

# The Top Five 2011

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



## *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440

<http://scc.lexum.org/en/2011/2011scc28/2011scc28.html>

*In this case, the Supreme Court of Canada (SCC) considered the legal meaning of "consent" to sexual activity, and determined that a person cannot give advance consent to sexual activity that will take place while they are unconscious.*

**Date released: May 27, 2011**

### Ruling

Prior consent to a sexual activity does not operate during a period of unconsciousness, as the important time period for consent is when the sexual touching is taking place. Consent for the purposes of sexual assault requires an individual to be conscious and consenting throughout the sexual activity.

### Facts

The two people in this case were partners in a long-term relationship. On one occasion the two were intimately engaging in erotic asphyxiation, which is intentional deprivation of oxygen to the brain for sexual arousal. During this event, J.A (the accused) choked his partner, K.D (the complainant) until she was unconscious. K.D woke up and realized that a sexual act had taken place while she was unconscious. Two months later, she made a complaint to the police. She stated that while she had consented to the choking, she did not consent to the sexual activity that occurred while she was unconscious. She later retracted the allegation stating she made the claim because J.A was threatening to seek sole custody of their child. Nevertheless, J.A was charged with sexual assault, among other offenses.

At trial, the judge convicted J.A of sexual assault stating that one cannot consent to a sexual act that occurs while being unconscious. The majority of the Court of Appeal overturned this decision, holding that there was not enough evidence to come to the conclusion that K.D did not consent to the sexual activity before being rendered unconscious. The Court of Appeal was split on the issue of whether someone could legally consent *in advance* to a sexual activity to occur while being unconscious.

## Decision

The majority of the Supreme Court of Canada (SCC) restored the sexual assault conviction. They held that consent to sex requires an individual to be conscious *throughout* the sexual act. Therefore, prior consent to a sexual activity does not operate throughout a period of unconsciousness.

According to the *Criminal Code of Canada*, the definition of consent for sexual assault requires the party to provide actual active consent throughout the entire sexual activity. According to section 273.1(2)(b) of the *Criminal Code*, no consent can be obtained if that person "is incapable of consenting to the activity." Thus, someone who is unconscious cannot meet the requirement of having "a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act." Further, parliament favours the requirement of ongoing, conscious consent in order to ensure that men and women are not sexually taken advantage of and to ensure that they are able to tell their partners to stop at any time.

## Dissent

In the dissent, the minority of the SCC defined the issue differently. In their view, the issue was not whether an unconscious person can consent to a sexual activity but whether an unconscious person can freely and voluntarily consent *in advance* to a sexual activity that may occur while that person is unconscious. The minority held, "It is a fundamental principle of the law governing sexual assault in Canada that no means 'no' and only yes means 'yes'", and that the law is aimed at safeguarding the autonomy of women to make sexual choices for themselves. For the dissenting justices, if someone consents in advance to a sexual activity and never changed her mind, then the only state of mind that person had was consent. The minority held that there was no evidence that J.A.'s conduct was outside the scope of what K.D. consented to.

## Discussion

1. The SCC said the following about consent: “[T]his concept of consent produces just results in the vast majority of cases and has proved to be of great value in combating stereotypes that have historically existed.” Discuss this statement. What are the stereotypes the court is referring to?
2. The SCC acknowledged that in some situations, the concept of consent that parliament has adopted may seem unrealistic; counsel for the accused brought up the example of a person kissing a sleeping partner. In your opinion, would this count as a sexual assault under this ruling?
3. This case raised several concerns about a woman’s right to self-determination. Which opinion of the court is more respectable towards women’s rights, the majority or the dissent?
4. Should courts take into account factors such as whether the two parties were in a long-term relationship during the sexual assault? Does it matter that the two parties were in the middle of a separation when the complaint was brought forward? Or, should the