

§ 2. THE SPECIAL CASE OF CONSENT

Austin cooked a continental dinner for a new acquaintance, Berwyn, served in candlelight and accompanied by excellent French wines. After

dinner the couple sat on the sofa listening to *Traviata* and sipping Benedictine and Brandy. The moment came, as it must in every scene of this sort, in which Austin drew closer and with parted lips looked in Berwyn's eyes. A kiss was imparted and Austin's hand caressed Berwyn's neck. Suddenly, to the surprise of everyone, there was a snap as a vertebra in Berwyn's neck broke.

This vignette illustrates several problems about the surprisingly complex "defense" of consent, but also suggests some common sense answers to some of those problems.

1. Berwyn testified: "I never consented to be touched at all, and in fact I was revolted at the idea." If the trier of fact believes this testimony, does it show there was no consent?
2. Was there anything to show there *was* consent?
3. Berwyn's lawyer argued to the trial judge: "Berwyn certainly did not consent to a broken vertebra even if there was consent to a kiss." What do you think of this argument?
4. Is consent really a "defense"? What practical matter would turn on the answer to this?
5. Common sense answers to these questions should suggest several legal principles. Could you state them?

NOTE: RELATIONSHIP OF PARTIES

In real cases lawyers would want to know a great deal more about the facts. Maybe Austin can take it that consent is given by silence in some relationships but not in others. Maybe in some cases a person has no capacity to consent and the actor knows it. Suppose you are sedated and while sedated give "consent" to an operation. If the doctor knows you are heavily sedated should the doctor believe you have manifested consent? Do you lack capacity to consent to acts with people who have great power over you? Suppose an employer asks an employee to engage in a sexual relationship. Does the employee have capacity to consent? Can the employer reasonably believe that consent is freely given if the employee expressly agrees?

"A position of relative weakness can, in some circumstances, interfere with the freedom of a person's will. Our notion of consent must, therefore, be modified to appreciate the power relationships between the parties." *Norberg v. Wynrib*, 92 D.L.R. 4th 449 (Can. 1992).

REAVIS v. SLOMINSKI, 250 Neb. 711, 551 N.W.2d 528 (1996). Reavis worked for Slominski as his dental clinic. They had sexual intercourse at times between about 1973 and 1975. From 1975 to 1988 Reavis was not working for Slominski. She resumed work for him in 1988 with the understanding that he would "leave her alone." They had no intercourse until after an office New Year's Eve party in 1991. According to Reavis, both were "somewhat intoxicated." Her testimony

was that when they were alone Slominski locked the door and began kissing her. She pushed Slominski away and told him no. Slominski laughed and said, "You know you want it." Reavis said, "Oh, hell," and then walked down the hall toward Slominski's office and "threw [her] sweater off." Reavis testified that she felt there was nothing she could do because Slominski would just laugh at her. In the office, Reavis admonished Slominski and said, "You know you should not be doing this." Reavis felt that if she did not comply, she would lose her job. She said that she numbed her mind and body during the sexual intercourse, but that the physical contact was hurting her "very bad." Slominski's defense was that the intercourse was consented to. Reavis argued in the alternative that her words and acts did not amount to consent but that if they did her consent was ineffective because she suffered from an abnormal inability to refuse sexual intercourse as a result of childhood sexual abuse. The jury found in favor of Reavis on her battery claim.

Held, in a plurality opinion, remanded for new trial. Consent is not effective if a person lacks capacity to give consent. But the trial court erroneously refused to instruct the jury: (a) Incapacity of an adult plaintiff renders her consent ineffective only if her condition substantially impairs her capacity to understand and weigh the harm and risks of harm against the benefits flowing from the proposed conduct. (b) The plaintiff's incapacity does not render her consent ineffective unless the defendant has knowledge of that incapacity.

Notes

1. Four judges wrote concurring or dissenting opinions or both on various issues this case.
2. Is it correct to say that for the *Reavis* court, incapacity is governed by the apparent consent rules?
3. What about the separate issue of duress? Should employers be permitted to claim that employees who are dependent for a job, wage increase, or promotion, have consented to sexual intercourse?
4. Incapacity of an adult is usually established only by showing that the adult could not manage his own affairs, or, in consent cases, that he did not understand the nature and character of his act. On that test, does the evidence show that Reavis was legally incompetent to give consent?
5. Federal statutes against employment discrimination in effect forbid sexual harassment of employees. Dr. Slominski's conduct might count as a violation of those statutes, which are usually considered in advanced courses. You should be aware, however, that the damages award under those statutes may be less attractive to the plaintiff in some instances than the common law award. In addition, if Reavis had sued under those statutes, an issue similar to the consent issue might be raised: courts would ask whether Dr. Slominski's advances were "welcome" or not.
6. Some state statutes forbid all sexual contact between mental health professionals and their patients. Under these statutes, the patient's consent

is not legally effective to bar a claim against the therapist. If that is a good legal rule, should it apply as well in employer cases?