Nos. 23890 and 23891

***IN THE SUPREME COURT OF CANADA***
(On Appeal from the Court of Appeal of Ontario)

B E T W E E N:

**PERCIVAL WHITLEY**
**and**
**TIMOTHY MOWERS**

APPELLANTS

- and -

**HER MAJESTY THE QUEEN**

RESPONDENT

- and -

**WOMEN'S LEGAL EDUCATION AND ACTION FUND**

INTERVENER

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# FACTUM OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

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## PART I: FACTS

1. The Intervener, the Women's Legal Education Action Fund (LEAF), is a national, not-for-profit advocacy organization that promotes the right of women to equal treatment before and under the law. LEAF has developed considerable expertise relating to sexual violence against women through its involvement in test case litigation, research and public education.

2. The Appellants, Timothy Mowers and Percival Whitley ("Mowers" and "Whitley"), seek to overturn their convictions on charges of sexual assault. William Rickard, a third man found guilty of the sexual assault, is not appealing his conviction to this Court.

3. LEAF accepts the facts set out in Part I of the Respondent's factum. LEAF rejects paragraphs 51 and 52 of Whitley's factum and paragraphs 75 and 76 of Mowers' factum to the extent that they distort or misrepresent the evidence given at trial.

4. Contrary to paragraphs 51(vi) and 51(ix) in Whitley's factum and paragraph 75(j) in Mowers' factum, the complainant never testified that she was aware that Whitley was in the bedroom during the initial kissing and touching by Mowers alone. Rather, the complainant maintained throughout her evidence in chief and in cross-examination by three counsel that: she did not think anyone else was in the room; she assumed no one else was in the room because people do not watch other people in such circumstances; she assumed that the other two accused

were in the other room; she heard voices in the other room, and those voices "didn't sound close".

Appellant Whitley's factum, paragraphs 51 (vi) and (ix).

Appellant Mowers' factum, paragraphs 8 and 75 (j)

Case on Appeal, Vol. 1, Holt, p. 115, p. 118, l.20-30, p. 119, l.1-30.

5. Both Appellants testified that the complainant actively participated in the prolonged sexual activity with the three accused. For instance, Mowers maintained that the complainant helped rub lotion onto her own body, gave "confirming moans", opened her own mouth to accept his penis, spread her legs for him and, generally, acted with "just the same equality" as during the "surprisingly passionate kissing" that occurred prior to Whitley touching her. Whitley, too, maintained that the complainant laid down and opened her legs for him, smiled, whispered to Mowers and rubbed lotion onto her skin along with the accused. Rickard, on the other hand, did not depict the complainant as an active participant. Rather, he admitted that he thought he could touch the complainant in the first instance "because she was letting Percy do it". He noted that she was "already with two guys, so I just went in with them too" and when she "did nothing" throughout the assault, "I thought she was a party girl when she didn't resist. I honestly thought she's saying it was okay."

Case on Appeal, Vol. 2, Whitley, p. 310, l.30, p. 311, l.10-35, p.314, l.15-30, p. 323, l.15-30, p. 354, l. 30 to p. 355. l.20; Mowers, p. 393, l.20 to p. 394. l.20, p. 395. l. 1-10, p. 396, l.15-40, p. 399, l.1-40, p. 434, l.22-25, p. 439, l.20-21, p. 440, l.7-11, p. 441, l.8.33, p. 443, l.20-28, p. 448. l.30 to p. 449, l.40; Vol. 3, Rickard, p. 505, l. 30 to p. 507, l.30.

6. By its verdict, the jury clearly rejected the Appellants' evidence that the complainant actively participated in "group sex".

7. As an alternative defence after the close of their evidence and, now, on appeal, the Appellants seek to rely on what they describe as the complainant's non-objection and absence of physical resistance as the basis for an alleged "mistaken belief in consent" defence, despite the fact that absence of physical resistance and/or non-objection do not constitute legal consent.

## PART II: POINTS IN ISSUE

8. LEAF will address the issue of whether the learned Trial Judge erred in refusing to put the defence of mistaken belief in consent to the jury.

9. It is the position of LEAF that as a matter of law and, in particular, as a matter of constitutional law, the Court of Appeal for Ontario was correct in ruling that the defence of a mistaken belief in consent was not available in this case. In particular, it is LEAF's position that:

(a) the "mistaken belief in consent defence" is not available as a defence where the belief is based on a mistake about the legal definition of consent, or on a misapplication of the legal definition of consent to the facts that are legally material;

(b) mistakes that are mistakes of law are not a defence to sexual assault and therefore the air of reality test has no application;

(c) the test of whether the defence of mistake of fact in sexual assault cases should be put to the jury is whether the jury, having rejected the consent defence, could still harbour a reasonable doubt based on the remaining evidence in toto.

## PART III: ARGUMENT

### A. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

10. The Canadian Charter of Rights and Freedoms is the supreme law of the land. Common law rules and statutes must be interpreted in a manner consistent with the fundamental values enshrined in the Charter.

> Retail Wholesale and Department Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

11. Section 15(1) is the broadest of all guarantees in the Charter. It is designed to "protect those groups who suffer social, political and legal disadvantage in our society." This Court has identified the remedial purposes of s. 15(1) guarantees variously as: "to ensure equality in the formulation and application of the law"; "to ensure law made distinctions among citizens do not bring about or reinforce group disadvantage"; and "to promote a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect, and consideration."

> Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, per Wilson J. at 154, per McIntyre J. at 171.

12. As this Honourable Court has recognized:

> Sexual assault is, in the vast majority of cases, gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. The reality of the situation can be seen from the statistics which demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women.
>
> Osolin v. R., [1993] 4 S.C.R. 595, per Cory J. at 669.

13. Studies show that two factors operate in the rapist's selection of a victim: availability and vulnerability. The more disadvantaged, dependent or relatively powerless an individual, the more she is vulnerable to sexual exploitation and violation.

Ministry of the Solicitor General, Canadian Urban Victimization Survey, "Female Victims of Crime" (Ottawa: Ministry of Supply and Services Canada, 1985) at 2.

Report of the Committee on Sexual Offences Against Children and Youth (The Badgley Report): Sexual Offences Against Children and Youth vol. 1 (Ottawa: Ministry of Supply and Services Canada, 1984) (Chair: R.F. Badgley) at 196-98.

14. Some women are more vulnerable than others:

a) Older women, women living in poverty, women with disabilities, rural women, lesbians, women of official language minorities, women of colour, young women, immigrant and refugee women, Inuit women and aboriginal women are particularly vulnerable to violence.

Final Report of the Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence - Achieving Equality (Ottawa: Ministry of Supply and Services Canada, 1993).

b) People with disabilities are at least 150% as vulnerable to sexual abuse as individuals of the same age and sex who are not disabled.

D. Sobsey, "Sexual Offenses and Disabled Victims: Research and Practical Implications" (1988) 6:4 Vis-a-vis: A National Newletter on Family Violence, Canadian Council on Social Development at 1.

c) Since racism and sexism are root causes of violence, women of colour in Canada are extremely vulnerable as they are subjected daily to both forms of harassment on an individual and systemic level.

Final Report of the Canadian Panel on Violence Against Women, supra, at 80.

15. Young women are at the greatest risk of being sexually assaulted. Sixty eight percent of all sexual assaults happen to women between the ages of 16 and 25. Four out of five victims of sexual assault reported to the police were attacked by someone known to them. A third of all college men say they would rape women if they could be assured they would not get caught.

Solicitor General, supra, para. 13 at 2-3.

The Daily, "The Violence Against Women Survey" (Ottawa: Statistics Canada, November 18, 1993).

S. Ward et al., "Acquintance Rape and the College Social Scene" (1991) Family Relations 65.

R. Gunn and C. Minch, Sexual Assault: The Dilemma of Disclosure, The Question of Conviction (Winnipeg: U. of Manitoba, 1988) at 3-13. 44-46.

N. Malamuth, "Rape Proclivity Among Males" (1981) 37:4 Journal of Social Issues 138 at 140.

16. It is respectfully submitted that the factors that have made members of disempowered groups more vulnerable to sexual assault have also historically placed them at a disadvantage at each stage of the criminal justice system, which results in part because of stereotypical and unfounded assumptions about women and sexual assault.

## B. THE LAW OF CONSENT

17. Even before Parliament provided specific statutory guidance by enacting s.273.1 of the Criminal Code, Courts and Parliament developed the definition of consent. As Mr. Justice Gonthier, for the majority, stated in R. v. Jobidon:

> Just as the common law has built up a rich jurisprudence around the concepts of agreement in contract law, and *volenti non fit injuria*in the law of negligence, it has also generated a body of law to illuminate the meaning of consent and to place certain limitations on its legal effectiveness in the criminal law. It has done this in respect of assault.....
>
> R. v. Jobidon, [1991] 2 S.C.R. 714, per Gonthier J. at 735.
>
> Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(1),(3).

18. The definition of consent includes the expression of voluntary agreement to the act in question by the complainant. Consent that is obtained by fear of the application of force or the application of actual force is not valid consent.

> Criminal Code, supra, s. 265(3), s. 273.1.

19. In the recent sexual assault case of R. v. M.L.M. this Honourable Court unanimously held that:

> The majority of the Court of Appeal was in error in holding that the victim is required to offer some minimal word or gesture of objection and that lack of resistance must be equated with consent.
>
> R. v. M.L.M., [1994] 2 S.C.R. 3 at 4.

20. In R. v. Wills, the Ontario Court of Appeal found that in order to assert that an individual consented to giving up a constitutionally protected right, which would include a woman's right to bodily security, the Crown must prove: (1) there was consent; (2) the giver of the consent had the authority to give the consent; (3) the consent was voluntary and not the product of coercion or other conduct that influenced the accused's choice; (4) the giver of the

consent was aware of the nature of the conduct to which she was being asked to consent; (5) the giver of the consent was aware of her right to refuse to consent; (6) the giver of the consent was aware of the potential consequences of giving the consent.

R. v. Wills (1992), 7 O.R. (3d) 337 (C.A.) at 348 - 354.

R. v. Morgentaler, [1988] 1 S.C.R. 30 per Wilson J. at 171, 173.

## C. MISTAKE OF LAW VERSUS MISTAKE OF FACT

21. In full mens rea offences, mistakes based on a belief in the existence of facts regarding the external circumstances of the offence which, if true, would render the accused's acts innocent, will exonerate the accused. On the other hand, mistakes based on the meaning, scope or application of a law do not exonerate, nor do honest mistakes about the legal consequences of one's actions.

Criminal Code, supra, para. 17, s.19.

G. Williams, Criminal Law. The General Part 2nd ed. (Stevens & Sons, 1961) at 287-293.

E. Mureinik, "The Application of Rules: Law or Fact," (1982) 98 The Law Quarterly Review 587.

L. Hall and S. Seligman, "Mistake of Law and Mens Rea" (1940-41) 8 University of Chicago Law Review 641.

22. In Molis v. R. this Honourable Court held that section 19 of the Criminal Code refers not just to ignorance of the existence of law but also to mistakes as to its meaning, scope or application. Further, this Court has consistently recognised that an honest mistake about the legal

consequences of one's actions is no defence to a criminal charge. Every individual in Canada has the duty to understand and know the criminal law even with respect to points of interpretation over which judges may differ.

Molis v. R., [1980] 2 S.C.R. 356.

R. v. Forster, [1992] 1 S.C.R. 339.

Jones v. R., [1991] 3 S.C.R. 110.

L. Vandervort, "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-88) 2 Canadian Journal of Women and The Law 233 at 233-256.

Williams, supra, para. 21 at 288-289.

23. Many provincial appellate courts have also identified various situations in which mistakes of law will not exculpate. In all of these cases, the accused was aware of the empirical or socio-factual elements that constituted the offence, but he was mistaken about or misapprehended the legal status, description or consequences of his actions.

R. v. Rio Algoma (1988), 46 C.C.C. (3d) 242 (Ont. C.A.).

R. v. Baxter (1982), 6 C.C.C. (3d) 447 (Alta. C.A.).

R. v. MacDonald (1983), 3 C.C.C. (3d) 419 (Alta. C.A.).

Vandervort, supra, para. 22 at p. 247-256.

24. One rationale for the rule that mistakes of law do not exculpate has been stated as follows:

> To permit an individual to plead successfully that he had a different opinion or interpretation of the law would contradict postulates of a legal order. For there is a basic incompatibility between asserting that the law is what certain officials declare it to be after a prescribed analysis, and asserting, also, that those officials must declare it to be,

> i.e. that the law is, what defendants or their lawyers believed it to be. A legal order implies the rejection of such contradiction. It opposes objectivity to subjectivity, judicial process to individual opinion, official to lay, and authoritative to non-authoritative declarations of what the law is.
>
> J. Hall, General Principles of Criminal Law, 2nd ed., (Indianapolis: Bobbs-Merrill, 1960) at 383.

25. In the area of sexual violence, the distinction between mistakes of fact and mistakes of law has long been blurred Notwithstanding that consent is defined as a matter of law, Canadian courts since Pappajohn v. R., [1980] 2 S.C.R. 120 have assumed that consent involves a pure question of fact to be resolved by the accused alone. A full critical analysis of the distinction between mistakes of law and mistakes of fact in the sexual assault context has never been undertaken by this Court.

L. Vandervort, supra, para. 22.

26. It is submitted that ignorance, misinterpretation and misapplication of the legal definition of consent in sexual assault cases constitute mistakes of law and do not operate as a defence. An accused's belief cannot render non-consensual sex legally blameless if that belief is based on a misapprehension of what constitutes sexual consent as a matter of law. The defence of mistaken belief in consent is not available in cases where the accused had no mistaken belief in a false set of facts bearing on the presence of consent, but merely failed to appreciate, or was indifferent to, the legal significance of facts of which he was well aware.

Vandervort, supra, para. 22 at 233-309.

27. The criminal law, rather than commonly held inaccurate myths, or personally held myths, must define the extent to which an individual's right to sexual integrity is protected. When an offender chooses to act as if his behaviour is subject only to the norms of commonly held myths or those of his personal world, rather than those of Canadian law in the 1990's, he does not make an exculpatory mistake of fact, but rather, he has chosen to defy the law and to run the risk of arrest and conviction.

Vandervort, supra, para 22 at 295-305.

R. v. Barrow (1984), 14 C.C.C. (3d) 471 (N.S.C.A.).

28. Bringing the law of mistake in sexual assault cases into line with the rest of the criminal law does not exclude the possibility that a mistake of fact can exonerate an accused charged with sexual assault. However, to provide a defence to an accused for the commision of the offence of sexual assault, the exculpatory belief must be such that if the facts were as the accused claims to have believed them to be, the actions would not have violated the law. It is submitted that such mistakes can occur when there is some evidence that the accused misperceived the verbal or non-verbal behaviour of the complainant.

Vandervort, supra, para. 22.

See infra, paras. 38 to 45.

29. The Appellants allege that the complainant actively participated after the group sex began. On the other hand, the complainant gave evidence of active resistance, which was both verbal

and physical. As the Court of Appeal properly held: "By its verdict the jury has held that the appellants' acts were without the complainant's consent and that each of the appellants knew it." It is submitted, on that basis alone, this Court ought to dismiss the appeal. Nonetheless, the Appellants go on to assert that there is an evidentiary basis for the mistaken belief in consent defence.

30. In advancing the mistaken belief in consent defence, the Appellants seek to rely on the alleged non-resistance of the complainant who, according to them, "voiced no objection" to the actions performed on her body. It is submitted that any "mistake" based on a belief that non-resistance is consent, is an error of law and does not exculpate an accused.

R. v. M.L.M., supra, para. 19.

31. It is further submitted that the Appellants' assertion that the complainant must have consented because she did not resist and suffered no injuries is based on the myth that women will necessarily struggle or offer overt physical resistance to prevent a sexual assault and that, absent a struggle, the complainant must be consenting. This myth has been discredited by this Court in Seaboyer.

Seaboyer v. R., [1991] 2 S.C.R. 577 per L'Heureux-Dube J. at 651.

32. There is no one correct response to sexual assault. As Madame Justice L'Heureux-Dube noted in Seaboyer:

Women know that there is no response on their part that will assure their safety. The

> experience and knowledge of women is born out by the Canadian Urban Victimization Study....
>
> Sixty percent of those who tried reasoning with their attackers, and sixty percent of those who resisted by actively fighting or using a weapon were injured.....
>
> Seaboyer v. R., supra, para. 31 per L'Heureux-Dube J. at 652.
>
> R. v. M.L.M., supra, para. 19.

33. Mowers claims that he is in a "unique situation among the three accused", since he was involved in the initial consensual activity with the complainant. However, the granting of consent to Mowers in the activity of kissing and touching cannot legally be equated with consent to do more. The nature of the activity changed, even from Mowers' perspective, the moment the complainant felt "too many sets of hands on [her]." If Mowers truly believed that consent to kiss and touch the complainant was equivalent to consent to engage in group sex, he made a mistake of law which will not exculpate him.

34. Whitley argues that because Mowers was touching the complainant, she was consenting to let Whitley perform sexual acts on her body. As a matter of law, consent to A cannot found legally valid consent to B or C. If Whitley truly believed that consent to Mowers meant he had consent to touch the complainant, he made an error of law which will not exculpate him.

35. Whitley suggests that because Mowers "invited" him to touch the complainant he believed that the complainant was consenting. Any belief that the complainant consented because Mowers, in essence, consented for her, is a mistake of law and will not exculpate him.

## D. AIR OF REALITY

### i) Mistakes of Law and "Air of Reality"

36. The "air of reality" test is the test used to determine when any defence may be put before the trier of fact for consideration.

Osolin v. R., supra, para. 12 per Cory J. at 676.

37. It is submitted that the Appellants' claims to have made the mistakes outlined in paragraphs 51 and 52 of Whitley's factum and paragraphs 75 and 76 of Mowers' factum are, as mistakes of law, barred as defences by s. 19 of the Criminal Code of Canada. Hence the "air of reality" test has no application to these specific claims.

### ii) Mistakes of Fact and "Air of Reality"

38. This Honourable Court has consistently held that the defence of mistake of fact regarding consent to a charge of sexual assault must meet the "air of reality" test before it can be considered by the trier of fact.

Pappajohn v. R., supra, para. 25.

R. v. Robertson, [1987] 1 S.C.R. 918.

Reddick v. R., [1991] 1 S.C.R. 1086.

Osolin v. R., supra, para. 12.

39. "In order to give an air of reality to the defence of honest but mistaken belief, there must be: (1) evidence of lack of consent to the sexual acts; and (2) evidence that notwithstanding the actual refusal, the accused honestly but mistakenly believed that the complainant was consenting."

Osolin v. R., supra, para. 12 per McLachlin J. at 648.

40. It is submitted that the decisions of this Honourable Court have in fact utilized a consistent approach in the cases where the Court has found that there is no "air of reality" to a proposed defence of mistake regarding consent: there is no "air of reality" to a mistake defence unless the trier of fact, having accepted that the victim did not consent, could still harbour a reasonable doubt about the accused's awareness of the risk of non-consent based on the remaining evidence in toto.

Pappajohn v. R., supra, para. 25 per McIntyre J. at 500-501.

R v. Robertson, supra, para. 38 per Wilson J. at 938-939.

Reddick v. R., supra, para. 38 per McLachlin J. at 1088.

Osolin v. R., supra, para. 12 per L'Heureux-Dube J. at 609, per McLachlin J. at 648-649, per Cory J. at 682-683.

C. Boyle, Sexual Assault (Toronto: Carswell, 1984) at 166.

41. An accused who argues that the complainant consented is advancing an actus reus argument. Accused, such as the Appellants in the instant case, will often allege that the complainant overtly agreed to, by words and actions, and in fact enjoyed, the sexual contact that

is the subject of the criminal charge. In the case at hand, the accuseds' evidence as to such consent was rejected by the trier of fact.

42. An accused who advances a mistake defence is advancing a mens rea argument. It is submitted that an accused who asserts that he shot a person, mistakenly believing that it was a deer, or who asserts that he mistakenly believed a small, cellophane-wrapped packet of cocaine to be sugar, will need some other evidence to give an "air of reality" to the proposed defence of mistake. Given that the accused is conceding the actus reus of the offence but alleging perceptual error, that other evidence must go to the issue of the accused's perception.

43. The Appellants, by advancing an alternative defence of mistake regarding consent that includes acknowledgement that consent was absent, must, from the remaining evidence point to something in support of their assertion that they misperceived the complainant to have overtly communicated her agreement. To give an "air of reality" to this mens rea argument, the Appellants must identify circumstances that interfered with their ability to perceive accurately the facts.

44. The Appellants do not point to any evidence that supports a theory that they genuinely misperceived the complainant to have willingly spread her legs, that they misperceived her to have embraced the Appellants, that they misperceived her to have willingly fondled their penises, or that they misperceived her to have performed fellatio. To instruct the trier of fact to consider the defence in the absence of any evidentiary support for the alleged misperception is to invite

speculation.

45. It is therefore submitted that the learned trial judge was correct in law in ruling that the defence of mistake of fact was unavailable to the Appellants on the basis of the "air of reality" test.

## E. CONCLUSION

46. LEAF submits that to permit an accused to rely on his own interpretation of the law of consent is to permit the accused in sexual assault cases to raise a defence which is not available to persons accused of other types of offences.

47. LEAF submits that where courts permit an accused to rely on his own interpretation of consent, they are permitting the accused to rely on a defence based on myths and stereotypes about women and sexual assault.

48. LEAF further submits that given the gendered nature of sexual assault, to allow those accused of sexual assault to rely on groundless myths and stereotypes about women and sexual assault is to discriminate directly against women, and in particular those women who are especially vulnerable because of their age, race and\or ability, contrary to sections 7, 15 and 28 of the Charter.

49. In a sex unequal society, jury members are also influenced by stereotypes about women and sexual assault. LEAF submits that for the same reason that judges are required to give careful limiting instructions when sexual history evidence is admitted, so too must judges strictly prohibit juries from relying on "defences" based on myth and stereotype.

50. It is respectfully submitted that this Honourable Court must acknowledge mistakes of law for what they are in sexual assault cases. To fail to do so will deny women effective protection of sexual assault laws and perpetuate women's social and legal inequality in Canada.

## PART IV: ORDER REQUESTED

51. It is respectfully submitted that this Honourable Court ought to dismiss this appeal and uphold the convictions of the Appellants.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated November 21st, 1994

Diane Oleskiw

Laurie Joe

Counsel for the Women's Legal Education
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## PART V - AUTHORITIES

**Factum Page Reference**

### A. CASES

## B. OTHER AUTHORITIES

30. L. Vandervort, "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-88) 2 Canadian Journal of Women and the Law 233 — 10, 11, 12

31. S. Ward et al., "Acquaintance Rape and the College Social Scene" 1991 Family Relations 65. — 7

32. G. Williams, Criminal Law, The General Part, 2nd ed. (Stevens & Sons, 1961) — 9, 10

**C. STATUTES**

33. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1(1), (3) — 8, 9

34. Criminal Code, R.S.C. 1985, c. C-46, s. 273.1, s. 265(3)(a)(b) — 8

35. Criminal Code, R.S.C. 1985, c. C-46, s. 19 — 9