

Ruling demonstrates progress in court's view of casual sex

By AdvocateDaily.com Staff



A recent case where a man was found guilty of sexual assault after he agreed to wear a condom but proceeded to have unprotected sex with his partner shows that the courts are more open to the fact that people can set limits when participating in casual sex, says Toronto civil litigator [Sarah O'Connor](#).

The man and the complainant met online and agreed to rendezvous at the woman's home for a sexual encounter for which the complainant set out two conditions — that wearing a condom was a must and “no means no,” according to the [Superior Court ruling](#).

However, the complainant testified that the man proceeded to engage in unprotected sex without her consent.

The complainant's evidence was that afterward, the pair engaged in small talk on her bed for 10 minutes before he left. The next day, she visited the hospital to have a sexual assault kit and STD and pregnancy tests performed. A few days later, she filed a complaint with police.

Although the man claimed that it was the complainant who initiated sex without a condom, saying she could not “get pregnant,” the court noted that he drafted his written statement before he had been provided with details of the allegations by police.

“His fabrication that the sexual encounter was initiated by the complainant without a condom and his assertion that she told him she could not get pregnant suggests to me he knew prior to going to the police station that the sexual encounter without a condom was the subject of the complaint. In addition, when confronted with the fact that he drafted the statement at a time he purported to know nothing about the allegations, he changed his testimony,” says the ruling.

The man was found guilty of sexual assault against the complainant, as the court noted that “his failure to wear a condom increased the complainant's risk of pregnancy and constitutes a significant risk of bodily harm.”

As the decision points out, this is a ‘he-said-she-said’ matter that raises questions of credibility and reliability. This is often the case, says O'Connor, principal of [O'Connor Richardson Professional Corporation](#).

“The fact that the man wrote the statement before going to the police leads to the conclusion that he knew what was happening or he knew that she wanted him to wear condoms, but he didn't,” she tells [AdvocateDaily.com](#).

“We've done some similar cases where there's been an STD transmitted — they had protected sex for awhile in a committed relationship, and then both got tested and were clean. They then moved forward without any protection, and one party was then passed an STD,” adds O'Connor.

Although it wasn't raised in this case, another issue that has come up in similar matters is “stealthing,” where one partner says they are going to use a condom and then, during the act, removes it without letting the other know, she says, adding that the partner that “stealths” can be convicted of sexual assault and potentially sued civilly for battery.

Most importantly, in this decision, says O'Connor, is the lack of weight the court placed on how the complainant handled the aftermath of the situation.

“The judge didn't put any negative conclusions on the small talk afterwards and her waiting to go see the police. And I think that's positive progress — making small talk with whoever is there, waiting to discuss options or waiting to think about what you're going to do is not a negative inference that you consented,” she says.

Although this remains a grey area, says O'Connor, this case, along with earlier decisions, helps to provide additional clarity on how the courts view sexual assault.

“I think it's a good step forward for future situations like this or stealthing, and it seems to be a bigger trend in how the courts view rape and sexual assault, because this is similar to [the 2014 case](#) where the Supreme Court upheld the sex assault conviction of a man who pierced holes in condoms without his partner's knowledge,” she says.

Ultimately, says O'Connor, if the complainant in this case had contracted a disease from the unprotected sexual encounter, she may have been able to pursue a lawsuit in civil court.

“This was a criminal proceeding, so in civil court, it's similar to battery where if you have unprotected sex against a partner's consent, you can sue civilly as well.”