

WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

486.4 Order restricting publication — sexual offences. — (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

. . .

486.6 OFFENCE — (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

ONTARIO COURT OF JUSTICE

DATE: 2022 12 15
COURT FILE No.: 20-5897 Hamilton

B E T W E E N :

HIS MAJESTY THE KING

— AND —

SCOTT WATTER

Before Justice Amanda J. Camara
Heard on May 17, 18, 20, June 13, July 26, 28 and October 19, 2022
Reasons for Judgment released on December 15, 2022

Nancy Flynncounsel for the Crown
Jeff Manishen counsel for the accused Scott Watter

CAMARA J.:

[1] Scott Watter is charged with sexual assault and sexual assault cause bodily harm against S.L. At the time of the allegations, S.L. was a postgraduate student in the department of psychology at McMaster University. Dr. Watter was a professor who worked in that department. The Crown alleges that there were five specific sexual assaults that occurred between February 1, 2017 and August 31, 2017. The allegations, broadly speaking, are as follows:

1. Dr. Watter kissed S.L. without her consent in the basement of his home
2. Dr. Watter spanked S.L. without her consent in her home which bruised S.L.'s buttocks
3. Dr. Watter digitally probed S.L.'s vagina without her consent in her bathroom after she had self-harmed
4. Dr. Watter choked S.L. in his basement without her consent
5. Dr. Watter twisted S.L.'s nipples without her consent causing them significant injury

[2] With the exception of the incident that is alleged to have occurred in the bathroom, there is no dispute on the evidence before me that four of the physical acts occurred. The

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central issue at this trial is whether or not the Crown has proved beyond a reasonable doubt that the complainant had not consented to participating in these physical acts. The defence also contests whether the allegation of choking was a sexual act.

I. Issue

[3] The issue I am to determine is whether the Crown has proved all the elements of offences beyond a reasonable doubt.

II. Burden of Proof

[4] The burden of proof in a criminal trial always rests with the Crown. The burden of proof is a heavy one. It is proof beyond a reasonable doubt in relation to each of the offence's essential elements. A reasonable doubt is not an imaginary, far-fetched, or frivolous doubt. It is not a doubt based on sympathy for or prejudice against anyone involved in this trial. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence, or the absence of evidence¹. To be clear, it is not sufficient that, on the whole of the evidence, I am satisfied that Dr. Watter is *probably* guilty.

III. Credibility and Reliability

[5] It is common ground between the parties that the Crown's case stands or falls on my findings of credibility and reliability on the whole of the evidence tendered at this trial. In assessing a witness's testimony, I must consider the credibility and reliability of the account provided. Credibility relates to the witness's veracity. Reliability relates to the account's accuracy and whether the witness is mistaken in his or her narrative. In assessing each witness's testimonial account, I have considered the following factors:

- (a) whether the account is inherently logical, having regard to common sense, life experience and, in particular, what the evidence reveals about this particular witness;
- (b) whether the account is internally consistent;
- (c) whether the account is consistent with other accounts that the witness has provided in advance of his or her testimonial account before me;
- (d) whether the account is consistent with the testimonial accounts provided by other witnesses whose evidence I accept or, at the very least, cannot reject;
- (e) whether the account is consistent with reliable evidence that exists exclusive of any witness's account, e.g., forensic evidence, photographic depictions, video- or audio-recorded evidence, or evidence that the police have seized during their investigation of the matter or incidental to the arrest of the accused;
- (f) the significance of any inconsistency in the witness's account, e.g., is it in relation to a key or peripheral point, and to what extent does the evidence

¹ *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 (S.C.C.).

otherwise reveal a plausible explanation for it that serves to rehabilitate the account;

(g) whether the witness has an interest in the outcome of the case, or is somehow otherwise motivated to give an account more favorable to one party than the other;

(h) whether the witness has a youth court or criminal record, the entries of which are probative of dishonesty;

(i) whether a witness, who is not the accused before the court, has engaged in discreditable conduct that reflects poorly on his or her credibility or reliability;

(j) whether the reliability of the account is undermined by:

i) the circumstances, including those specific to the observer and those specific to what is being observed, under which the observations that ground the account were made;

ii) a *bona fide* diminished recollection of the events over time;

iii) intentional and/or unintentional tainting by other sources of information; and

iv) the witness's mental, including cognitive and developmental, limitations that are probative of the account's reliability;

(k) the witness's apparent level of sophistication and life experience, particularly as it relates to pre-testimonial contact, in any capacity, with the criminal justice system; and, to a lesser degree,

(l) the witness's testimonial demeanor.

As I assess a given witness's testimonial account, I am mindful that I may accept some, none, or all of that account.

IV. Rule against Ungrounded Common-Sense Assumptions

[6] I am mindful of and caution myself that judges must avoid speculative reasoning that invokes "common-sense" assumptions that are not grounded in the evidence or appropriately supported by judicial notice². As explained by the Ontario Court of Appeal in *J.C.*: "Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour"³. However, it is an error of law to rely on stereotypes or erroneous common-sense assumptions about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility⁴.

² *R v. Roth*, 2020 BCCA 240 at para 65 and *R v. J.C.*, 2021 ONCA 131 at para 58.

³ *J.C.*, *Supra*, at para 61.

⁴ *Roth*, *Supra* at para 129 and *J.C.*, *Supra* at para 63.

V. Analysis

[7] S.L. was the only witness called during this trial. S.L. endured six days of testimony – five of which she was the subject of cross-examination. No doubt reliving her experiences with Dr. Watter in this public forum was difficult. I put little weight, if any, on her testimonial demeanor because demeanour can be an unreliable gauge of credibility given the impact that personality and pressure can have on courtroom behaviour⁵.

[8] I do have concerns regarding S.L.'s reliability for the following reasons:

(1) S.L.'s account is, at times, internally inconsistent

(2) S.L.'s account is inconsistent with other accounts she provided to the police, to McMaster University during their investigation and to the reporter who worked with the Hamilton Spectator. The inconsistencies concern key aspects of the allegations and not merely peripheral matters.

(3) S.L.'s account is inconsistent with text messages that were exchanged with Dr. Watter at the time of the allegations

(4) S.L. demonstrated an interest in the outcome of the trial

(5) S.L. is a very sophisticated and well-educated witness which impacted her reliability as a witness because she would frequently interpret her actions and attempt to proffer expert opinion evidence rather than tell the court what she experienced and witnessed.

I will address each of these concerns in turn.

1 Internally Inconsistent

[9] The first concern I have regarding S.L.'s testimony is that she was internally inconsistent regarding her level of intoxication and how that intoxication affected her memory. For example, with regard to the spanking incident, S.L. testified that she was so intoxicated that she was in and out of consciousness⁶. Despite being in and out of consciousness, S.L. was able to relay specific details and order of events to the court with no loss of detail. S.L. was able to describe going to her bedroom, becoming disrobed, how Dr. Watter cupped his hand while striking her buttocks. She was able to describe other sexual contact and being curled up in his arms following the sexual contact⁷. S.L. testified she was in and out of consciousness but from the account she provided, no details of the event were lost, aside from not remembering if Dr. Watter said anything as he smacked her buttocks.

⁵ *R v. J.L.*, 2022 ONCA 271 at para 6.

⁶ *Transcript of Proceedings*, May 20, 2022, page 63.

⁷ *Transcript of Proceedings*, May 17, 2022, pages 46-51.

[10] This inconsistency is significant because both facts cannot be true at the same time. S.L. was either so intoxicated that she was in and out of consciousness in which case she would not have memories of periods of time, or she was not that intoxicated and exaggerated her level of intoxication. Alternatively, if she did not have a memory of the sexual contact, she provided the court with specific details of the encounter that were fabricated. Either way, this internal inconsistency is significant to my finding that S.L. is not a reliable witness.

2 Inconsistent with Other Accounts provided to the Police, McMaster University and with the Hamilton Spectator.

[11] The second concern that I have regarding S.L.'s reliability is that her testimonial account was inconsistent with prior accounts she provided to the police, to McMaster University during their investigation and to the reporter who worked for the Hamilton Spectator. The inconsistencies which impact her credibility and reliability concern key aspects of the allegations and do not concern merely peripheral matters.

[12] Before addressing the specific inconsistencies that caused the court concern, I do wish to address an argument the Crown made during their submissions that S.L. ought to be viewed as a strong advocate for herself, a victim with a voice. S.L.'s resolve to stand up for justice and to tell what she knows to be true demonstrates that S.L. is a strong sexual assault complainant.

[13] In my view, who the complainant decided to disclose her story to and when does not impact her credibility one way or another. Her decision to report to the police and when she decided to report to police neither enhances nor detracts from her credibility or reliability. Her decision to provide interviews with the media neither enhances nor detracts from her credibility or reliability. What concerns the court, is the significant inconsistencies between her statement to the police, the statements to McMaster University and the statements made to the reporter when compared with what she told the Court during the course of the trial⁸.

[14] In this case, S.L. provided a statement to the police, provided several audio-recorded statements to an investigator hired by McMaster University to investigate these allegations, and she provided several audio-recorded statements to a reporter with the Hamilton Spectator during which she discussed the allegations against Dr. Watter. It is not surprising that there would be some inconsistencies between all of these statements. However, in this case, there are significant and substantial inconsistencies which lie at the heart of S.L.'s testimony. The following are examples of inconsistencies concerning central areas of S.L.'s testimony:

1. S.L.'s recollection of her reaction to Dr. Watter's kiss in the basement

[15] In-chief examination, S.L. testified that when Dr. Watter kissed her in the basement she froze.

⁸ *R v. S.G.*, 2022 ONCA 727 at para 23.

Q. And, physically, how did that come about?

A. He turned towards me and leaned in and kissed me [...]

Q. And, so when after he turned towards you, leaned in, and kissed you what, what did you feel at that time when this happened?

A. I remember just freezing and being in a state of shock [...]

Q. And, what happens from this kiss? What, what's next after he leans in and he kisses you and you freeze and you're in shock?

A. He just started saying a bunch of different things that seemed to come out of absolutely nowhere, like, asking about my sexual preferences, do I like it rough? Am I a good girl?".⁹

When she spoke with the police, S.L. also recalled that she had frozen after this initial kiss. But when speaking with the reporter from the Hamilton Spectator she had a different memory; she recalled pushing him off of her when he kissed her.

Q. And, I'm at page 16. I'm going to read you some answers that you gave there. At line 18, you say to Ms. Clarke,

And yet what he does, he puts his arm around me and he starts making out with me. [And she says] Oh. [And you go on] Yeah, I'm, I barely remember enough because I wasn't blackout drunk, but I was not with it either. And, I was freaking out and was like, what the fuck is going on? And, *I push him off me*. And, I was like, *what the fuck was that?*¹⁰

[16] S.L. testified that she made that statement to the reporter because that was the way the event came to her memory at the time. Further, she agreed that what she had said to the reporter about pushing him away was in fact inaccurate.

[17] The act of pushing someone away is very different than freezing. Either reaction would not be unreasonable nor unexpected. However, S.L.'s description to the media reporter of her reaction to being kissed was diametrically opposed to the versions of this event that she relayed to the police and to the court in her examination-in-chief.

[18] S.L. did provide the court with an explanation for the inconsistency. She testified that: "Occasionally small memories, small parts of memories may not be distinctly clear, but the big parts are"¹¹. I do not accept her explanation for this significant inconsistency.¹² The inconsistency is not merely on a matter which is peripheral to the alleged assault. It relates to S.L.'s initial response to the unwanted sexual advance by Dr. Watter. This inconsistency calls into question whether S.L. is a reliable historian.

2. The photographs of her injuries following the spanking incident

[19] S.L. testified in-chief examination that she took pictures of her injuries after Dr. Watter "beat her"¹³ and texted Dr. Watter those pictures so he could see what he had

⁹ *Transcript of the Proceeding*, May 17, 2022, at page 32.

¹⁰ *Transcript of the Proceeding*, May 20, 2022, at pages 21-22. Emphasis added.

¹¹ *Transcript of the Proceeding*, May 20, 2022, at page 23.

¹² *R v. S.G.*, *Supra* at para 26

¹³ *Transcript of the Proceeding*, May 17, 2022, at page 56.

done to her. However, S.L. told the police during her statement that she and Dr. Watter had never had a conversation about the beating incident¹⁴. Importantly, there were text messages exchanged about this sexual contact, but no messages that contained these photographs were introduced. Those text messages will be discussed later in this ruling. Putting aside the text messages themselves for the moment, this inconsistency - that she told police she and Dr. Watter never discussed the beating incident and told the court that they did discuss the incident and she sent him photographs of her injuries – is significant. This inconsistently demonstrates that she was careless with the truth when speaking to the police. Her statement to the police was provided years after the allegations occurred and it is possible that she had forgotten this detail when speaking with the police. Had this issue been the only inconsistency, my concerns would be lessened. However, this inconsistency coupled with the other areas I have identified heighten my concern that S.L. is not a reliable historian.

3. Changes regarding the details of the allegations

[20] During her testimony before the court, significant details were added or expanded upon of the sexual contact; details that were not shared with the police during the course of their investigation. For instance, during her testimony, S.L. described the alleged sexual contact that took place in the bathroom following her self-harm, as Dr. Watter “prodding” her “vulva”¹⁵. This significant detail was not mentioned to the police at the time of her statement despite S.L. providing the police with other details of the incident. She testified that these were memories that came to her later¹⁶. I do not accept her explanation for this inconsistency that the prodding of her vulva was a detail that came to her later and not at the time of her statement since her statement was made some three years after the incident. This inconsistency is another example of S.L.’s carelessness with the truth. It is also an example of S.L. describing the sexual contact as more egregious in her testimony than she described it to the police.

[21] Another example of S.L.’s tendency to heighten the allegations occurred when S.L. testified that Dr. Watter was aroused during the bathroom incident. She testified that she thought Dr. Watter was aroused during the incident because she saw an erection in Dr. Watter’s pants¹⁷. Defence counsel cross-examined S.L. about telling the Hamilton Spectator reporter that she saw arousal on Dr. Watter’s face during this bathroom incident. S.L. agreed that she told the reporter that Dr. Watter showed arousal on his face¹⁸. S.L. and counsel then had the following exchange in cross-examination:

- Q. So, that doesn't have anything about arousal in his pants. You didn't remember that when you spoke to Ms. Clarke.
- A. Within each of these...
- Q. Pardon me, sorry?

¹⁴ *Transcript of the Proceeding*, May 20, 2022, at page 76.

¹⁵ *Transcript of the Proceeding*, May 17, 2022, at pages 70-71.

¹⁶ *Transcript of the Proceeding*, May 20, 2022, at pages 102-107.

¹⁷ *Transcript of the Proceeding*, May 17, 2022, at page 71.

¹⁸ *Transcript of the Proceeding*, May 20, 2022, at pages 111-113.

- A. Sorry, within each of these interviews, these subjects were very very difficult to speak of and I, I didn't - it was not comfortable to speak of, and so I don't think I, I always mentioned certain things because it was difficult to speak about.
- Q. I'm going to suggest to you that it didn't come into your mind because it didn't happen. He wasn't aroused, that's why you didn't say it. And, you can agree or disagree.
- A. I disagree.
- Q. Okay. Are you claiming, are you claiming, Ms. L. that at the time of this interview, you remember that he, he was aroused in his pants but you didn't tell the reporter? Is that what you're saying here?
- A. Yes
- Q. Okay. So, what you're doing is you're prepared to tell the reporter all kinds of details about sexual activity, literally the point of him touching your vagina, but you're too uncomfortable or embarrassed to tell him, to tell her that he was aroused in his pants. Is that your evidence?
- A. I'm uncomfortable with you saying it now. Yes, it's very uncomfortable.
- Q. Never mind me saying it now, you were very comfortable with the reporter by the time of - this is the interview - we know you'd had, you'd had several interviews with her. You were very comfortable with her, weren't you, Ms. L.?
- A. I was becoming more comfortable, yes.
- Q. Becoming more comfortable? By the time we're no April, April 13th, there had been a whole series of interviews. You had gone over all kinds of details and she was re-assuring and supportive, right?
- A. Of course she was.
- Q. Right
- A. She was great
- Q. Pardon me?
- A. She was great.
- Q. Great. So, by the time we get to April 13th, you're perfectly comfortable with her to talk with her about how she could word things in the story right?
- A. Yes
- Q. And, you're comfortable enough to share with her that Dr. Watter had touched your vagina. You were comfortable enough to do that, right?
- A. Yes
- Q. And, you were comfortable enough to discuss with her how it could be worded in a newspaper article, right?
- A. Yes
- Q. But, your claim is at the time you remembered also that you could see he was aroused by he's erect by looking at his pants, but you're too uncomfortable to tell Ms. Clarke that. Is that your evidence?
- A. I'm saying it was uncomfortable to talk about
- Q. Sure
- A. I knew not of, I may have forgotten to mention that particular detail on that particular day¹⁹.

[22] The discrepancy on this particular detail is significant as it involves an important component of the narrative. But also significant in this exchange is S.L.'s explanation for the inconsistency. It defies common sense that she was uncomfortable with the reporter by the time this statement was made to the reporter. It was clear the reporter was successful in establishing a rapport in which S.L. was comfortable and did share her story and intimate details of the allegations and of her personal life. I reject S.L.'s testimony that she was uncomfortable and therefore did not mention this detail to the reporter. Furthermore, S.L.'s claim that she may have forgotten to mention this detail is inconsistent with her claim that she did not mention it because it was uncomfortable to talk about. In

¹⁹ *Transcript of the Proceeding*, May 20, 2022, at pages 113-115.

her testimony at trial, therefore, S.L. added a detail that was not previously mentioned in her discussions with the reporter – the fact that she saw Dr. Watter was aroused in his pants. This evolution in S.L.’s version of events regarding the bathroom incident contributes to my concern about the reliability of her evidence.

[23] Further inconsistencies were revealed during S.L.’s testimony regarding the circumstances surrounding the allegation of choking. The details of the choking incident changed from when she spoke to the police to when she testified during this trial. For instance, during her testimony, S.L. describes being choked in Dr. Watter’s basement without her consent while being pushed against a support pillar. At trial, she describes in detail the location of the pillar relative to the piano and places the futon relative to the pillar²⁰. In contrast, when she spoke with the police, S.L. described the choking occurring against a wall in the basement²¹. S.L. testified that reflecting back on this discrepancy she believes the incident happened against the pillar and not the wall. This detail may not have been significant had the complainant simply testified that she wasn’t sure exactly where the choking took place. But that is not the case. She provided specific evidence in a clear manner. And on a previous date, she stated something different. The fact that S.L. provided specific details to the police about the manner in which the assault took place on this occasion, and then changed those details when testifying at trial, diminishes S.L.’s reliability as an accurate historian.

[24] Further, S.L. testified that during the choking incident Dr. Watter had an erection²². She also agreed that she did not provide that detail to the police at the time of her statement²³. Her explanation for this omission in her statement is incredible. She testified that she was “struggling to use those words at that point in time”²⁴ when she spoke to the police. In other words, she remembered the erection but did not feel comfortable enough to tell the police during her statement. I do not accept S.L.’s explanation for this omission as it defies common sense that she would be comfortable enough to describe to the police details of the sexual contact but not comfortable enough to describe seeing an erection under Dr. Watter’s pants.

[25] S.L.’s description of the nipple twisting incident at trial is also inconsistent with previous statements she made about this incident. S.L. described in-chief examination that she and Dr. Watter were first talking in the car and that Dr. Watter twisted her nipples so hard that they were injured²⁵. Then her testimony changed and she added that perhaps Dr. Watter had kissed her without her consent, and then twisted her nipples²⁶. She also clarified that both of her nipples were twisted and injured. However, when she relayed the nipple twisting incident to the police, she told them only one nipple was injured²⁷ and that the kissing was “somewhat consensual”²⁸. Importantly, the kiss, which

²⁰ *Transcript of the Proceeding*, May 17, 2022, at page 78.

²¹ *Transcript of the Proceeding*, May 20, 2022, at page 131.

²² *Transcript of the Proceeding*, May 17, 2022, at pages 81-82.

²³ *Transcript of the Proceeding* May 20, 2022, at page 133.

²⁴ *Transcript of the Proceeding* May 20, 2022, at page 133.

²⁵ *Transcript of the Proceeding* May 20, 2022, at page 140.

²⁶ *Transcript of the Proceeding* May 20, 2022, at page 131.

²⁷ *Transcript of the Proceeding*, May 20, 2022, at page 142.

²⁸ *Transcript of the Proceeding*, May 20, 2022, at page 145.

was somewhat consensual, is in direct contradiction to her earlier testimony that she never consented to any sexual contact. Also important, is that S.L. testified that it is possible that she did consent to the activity of pinching her nipples²⁹. That concession was made by S.L. after being confronted with various text messages she and Dr. Watter had exchanged on the subject. S.L.'s testimony fluctuated from never consenting to any sexual contact, to consenting to some sexual contact – namely a kiss, to two nipples being twisted and injured from one nipple being injured. These inconsistencies regarding this sexual contact are significant and further demonstrate the frailties of S.L.'s evidence which was ever shifting and changing.

[26] I have considered all of these inconsistencies and the explanations for the inconsistencies. I find that these inconsistencies concern the heart of the allegations and are not of a peripheral nature. I do not accept S.L.'s explanations for the inconsistencies. These inconsistencies have contributed to my finding that S.L. is an unreliable witness.

3 Inconsistencies with the text messages exchanged with Dr. Watter at the time of the alleged offence

[27] The third reason I have concern regarding S.L.'s reliability is that S.L.'s account of the allegations against Dr. Watter stands in stark contrast to the content of the messages she exchanged with Dr. Watter at the time of the allegations.

[28] During the course of their relationship, S.L. and Dr. Watter communicated frequently via text message. S.L. provided some of those text messages to the police. Dr. Watter retained other messages. S.L. was cross-examined on many of the text message exchanges she had with Dr. Watter that occurred before, during and after the alleged incidents of sexual assaults.

[29] It is important that I emphasize that the fact of the communication after an alleged sexual assault or that a relationship continued after an alleged sexual assault does not detract nor enhance a complainant's reliability or credibility. Nor does the sexual content of any of the messages detract nor bolster the complainant's reliability or credibility.

[30] The text messages are not proof that the complainant did or did not consent at the time of the sexual contact; nor could they ever be. Consent cannot be given in advance of the sexual contact. For the consent to be valid, it must be given and exist at the time of the sexual contact.

[31] The text messages are important because they were exchanged during the time frame captured on the information. Therefore, the text messages are a window into what was occurring during the general time frame of the allegations. The text messages are significant when juxtaposed with the complainant's testimony at trial. The content of these text messages belies the complainant's allegations of sexual assault³⁰. For instance, the text messages demonstrate that the complainant had expressed an interest in a romantic relationship with Dr. Watter – contrary to her testimony during this trial. At trial, S.L.

²⁹ *Transcript of the Proceeding*, July 26, 2022, at page 114.

³⁰ *R v. B.T.D.*, 2022 ONCA 732 at para 44.

denied having any interest in ever developing a romantic interest with Dr. Watter³¹. The text messages that were exchanged paint a different picture. The following is an exchange between S.L. and counsel in cross-examination regarding the messages:

Q. All right. So, you write, "Got a lot going on in this head right now," and he writes back, "I hope I'm not a bad contributor to that." And you write, "No, you're fine," with a little smile punctuation. And he says, "It's so," and he meant to write, "Much the opposite, of what I want to be for you," and you write back, "You're wonderful for me." "I just meant you don't have to worry about being a bad addition to my head space." And he writes back, "Okay, good to know, it's super, super important, good things for you is the most important thing." "If people care about you, I don't want to wreck that in anyway," and you write back, "I know that, and vice versa." You see that exchange?

A. Yes.

Q. So, when you wrote him, he says, "I hope I'm not a bad contributor," to the response to your having, "A lot going on in your head," and you write back, "No, you're fine." And he says, "It's the opposite of that." He's conveying to you he doesn't want to be a bad contributor to your head space.

A. Yes.

Q. And you write back to him to say, "You're wonderful for me." That's how you wrote because that's how you felt, isn't that right?

A. He had been a very, very good friend, a very close friend, and a mentor. I wanted that to continue. I, everything was a juxtaposition between what had happened and what I had known, and I don't think, I think part of me just didn't believe it had happened. Everything was extremely confused, and I was just trying to go back to normal.

Q. And if I suggest to you that you felt an attraction to him, the potential for a relationship with him that could have some physical intimacy. And so, you conveyed to him, "You're wonderful for me." You wanted to reassure him you were interested in that, isn't that what you conveyed by that?

A. I don't think that's what I intended.³²

[32] This text message exchange is one of many in which the complainant expresses to Dr. Watter that she has an interest in a relationship with him. She expresses an interest in getting "involved" with him³³ in the text messages but denied during her testimony that that is what she meant to convey to Dr. Watters. Further on in her testimony, S.L. agreed she texted Dr. Watter the following "I'm a tad possessive of the idea of getting involved with you" but denied the suggestion that she was discussing a romantic relationship³⁴. When confronted with more text messages and images she had sent Dr. Watter of herself, S.L. began to acknowledge that the text messages painted a picture that demonstrated her interest in having a non-platonic relationship with Dr. Watter:

³¹ *Transcript of the Proceeding*, May 20, 2022, at pages 24-25, 35, 53 and 122.

³² *Transcript of the Proceeding*, June 13, 2022, at pages 37-40.

³³ *Transcript of the Proceeding*, June 13, 2022, at page 47.

³⁴ *Transcript of the Proceeding*, June 13, 2022, at page 47.

Q. [...] And then you write, "Prove my body is better than tattoo girl," and you pull up a picture of that scarification girl.

A. Yep.

Q. And you send a picture, and this is April the 17th, at 9:32, so this would be a picture that you send of you in a bikini. Correct?

A. Yes.

Q. All right. So, I'm going to suggest to you, Ms. L., that this is all consistent with you wanting to have an intimate relationship with Dr. Watter. That you want to show him your body is better than the girl in the scarification picture. That's why you sent it. Agree or disagree with me?

A. This was well, clearly, within the point where things were starting to get messed up for me, and knowing where I was, what I wanted, what harm I wanted to come to me. At that point it looks like I was, to some degree, involved in that line of thinking, yes.

Q. The line of thinking of being in a relationship with Dr. Watter?

A. I wouldn't call it a relationship, but, sure.

Q. And certainly, more than friends, that there was potentially a relationship that was more than just platonic. Can we call it that?

A. Sure.³⁵

[33] These text messages directly contradict S.L.'s contention that she was never interested in a romantic relationship with Dr. Watter. These text message show that she in fact was interested in a romantic relationship with him and had told him so during these text message exchanges.

[34] Whether S.L. was in an intimate relationship with Dr. Watter before, during or after the allegations of sexual assault don't detract or bolster S.L.'s credibility. The issue is here, she testified that she was never interested in a romantic relationship with Dr. Watter but the text messages they exchanged at the time express something different. In fact, the text messages demonstrate that S.L. and Dr. Watter even communicated about the progression of their romantic relationship and included the possibility of sharing an apartment. The following exchange demonstrates that progression:

Q. Sure. What's being discussed there is you being in one another's company, the relationship proceeding potentially to kissing and you'd both be consenting.

A. It could be. It could be part of the discussion, sure.

Q. And we actually see a little bit further exchange out of that from 8:40. He writes, "I imagine it would be hard not to at some point in all this". You write, "um yeah". He writes, "yeah". He writes "in the meantime we'll just have to pass the time talking about all of those things that might lead to all this future kissing." You write, "ye". And you write, "Honestly, though, I'm not like all raring to go." He writes, "LOL okay then." And you say "when I say I'm innocent I mean it will need to be graduated". And he writes, "Oh goodness, yes". And you write, "Okay, 'cause I think I will love most things".

³⁵ *Transcript of the Proceeding*, June 13, 2022, at pages 67-68.

That's how you expressed to him, I'm going to suggest to you an interest in the relationship moving in a graduated way through increasing levels of physical intimacy. Isn't that what you wrote?

A. It's possible, but I don't think that's what I meant.

Q. Just to complete this section he writes, "I think whether we are talking now or even if we are deciding to do things now all these things would be graduated". And that's with capitals. And you write, "okay good". And you write, "Also there's some fucking practical considerations". He writes back, "yes indeed". And you write back, "Like your or my house doesn't really work". He writes "very true". You write "we would have to split an apartment rental I mean". He said "we could do that" – he writes, "we could do that". You write, "Anyhow that's a future issue".

So you were thinking ahead as to the relationship progressing and needing to find someplace that the two of you could rent together to go to for the relationship, isn't that what you wrote?

A. Apparently in this context, yes.³⁶

The text messages reveal that not only did the complainant express interest in a romantic relationship, contrary to her earlier testimony that she did not, she even spoke to him about sharing an apartment together. S.L.'s explanation for this apparent contradiction was that she was "trying to figure out how to advocate for [her] not wanting it in [her] home"³⁷. I do not accept that explanation as truthful. That explanation flies in the face of all the other text messages wherein she is expressing an interest in a relationship, in intimacy and in her desire to spend time with Dr. Watter. This is a significant example of the unbalanced nature of S.L.'s evidence. Rather than concede and acknowledge the weakness in her evidence she offered an incredible strategic explanation. This explanation did not enhance my confidence that S.L. was intent on being truthful.

[35] The text messages directly contradict the complainant's testimony about whether she ever expressed to Dr. Watter an interest in participating in sexual activity specifically participating in a threesome or BDSM activities. Again this evidence cannot be used to show that the complainant provided consent in advance of the sexual activities as that is not valid consent. Nor does her interest or disinterest in certain acts bolster or detract from her credibility. The text messages directly contradict statements she has made during the course of her testimony which calls into question S.L.'s credibility. For example, S.L. denied ever expressing to Dr. Watter an interest in BDSM³⁸ and she denied every communicating back and forth in text messages about BDSM practices³⁹. Yet the text message communication demonstrates frequent and varied discussion about BDSM practices during which S.L. expresses interest in the practice.⁴⁰ She later explained that her interest came after a period of grooming⁴¹ but continued to deny an interest in the activity. The text messages prove otherwise. In her trial testimony, S.L. was unwavering

³⁶ *Transcript of the Proceeding*, July 26, 2022, at pages 13-14.

³⁷ *Transcript of the Proceeding*, July 28, 2022, at page 38.

³⁸ *Transcript of the Proceeding*, May 20, 2022, at page 46.

³⁹ *Transcript of the Proceeding*, May 20, 2022, at page 50.

⁴⁰ *Transcript of the Proceeding*, June 13, 2022, at pages 61-62, 66, 67, 69, 70.

⁴¹ *Transcript of the Proceeding*, July 28, 2022, at page 27.

in her assertion that she did not have an interest in the activity; that assertion is squarely contradicted in the text messages.

[36] Another significant contradiction exists between S.L.'s testimony regarding the nipple twisting incident and the text messages. In-chief examination, S.L. described being in Dr. Watter's car, talking. Then she said that Dr. Watter suddenly twisted both nipples until they were oozing and S.L. screamed. She described the contact in the car as both unwanted and testified that she did not provide consent to that sexual contact⁴². In cross-examination, defence counsel suggested to her that she told the police that she and Dr. Watter had been kissing in the car before there was contact with her nipples; and that the kissing was consensual⁴³. After her memory was refreshed, she did recall consenting to kissing Dr. Watter. Later in her testimony, S.L. was confronted by messages she had exchanged with Dr. Watter after the nipple twisting incident which paints a different picture than her in-court testimony - namely that she did consent to having her nipples twisted:

Q. All right. And you write next, "All I can focus on is how sore something is LOL." And he writes, "sorry lovely you did keep asking for more". And you write back with a punctuation that has a semi colon and a closed parenthesis which is like a wink, you write back, "I know"⁴⁴.

S.L. is asked to explain this apparent inconsistency and she testifies that she doesn't remember exactly but "it could be humor, could be a coping mechanism"⁴⁵. I do not accept this explanation as credible. In this particular context, and in the context of this text exchange that explanation seems frankly incredible. In fact, at a later point in the cross-examination S.L. accepts that this explanation was incredible and acknowledges that it is possible that she had consented to the sexual contact:

Q. And he writes – or you write, "But I just couldn't exactly remember" and he asks, "how is the rest of you no bruises I hope". And you write back, "not a mark". He writes, "Wonderful" with a smiley face. And you write, "just very sore nipples". And he writes, "well, yes, that was the point" with a smiley face and a closed parenthesis. And you write back with a colon and a closed parenthesis, smile. I'm going to suggest there, Ms. L., that shows that a point of the activity of pinching your nipples, you are experiencing some pain, you were being in agreement with that, kind've like a BDSM activity was something you agreed to just as the point just as he/s describing the point of the activity. Isn't that what happened?

A. It is possible, I don't remember.⁴⁶

This testimony is in stark contrast to her earlier testimony that Dr. Watter twisting and grabbing her nipples was a surprise and an act to which she had not consented. This testimony concerns a key issue in this trial and is far from a trivial or peripheral issue. This testimony is another example of S.L.'s lack of commitment to the truth. I find I am

⁴² *Transcript of the Proceeding*, May 17, 2022, at pages 84-95.

⁴³ *Transcript of the Proceeding*, May 20, 2022, at pages 138-149.

⁴⁴ *Transcript of the Proceeding*, July 26, 2022, at page 111.

⁴⁵ *Transcript of the Proceeding*, July 16, 2022, at page 111.

⁴⁶ *Transcript of the Proceeding*, July 26, 2022, at page 114.

unable to rely upon her testimony unless it is corroborated in some way by external evidence.

4 S.L. demonstrated bias

[37] The fourth concern I have regarding S.L.'s reliability is that she has bias. It is perhaps unsurprising that S.L. harbours ill-will towards Dr. Watter. What concerns the court, though, is her testimony regarding statements she made to him about her ability to "ruin his life". The following is an exchange during cross-examination which causes the courts concern:

Q. And if we go into 2019, and I'm going to suggest particularly in the spring of 2019, did you contact him by phone at night, and talk with him about how you were feeling?

A. I don't remember doing that, but again it's possible over the period of time from 2017, 2018 into 2019. I was still, I was struggling with my emotions, I was struggling with deal with the trauma. I was not, I wasn't in the best place.

Q. Sure. And so, that's fine. And so, what I'm going to suggest is that it may have happened. That is, I'll describe it to you that you contacted him. It would have been in May of 2019, late in the evening, contacted him, talked with him about how you wished that you could have a relationship with him again but realized that'd be impossible because he was with K. Was that something you would've talked with him about in the phone call?

A. I don't remember that at all.

Q. And that you may have said to him "You know, I could ruin your life." "I can fuck up your life" Could you have said that to him in that phone call?

A. It is possible, but again I don't remember saying that

Q. And that you suggested that he could come over, and the two of you could talk, and he, he said he didn't want to do that?

A. I don't remember that.⁴⁷

[38] This passage demonstrates that S.L. had a potential motive to fabricate the allegations to get back at Dr. Watter for a perceived slight. S.L. did not deny the possibility that she told Dr. Watter that she could ruin his life, which would suggest that she bore some animus and bias towards him.

[39] The bias and potential motive to fabricate is only one factor I must consider in assessing whether the Crown has met its burden. However, in this case, S.L.'s potential motive to fabricate and bias is coupled with the substantial inconsistencies between her in-court testimony and prior statements she made to the police and text messages she exchanged with the accused.

⁴⁷ *Transcript of the Proceeding*, June 13, 2020, at pages 23-24.

5 S.L. was a witness who attempted to control the narrative.

[40] The fifth reason I have concerns regarding S.L.'s reliability is that her testimony was unbalanced. She appeared to be motivated to advocate her position rather than answering questions truthfully. S.L. is currently completing her doctorate in clinical psychology at McMaster University. She is highly educated and a very sophisticated witness. S.L. would often interpret her own actions or proffer an opinion to explain why she must have done or acted in a certain way rather than merely tell the court what she did, what she saw or what she experienced. I found that S.L. was frequently attempting to control the narrative and was advocating her case rather than describing what happened to her.

[41] For instance, S.L. testified that before the first incident she recalled becoming dissociative. She described that “dissociation is a condition in which you begin to distance yourself from reality either in the form of depersonalization in which you become absent from yourself, and things start moving slowly around you, or de-realization where kind of the world around you becomes fuzzy”⁴⁸. S.L. frequently described herself as dissociative⁴⁹. She testified about dissociation and trauma dissociation and the impacts that trauma can have on memory⁵⁰. Trauma dissociation is offered by S.L. as an explanation for why she may have more details of an event on one day than on another⁵¹. At some points, S.L. was testifying about what she was experiencing and also analyzing from a psychological perspective what was occurring:

Q. Thank you. And, the phrase, I'm not quite present in my body. Well, did you have the sensation of looking down on yourself? You're sitting on a couch, and you can look down and see your body there?

A. No.

Q. Okay. Removed from myself, is it a matter of you're thinking of things, but your body is acting independent of your thinking?

A. no

Q. So, the sensation of removing myself or withdrawing from my personal environment, can you give us any more detail about what that felt like to you?

A. Sure. Mostly, numbness to – numbing, numbing myself from the emotions I was experiencing as a way to cope with them and feeling somewhat numb to the, to the people that were around me in the social dynamics.

Q. Numb to the people around, well, of course, it's a friendly setting

A. of course, yes

⁴⁸ *Transcript of the Proceeding* May 17, at page 29

⁴⁹ *Transcript of the Proceeding* May 17 at page 37 38 39

⁵⁰ *Transcript of the Proceeding* May 18 at page 36, 37

⁵¹ *Transcript of the Proceeding* May 18 page 37. S.L. also testified that during these events she became dissociative even before any assault was alleged to have occurred

Q. So, there isn't any emotional component to the environment

A. There's always an emotional component to any social environment

Q. Okay. So, when you say numb and others, you didn't like them as much or you didn't care about them as much?

A. Oh no, I don't mean that at all. I mean, they just – their presence around me was not quite as obvious. Imagine if you are in a bubble and the sides of that bubble are a little bit fuzzy. So, your peripheral vision is a little bit, glazed, that would be a way of describing it

Q. and, another way might be less engaged with them?

A. Yes.

Q. Less connected to them in terms of interrelating.

A. Sure

Q. Would that be a way to put it?

A. Partly and then also including the statement I mentioned about the visual component.

Q. Okay. And, you used the phrase, earlier, that your emotions became amplified, but yet I understand from being dissociative what you've given us is, I was numbing myself from the emotions I was experiencing. I - can you assist? On the one hand the emotions seem amplified and on the other the dissociation seems to numb the emotions. Can you assist us on what you're experiencing?

A. You've asked me not to be an expert witness. So, how much detail do you want me to go into from a psychology level or how much do you want me – it's hard to remove my ability to talk about them without – well, when you're asking me to describe the details.

Q. I'm asking you what you experienced, in other words, what it – apart from what might be theoretically...

A. Okay, I will try to describe it in my own words as much as possible.

Q. And, not only your own words, what you were experiencing. So, what I'd like to do...

A. Yes

Q. ...is understand emotions being amplified...

A. Sure

Q. ...you can understand, much more sad, much more dismayed, just depressed.

A. Yeah

Q. On the other hand, numbing the emotions doesn't seem to fit.

A. I hear ya. I see how it can seem contradictory, or course

Q. Indeed

A. So, when emotion – when you – sorry, I was experiencing many emotions at once. All of those emotions were occurring simultaneously, while numbing and both were going on at the same time.⁵²

Ultimately, S.L. determined that she was dissociative when at the table in a social situation before the first kiss, and less dissociative when she sat at the piano before the first kiss because the piano helped her regulate her emotions.⁵³ Interestingly, she also testified that notwithstanding this mild state of dissociation, and a level of intoxication, she was still capable of making decisions⁵⁴ but incapable of consenting⁵⁵.

[42] This area of testimony was not only confusing – it added a layer of opinion evidence that S.L. was not qualified to provide. Despite her expertise, she would not be qualified to offer expert testimony regarding her own behaviour or her own conduct. The effect of her attempt to offer expert opinions was to confuse the issues – like testifying that she was capable of making decision but incapable of consenting. It became difficult to discern when S.L. was describing how she felt or how she experienced a particular event versus how she has subsequently come to interpret and understand her experiences. By attempting to provide expert opinion evidence, S.L.’s testimony was unbalanced, and it appeared as if she had an agenda in providing the details of her experience rather than being a witness to an event who was trying to provide the court with the most accurate record of what occurred.

VI. Finding

[43] A finding of guilt requires proof beyond a reasonable doubt. As I stated at the outset, it is not enough for the trier of fact to find Dr. Watter probably guilty. Proof beyond a reasonable doubt must be grounded in reliable evidence. Taken as a whole the evidence before me falls short of that high standard.

[44] For all of the foregoing reasons, I find that S.L. is an unreliable witness, and I am unable to rely upon her testimony where there is no corroboration. Specifically, I do not accept, nor can I rely upon her testimony that she did not consent to kiss Dr. Watter, nor do I accept that she did not consent to the spanking incident. I find that there is no evidence upon which I can rely to support a finding that any sexual activity took place in the bathroom of S.L.’s home. I find that I cannot accept the evidence of S.L. when she says she did not consent to being choked in his basement. Lastly, I do not accept S.L.’s testimony that she did not consent to her nipples being twisted.

[45] There are two final areas that I wish to address:

1. The Crown’s submission that any consent S.L. may have provided was vitiated by Dr. Watter’s abuse of a position of trust, power or authority pursuant to Section 273.1(2)(c) of the *Criminal Code*; and

⁵² *Transcript of the Proceeding*, May 18, 2022, at pages 60-63.

⁵³ *Transcript of the Proceeding*, May 18, 2022, at page 65.

⁵⁴ *Transcript of the Proceeding*, May 18, 2022, at page 66.

⁵⁵ *Transcript of the Proceeding*, May 18, 2022, at page 65.

2. The Crown's submission that S.L. could not have consented to the nipple twisting incident nor the spanking incident since a person cannot consent to an assault that causes bodily harm.

VII. 273.1(2)(c)

[46] The Crown has submitted that even if I reject S.L.'s testimony that she did not ever consent to any sexual activity and find that she had in fact provided consent, that that consent was vitiated because Dr. Watter abused his position of trust, power or authority over S.L. in obtaining that consent pursuant to section 273.1(2)(c). I have found that the Crown has not proved beyond a reasonable doubt that S.L. did not consent to the sexual acts. Was the consent that S.L. provided vitiated?

[47] Importantly, for the Crown to rely upon s 273.1(2)(c) of the *Criminal Code*, the onus is on the Crown to establish the factual underpinnings of the section. In particular the onus is on the Crown to establish that Dr. Watter was in a position of trust, power or authority with respect to the complainant which reduced her to a state of dependency upon him such that he was able to misuse his dominant position to extract her consent to a sexual assault⁵⁶. Section 273.1(2)(c) engages a more nuanced or subtle form or pressure or inducement which may be inferred from the circumstances⁵⁷.

[48] In this case, there is no dispute that S.L. was a student in the department of psychology at McMaster University. There is no dispute that she first met Dr. Watter when she was an undergraduate student and these sexual encounters occurred when she was working on her Master's degree. Dr. Watter was a professor of psychology employed at the same university. S.L. testified that Dr. Watter assigned the TA jobs but was not involved with her master's program⁵⁸. There is no doubt that the relationship was ill-advised. By the very nature of Dr. Watter's position in the department and S.L.'s position as a student in that very same department there was a power imbalance. The issue for me to determine is whether the Crown has proven beyond a reasonable doubt that Dr. Watter misused his position to persuade or entice the S.L. to consent.

[49] For the following reasons, I find that the Crown has not proved beyond a reasonable doubt that Dr. Watter misused his dominant position to extract or persuade S.L. to consent.

[50] The issue of consent was central to S.L.'s testimony. She testified that she did not consent to any sexual activity at all and that the power imbalance that existed between herself and Dr. Watter played in a role in not consenting. For instance, in chief-examination she testified to the following:

Q. And, and during the various events that you've described in your evidence happening between February and August 2017, was any of the sexual contact between you and Scott Watter consensual on your part?

⁵⁶ *R v. A.H.* 2000 CanLii 16865 (Ont.C.A.) at para 12.

⁵⁷ *R v. Snelgrove*, [2018] N.J. No. 300 at para 23.

⁵⁸ *Transcript of the Proceeding*, May 18, 2022, at pages 39 and 40.

A. No.

Q. Can you explain that, please?

A. It was not consensual for several reasons: one, because I was extremely mentally unwell and, and he knew that; two, because he was in a position of power and authority over me and there was a power imbalance; three, because during all of the events, I was not just intoxicated, but evidently to anyone, intoxicated and I could not consent for myself in that state. And four, because I never did consent and he did not ask me.⁵⁹

S.L. was cross-examined on the impact that the power imbalance had on her ability to consent or not:

Q. So, if the two of you talked about the idea of doing some, some spanking, doing some of that kind of behaviour, that could have been the conversation and you don't remember it today?

A. Even if we were speaking about that, that would have been completely inappropriate on his part.

Q. That's because you weren't interest in anything like that.

A. No, that's because he was a professor, and I was a student.

Q. Well, when you say that, and completely inappropriate, you were an adult engaging in, I'm going to suggest to you, a consensual relationship, apart from what is and isn't appropriate. That's what I've suggested to you. You engaged in a consensual, physical, sexual relationship with him. You're disagreeing with me?

A. Regardless of the fact that I was an adult, there was a power imbalance.

Q. There was a power imbalance that I'm going to suggest to you played no part, whatsoever, in the relationship. That's what I'm suggesting to you.

A. I understand that's what you're suggesting.

Q. And, is your position, let's be clear on this. So, it's your position that it was improper and so it's because of the power imbalance I agreed to do these things? Is that your evidence?

A. No

Q. So, the power imbalance didn't stop you from taking the position, I didn't agree to these things because you say you didn't agree to these things. Am I right?

A. The power imbalance was in addition to that.

Q. Oh, it's in addition to that, but you still took the position, I didn't agree. Regardless of power, I never consented anyway.

A. Correct.

⁵⁹ *Transcript of the Proceeding*, May 18, 2022, at page 14

Q. All right. So we'll the power imbalance for a moment because it played, I'm going to suggest, no part in your decision to agree or not agree because you didn't agree. Do I have your evidence right on that?

A. Can you repeat that please?

Q. Sure. I'm suggesting to you, you made the decision not to agree to any sexual and physical relationship with him. Do I have your evidence on that?

A. yes.

Q. And, the power, whatever the power relationship didn't have any effect on your decision to choose not to agree. You choose not to agree. Am I right?

A. In addition to the fact that I was aware of the power imbalance, yes.

Q. But you chose, you're aware of the power imbalance and still have the right to choose and choose not to agree, right?

A. Consent is more complicated than that

Q. Oh, consent is more – you, your position is you didn't consent any way

A. Correct

Q. So, it's black and white. It's not I consented because of the power imbalance. Your position is I didn't consent at all. Do I have it right?

A. I think I spoke to four factors the other day that all came into play with respect to my consent or not consenting.

Q. Leave aside the four factors for a minute. Black and white is you didn't consent always. That's your position, isn't it?

A. Correct.

Q. All right . So you, weren't saying I was so drunk that I consented but I, I didn't remember, I didn't mean to consent. You aren't saying that are you?

A. I'm saying that I was drunk enough to the point I would not have been able to consent anyways.

Q. But, you didn't consent anyway.

A. I do not remember saying, yes, to what happened to me.

Q. So, your position is I didn't consent to anything

A. Yes.⁶⁰

[51] This testimony makes clear that although there was a power imbalance, that imbalance did not in fact impact S.L.'s decisions. Put another way, there is no reliable

⁶⁰ *Transcript of the Proceeding*, May 20, 2022, at pages 59-62.

evidence before me that Dr. Watter used his position in the department to pressure or induce S.L. to consent to any sexual activity.

VIII. Consent vitiated because bodily harm caused

[52] The Crown has argued that even if I find that S.L. had consented to having her nipples twisted and consented to being “spanked” by Dr. Watters, bodily harm resulted which vitiated S.L.’s consent. The Crown relies upon the SCC decision of *Jobidon* which stands for the proposition that a complainant’s consent to engage in a physical fight implies consent to any assaultive force used during the course of that fight so long as no bodily harm is intentionally caused to the complainant⁶¹.

[53] The law has evolved since *Jobidon* and in particular in the context of sexual assault. Consent is not vitiated in all circumstances of sexual assault cause bodily harm; consent is only vitiated where bodily harm is *intended* and *caused*. Consent is available as a defence, where the accused did not intend to cause bodily harm, but bodily harm is inadvertently caused⁶².

[54] The Ontario Court of Appeal set out the 5-step test that the Crown needs to establish to prove the essential elements of the offence:

1. The jury must be satisfied beyond a reasonable doubt that the accused intentionally applied force to the complainant.
2. The jury must be satisfied beyond a reasonable doubt that the intentional application of force to the complainant took place in circumstances of a *sexual nature* such as to violate the complainant’s sexual integrity.
3. The jury must be satisfied beyond a reasonable doubt that the intentional application of force in circumstances of a sexual nature *caused* bodily harm.
4. If in addition to the above three criteria, the jury is satisfied beyond a reasonable doubt that the accused intended to inflict bodily harm upon the complainant (a subjective criterion), then consent is irrelevant, and the accused would be found guilty of sexual assault causing bodily harm.
5. If the jury is not satisfied beyond a reasonable doubt that the accused intended to cause the complainant bodily harm, then they would need to go on to consider whether they are satisfied beyond a reasonable doubt that the complainant did not consent to the intentional application of force by the accused⁶³.

⁶¹ 1991, 7 C.R. 4th 233 (S.C.C.).

⁶² *R v. Quashie*, 2005 OJ No 2694 and *R v. Zhao*, 2013 ONCA 293 at para.107.

⁶³ *Zhao*, *Supra* at para 107

[55] In this case, I am satisfied that the accused intentionally applied force to the complainant when he slapped her buttocks and twisted her nipples. I am satisfied beyond a reasonable doubt that these actions took place in a sexual context. I am satisfied beyond a reasonable doubt that bodily harm resulted from both the spanking incident and the nipple twisting incident. Specifically, the complainant suffered bruising as a result of the spanking incident and her nipples suffered an injury that was more than trifling. That fact of injury for both incidents is corroborated by text messages that were exchanged between the Complainant and the Accused after the incident occurred.

[56] I am not satisfied beyond a reasonable doubt that the accused intended to cause bodily harm to the complainant. There is no reliable or credible evidence before this court that would support a finding that Dr. Watter intended to cause bodily harm to S.L.. For the reasons stated above, I am unable to rely upon S.L.'s testimony except where her evidence is corroborated, and I specifically reject her testimony that Dr. Watter intended to cause her bodily harm.

[57] Lastly, I find that the Crown has not proved beyond a reasonable doubt that the complainant did not consent to the intentional application of force by the accused. The text messages exchanged between the complainant and accused belie the complainant's assertion that she did not consent to the sexual activity. For that reason, and the reasons stated earlier regarding her credibility and reliability, I reject her testimony that she did not consent to the sexual activity.

[58] I find Dr. Watter not guilty of both criminal charges.

Released: December 15, 2022

A handwritten signature in black ink, appearing to read 'Amanda', written over a horizontal line.

Signed: Justice Amanda J. Camara