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Sexual Assault

"Stealthing" and the law: Is it sexual assault?

Latest phenomenon testing legal boundaries of consent

By **Chris Young**

(May 19, 2017, 9:13 AM EDT) -- "Stealthing" is the new sexual assault — a crime by any other name, say Canadian lawyers — that adds another twist to current issues of consent in cases of sexual violence.

The practice — not rape, but "rape-adjacent", as one victim put it — refers to partners who during consensual sex with a condom surreptitiously remove the prophylactic, or cause it to be removed.

Alexandra Brodsky's report in the *Columbia Journal of Gender and Law* last month attracted international attention and headlines for its novelty and in legal circles, for its suggestion that a new tort remedy may be in order. Brodsky cited victims' accounts and pointed to an online underground community of men who regard it as their right to "spread their seed" regardless of their partner's express wishes.

No stealthing case has ever come to light in Canadian courts. But media reports last month noted rape crisis hotlines have received complaints from victims of the morally reprehensible deception, and lawyers who practise in the area of sexual abuse noted the Supreme Court of Canada's 2014 decision in *R. v. Hutchinson* 2014 SCC 19 and in 2011 in *R. v. J.A.* 2011 SCC 28 as potential guiding cases in Canadian criminal law.

Anne London-Weinstein, Weinstein Law

"In (*R. v J.A.*) the issue was whether someone could consent to activity while they were not conscious — in other words, if you could give consent ahead of time. And the SC said no, consent has to be ongoing and it has to be informed," said Anne London-Weinstein, a criminal defence lawyer at Weinstein Law in Ottawa. "So if you agree to have sexual intercourse with someone and you've agreed that you're going to wear a condom and then you change the terms, that's not informed consent. What you have then is a consent that's not valid, and that is definitionally sexual assault."

In *Hutchinson*, as it could well apply in a stealthing situation, "the wearing of the condom was an

essential feature of the sexual activity to which the woman had consented. So they said if you take away an essential feature of the activity or change the nature of an essential feature of the activity, basically you’re vitiating the consent by fraud,” said lawyer Loretta Merritt of Torkin Manes LLP, based in London, Ont., who practices in the area of civil law and sexual abuse.

The 2014 high court ruling upheld the aggravated sexual assault conviction in Nova Scotia of a man who had sex while using a condom he had poked with holes without the knowledge of his partner, who ended up with an unwanted pregnancy and had to have an abortion. But while the seven-judge panel agreed unanimously on the decision, they took different routes to get there — a bare majority of four ruling it was consent vitiated by fraud.

Dissenting Justices Rosalie Abella, Michael Moldaver and Andromache Karakatsanis said any consent was vitiated from the start: “If one of those individuals has insisted upon the use of a condom, and their partner has *deliberately* and *knowingly* ignored those wishes — whether by not using a condom at all, removing it partway through the sexual activity, or sabotaging it — that individual will nonetheless be presumed to have consented under the approach suggested by our [majority] colleagues. ... If what is consented to is sexual activity with a condom, the condom is expected to be intact.”

“The path to a sexual assault in the circumstances of stealthing is more clear when you say there was no valid consent to begin with,” said Karen Bellehumeur, a sexual abuse lawyer in London, Ont., with Jellinek Law, and a former Crown attorney. “That [majority] path is a little more difficult in a stealthing case — it would always depend on what the facts were.”

In the civil law sphere, an attempt at a reverse spin on *Hutchinson’s* majority path can be found in P.P. v. D.D. 2017 ONCA 180, wherein an Ontario doctor sued his former partner for “emotional harm” after she became pregnant following what he termed “recreational sexual intercourse.” His lawsuit including claims of sexual battery and fraudulent misrepresentation were dismissed by Superior Court Justice Paul Perell.

“The court said look, if you’re talking about some kind of upset being a parent when you didn’t want to, we’re not awarding damages for that. But they did talk in that case about the tort of sexual battery, and they said in a civil context, sexual battery happens when there is no consent, and the consent has to be meaningful, voluntary and genuine,” said Merritt.

Of course, both civil and criminal courts remain daunting arenas for a victim of sexual assault to enter — if they are able and willing to at all. National statistics show that 91 per cent of sexual crimes go unreported, and a *Globe and Mail* study in February reported a rate of nearly 20 per cent of sexual assault allegations, or about 5,500 per year, are dismissed as “unfounded” by police investigators. At least from a legal standpoint, add “stealthing” to the list of recent cases and developments hinging on the concept of consent, illustrative of the barriers victims face in seeking a legal remedy.

“This is just another example of more thought needs to be put into how the law as it exists now, and as it’s been applied so far, could apply to these kind of stealthing situations,” said Bellehumeur.

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