

SB 566 PHYSICAL RESISTANCE & CONSENT

Written testimony in favor, by:

Joan Demarest
Circuit Court Judge
Benton County Circuit Court
21st Judicial District
As an individual (not as a representative of Oregon Judicial Department)

CURRENT LAW: ORS 163.315 “Incapacity to Consent”

A person is considered incapable of consenting to a sexual act if the person is:

- (a) Under 18 years of age;
- (b) Mentally defective;
- (c) Mentally incapacitated; or
- (d) Physically helpless.

(2) **A lack of verbal or physical resistance does not, by itself, constitute consent but may be considered by the trier of fact along with all other relevant evidence.** [1971 c.743 §105; 1999 c.949 §2; 2001 c.104 §52]

The legislature has had, and continues to have, an important public policy interest/obligation in codification of the concept that lack of resistance is not necessarily consent.

But the current language is misleading because we know that lack of resistance can also be evidence of inability to consent and lack of consent (due to fight, flight freeze responses to threat, or a victim’s conscious decision for self-preservation, for example).

The limited language of the current statute amounts to the legislature and the court commenting on the evidence, telling the jury how it should evaluate or characterize evidence. This should be solely the jury’s role.

It is not the legislature’s or court’s role to determine the reason for certain behavior, or what certain behavior indicates. That is the role of the factfinder. The judge (and legislature) determines the law, the jury determines the facts and applies the law they have been given to the facts they determine from the evidence.

It is also a comment on the credibility of a witness, which is absolutely prohibited and can be grounds for a mistrial. For example, if a witness testified that she did not physically resist due to fear, and court tells the jury that lack of physical resistance is

evidence of consent, the court is telling the jury it does not believe the witness and they should not believe the witness. The court telling the jury the victim is not accurate about describing her what she meant by her behavior.

In my opinion, the best solution is to amend the current statute to read:

“A lack of verbal or physical resistance can be evidence of consent, lack of consent, or inability to consent, but may be considered by the trier of fact along with all other relevant evidence.”

This proposed amendment accomplishes a broader public policy interest, is more accurate, and it does not interfere with the role of the jury.

