Sexual Communications, Digital Intimacy, and the Extremely Limited Admissibility of Evidence of a Complainant's Intention to Consent

by

Elaine Craig[•]

Research indicates that women are less likely than men to have any intention of actually engaging in the sexual activities they communicate about digitally, and men are more likely than women to assume that sexual text messages indicate an intention to engage in sex 'in real life'. Sexting often reflects a highly stylized, performance based, uninhibited and sometimes disinhibited form of discourse that distinguishes it from in-person communications. It is frequently open to interpretation and only rarely can these communications reasonably be said to reveal a reliable and non-discriminatory inference about a complainant's actual sexual intentions for the future, let alone a reliable inference connecting her state of mind at the time she sent them to her state of mind regarding consent at the time of the alleged offence. In the vast majority of cases, it is not reasonable to rely on sexting, to infer that a complainant intended to consent. In the limited number of cases in which digital sexual communications are specific enough to infer such an intention, their probative value regarding consent is very minimal and their prejudicial effect substantial. Unless the complainant has made inconsistent statements about her intentions they should be excluded. Moreover, demonstrating this type of inconsistency requires a non-discriminatory basis for concluding that the text messages actually reveal such an intention. General sexual communications are not capable of demonstrating this intention without relying on "twin myth reasoning".

• Professor of Law, Schulich School of Law at Dalhousie University; Dorothy Killam Research Fellow. The research for this article was supported by an Insight Grant from the Social Sciences and Humanities Research Council of Canada. Thank-you to Lisa Dufraimont, Alicia Kennedy, David Tanovich, Jane Bailey, Steve Coughlan, Adelina Iftene, Rob Currie, Suzie Dunn, Joanna Birenbaum, Teresa Donnelly, Janine Benedet, Isabel Grant, Lise Gotell, Ron Macdonald, and Elizabeth Sheehy for the informative and insightful discussions on the issues considered in this paper. A special thank-you to Alicia Kennedy, David Tanovich and Jane Baily, all of whom reviewed earlier drafts of this work and offered comments and feedback that significantly improved the final article. Any insights reflected in this piece are deeply informed by the expertise of this group; mistakes and opinions are mine. Thank-you to my research assistant, Austin Clary, for his exceptional work. Finally, thank-you to Richard Devlin, Lynda Corkum, and the anonymous peer reviewers at the Dalhousie Law Journal.

Introduction

The admissibility of a complainant's digital sexual communications in sexual assault proceedings has become a matter of significant focus for appellate courts in Canada.[1] The pervasive use of digital communications today and the inclusion of sexual communications as a form of "sexual activity" for purposes of section 276 of the *Criminal Code*, combined with the growing tendency of trial judges to more carefully apply and consistently uphold the *Criminal Code's* rape shield provisions, means that the issue will continue to arise in sexual offence prosecutions in Canada.[2]

The Court of Appeal of Ontario's decision in *R v Reimer* is one of the most recent cases to address the admissibility of a complainant's sexual text messages. Unfortunately, the Court's decision in *Reimer* will not provide lower courts with proper guidance on the admissibility of digital sexual communications generally, nor specifically on the application of section 276 of the *Criminal Code* to this type of evidence.[3] *Reimer*, if permitted to stand, will undermine the evidentiary rules intended to protect sexual assault complainants from prejudicial and discriminatory attempts to introduce their prior sexual history, and the general rules of evidence aimed at preserving the legitimacy and truth-seeking function of the trial process. It will be particularly damaging to adolescent girls and younger women.[4]

It is of critical national importance that the Supreme Court of Canada correct the reasoning in *Reimer.* Most importantly, the Supreme Court needs to clarify for lawyers and

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[1] See e.g. *R v Reimer,* 2024 ONCA 519 [*Reimer*]; *R v MKA,* 2025 BCCA 28; *R v BJ*, 2025 ABCA 57; R *v Hanrahan,* 2024 NLCA 9; *R v Kinamore*, 2023 BCCA 337 [*Kinamore*]; *R v Langan,* 2019 BCCA 467 [*Langan*].
[2] *Criminal Code*, RSC 1985, c C-46, s 276.
[3] *Ibid.*
[4] See e.g. Jonas Burén & Carolina Lunde, "Sexting Among Adolescents: A Nuanced and Gendered Online Challenge For Young People" (2018) 85 Computers in Human Behavior 210.

lower courts that, despite the ruling on relevancy in *Reimer,* evidence of a sexual assault complainant's digital sexual communications will virtually never be admissible, in and of itself, to show that she intended to consent to sex when she sent the messages, making it more likely that she did consent. In other words, upon a proper application of the rules of evidence and section 276 of the *Criminal Code,* Justice Paciocco's relevancy reasoning in *Reimer* will virtually never result in the admission of evidence of a complainant's digital sexual communications as probative of consent.

Justice Paciocco anchored his assessment of the relevance of the complainant's sexual communications in *Reimer* to the inference underpinning the state of mind exception to the rule against hearsay. But, in fact, the common-sense inference upon which this hearsay exception is based is not applicable in this context, making the reasoning in *Reimer* misleading and incomplete. As will be explained, digitally mediated sexual communications do not share the commonplace, everyday character upon which the reliability of the inference underpinning the present intention exception is premised. While it is true that the reliability calculation is different when considering the admissibility of evidence as hearsay, it is equally true that any evidence, hearsay or otherwise, which is reliant for its probative value on an unreasonable and unreliable inference about human behaviour is inadmissible. As it pertains to digital sexual communications, the assumption proposed by Justice Paciocco in *Reimer* is unreasonable and unreliable. His reasoning suggests a significant misunderstanding of the modern context of sexting and how younger generations, in particular, construe its norms.

Moreover, in the minute fraction of cases in which "sexting"[5] would yield a reasonable inference about a complainant's intention to have sex in the future, to be admissible under section 276 of the *Criminal Code* evidence must have significant probative value that is not substantially outweighed by its prejudicial effect. The probative value of digital sexual communications that indicate a complainant intended to have sex, as evidence to challenge a complainant's assertion that she did not consent to the impugned sex, will, without more, virtually never meet this standard. This is highly prejudicial evidence that has almost no probative value: people frequently change their minds about sex.

Unfortunately, the problematic reasoning in *Reimer* creates a substantial risk that the decision will be improperly relied upon in the adjudication of section 276 applications. At least one court in Ontario has already made this harmful legal error, relying on *Reimer* to admit a complainant's online sexual communications as relevant to consent. In *R v MA,* evidence of what the trial judge characterized as nothing more than a complainant's expression of her "sexual fantasies" was admitted as relevant to consent, explicitly on the basis of *Reimer*. [6] How can we expect girls and women to come forward, to report their experiences of sexualized violence, if evidence of a complainant's sexual fantasies is admissible to prove she consented to an alleged sexual assualt?

If the Supreme Court permits *Reimer* to stand, sexual assault proceedings in Ontario will be left in a perverse circumstance in which evidence that an accused and complainant had a "friends with benefits" casual sexual relationship will not be admissible as relevant to consent,

[5] For a definition of sexting see Camille Mori et al, "The Prevalence of Sexting Behaviors Among Emerging Adults: A Meta-Analysis" (2020) 49:4 Archives of Sexual Behavior 1103 at 1103.
[6] *R v MA*, 2024 ONCJ 416 at para 36 [*MA*]. The legal errors in Justice Robinson's decision in *MA* will be examined in detail in Part III.

but sexual text messages between them, or online conversations they had about their sexual fantasies, will likely be admitted for this purpose.[7] The Court of Appeal of Ontario should not be permitted to subvert the sound reasoning in *R v Goldfinch* by asserting, as unqualified common sense, a proposition about human nature drawn from a hearsay exception that treats this proposition as very much qualified.

The remainder of this article proceeds in three parts. Part I offers a brief summary of the facts and reasoning in *Reimer*. Part II explains why, given the nature of digital sexual communications, the common-sense inference that Justice Pacaccio invokes in this case is not available with respect to digital sexual communications. Moreover, even if it were reasonable to apply the common-sense inference embedded in the present intention exception to digital sexual communications, this type of evidence adduced for this purpose would, without more, still be inadmissible under section 276 of the *Criminal Code*. Part III examines the reasoning in *MA,* the first reported case to apply *Reimer*, to demonstrate the type of harmful legal errors that the reasoning in *Reimer* is likely to produce. The conclusory section emphasizes the national importance of the issues raised by the problematic aspects of the Court of Appeal's decision in *Reimer.*

I. Brief Summary of *R v Reimer*

The complainant and accused in *Reimer* met on an online dating website. The accused's profile on the website did not accurately reflect his age and used an outdated photo that did not accurately depict his appearance, including his weight. After exchanging text messages for a period of time, they arranged to meet in person for a first date. Her evidence was that this was to

[7] *R v Goldfinch,* 2019 SCC 38 at para 3 [*Goldfinch*]. I am grateful to my colleague Professor David Tanovich for emphasizing this point to me.

be an introductory, in-person visit for an hour or two while her mother watched her son. She testified that, upon meeting, she was taken aback by Reimer's appearance because he was older and heavier than expected, and dishevelled. They both stated that she commented adversely on his appearance.[8]

After stopping at a fast-food restaurant, the accused drove them to a motel. The complainant testified that she was not expecting to go to a motel, and that she told the accused she would not go into the motel with him and that "this is not happening" – referring to sex.[9] The complainant alleged that the accused coerced her into the motel room by threatening to expose intimate images and messages she had sent him to her co-workers if she refused. She complied. She alleged that once in the motel room, against her protests, the accused held her ankles, removed her clothing, bound her wrists together with her nylons, gagging her mouth with the reinforced crotch area of the garment and partially restraining her head to the right by shoving the remaining portion of the nylons under the mattress. She alleged that he then engaged in unwanted oral-genital contact, and aggressive vaginal penetration with his penis that caused her neck to repeatedly strike the headboard of the bed.[10]

The accused's account of what occurred was diametrically opposed. He testified that they planned to go to a motel which she chose, and that she went willingly into the motel room, removed her own clothing, and initiated the sexual encounter - which consisted of consensual oral and vaginal sex - by rubbing up against him. Surveillance video from the parking lot of the motel showed her entering the motel voluntarily, carrying the food they had picked up. The accused testified that he noticed her grimacing during vaginal penetration, but that she indicated

[8] *Reimer, supra* note 1 at paras 4-6.
[9] *Reimer, supra* note 1 at para 10.
[10] *Ibid* at paras 8-11.

she wanted him to continue when he asked. He stated that he pulled her hair because in her texts to him she said she liked having her hair pulled; although in cross-examination he testified that she asked him to pull her hair during sex. He testified that he told her that he owned her because she asked him to do so in their text exchanges.[11] Not all of their text messages were recovered by the police.

Photographs of the complainant's wrists, arms, ankles, chest and feet revealed extensive swelling and bruising and a significant scratch, which the trial judge found were consistent with her account of what occurred and inconsistent with the accused's account of their interaction.[12] The trial judge refused to grant defence counsel's application to introduce their sexual communications on the basis that the text messages were irrelevant; were being offered to prove the complainant consented in advance to the sexual activity that occurred; and because their probative value depended upon inferences prohibited by section 276.[13]

The Court of Appeal in *Reimer* found that the trial judge erred by failing to determine that at least some of the complainant's texts were relevant because they showed that she intended to have sex with the accused. Justice Paciocco reasoned that: "the fact that the complainant communicated an intention to engage in consensual sexual acts with Mr. Reimer when they got together, is logically relevant to the likelihood that she did so when they got together."[14] He described this inference as an "incontrovertible prospect of logic and human experience", and on the basis of it concluded that at least some of her texts were of "obvious relevance" to the issue

[11] *Reimer, supra* note 1 at paras 14, 15.
[12] *Reimer, supra* note 1 at para 17.
[13] *Ibid* at para 2.
[14] *Reimer, supra* note 1 at para 70.

of consent, and were not reliant on prohibited inferences.[15] He did not make a determination regarding the admissibility of the digital communications he found relevant to consent.

The particular texts relied upon in his decision were redacted subject to a temporary publication ban, pending the Crown's appeal in this case.[16]

II. Absent A Prior Inconsistent Statement A Complainant's Digital Sexual Communications Will Virtually Never be Admissible

Two preliminary points about the reasoning in *Reimer* must be made. First, a sexual assault complainant's words and actions before and during an alleged sexual assault may be assessed in determining the credibility of her statement that she did not consent.[17] However, what she said or did before the incident is *not*, as the majority notes in *R v JA*, "directly relevant" to consent.[18] It is clear that a complainant's pre-incident words and actions, including her digital communications, can only be relied upon to challenge her credibility on consent, rather than probative of consent itself. As the Court noted in *Ewanchuk,* "[t]he complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent".[19]

Justice Paciocco's reasoning in *Reimer* is not clear on this point.[20] His reasons do not adequately acknowledge that evidence of a pre-incident intention to have sex could only ever go

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[15] *Ibid* at para 65.
[16] *R v Reimer*, 2024 ONCA 641 (partial stay and publication ban pending leave to appeal).
[17] *R v Ewanchuk,* 1999 SCC 711 at paras 29, 30
[18] *R v JA*, [2011] 2 SCR 440 at para 46.
[19] *Ewanchuk, ibid* at para 30.
[20] In *Reimer, supra* note 1 at para 74 Justice Paciocco excerpts part of only one sentence of the passage he relies on from *Ewanchuk.* He states:

> *R. v. Ewanchuk* is one of the leading authorities insisting that consent must relate to the complainant's subjective state of mind at the time of the sexual activity: [1999] 1 S.C.R. 330, 131 C.C.C. (3d) 481, at para. 26. Yet in that decision Major J. recognised (sic), at para. 29, that, "the complainant's words and

to the complainant's credibility regarding her allegation of non-consent. Admitting evidence of pre-incident behavior as probative of consent itself is either inconsistent with the subjective, contemporaneous nature of the definition of consent for purposes of the *actus reus* for sexual assault.

Second, evidence of what a complainant said and did prior to the alleged assault, including what she texted, must comply with the rules of admissibility. This includes the law with respect to common sense inferences, the basic principle of admissibility regarding probative value and prejudicial effect, and the rules under section 276 of the *Criminal Code.* The conclusion in *Ewanchuk* that a complainant's credibility regarding her subjective and contemporaneous state of mind at the time of the alleged offence can be assessed based on what she said and did both before and during the incident does not alter this requirement.

Courts are not permitted to draw adverse inferences as to the credibility of a witness on the basis of unreasonable assumptions and generalizations about how individuals behave.[21] The

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> actions, before and during the incident" can be considered in determining whether a complainant has consented at the time of the sexual activity.

This passage from *Reimer* could be taken to be asserting that the complainant's pre-incident words and actions can constitute direct evidence of consent. The sentences in *Ewanchuk*, before and after the one which Justice Paciocco excerpts, emphasize that the complainant's pre-incident words and actions may impugn her credibility regarding lack of consent but are not directly probative of consent. The passage in *Ewanchuk*, reads:

> 29 While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.
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> 30 The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent.

[21] While the Court in *R v Kruk,* 2024 SCC 7 at paras 125, 126 [*Kruk*], rejected the prospect that doing so is an error of law (unless the assumption is driven by a legally rejected stereotype about sexual assault complainants), it still recognized this to be an error which, if palpable and overriding, would warrant overturning a trial judge's conclusion.

inference relied upon by Justice Paciocco in *Reimer* to conclude that at least some of the complainant's texts had obvious relevance is not a reasonable or reliable assumption about human behavior. Moreover, it is clear that the text messages in *Reimer* would be excluded under section 276 regardless.

i. *digital sexual communications will rarely give rise to the common-sense inference underpinning the present intention exception relied upon in Reimer*

According to Justice Paciocco the inference he invokes in *Reimer* depends on "the very line of reasoning" at issue under the present intention exception to the rule against hearsay, as explained in *R v Starr*.[22] In *Starr*, the Crown sought to admit evidence of the fact that the deceased declarant told his girlfriend that he was going to go out with the accused, as evidence of his present intention to, later that day, go out with the accused, making it more likely that he did, in fact, go out with the accused later that day. As Justice Paciocco acknowledged, the reasoning he relies on in *Reimer* to conclude that at least some of the complainant's sexual communications were of "obvious relevance" is precisely the same as in *Starr*.[23] The text messages (or some of them) are relevant, according to Justice Paciocco, because they may "represent serious expressions of intention increasing the likelihood that the complainant later acted consensually."[24] This parallels the structure of the reasoning in *Starr* and other state of mind hearsay cases.[25]

But while Justice Paciocco identified and relied upon the inference that underpins the present intention exception,[26] he failed to acknowledge the qualified nature of this inference

[22] *Reimer, supra* note 1 at para 70.
[23] *Ibid* at paras 70, 75.
[24] *Ibid* at para 71.
[25] *R v Starr,* 2000 SCC 40 [*Starr*]; *R v Dion,* 2025 ONCA 7; *R v Smith*, 1992 CanLII 79 (SCC).
[26] *Reimer, supra* note 1 at para 75.

under the present intention exception: the requirements that the out of court statements were contemporaneous with the intention, made in a natural manner, and in non-suspicious circumstances.[27] These requirements under the present intention exception are aimed at ensuring that the inference is sufficiently reliable. For instance,

> [c]ontemporaneity is cited as providing a guarantee of trustworthiness for statements of present intention. In the normal course, the words are contemporaneous with a present intention to do that act. If a person as she heads out the door says, "I'm going to the store", there is every reason to believe that is what she intends to do.[28]

As then Justice Mclachlin explained in *Starr*, under the present intention exception, the trustworthiness of the statement "…flows from the fact that in the great majority of cases, people making such statements actually intend to do the indicated act".[29] She notes that "the reason statements of present intention are generally reliable indicators of the speaker's present or contemporaneous state of mind" is because, quoting from American precedent:

> [i]n the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends, or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed.[30]

To be sufficiently reliable such that the inference can be drawn under the exception, the statement must be: made "in the ordinary course of things"; the "usual information" offered by someone in the circumstance in which it was uttered; declared by someone with "no expedition of mischief"; and made in circumstances that "entirely explode" the possibility that the utterance was "intended to serve any purpose but that for which [it was] obviously designed".

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[27] *R v Griffin*, 2009 SCC 28, at para 59.
[28] *Starr, supra* note 25 at para 6, McLachlin CJC, dissenting (but not on this point).
[29] *Ibid*.
[30] *Ibid* at para 7.

Sexting simply cannot be characterized in this manner. Sexual communications, particularly ones mediated digitally, are not the conveyance of "usual information" communicated "in the ordinary course of things",[31] and there is not "every reason to believe"[32] that a woman who articulates an intention to engage in sex acts through text message intends to perform those acts. Digitally mediated sexual communication often reflects a highly stylized, performance based, disinhibited form of discourse that distinguishes it from in-person interactions. Unlike reporting an intention to go to the store as one heads out the door, digital sexual communications most certainly *can* "explode the idea that such utterances"[33] serve a purpose other than that which might be gleaned from the nominal meaning of the utterance itself. Digital sexual communications are frequently open to interpretation; and only rarely can they reasonably be said to reveal a reliable inference about a complainant's actual sexual intentions for the future, let alone a reliable inference connecting her state of mind at the time she sent them to her state of mind regarding consent at the time of the alleged offence.

To be sure, sexting *can* be aimed at initiating sex or expressing an intention to engage in future sex, but it can also be a performance of desire, articulated in an effort to arouse the recipient and/or the declarant in the moment, sent without any intention to engage in the sexual activity in a non-digital context.[34] Some sexual communications constitute a sex act with no real-world analogue.[35] The potential disjuncture between digital intimacy and 'in real life'

[31] *Starr, supra* note 25 at para 7, citing *Mutual Life Ins Co v Hilmon*, 145 US 285 (USSC 1892), citing *Hunter v State*, 40 NJL 495 (NJ Ct Err & App 1878).
[32] *Ibid* at para 6.
[33] *Ibid* at para 7, citing *Mutual Life Ins Co v Hilmon*, 145 US 285 (USSC 1892), citing *Hunter v State*, 40 NJL 495 (NJ Ct Err & App 1878).
[34] See e.g. Kath Albury & Kate Crawford, "Sexting, Consent and Young People's Ethics: Beyond Megan's Story" (2012) 26:3 Continuum 463.
[35] See e.g. Michelle Drouin, Elisa Hernandez & Shawn M J Wehle, "'Tell Me Lies, Tell Me Sweet Little Lies:' Sexting Deception Among Adults" (2018) 22 Sexuality & Culture 865 at 868 [Drouin, Hernandez & Wehle, "'Tell

sexual activity is significantly more pronounced than is the case with respect to the type of utterances upon which the traditional exception is based. It is true that an admissibility assessment and a determination of relevance are separate considerations, and the former is stricter in the context of admitting hearsay than is the admissibility assessment with respect to other forms of evidence (due to the reliability issues hearsay presents). However, it is also true that highly prejudicial evidence with virtually no probative value, which is premised on unreasonable inferences based on unreliable generalizations about human behavior, ought not to be admitted. As explained in the next section, when the inference relies for its probative value on a legally rejected stereotype or generalization, as is the case with respect to general sexting and present intention reasoning, admitting it is an error of law.

Consider some text messages, taken from online sources aimed at providing users with tips on sexting: "I want you"; "I am so turned on baby"; "Moan like that for me"; "I love having [insert sexual act]"; "I must feel your hands all over me"; "You feel so good inside me"; "I need you on top of me".[36] Sexual communications that take this shape cannot be said to be made in the "natural manner" intended by the Court in *Starr,* not only because they are generic but also because they are performance based. They may well be intended to "serve [a] purpose" other than that which might seem obvious if taken at face value.[37]

Individuals tend to be less inhibited in their online and digital communications because of factors such as the a-synchroneity, lack of eye contact, diminished accountability, and/or distance

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Me Lies, Tell Me Sweet Little Lies'"] (finding that 80% of those in their sample who sexted with someone online had no intention of engaging in the sexual acts discussed by text message).

[36] See for e.g. Hayley Folk, "These Spicy Sexting Ideas Will Keep You From Feeling Awkward as Hell", *The Knot* (20 September 2023), online: <https://www.theknot.com/content/sexting-ideas>.

[37] *Starr, supra* note 25 at para 7.

or detachment associated with this form of communication relative to in-person interactions.[38] This "online disinhibition effect"[39] is of particular significance in the context of *sexual* communications online, given the social inhibitions which commonly envelop our non-virtual sexual engagements.

The norms that have evolved in the context of digital sexual intimacy, in part due to the disinhibited nature of online communications, differ from those that inform in-person interactions, or even more distanced sexual communications popular in earlier eras (such as so called 'phone sex').[40] Online unidentifiability - the ability to "conceal personal details, such as gender, weight, age, occupation, ethnic origin and residential location" (as occurred to some extent in *Reimer*[41]) - furthers the culture of disinhibition associated with digital communications relative to in-person ones .[42] Some research suggests individuals are more likely to share sexual fantasies via technology mediated modes of communication than through face-to-face conversations.[43] Sexting for some women is a way to explore pleasurable sexual activities that

[38] See John Suler, "The Online Disinhibition Effect" (2004) 7:3 Cyberpsychology & Behavior 321; Tom Green et al, "Social Anxiety, Attributes of Online Communication and Self-Disclosure Across Private and Public Facebook Communication" (2016) 58 Computers in Human Behavior 206 (finding that socially anxious people are more likely to be disinhibited in private forms of online communication as opposed to public ones); Valerie Rubinsky, "'Sometimes It's Easier to Type Things Than to Say Them': Technology in BDSM Sexual Partner Communication" (2018) 22 Sexuality & Culture 1412; Yair Amichai-Hamburger & Adrian Furnham, "The Positive Net" (2007) 23:2 Computers in Human Behavior 1033; Ryan Varghese, "The Online Sexual Disinhibition Effect" (2024) Intl J Impotence Research 1; Christopher Terry & Jeff Cain, "The Emerging Issue of Digital Empathy" (2016) 80:4 Am J Pharmaceutical Education 58. Noam Lapidot-Lefler & Azy Barak, "The Benign Online Disinhibition Effect: Could Situational Factors Induce Self-Disclosure and Prosocial Behaviors?" (2015) 9:2 Cyberpsychology Article 3 (finding that the combination of anonymity and lack of eye contact increased disinhibition in relation to emotions and self-disclosure).

[39] Suler, *ibid* at 184.

[40] See generally *supra* note 38 for the disinhibited character of online communications.

[41] See e.g. *Reimer*, *supra* note 1, wherein the accused was using an outdated photo on his online dating profile that did not accurately depict his appearance. The possibility of unidentifiability and the culture of disinhibition it fosters would presumably inform both parties to a communication.

[42] Lapidot-Lefler & Barak, *supra* note 38 at 3; see also *supra* note 38, generally.

[43] Rubinsky, *supra* note 38 at 1420 (research was conducted with individuals engaged in BDSM sexual practices).

they would never pursue physically.[44] In short, "many people entertain ideas in online sexual chats that they would never do in reality".[45]

Perhaps most importantly, research on sexting suggests that even when they frame them as intentions, people often do not have any intention of following through in person on the sexual activities they propose or promise digitally. Equally important, they frequently do not reveal to the recipients of their messages that they have no intention of having sex 'in real life'. In their study, Druin et al found that at least half of participants had sent sexual text messages (either to partners or people they knew only online) that misrepresented what they were doing or wearing, or their sexual intentions.[46] Two-thirds of their sample had engaged in fantasy/role play during sexting (with 84% of those who texted with someone they had met online doing so), but more than half reported that they rarely or never revealed to the recipients that "their exchange was just fantasy".[47]

Even within established intimate relationships, 40% of participants did not intend to engage in the specific sexual activities discussed in their sexual text messages or engage in any type of sexual activity the next time they saw their partner.[48] Among those known to each other exclusively online, only 20% expected the particular sexual activities that they sexted about to

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[44] Erin Dawn Watson, "How Young Canadian Women Make Sense of Their Experiences of Sexting" (Doctorate of Philosophy Thesis, University of Guelph, 2018) at 61, online: < atrium.lib.uoguelph.ca/server/api/core/bitstreams/ff78a7e2-8f12-4baa-8e88-f2c773b414d3/content> [perma.cc/2NYR-GHYW].

[45] Drouin, Hernandez & Wehle "'Tell Me Lies, Tell Me Sweet Little Lies'" *supra* note 35 at 868. See also Philippe C G Adam, Dean A Murphy & John B F de Wit, "When Do Online Sexual Fantasies Become Reality? The Contribution of Erotic Chatting via the Internet to Sexual Risk-Taking in Gay and Other Men Who Have Sex With Men" (2011) 26:3 Health Education Research 506; Michelle Drouin, Elizabeth Tobin & Kara Wygant, "'Love the Way You Lie': Sexting Deception in Romantic Relationships" (2014) 35:1 Computers in Human Behavior 542 [Drouin, Tobin & Wygant, "'Love the Way You Lie'"].

[46] Drouin, Hernandez & Wehle, "'Tell Me Lies, Tell Me Sweet Little Lies'" *ibid* at 872.

[47] *Ibid* at 873.

[48] *Ibid* at 876.

occur when they met in person.[49] Men were more likely than women to expect sexual activity after sexting with online partners.[50] In a study of sexting between committed partners, approximately half of the study's participants indicated that they had misrepresented what they were wearing or doing, mostly in order to make their partner happy or fulfill their partner's fantasies.[51] Neither courts nor accused should rely on what women say by text message as evidence of their intention to consent to sex 'in real life'.

Sexting is also motivated by a variety of non-sexual objectives: "sexting has been found to be engaged in by both sexes for the purposes of a 'joke' with friends,"[52] fun, or "as a form of peer bonding".[53] Some young people have been found to 'sext' in an effort to gain social status.[54] Research indicates that, for women in particular, sexting is frequently done to fulfill a partner's needs,[55] promote other forms of intimacy with a partner,[56] or reinforce relational commitment.[57]

Building trust is identified by some women as a common motivation for engaging in digital sexual communications.[58] In their interview-based study of women who have sexted, Wendy McDowal et al found that

> in terms of motivation, the sharing of intimate images was seen as a way that trust could be evoked, demonstrated and reinforced with an associated set of feeling rules

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[49] *Ibid* at 876.
[50] *Ibid.*
[51] Drouin, Tobin & Wygant, "'Love the Way You Lie'" *supra* note 45.
[52] See Albury & Crawford, *supra* note 34.
[53] *Ibid.*
[54] *Ibid* citing Jessice Ringrose et al, *A Qualitative Study of Children, Young People and 'Sexting': A Report Prepared for the NSPCC* (London: National Society for the Prevention of Cruelty to Children, 2012).
[55] Albury & Crawford, *supra* note 34; Drouin, Hernandez & Wehle "'Tell Me Lies, Tell Me Sweet Little Lies'" *supra* note 35.
[56] Michelle Drouin & Elizabeth Tobin "Unwanted but Consensual Sexting Among Young Adults: Relations with Attachment and Sexual Motivations" (2014) 31 Computers in Human Behavior 412.
[57] Joseph M Currin, Brittney L Golden & Randolph D Hubach, "Predicting Type of Sext Message Sent in Adults 25 and Older Using Motivations to Sext and Relational Attachment (2022) 41:3 Current Psychology 1526.
[58] Wendy G Macdowall et al, "Sexting Among British Adults: A Qualitative Analysis of Sexting as Emotion Work Governed by 'Feeling Rules'" (2023) 25:5 Culture, Health & Sexuality, 617.

> that 'I should feel trust', 'they should feel they can trust me', and 'we should have an interaction which feels mutually trusting'.[59]

This finding is particularly noteworthy in assessing the admissibility of a complainant's sexual communications as probative of her state of mind when she sent them to an accused that she met on an online dating site and had yet to meet in person, as occurred in *Reimer*. It would appear that some women engage in this form of digital intimacy with someone they meet online in order to build trust before meeting them in person. Presumably, a woman's purpose for sexting in this circumstance, despite the sexual nature of the content, is to establish a degree of trust sufficient to satisfy themselves that it is safe to meet this individual in person, regardless of whether the messages communicate an intention to engage in sex.[60] Given the prevalence of sexualized violence, and its overwhelmingly gendered nature, this seems like a reasonable strategy for women interested in online dating.

Sexting is a sexual activity, separate and apart from 'in real life' sexual engagements, which is partly why it makes sense to include it within the definition of "other sexual activity" under section 276 of the *Criminal Code*. This makes digital sexual communications different than, for example, digitally communicated threats of violence or harassment.[61] Digital communications in which a complainant indicates that she *does not intend to have sex* with the accused are also different. Evidence of them is not considered sexual activity for the purposes of

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[59] *Ibid* at 621.

[60] Danielle Couch, Pranee Liamputtong & Marian Pitts, "What Are the Real and Perceived Risks and Dangers of Online Dating? Perspectives From Online Daters" (2012) 14:7-8 Health, Risk & Society 697 at 706 (interviews with women who engage in online dating; discussing their perceptions regarding the risk of sexual and physical violence)

[61] Threats of violence or digitally communicated acts of harassment are also governed by different rules of admissibility. For instance, with respect to a charge of criminal harassment perpetrated by text message, the digital communications would be admissible to prove that they were communicated as relevant to the *actus reus.* Sexting and threatening are very different communicative activities that do not share the same capacity to establish reliable inferences regarding the future intentions of those engaged in sexting and threatening, respectively.

section 276 and *R v Seaboyer*.[62] Moreover, this type of communication is not like 'sexting'; while it too can be less proximate than in-person communications, it does not share the other attributes of digital *sexual* communication (for example fantasy, or the particular relationship between sex and social inhibition) which make the latter so unreliable.

Especially with respect to digital sexual communications between individuals unknown to each other, as in *Reimer*, it is not reasonable for the trier of fact to infer or assume that the declarant intended to follow through on the articulated course of action,[63] which is the inference upon which the present intention exception and Justice Paciocco's reasoning, is premised. More so than for other discursive formats, the content of sexual text messages is not a reliable source for discerning the intentions of those who sent them. To state it plainly, sexting is not comparable to Justice McLachlin's man, "in the ordinary course of things" advising his family, as he leaves the house, that he is heading to work.[64] A failure to appreciate this distinction reflects a fundamental lack of understanding of the nature of digital intimacy.

In addition, while there may be contemporaneity between the present intention and sending the sexual communication, proximity between the articulated intention and the future act is often more tenuous: sexting one's desires, state of arousal, or curiosity regarding particular sex acts, even when framed as intentions, is not the same as announcing that I am on my way to the store to get milk, as I head out the door.

Not only is sexting not the type of natural utterance contemplated by Justice Iacobucci (or then Justice McLachlin) in *Starr*, but to ensure reliability, evidence is only

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[62] *Langan, supra* note 1 at para 119.
[63] See Drouin, Hernandez & Wehle "'Tell Me Lies, Tell Me Sweet Little Lies'", *supra* note 35 at 876, finding that 80% of those who sexted with an online partner did not intend to engage in the sexual acts referenced in their communications.
[64] *Starr, supra* note 25 at para 7.

admissible under the present intention exception if it is made in non-suspicious circumstances.[65] Recall the nature of sexting: it is, more often than not, a performance based activity intended to arouse in the moment, articulate one's fantasy, or fulfill the fantasy of the recipient.[66] The purpose of sexting is often simply to arouse in the moment regardless of the words used; its purpose may not be apparent from the words used. In digital sexual communications it is possible to misrepresent key aspects of oneself that would be observable in a non-virtual setting. The nature of digital sexual communications makes this type of evidence highly unlikely to meet the non-suspicious circumstances standard articulated in *Starr*.

Justice Paciocco invoked the present intention exception but failed to include any mention of the reliability criteria embedded in the legal doctrine he cited. His failure in this regard is reflected most poignantly in his overstated characterization of the logical inference at play. The doctrine of present intention does not ascribe to the absolutist proposition about human nature articulated by Justice Paciocco in *Reimer*. While he acknowledged that people change their minds, he asserted that "it is it is an incontrovertible proposition of logic and human experience that a statement of present intention to do an act at a future time increases the likelihood that the speaker will engage in that act on that future occasion."[67] It is precisely because it is not an *incontrovertible* prospect of logic and human experience that the Court in *Starr* affirmed the requirement that hearsay statements will only be admitted under this exception if they are made in a natural manner, and not under suspicious circumstances. To use an obvious example: an intention stated as part of a line uttered by an actor in a play is not made in a natural manner; uttering it does not, as a matter of logic and human experience, make it more likely the

[65] *Ibid* at para 168.
[66] See generally *supra* note 35 and 38.

actor will carry out the stated intention. Similarly, a victim's stated intention to consent that is compelled at gun point, a most suspicious circumstance, does not make it more likely the victim will consent when the gun and perpetrator are no longer a threat. The reliability requirements embedded in the doctrine are not reflected in Justice Paciocco's reasoning because, while he invokes the inferential logic underpinning the legal test for the present intention exception to hearsay, he fails to state the test itself. The test itself embraces a qualified proposition about human nature, not an incontrovertible one.[68] Its qualifications are not met with respect to the type of statements (digital sexual communications) at issue in *Reimer.*

These qualifications are important; they are what guard against the admission of evidence premised on unreliable generalizations. This is true with respect to the present intention of any declarant and any utterance; these qualifications become all the more important in the context of sexualized violence. The law's legacy of discriminatory treatment towards women who allege sexual assault can be largely attributed to what judges, legislators, academics and 'man-made' common law assumed to be "incontrovertible proposition[s] of logic and human experience"[69] regarding women, sex, consent, and rape.[70] Historically, in the context of sexualized violence, these propositions of logic and human experience embedded in law were underpinned by discriminatory and empirically unfounded assumptions about women: women often lie about rape; promiscuous women are untrustworthy; women harbour a secret desire to be raped.[71]

The fact that someone texted a sexual intention regarding future sexual action does not, as an "incontrovertible prospect of logic and human experience",[72] make it more likely that they

[68] *Ibid*.
[69] *Ibid* at para 70.
[70] See Christine Boyle, *Sexual Assault,* (Toronto: Carswell Company Limited, 1984).
[71] See generally *Kruk, supra* note 21 at paras 36, 37; *R v Seaboyer*, 1991 CanLII 76 (SCC), L'Heureux-Dubé J, dissenting in part; *R v Goldfinch, supra* note 7 at para 34*; R v Barton,* 2019 SCC 33 at para 56 [*Barton*].
[72] *Reimer, supra* note 1 at para 70.

engaged in that action. Courts charged with adjudicating claims of sexualized violence would do well to avoid absolutist propositions about human experience and our sexual nature, particularly if the legal test from which this reasoning is drawn qualifies such propositions. It is acutely ill-advised to assert the incontrovertibility of claims about human nature in the context of online sexual activity and digital intimacy.

As discussed next, relying on generalizations about the sexual intentions of women to discredit their claims of sexual assault, depending on the assumption invoked, is an error of law.

ii) digital sexual communications that are general, rather than statements of intention regarding future sexual acts, are prohibited under section 276(1)

Section 276 applies to evidence of other sexual activity that is not "integrally connected, intertwined or directly linked" to the charged sexual activity".[73] Highly proximate sexual communications – ones that could be considered part of the same 'sexual transaction' – are not subject to the scrutiny of section 276. But digital sexual communications that *are* subject to section 276 will almost never be admissible for the purpose proposed by Justice Paciocco in *Reimer*.

Section 276 operates in the same way with respect to sexual communications as it does with respect to other evidence of a complainant's pre-incident behavior. For instance, section 276 precludes the accused from leading evidence to demonstrate that a complainant's pre-incident attire, or provocative dancing suggests that she intended to have consensual sex with the accused. Embedded in the conclusion that evidence of a woman's 'dirty dancing' makes it more likely she intended to have sex is the impermissible inference that a woman who dirty dances (or wears a short skirt), is more likely intent on having sex. When adduced for this purpose, it is a

[73] *R v Choudhary,* 2023 ONCA 467 at para 29.

hop, skip and a jump from there to 'she was asking for it': without the prohibited inference dancing is just dancing, and a skirt is just a skirt. What matters in the application of section 276(1) is the purpose for which the evidence is being offered. For instance, the same evidence of her pre-incident dancing and short skirt is not reliant on the prohibited inference if it is being offered to challenge her credibility on the basis that she told the police that she has never danced with the accused and that she was wearing jeans on the evening in question.

In the same vein, pre-incident text messages that rely on twin myth reasoning in order to infer that the messages show a complainant's present intention to engage in future sexual activity are prohibited by section 276(1). The prohibited twin myths under section 276(1) are that women who have consented to sex in the past are more likely to have consented to the sex at issue in the allegation and that sexually active women are less trustworthy.

As with 'dirty dancing', the inference that a woman who 'talks dirty' is more likely intent on having sex is prohibited. A text asserting "I am so turned on" or "I love having my hair pulled during sex" may evidence a complainant's state of mind at the time she sent it, but it is not evidence of her intentions regarding future consensual sex – without, that is, relying on the prohibited stereotype that women who sext are more likely intent on having sex (and therefore more likely to consent). Similarly, unless you infer that women who 'talk dirty' are more likely intent on having sex, that they are '*that* type of woman', a complainant's response of "oh yes baby" to an accused's text of "I want you" is not admissible evidence of a present intention to consent at a future time. It is evidence that the complainant and the accused sexted.

To explain further, section 276(1) prohibits the inference that a complainant's act of 'sexting' makes it more likely she intended to have consensual sex. The inference is prohibited because, given its generality, it relies for its probative value on the sexual nature of the

communication, rather than the articulation of a present intention to do a future act. The prohibited stereotype underpinning this inference is that women, or a certain type of women (those who 'sext') are more likely to consent.[74] The risk of moral prejudice, particularly on the part of triers of fact unfamiliar with this type of sexual activity, should be obvious.

Inserting a second step of logic into the reasoning - that it is the intention to consent to future sex (rather than the consent to that future sex itself) does not eradicate the risk of moral prejudice and does not make this reasoning lawful under section 276(1). At its foundation is still the twin myth that a woman who consents (whether that be to sex, to sexting, or at the time of the digital communication to future sex) is more likely to have consented to the sex at issue in the allegation. This is prohibited reasoning under section 276(1).

What this means is that, even setting aside the reliability issues examined in the previous section, only a text which is a specific expression of intention regarding the complainant's present intention to consent to the specific sexual activity at issue could pass the admissibility bar under section 276(1). For instance, the fact that a complainant sent pre-incident text messages stating: "I am so aroused and excited honey"; "I love having my neck kissed"; or "I need your mouth on me so bad" does not give rise to a permissible (or reliable) inference that she intended to have sex with the accused. Texts of this sort are not sufficiently specific regarding either her intentions or the details and context of contemplated future consensual sex to support an inference that she intended to have sex on the date of the alleged incident – without resort to

[74] See *Kinamore, supra* note 1 ("underlying Mr. Kinamore's position appears to be the suggestion that, because G.L. exchanged flirtatious, perhaps even romantic, communications with Mr. Kinamore, she is more likely to have consented to subsequent sexual activity. Respectfully, this is the type of twin myth reasoning that is not permitted: *R. v. Barton.*" at para 31).

the stereotype. Admitting sexual communications of this nature for this purpose is an error of law.[75]

Articulations of arousal or excitement in the moment (e.g. "I am so turned on"; "I am so hot for you"; "I am so aroused"), discussion of fantasy, or incorporation of fictional characters or other forms of role playing are prohibited under section 276(1) if offered simply to show that a complainant intended to consent to sex at the time the messages were conveyed. They are prohibited because, given their lack of specificity and connection to the impugned activity, they rely on twin myth reasoning: an intention to consent to future sex is imputed to the complainant by virtue of the sexual nature of her communication.

To summarize, sexual communications which are general in nature cannot be relied upon to infer a present intention to consent to future sex in order to demonstrate that the complainant has made inconsistent statements about her sexual intentions. It is impermissible to infer that a woman who 'talks dirty' is more likely intent on having sex.

iii) even digital sexual communications that are sufficiently specific will be inadmissible under section 276(2) if adduced solely to show a present intention to consent to future sex

In the fraction of cases in which evidence of a complainant's pre-incident digital sexual communications could reasonably be relied upon to infer an intention to have sex, and which are sufficiently specific such that they are not barred by section 276(1), the evidence must still meet the requirements stipulated under section 276(2). Even reliable digital sexual communications that specifically articulate a complainant's pre-incident intention to engage in specific sexual acts with the accused – such that they could be said to evidence an intention to have sex at a future point in time without relying on twin myth reasoning - are unlikely to have significant probative

[75] *Kruk, supra* note 21 at para 184.

value regarding consent that is not substantially outweighed by its prejudicial effect. Consider first the probative value.

Evidence that the complainant, at a previous point in time, intended to have sex with the accused in and of itself, tells us very little about the credibility of her claim that the sexual touching at issue in the charge was non-consensual. People frequently change their minds about sex: when to have it, with whom, for how long, where, and what type. That people frequently change their minds about sex *is* a reliable common-sense assumption about human behaviour. It is also one of the justifications for the legal requirement that a complainant's subjective consent to sexual touching be ongoing and contemporaneous with the touching.[76]

It may be compliant with section 276(1) to rely on a complainant's digital communications to infer that she intended to have consensual sex *if* the communications are sufficiently specific regarding her intention. But the capacity of even this subset of digital sexual communications to impeach the credibility of a complainant's statement that she did not consent to the sexual activity at issue in the charge is, without more, extremely modest.

In his concurring decision in *Goldfinch,* Justice Moldaver emphasized that to be admissible under section 276, relevant evidence must "be "integral" to the accused's ability to make full answer and defence."[77] In most cases, , given that it is common for people to change their minds on this matter, a complainant's pre-incident intention to engage in sexual activity (even when it can be evidenced reliably) , is very far from integral to raising a reasonable doubt regarding her lack of consent. Circumstances like *Reimer*, where the accused was unknown to the complainant prior to the date of the incident, make the probative value of this evidence for

[76] *Criminal Code, supra* note 2, s 273.1(1.1); *R v A (J),* 2011 SCC 28 at para 65.
[77] *Goldfinch, supra* note 7 at para 96.

this purpose, even were it to be sufficiently reliable and specific regarding her intentions, incredibly marginal. In the vast majority of cases, evidence that a complainant sexted a present intention to have future sex with the accused is not, on its own, significantly probative of the credibility of the complainant's statement that she did not consent to the subject matter of the charge.

Moreover, the prejudicial effect of admitting this evidence of other sexual activity, even in the rare cases in which it could give rise to a reliable inference regarding her intentions that is not premised on twin myth reasoning, is substantial.[78] Assessing the potential prejudice to the complainant's personal dignity and right of privacy in this context must be done in light of the character of digital sexual communications. The highly stylized, performance based and disinhibited element to this form of discourse elevates the risk that it will unduly arouse sentiments of prejudice or hostility, or discriminatory belief or bias against the complainant, which section 276 aims to prevent.[79] As a consequence of the discursive norms common in digital contexts, sexual communications mediated digitally may be significantly more explicit and graphic than are 'face-to-face' communications.[80] This online disinhibition effect and its impact on the tone, tenor, and content of digitally mediated intimate communications compounds the risk that this type of evidence, given its frequently graphic nature, will trigger discriminatory, victim blaming and shaming attitudes towards women complainants: the type of woman who texts explicit, highly graphic sexual content is the type of woman who will consent to anyone and anything.

[78] *Criminal Code, supra* note 2, s 276(3)(f).
[79] *Criminal Code, supra* note *2*, ss 276(3)(e)-(f).
[80] Suler, *supra* note 38.

The probative value of a complainant's pre-incident intention to have sex (offered to challenge her credibility regarding her evidence that she did not consent) is, on its own very unlikely to outweigh the substantial prejudice posed by digital sexual communications. To be admissible under sections 276(2) and 276(3), an additional inference regarding her credibility, such as the inference that would arise if the complainant was inconsistent regarding her pre-incident intentions, will almost always be necessary.

A complainant can be asked about her pre-incident state of mind; she can properly be asked whether she had planned to have sex with the accused (and changed her mind), or what her intentions were when she, for instance, met up with the accused or returned home from work. If the complainant claims that she had no intention of engaging in sexual activity, or in particular sexual acts, then sexual communications that she has sent which directly contradict this assertion may be admissible as probative of her credibility. In other words, a complainant's pre-incident sexual communications may be used to impugn her credibility if the pre-incident messages demonstrate a prior inconsistent statement on the part of the complainant regarding her state of mind when she sent them.

This is a different credibility inference than the one at issue when the accused seeks to introduce her digital sexual communications simply to show that she had intended to have sex with him. The inference here is that she is less credible because of her inconsistency; in particular, she has denied expressing an intention to have sex which is inconsistent with her digital communications. The inference that inconsistent witnesses are less credible is well established, and can be contrasted with the much less reliable and controversial inference that a complainant lacks credibility simply because she expressed an earlier intention to have sex with the accused. The former has probative value that is more likely to outweigh the prejudicial

effects of digital sexual communications evidence; it is more likely to be properly admitted pursuant to section 276(2).

If the complainant testifies, that yes, her intention was to have sex, but she changed her mind because for instance, the accused was dishevelled, much older than she expected, and substantially overweight, as in *Reimer,* then sexual communications in which she articulated an intention to engage in consensual sex do not have this impeachment value and are not admissible to impugn credibility on this basis. But if a complainant's evidence is that she had no intention of having sex with the accused or did not plan to engage in a particular sexual act, then evidence of communications she made that do show an intention to have sex, or to engage in that particular sexual act, with the accused on the date of the incident, would be admissible under section 276(2) (provided that intention is not evidenced on the basis of the discriminatory inferences prohibited by section 276(1))/

One important point must be attended to: it is evidence of the present intention to consent at the time of the communication, and not the sexual nature of the communication, that establishes the inconsistency which makes a sexual communication admissible to impugn credibility on this basis. General communications about state of arousal (e.g. "I am so horny" or "I am so turned on") or sexual desire (e.g. "I love being licked", "Mmmm, oh yeah baby" or "I want you so badly") are not admissible to evidence a contradiction with testimony from a complainant stipulating that she had no intention of having sex on the date of the alleged offence. Again, an accused cannot rely on this category of sexual communications as probative of a present intention to engage in future sex because sexting of this nature cannot be said to evidence a present intention to engage in future consensual sex without reliance on prohibited twin myth inferences. There is, therefore, no inconsistency. Contrast the examples just given with

communications that do speak to a specific intention: "when I come over tonight I am going to rip your clothes off" or "I intend to kiss you everywhere when I see you on Tuesday". Were a complainant to testify that she had no intention of having sex with the accused, these latter examples would evidence an inconsistency without relying on twin myth reasoning. To apply the law of section 276 correctly, trial judges must be attentive to, and insistent upon, this degree of specificity.

Finally, it is of course true that it is only if the complainant's evidence regarding her pre-incident intentions to engage in consensual sex at the time of the incident is inconsistent with *her* sexual communications that an inconsistency arises, and it is only her pre-incident communications that have the potential to impeach her credibility in this way. The accused's communications to her are only admissible to the extent that they are necessary to render coherent her communications, in relation to *her* intentions, for purposes of demonstrating the inconsistency.

iii) the text messages in Reimer were likely not sufficiently specific and were made in suspicious circumstances

To understand how this analysis fits together, consider the facts as published in the redacted decision in *Reimer.* The complainant's allegation was that she was coerced into the motel room, bound and gagged with her nylons, her head restrained to one side, with the accused on top of her, forcefully penetrating her vagina with his penis.[81] Justice Paciocco determined that the complainant's sexual communications were not part of the subject matter of the offence and must, as other sexual activity, be screened under section 276. He did so on the basis that "the sexualized texts are simply *too remote in time and too distinct in nature* from the charged

[81] *Reimer, supra* note1 at para 11.

events to avoid s. 276 scrutiny."[82] Based on this reasoning, it is safe to assume that the unredacted version of his decision, which will be released at the conclusion of the Crown's appeal to the Supreme Court, will not reveal text messages from the complainant indicating an intention to consent to being bound and gagged with her undergarment, head restrained, with the accused on top of her penetrating her vagina with enough force to repeatedly hit her neck against the headboard. A disjuncture of this extent, between the content of the sexual communications and her account of what occurred, would on its own indicate that these statements are not trustworthy for purposes of evidencing her sexual intentions.

Assume, based on Justice Paciocco's characterization of the texts as distinct and remote from the charged events, that the complainant and Reimer's sexual text messages contained more general sexual communications, such as statements of contemporaneous arousal or excitement, and/or role playing or fantasy. This type of content would further support the conclusion that the complainant's pre-incident digital communications could not give rise to a reliable, non-discriminatory inference about the complainant's sexual intentions.

Recall that the doctrine from which Justice Paciocco borrows his inferential reasoning stipulates that the statement must be made in circumstances that "entirely explode" the possibility that the utterance was "intended to serve any purpose but that for which [it was] obviously designed".[83] While it is true that concerns over the reliability of evidence are more pressing when a complainant is not available to testify and be cross-examined on her statement, it is worth noting that in *Reimer* Justice Paciocco characterized an alternative explanation for her statement as "entirely possible":

[82] *Reimer, supra* note 1 at para 49.
[83] *Starr, supra* note 25 at para 6.

> The Crown argued before us… that the complainant may simply have been engaging in fantasy role playing when exchanging the sexualized messages, with no intention to carry forward. *That is entirely possible, and it would be open to a trier of fact to accept that theory at the end of a trial*.[84]

In addition, the circumstances in *Reimer* were suspicious: she was sexting with someone she had never met, who she knew was not accurately represented in his online profile, in a case in which not all of the text messages between them were recovered.[85] The facts in *Reimer* demonstrate why the common-sense inference underpinning the present intention hearsay exception, invoked by Justice Paciocco, is ill advised in this context.

Would her text messages be admissible as a prior inconsistent statement regarding her intentions? If her communications were general in nature the answer is no. Admitting generalized sexual communications by the complainant, such as statements of arousal or excitement, generic sexual exchanges, or fantasy-based content, in order to challenge her credibility on the basis that she intended to have sex with the accused would violate section 276(1). If her communications were specific statements of intention regarding the type of sexual encounter she alleges occurred – an intention to be bound and gagged during vaginal intercourse for instance - which Justice Paciocco's description of them as remote and distinct suggest was not the case, then evidence of them would be admissible for purposes of impugning her credibility on the basis of a prior inconsistent statement. She testified that she did not intend to engage in sexual activity with the accused when they met for the first time.

This last point raises one further issue. The complainant and the accused in this case offered completely different accounts of what occurred. Recall, she alleged a sexual assault in which, despite her physical resistance, she was bound, gagged and physically restrained while

[84] *Reimer, supra* note 1 at para 71 [emphasis added].
[85] *Ibid* at paras 4, 8.

the accused violently penetrated her. He maintained that they had consensual oral and vaginal sex that she initiated.

Even if we were to accept Justice Paciocco's problematic approach, it is not material to the facts in *Reimer*. Even if the complainant's pre-incident sexual communications could be said to reasonably evidence a present intention to consent to future sex with Reimer, which is highly questionable, it seems clear based on Justice Paciocco's decision that they did not evidence communication of an intention to consent to the sexual activity that she says occurred. Surely, we cannot accept the proposition that a statement communicating an intention to consent to one form of sex makes it more likely a complainant consented to a totally different type of sexual encounter.

If admitted on the basis Justice Paciocco proposes, the text messages in *Reimer* would be relied upon to show that the complainant communicated an intention to engage in the type of sexual activity that Reimer says occurred, a largely generic description of consensual oral and vaginal intercourse that is distinctly different from what the complainant alleges transpired. This would mean relying on the text messages to prove not simply that the complainant intended to have sex, but that she intended to have the particular type of sexual encounter that the accused says occurred. The complainant's intention to have the type of sex the accused said occurred could only be relevant for the purpose proposed in *Reimer*, in order to evidence the complainant's consent to the accused's account of the type of sexual encounter that transpired. In *Reimer*, a pre-incident intention to have oral sex and vaginal intercourse with the accused is not relevant to whether the complainant was tied up, gagged, and raped.

The Court of Appeal's decision in *Reimer* creates a substantial risk that trial judges will erroneously admit prejudicial sexual history evidence as relevant to consent. Precisely this occurred in the very first reported decision to apply *Reimer*.

III. The Harms to Complainants and the Truth-Seeking Process of the Trial That Will Be Caused by the Reasoning in *Reimer* Arose Even in the Very First Case to Apply the Decision: *R v MA*

Justice Robinson's erroneous reasoning in *MA* is emblematic of the problems that *Reimer* will produce.[86] The complainant in this case, MM, alleged that, while in the accused's car and after consensual kissing, she told him that she did not want to engage in sexual activity. According to her, the accused pushed her head down onto his penis and forced oral penetration despite her protests. The accused brought an application to adduce evidence of verbal sexual communications (Facetime conversations) between the complainant and him, in the days leading up to the alleged offence, as evidence of an inconsistency with her statement to the police. In her police statement the complainant said that she told the accused that she does not have sex with someone until she gets to know them.[87] The accused sought to adduce evidence that:

> (x) M.M. advised M.A. "that she wanted to engage in sexual activity with him and … she wanted to call him "daddy" as they engaged in this activity".
> (ii) She advised him "that she liked to get choked".
> (iii) She told him that "she wanted to make sexual videos with him as she wanted to make an "OnlyFans" account when she turned 18".
> (iv) She told him that "she wanted it "hard"".
> (v) She told him that "she wanted to go down on him".
> (vi) She told him that "she wanted him to go down on her".
> (vii) She told him that "she has had a lot of bad sex previously and [he] told her that she doesn't have to worry about this with him".
> (viii) She told him that "she gives the best "head"".
> (ix) He told her that "he wanted to have sex and oral sex"; and
> (x) They both "talked about having sex in [his] car".

[86] *MA, supra* note 6.
[87] *Ibid* at para 32.

Justice Robinson determined that he should consider the admissibility of these communications "not only in terms of possible inconsistency, but also in terms of actual consent and M.M.'s credibility, in light of *R. v. Reimer*".[88] He properly rejected defence counsel's submission that these alleged sexual communications evidenced an inconsistency, stating:

> A plain interpretation of the words M.A. attributed to M.M. during the FaceTime conversations on 11 or 12 December 2022, is that she was expressing a desire at some unspecified point in the future. That point in the future could very well be when she has already got to know M.A. to her satisfaction. M.A.'s materials do not allege that M.M. expressed a concrete intention to engage in the activities set out in items #2(i), (iii), (iv), (v), (vi), and (x) *when they met up on 13 December 2022*.

Despite this finding, and on the basis of *Reimer,* Justice Robinson then concluded that "a number of the topics that the two allegedly discussed over FaceTime on 11 or 12 December 2022 have obvious relevance on the issue of consent."[89] Quoting *Reimer,* he admitted evidence of some of the sexual conversations the accused attributed to the complainant "on the theory that her earlier statements of intention to consent are relevant to the question of whether she did, in fact, consent during their meeting [because of the] incontrovertible proposition of logic and human experience that a statement of present intention to do an act at a future time increases the likelihood that the speaker will engage in that act on that future occasion."[90] The accused, he determined, would be permitted to adduce evidence that: "(i) M.M. advised M.A. "that she wanted to engage in sexual activity with him and … she wanted to call him "daddy" as they engaged in this activity… (v) She told him that "she wanted to go down on him" [and] (x)They both "talked about having sex in [his] car"."

[88] *Ibid* at para 28.
[89] *Ibid* at para 39.
[90] *Ibid* at paras 39, 41.

Justice Robinson admitted these sexual communications as relevant to consent without proper consideration of whether it was reasonable to infer that the complainant intended to consent and was thus more likely to have consented to the impugned sexual activity because she had generalized sexual conversations on Facetime. In fact, he admitted it despite his explicit conclusion that these conversations, if they occurred, *did not* evidence a present intention to engage in the specific sexual activity at issue in the allegation: "a plain interpretation of the words M.A. attributed to M.M. during the FaceTime conversations is that she was expressing a desire at some unspecified point in the future" and that the accused was not alleging "a concrete intention expressed by her to engage in [these] activities" when they met up on the date of the alleged offence. According to Justice Robinson, these conversations "were merely an expression of her sexual fantasies".[91] He admitted this evidence without any consideration of the fact that these communications would not satisfy the present intention exception to hearsay from which the common-sense inference he relied on is drawn – an exception which qualifies the inference.

Admitting evidence of these sexual communications on the basis that they showed a present intention to engage in future sex, after finding that they did not evidence a specific intention connected to the specific impugned sexual activity was a violation of both section 276(1) and 276(2) of the *Criminal Code*, for the reasons explained in Part II.

Justice Robinson is responsible for the incongruence between his finding that the evidence was not probative of a "concrete intention" on her part to engage in the impugned activities[92] and his finding that the very same evidence was admissible because "her earlier statements of intention to consent are relevant to the question of whether she did consent".[93] But

[91] *Ibid* at para 36.
[92] *Ibid* at para 33.
[93] *Ibid* at para 42.

in the main, the fault for the distorted, harmful, and erroneous reasoning in *MA* lies with the incomplete, and misleading, decision in *Reimer.*

We need look no further than *MA* to observe the discriminatory reasoning that will be caused by *Reimer* if the Supreme Court fails to clarify and correct the Court of Appeal's reasoning.

IV. Conclusion: A Present Intention to Undermine Canada's Rape Shield Regime?

Preserving the personal dignity and right to privacy of vulnerable witnesses – such as adolescent girls and women who come forward to report the sexual harms they have experienced – by preventing the admission of prejudicial and non-probative information about their digital intimacies, was the central legislative objective motivating Bill C-51's explicit inclusion of sexual communications within the definition of "other sexual activity" under section 276.[94] This amendment, which is unquestionably *Charter* compliant and had already been reflected in a good deal of caselaw interpreting section 276 prior to its enactment, was enthusiastically embraced by all three political parties.[95] It was specifically intended[96] to prevent precisely what occurred in *MA*, and precisely what *Reimer* will undoubtedly cause in other sexual assault proceedings if left uncorrected.

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[94] See e.g. "Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act", 3rd reading, *House of Commons Debates*, 42-1, No 249 (11 December 2017) [Bill C-51, 3rd reading].

[95] See e.g. "Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act", 2nd reading, *House of Commons Debates*, 42-1, No 195 (15 June 2017).

[96] Bill C-51, 3rd reading, *supra* note 94 ("Bill C-51 would expand this protection to ensure that communications sent with sexual content or for a sexual purpose were not used to perpetuate those same myths. This is an added layer of protection that reflects the world we live in. In the 21st century, if consenting adults wish to send each other communications of a sexual nature or for a sexual purpose, that is their decision. However, the fact that someone has demonstrated that he or she was interested in sexual activity before cannot be used by a court to make a finding that he or she has given consent" at 1654-1655 [Mr Sean Fraser])

There are important gendered aspects to 'sexting'. For instance, research suggests that adolescent girls are significantly more likely to be sexted by a stranger, or pressured to send sexual communications, than are adolescent boys.[97] As noted, some research indicates that women are less likely than men to have any intention of actually engaging in the sexual activities they communicate about digitally, and men are more likely than women to assume that sexual text messages indicate an intention to engage in sex 'in real life'.[98] One recent study suggests that while digital mediums have become a normative format for sexual communications among emerging adults, men are more likely to consider these communications an articulation of consent to in-person sexual activity, even when women do not intend to convey this message.[99] The disconnect between these sexual perspectives is the very sort of circumstance motivating the requirement that consent be based, for the purpose of the *actus reus*, on the subjective state of mind of the complainant at the time the sexual touching occurred. The Court of Appeal's decision in *Reimer* does not properly account for the reality of digital intimacy, particularly in the lives of adolescent girls and young women. Without clarification there will be more cases like *MA*. These cases will undermine critically important legal protections for sexual assault complainants; protections that trial judges have begun to more consistently and rigorously uphold following the Supreme Court's directions in *Barton, Goldfinch* and *R v RV.*[100]

In the vast majority of cases it is not reasonable to rely on digital sexual communications, such as sexting, to infer that a complainant intended to consent to the sexual activity that forms the subject matter of the charge. This is rendered obvious even from the fact that were this

[97] Burén & Lunde, *supra* note 4 at 210-217.
[98] See e.g. Drouin, Tobin & Wygant, "'Love the Way You Lie'" *supra* note 45; Drouin, Hernandez & Wehle "'Tell Me Lies, Tell Me Sweet Little Lies'" *supra* note 35.
[99] Rylie Yager, Michelle Drouin & Tara L Cornelius, "Do Individuals Interpret Sexting as an Indicator of Sexual Intent and Sexual Consent?" (2025) 165 Computers in Human Behavior 108530 at 7.
[100] *Barton, supra* note 71; *Goldfinch, supra* note 7; *R v RV,* 2019 SCC 41.

evidence being introduced as hearsay it would not meet the test for the very hearsay exception that Justice Paciocco invokes as the basis for his common-sense inference. In the limited number of cases in which digital sexual communications are specific enough to reliably infer such an intention, their probative value regarding consent is very minimal and their prejudicial effect substantial. Unless the complainant offered statements to the police or at trial about her pre-incident sexual intentions, that are inconsistent with her digital communication (creating an additional and separate inference regarding her credibility) digital sexual communications should be excluded under section 276(2). Finally, demonstrating an inconsistency between her digital communications and her testimony or police statement (denying an intention to have sex) requires a non-discriminatory basis for concluding that the text messages actually reveal such an intention. General sexual communications are not capable of demonstrating this intention without relying on twin myth reasoning.

The legislative framework governing sexual assault prosecutions, and judicial interpretation of it, have been the subject of substantial criticism by the criminal defence bar of late.[101] Some criminal defence lawyers argue that "the typical sexual assault trial now involves multiple pre-trial motions in order for the defence to get permission to tender obviously relevant and admissible evidence, like text messages between the complainant and accused."[102] They maintain that "[t]his is a massive waste of time and money."[103] There are a variety of problems with this statement that exceed the scope of this article. But it is true that an onslaught of ill-founded and unjust applications to introduce a complainant's digital sexual communications as

[101] See e.g. Cristin Schmitz, "SCC Judge's 13-Year Track Record Shows Concern for Fairness, Privacy Rights & Access to Justice", *Law360 Canada* (24 January 2025), online: <www.law360.ca/ca/estates/articles/2288267/scc-judge-s-13-year-track-record-shows-concern-for-fairness-privacy-rights-access-to-justice-> [perma.cc/H73Y-SMEU].
[102] *Ibid.*
[103] *Ibid.*

probative of her sexual intentions and thus relevant to consent, on the basis of the reasoning in *Reimer,* will surely aggravate the length of time and resources consumed prosecuting sexual violence in Canada, making the process more challenging for courts and lawyers. But make no mistake, as aggravating as this will be for legal actors, the impact of relying on inadmissible, highly prejudicial digital sexual communications to adjudicate consent, and in the process undermining the protections granted under Canada's rape shield regime, will be experienced most acutely and most painfully by the women and girls who turn to the criminal justice system to respond to the harmful sexual behavior that they have experienced.