs, videos, text messages etc.

Evidence of prior sexual acts (s.276 evidence) can be used to support the defence of honest but mistaken belief. Earlier acts or gestures can inform the accused's perception of the complainant's behaviour, and serve as relevant evidence in assessing the existence or air of reality of an honest but mistaken belief in actual consent. Those acts and gestures may be necessary to understand the accused's honest perception of the complainant's behaviour at the time of the alleged assault. In some cases, prior sexual activities may establish legitimate expectations about how consent is communicated between the parties, thereby shaping the accused's perception of communicated consent to the sexual activity in question at the time it occurred.

R. v. Barton, 2019 SCC 33 at para 93; *R v Park*, [1995] 2 SCR 836 at para 23

Counsel should also be careful not to slip into propensity reasoning - simply believing that an individual would have consented because they had consented to similar acts in the past is not enough to give an air of reality to the defence of honest but mistaken belief in consent and is impermissible twin myth reasoning. The accused must have honest but mistaken belief that the complainant did consent to the sexual activity in question not that the complainant was likely to have consented because of a prior sexual act.

R. v. Hay, 2022 ABCA 246, affirmed 2023 SCC 15

For evidence of prior sexual activity to have relevance to an honest but mistaken belief in consent, there needs to be some link between the prior sexual activity and the sexual activity in question. For example, in *R v Hay*, 2022 ABCA 246, affirmed 2023 SCC 15 evidence of prior digital anal penetration was not relevant to an honest but mistaken belief in consent to later anal intercourse. Similarly, prior sexual acts that were remote in time may not be relevant to the accused's honest but mistaken belief during the alleged event.

R. v. R.S., 2020 ONSC 1328

Some practical considerations

In most sexual assault cases, the complainant will claim that they said "no, no, no" or vigorously resisted the sexual activity. Whereas the accused will describe an event which can be interpreted as consensual. In many cases, it is impossible to reconcile the complainant and accused's version of events and there would be no air of reality to the defence of honest but mistake belief in consent.

For s.276 applications, it may be easier to ground relevance for the application to introduce evidence of prior sexual activity in the defence of honest but mistaken belief. For example, evidence of past role playing is not relevant to the issue of consent. However, it can be relevant to whether there was an honest but mistaken belief in communicated consent.

R v A.P., 2013 ONCA 344; *R. v. V.Z.,* 2022 ONCJ 283, Paras 26-27

<u>The Reasonable Steps Requirement</u>

Section 273.2(b) of the *Code* states that it is not a defence that the accused believed that the complainant consented to the activity that forms the subject-mater of the charge, where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting. As such, the taking of reasonable steps is a precondition to a defence of honest but mistaken belief in communicated consent.

Reasonable steps are not steps based on myth stereotypical assumptions. For example silence, ambiguous conduct, or testing the waters.

R. v. Barton, 2019 SCC 33, at para 107; *R. v. I.A.D.,* 2021 ONCA 110

Both Objective and Subjective

1) The accused must take steps that are objectively reasonable.
2) The reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time.

R. v. Barton, 2019 SCC 33, at para 104

In other words: What would a reasonable person do if they knew what the accused knew at the time? If a reasonable person was aware of the same circumstances, would he take further steps before proceeding with sexual activity?

- If yes, and the accused has not, then no defence.
- If no, or maybe, then further steps are not required, and defence will apply.

R. v. Malcolm, 2000 MBCA 147, at para 24; *R. v. A. (O.)*, 2013 ONCA 581, at para 41

An accused's mistaken belief in consent need not be reasonable for the defence to be available. An accused that takes reasonable steps but nonetheless makes an unreasonable mistake about the presence of consent, is entitled to ask for an acquittal.

R. v. Darrach, [1998] O.J. No. 397, at para 90

What are Reasonable Steps?

A healthy dose of common sense is required when assessing whether reasonable steps have been taken. The analysis is highly fact specific because the circumstance known to each accused will vary.

R. v. Barton, 2019 SCC 33, at para 107

There is no requirement on the accused to exhaust all possible steps and there is no exhaustive list of reasonable steps.

R. v. Barton, 2019 SCC 33, at para 106

The accused must act reasonably, but only on the basis of what he or she perceives at the time. The accused is not under a positive obligation to determine all the relevant circumstances, rather, the assessment is based on the circumstances actually known to him or her at the time.

R. v. Darrach, [1998] O.J. No. 397; *R. v. Barton,* 2019 SCC 33

There is a continuing requirement on the accused as the 'circumstance' known to him or her can change. The specific circumstances known to the accused are important. For example, in *R. v. I.A.D.* the complainant indicated that she wanted to use a condom. The fact that she continued physical grinding, movement of her hip and assisted pulling down one side of her pants did not change the fact that the accused failed to specifically address the request for a condom.

R. v. I.A.D., 2021 ONCA 110

In *Crangle,* the accused had a twin brother who was in a consensual sexual relationship with the complainant. After a party the accused got into bed with the complainant and had sex with her. The intercourse ended when the complainant realized it was the accused and not his brother. The trial judge and the Court of Appeal found he did not take reasonable steps to ensure the complainant knew it was the accused given the information known to him at the time.

R. v. Crangle, 2010 ONCA 451, at para 30

When is there an Elevated Requirement on Reasonable Steps?

There are times when there is an elevated requirement on reasonable steps. For example, where there is more invasive sexual activity, a greater risk posed to the health and safety of those involved, where the accused and the complainant are unfamiliar with each other, or when the complainant is intoxicated.

R. v. J.M., 2020 ONCA 806; *R. v. Barton,* 2019 SCC 33, at para 108

Another area where there may be an elevated requirement on reasonable steps could arise if the complainant had an intellectual disability. Would expert evidence be required?

Is the Accused's Subjective State of Mind Relevant to the Reasonable Steps Analysis?

While not determinative, the accused's subjective state of mind is relevant to the reasonable steps inquiry.

R. v. L.T.P., [1997] BCJ No. 24, (BCCA)

In *Sinclair* the accused had Fetal Alcohol Spectrum Disorder. The court held that:

> "reasonable steps, must take into account factors personal to the accused, such as any personal knowledge the accused had of the complainant, the nature of the relationship between the accused and the complainant, and the accused's observation of the complainant. The trier of fact must ask what steps would have been reasonable for the accused to take in the circumstances. Therefore, if the expert evidence is directed toward the personal circumstances of the accused which may impact on the reasonableness of his conduct or his subjective belief, and meets the other three Mohan criteria, it is admissible: *R. v. Mohan*, [1994] 2 SCR 9."

Sinclair, 2013 ABQB 745 at para 45 and 46

In *M.(L.F.),* the court stated: "…L.F.M.'s significant intellectual disability is personal to him, and might be taken into account in determining the reasonableness of the actions he took to ascertain the complainant's age, and to determine that the complainant was consenting to touch him. Personal factors are relevant, but not determinative."

R. v. M.(L.F.), 2015 BCPC 449 at para 33

In *May*, the court ruled: "I do not accept that the crown has proven beyond reasonable doubt that the defendant was intellectually capable of doing more than he did to ascertain the age of C.S. in the summer of 2011."

R. v. May, 2017 ONCJ 167

The court in *R. v. J.A.C.,* 2017 ONCJ 580 ruled:

> "Courts have also held that "factors personal to the accused", including any intellectual or other limitations that may apply, must be considered in assessing whether or not reasonable steps were taken. Included in this category have been the intellectual limitations of an accused and a diagnosis of FASD (see, for example, *R. v. Sinclair* [2013] A.J. No. 1433 (ACQB); *R. v. May* [2017] O.J. No. 1347 (CJ)). J.A.C.'s youth (16 at the time of this offence) is a factor personal to him and one I must consider in assessing the reasonableness of the steps he took.
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> Although the steps taken must be reasonable, an accused's mistaken belief need not be. As noted by the Ontario Court of Appeal in *R. v. Darrach*, "[w]ere a person to take reasonable steps, and nonetheless make an unreasonable mistake about the presence of consent, he or she would be entitled to ask the trier of fact to acquit on this basis." ((1998), 38 O.R. (3d) 1 (C.A.), at p. 89.) However, the reasonableness of the belief will be relevant to the issue of whether it was in fact honestly held. The more reasonable the grounds for the asserted belief, the more likely a trier of fact will be to conclude it is genuine.
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> …
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> As for the Crown's second submission, that J.A.C. failed to take reasonable steps to ascertain consent, I again observe that the test to be applied is not, as the Crown says, a standard of strict objective reasonableness but rather a quasi-objective test. This is an important distinction. As the trier of fact I am obligated to consider factors personal to the accused. In this case that must include consideration of the fact that I am dealing with a 16 year old relatively inexperienced young man. I also cannot ignore that the sexual act to which S.C. did not consent lasted a few seconds at best. Furthermore, the uncontroverted evidence is that J.A.C. and S.C. discussed each act they were engaging in in advance, although they did differ somewhat on what words were used in each and every instance. I find that the steps taken by J.A.C. to ascertain S.C.'s consent, while imperfect, were nonetheless reasonable in the circumstances."

R. v. J.A.C., 2017 ONCJ 580, para 66-67 and 80

Burden of the Crown to Negative Defence

If there is an air of reality to the defence, the Crown must prove beyond a reasonable doubt that the accused did not take reasonable steps or that the accused's mistaken belief was not honestly held.

The court in *Barton* explained:

> "By contrast, if there is an air of reality to the defence of honest but mistaken belief in communicated consent, including the reasonable steps requirement, then the defence should be left with the jury. The onus would then shift to the Crown to negative the defence, which could be achieved by proving beyond a reasonable doubt that the accused failed to take reasonable steps. The trial judge should instruct the jury as such, making it clear that the reasonable steps requirement is a precondition to the defence. In addition, the trial judge should explain, as a matter of law, the type of evidence that can and cannot constitute reasonable steps, making sure any steps that are grounded in mistakes of law are relegated to the latter category. Where the Crown does not prove beyond a reasonable doubt that the accused failed to take reasonable steps, that does not lead automatically to an acquittal. In those circumstances, the trial judge should instruct the jury that they are required, as a matter of law, to go on to consider whether the Crown has nonetheless proven beyond a reasonable doubt that the accused did not have an honest but mistaken belief in communicated consent. This requirement flows from the fact that the defence is ultimately one of an "honest but mistaken belief in communicated consent", not one of "reasonable steps". Ultimately, if the Crown fails to disprove the defence beyond a reasonable doubt, then the accused would be entitled to an acquittal."
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> *R. v. Barton* 2019 SCC 33 para 123

In Ontario, the Court of Appeal has stated :

> "An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to it. If there is no air of reality to the defence, it is not left with the jury. If there is, the onus is on the Crown to negative the defence. If the Crown fails to do so, the accused is entitled to an acquittal. The Crown might disprove the defence by, for example, proving beyond a reasonable doubt that the accused did not take reasonable steps to determine whether the complainant was consenting or that the accused's mistaken belief was not honestly held: Barton, at paras. 121-23."
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> *R. v. HW*, 2022 ONCA 15, at para 52