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Mastery or Misogyny? The *Ghomeshi* Judgment and Sexual Assault Reform

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On March 24, 2016, Justice Horkins of the Ontario Court of Justice acquitted Jian Ghomeshi of five criminal charges: four counts of sexual assault and one count of overcoming resistance to sexual assault by choking. The judgment, like the original controversy surrounding his CBC dismissal and related sexual assault allegations, has polarized Canadian discourse on sexual assault – with reviews of Justice Horkins' reasons ranging from a "total masterclass in misogynist, arrogant windbaggery" to a "masterful job of analyzing the evidence, identifying the weaknesses in the prosecution's case and coming to the right decision."

It is undeniable that the Canadian administration of sexual assault law must be improved. But, in pursuing that improvement, it is critical to isolate where this administration truly fails, and how best to address those failures in a manner that properly balances the interests of the accused and victims of sexual assault. The *Ghomeshi* judgment, which contains both strengths and weaknesses, provides a unique opportunity to deconstruct our administration of sexual assault laws, note its flaws (and strengths), and begin developing a constructive strategy moving forward. This balanced approach is most likely to manifest in targeted reforms that will actually enhance the administration of justice and provide greater protection and support to victims of sexual assault.

The Evidence and Judgment

Justice Horkins' judgment depended "entirely on an assessment of the credibility and the reliability" of the three complainants: Lucy DeCoutere, and two complainants shielded from identification with initials LR and SD (see paras 1-4 and 11). Specifically, the judgment turned on various inconsistencies throughout the complainants' description of events in police interviews, examinations in-chief, cross-examinations, and media interviews. On this basis, Justice Horkins held that "[t]he evidence of each complainant suffered not just from inconsistencies and questionable behaviour, but was tainted by outright deception" (at para 138), and accordingly, acquitted Mr. Ghomeshi of all charges.

This post comprehensively summarizes the evidentiary inconsistencies that Justice Horkins relied on in reaching his judgment. I provide this comprehensive summary because understanding how the Court reached its judgment is integral to critiquing it in an informed and thoughtful way, and in a way that can actually bring about change to our criminal justice system.

I also comprehensively summarize these evidentiary inconsistencies because some responses to the Ghomeshi verdict pay inadequate attention to the actual judgment and the evidence it relied upon. I spoke with many people who wanted Mr. Ghomeshi convicted because, in essence, "everyone knows he did it." But surely a conviction based solely on reputation, and without resort to evidence, would be unjust. And surely social justice advocates, with their awareness of

how things like "reputation" are subject to myriad societal inequalities, could not advocate for a system of criminal justice that relies on such biased considerations. Leaving aside whether Mr. Ghomeshi's poor reputation was well earned, a criminal justice system that convicts (or acquits) based on reputation is an unjust system. Indeed, as Defence Counsel Marie Henein alluded to in a recent interview (at 3:00-3:59), good reputation (*i.e.* presumed credibility) of priests and police officers has been at the foundation of some of the most egregious injustices in history.

With the above in mind, I now turn to a review of the evidence in this case.

LR: Evidence and Judgment

The first complainant, LR, testified during examination in-chief to two separate sexual assaults:

1. an assault in December 2002, in Mr. Ghomeshi's car, where Mr. Ghomeshi suddenly and aggressively pulled LR's hair (at paras 16-17; the "Car Assault"); and

2. an assault in January 2003, at Mr. Ghomeshi's home, where he suddenly pulled her hair, punched her head several times, and pulled her to her knees (at para 21; the "Home Assault").

Justice Horkins viewed LR's evidence in-chief as "[seemingly] rational and balanced" (at para 44). However, Justice Horkins identified multiple inconsistencies that ultimately led to his conclusion that LR was "a witness willing to withhold relevant information from the police, from the Crown and from the Court", who "deliberately breached her oath to tell the truth", and whose "value as a reliable witness [was] diminished accordingly" (at para 44).

Specifically, the inconsistencies on which Justice Horkins relied with respect to LR were:

	LR's Initial Claim	**Contradiction(s)**	**LR's Explanation**
Kissing During Car Assault	LR testified that the Car Assault occurred during kissing (para 26)	LR described during media interviews that the Car Assault occurred "out of the blue" *i.e.* not while kissing (para 26) LR in her police report, initially described the hair pulling and kissing as separate, but near the end described them as intertwined (para 26)	LR explained that during her media interviews she was "unsure of the sequencing of events and "therefore […] didn't put it in" (para 27)
Hair Extensions	Following her police interview, LR told the police that she was wearing hair extensions during the Car Assault (para 28)	During cross-examination, LR claimed she was not wearing hair extensions (para 28)	LR explained that she genuinely reversed this memory following her email to the police (para 28)
Disclosing Reversal of Memory Re	Initially during cross-examination, LR claimed that she	Later during cross-examination, LR conceded that she did	No explanation for this inconsistency was identified in the

Hair Extensions to the Police	disclosed to the police her reversed memory about wearing hair extensions during the Car Assault (para 29)	not disclose this reversed memory to the police (para 29)	judgment (paras 28-29)
Car Window Head Smash	During four initial accounts to the police and media, LR never claimed that Mr. Ghomeshi smashed her head into his car window (para 30)	Following her police interview, LR told the police that Mr. Ghomeshi smashed her head into the window during the Car Assault (para 30) During cross-examination, LR reverted to the version of the Car Assault with no head smash (para 30)	LR explained that, during her police interview, she was "throwing thoughts" at the investigators (para 31)
Demonstrating Car Window Head Smash in Police Video	During cross-examination, LR denied demonstrating in her police video that her hair was pulled back towards the seat of the car, rather than towards the window (para 32)	During, cross-examination, the police video was played, and Justice Horkins held that it clearly showed LR demonstrating how her hair was pulled back towards the seat of the car (para 32)	LR explained that during the police interview she was "high on nerves" (para 32)
"Thrown" or "Pulled" to Ground during Home Assault	LR told the Toronto Star and CBC TV that she was "pulled" down to the ground during the Home Assault (para 33)	LR told CBC Radio that she was "thrown" down to the ground during the Home Assault (para 33) LR told the police that the events were "blurry" and that she did not know how she got to the ground (para 33)	LR explained that being "thrown" or "pulled" to the ground are the same (para 33)
Kissing During Home Assault	During her police interview, LR did not describe kissing as part of the assault (para 34)	At trial, LR described kissing Mr. Ghomeshi on the couch and while standing around the time of the Home Assault (para 34)	No explanation for this inconsistency was identified in the judgment (para 34)
Yoga Pose Before Home Assault	During her examination in-chief, LR did not mention doing a yoga pose just before the Home Assault (para 34)	During cross-examination, LR was reminded that she did a yoga pose and that she had previously disclosed that it bothered Mr. Ghomeshi (para 34)	No explanation for this inconsistency was identified in the judgment (para 34)

The Make of Mr. Ghomeshi's Car	During her examination in-chief, LR testified that Mr. Ghomeshi's car was a yellow Volkswagen Beetle, a "clear" memory that was a "significant factor" in her impression of Mr. Ghomeshi at the time of the assault (para 35)	Justice Horkins found as a fact that Mr. Ghomeshi did not acquire this Volkswagen Beetle until seven months after the assault (para 35)	No explanation for this inconsistency was identified in the judgment (paras 35-36)
Contacting Mr. Ghomeshi and Watching his Show Post-Assault	During examination in-chief, LR testified that after the Home Assault: (1) she never had further contact with Mr. Ghomeshi and (2) every time she heard Mr. Ghomeshi on TV or the radio, she had to turn it off because the sight and sound of him made her relive the trauma of the assault (para 37)	LR sent Mr. Ghomeshi a flirtatious email a year after the Home Assault, saying it was "good to see [him] again", that "[his] show is still great", and providing him with her contact information as an invitation for his reply (para 38) LR sent an email to Mr. Ghomeshi 18 months after the Home Assault, saying "I've been watching you" (a reference to watching his show) and attaching a photo of her in a bikini (para 39)	LR explained that these emails were part of a plan to "bait" Mr. Ghomeshi into contacting her so that she could confront him about the assaults (para 41)

Lucy DeCoutere: Evidence and Judgment

The second complainant, Ms. DeCoutere, testified during examination in-chief that, in July 2003 at Mr. Ghomeshi's home, he put his hand on her throat, pushed her forcefully against the wall, choked her, and slapped her in the face (at para 48).

However, after cross-examination, Justice Horkins considered Ms. DeCoutere's evidence unreliable because she suppressed evidence and maintained deceptions under oath. In particular, Justice Horkins sought to make clear his basis for finding Ms. DeCoutere's evidence unreliable:

> Let me emphasize strongly, it is the suppression of evidence and the deceptions maintained under oath that drive my concerns with the reliability of this witness, not necessarily her undetermined motivations for doing do. It is difficult to have trust in a witness who engages in the selective withholding [of] relevant information (at para 94).

Specifically, the inconsistencies on which Justice Horkins relied with respect to Ms. DeCoutere were the following:

	Ms. DeCoutere's Initial Claim	Contradiction(s)	Ms. DeCoutere's Explanation
Late Disclosure of Kissing Around Time of Assault	During Ms. DeCoutere's police interview and 19 reported media interviews she never mentioned that Mr. Ghomeshi attempted to kiss her on their walk to his house, that they kissed on the couch after the assault, or that they kissed goodnight when she left his house that evening (para 58). This was despite being directly asked by a detective what happened between the assault and her departure from his home and responding that "nothing stuck" (para 59)	Just prior to being called as a witness, Ms. DeCoutere met with the Crown and police and revealed that Mr. Ghomeshi attempted to kiss her on their walk to his house, that they kissed on the couch after the assault, and that they kissed goodnight when she left his house that evening (paras 56 and 58)	Ms. DeCoutere explained that she disclosed this information late because she did not understand its "importance" or "impact" until just prior to being called as a witness (paras 57 and 59) Ms. DeCoutere denied being aware that the previous witness, LR, had been confronted with embarrassing emails from 2004 (para 57)
Selective Disclosure of Details Around Time of Assault	Ms. DeCoutere reported specific details from her date with Mr. Ghomeshi, including his restaurant order and details about his home (para 61)	Ms. DeCoutere did not report, until just prior to her being called as a witness, the details related to kissing and cuddling with Mr. Ghomeshi (para 61)	Ms. DeCoutere explained that she left out intimate details from their date in the interest of brevity and succinctness (para 61)
Mr. Ghomeshi's Unappealing Suggestion	Ms. DeCoutere repeatedly stated that Mr. Ghomeshi's suggestion about lying down together and listening to music was creepy, cheesy or otherwise unappealing (para 61)	Five days after the assault, Ms. DeCoutere wrote Mr. Ghomeshi a "love letter" reading: "What on earth could be better than lying with you, listening to music and having peace?" (para 62)	No explanation for this inconsistency was identified in the judgment (para 62)
Recounting Specific Order of Events Surrounding Assault	During a Toronto Star interview, Ms. DeCoutere described how Mr. Ghomeshi first choked her, and then slapped her (para 63)	A few days after the Toronto Star interview, Ms. DeCoutere told police that her recollection of the events surrounding the assault was "all jumbled" and that she could not recall the	Ms. DeCoutere acknowledged during cross-examination that she provided multiple different versions of the order of events (para 63)

		order of events (para 63) When she spoke to CTV, Ms. DeCoutere was unsure about the order (para 63) At trial, Ms. DeCoutere described a "specific sequence of events": a push, two slaps, a pause, and then another slap (para 63)	
Ongoing Relationship with Mr. Ghomeshi	Ms. DeCoutere told police that, after the assault, she only saw Mr. Ghomeshi "in passing" and that she "didn't pursue any kind of relationship with him" (para 66)	Just before being called as a witness, Ms. DeCoutere swore another police statement describing how she (1) sent Mr. Ghomeshi "thank you flowers" days after the assault (paras 69 and 80); (2) spent considerable time with Mr. Ghomeshi in Banff in 2004, including multiple suggestive emails seeking to spend more time with him (paras 69 and 75-76); and (3) exchanged additional suggestive correspondence with him, including emails proposing further sexual activity and a "love letter" reading: "I love your hands" (paras 69 and 82-85)	Ms. DeCoutere explained that she disclosed this information late because she thought it was of no importance (para 70) and because it was her "first chance" to do so (para 74) Ms. DeCoutere explained that her ongoing relationship with Mr. Ghomeshi (including her specific reference to loving his hands) was a means of normalizing the situation and "flattening the negative" (paras 72, 80, 82, and 85-86)
No Intimacy In Days Following Assault	Ms. DeCoutere testified that, despite seeing Mr. Ghomeshi for the remainder of the weekend of the assault, she "kept her distance and certainly did not do anything intimate with him" (para 72)	During cross-examination, Ms. DeCoutere was confronted with a photograph of her and Mr. Ghomeshi cuddling affectionately in the park the day after the assault (para 72)	No explanation for this inconsistency was identified in the judgment (para 62)

In addition to Ms. DeCoutere's evidence, one of her close friends, Ms. Dunworth, gave a sworn statement to police in November 2015 providing that Ms. DeCoutere told her about the assault

ten years ago (at para 95). This evidence was tendered for the "limited use" of rebutting the claim that Ms. DeCoutere recently fabricated her complaint. Justice Horkins accepted that the evidence offset the inference that the complaint was fabricated in 2014, but noted that it did not offset the inference that the complaint may have been fabricated earlier and found it to be "of little assistance with respect to the general veracity of Ms. DeCoutere's evidence at trial" (at paras 98-99).

SD: Evidence and Judgment

Lastly, SD testified during examination in-chief that in July or August 2003, while "making out" on a secluded park bench, Mr. Ghomeshi squeezed her neck forcefully enough to cause discomfort and interfere with her ability to breathe (at paras 101, 103).

However, after cross-examination, Justice Horkins held that SD's evidence was unreliable because she was "playing chicken" with the justice system by telling only half the truth "for as long as she thought she might get away with it" (at para 118).

Specifically, the inconsistencies on which Justice Horkins relied with respect to SD were:

	SD's Initial Claim	**Contradiction(s)**	**SD's Explanation**
Discussion of Assault Details with Ms. DeCoutere	SD initially testified that she and Ms. DeCoutere never discussed the details of her experience before her police interview (para 107)	During cross-examination, SD admitted to discussing with Ms. DeCoutere details of her experience before her police interview (para 107)	No explanation for this inconsistency was identified in the judgment (para 107)
Post-Assault Contact with Mr. Ghomeshi	In her initial interviews, SD said that, after the assault, she "always kept her distance" and went out a couple times with Mr. Ghomeshi but only in public (para 112)	At trial, SD admitted to bringing Mr. Ghomeshi to her home for sexual activity after being assaulted (para 113) More than six months after the assault, SD sent an email to Mr. Ghomeshi asking him if he "[s]till want[ed] to grab that drink sometime?" (para 116)	SD admitted that her earlier comments were a deliberate lie and an intentional misrepresentation of her brief relationship with Mr. Ghomeshi (para 113)
Motivation Behind Late Disclosure of Post-Assault Contact with Mr. Ghomeshi	SD initially explained that she did not disclose post-assault contact with Mr. Ghomeshi because she did not think it was important and was not specifically asked about it (para	When pressed on her explanation, SD acknowledged that she left out information regarding post-assault contact with Mr. Ghomeshi because it did not fit "the pattern" (para 115)	SD explained that she did not think it was important to disclose post-assault intimate contact and that she wasn't "specifically" asked about it (para 115) SD explained that

	115)	When pressed further, SD explained that she did not think that what had happened between them ("[messing] around" and a "hand job") qualified as "sex" (para 115) SD only made this late disclosure on the eve of being called as a witness and after the first two witnesses had given evidence and both been confronted with their own non-disclosures (paras 117-118)	she hid this information because this was her "first kick at the can" and she did not know how to "navigate" this sort of proceeding (para 119)

In addition to the above inconsistencies, Justice Horkins had additional concerns with SD's evidence.

First, Justice Horkins considered SD's evidence lacking in sufficient precision as illustrated by a portion of her examination during which she could not recall whether Mr. Ghomeshi's hands were open or closed and the precise number of seconds his hands were around her neck (at para 106).

Second, Justice Horkins held that the evidence demonstrated "possible collusion" between SD and Ms. DeCoutere, who exchanged approximately 5000 messages between October 2014 and September 2015 describing themselves as a "team", discussing witnesses, court dates, and meetings with the prosecution, and displaying significant animosity towards Mr. Ghomeshi and an "extreme dedication to bringing [him] down" (see paras 107-110).

Commentary

As discussed earlier, Justice Horkins' judgment has deeply polarized Canadian discourse on sexual assault, receiving both warm praise and vitriolic criticism.

However, in my view, neither approach is optimal for deconstructing the judgment with a view to improving the Canadian administration of sexual assault law. Rather, a careful consideration of the judgment's strengths and weaknesses permits the most comprehensive analysis of the genuine mistakes made by Justice Horkins (and others), and how best to avoid those mistakes in future cases.

We need to address the problems that pervade the Canadian administration of sexual assault law, and those problems must be understood before they can be solved.

Strengths of the Judgment

There are four strengths in Justice Horkins' judgment:

1. the outcome, which, in my view, properly relied on material inconsistencies to find a reasonable doubt;

2. the repeated statements by Justice Horkins against the need for credible sexual assault victims to behave in a stereotypical manner (though he occasionally relies on such stereotypes at portions of his reasons);

3. the recognition by Justice Horkins that limitations on memory are understandable, particularly in historical sexual assault claims (though he is occasionally too strict with his expectations on the complainants' memories); and

4. Justice Horkins statement that his finding of a reasonable doubt is not equivalent to positively finding that these complainants were never assaulted.

First, the outcome was, in my view, the correct legal conclusion reached in response to many material inconsistencies uncovered during the cross-examination of each complainant (a view echoed consistently in commentary from the legal profession; see here, here, here, here, and here). In particular, LR's unqualified testimony that she never contacted Mr. Ghomeshi post-assault and avoided watching his show (at para 38) despite contacting him twice and both times alluding to watching his show (at paras 38-39), Ms. DeCoutere's claim that she only saw Mr. Ghomeshi "in passing" and that she "didn't pursue any kind of relationship with him" (see para 66) despite spending considerable time with Mr. Ghomeshi post-assault in Banff (at paras 69 and 75-76) and pursuing a relationship with him in multiple messages (at paras 69 and 82-85), and SD's admission that her testimony of "always [keeping] her distance" and limiting her future encounters with Mr. Ghomeshi to public settings was an intentional misrepresentation of her brief relationship with Mr. Ghomeshi (at para 113) show material inconsistencies in the evidence of the complainants that reasonably undermine their credibility. This is in addition to the fact that the second and third complainants only disclosed certain information after the directly preceding witnesses had their reliability undermined on cross-examination by being confronted with evidence contradicting their initial testimony (see paras 56-57 and 111). In my view, Justice Horkins reasonably interpreted these late disclosures of evidence as the second and third complainants withholding information (regardless of motivation) until they realized it would likely come out during cross-examination (at paras 79 and 117), a legitimate basis for diminished credibility.

Some have argued that this line of reasoning stereotypes sexual assault victims and misunderstands the complexities of trauma and how victims of sexual assault may act in ways counter to societal expectations. I completely agree that it is critical to avoid stereotypical expectations on women when assessing sexual assault complaints, and have written previously about the often outrageous expectations placed on victims of sexual assault. But Justice Horkins (primarily) doubted the credibility of these complainants because they withheld information about their post-assault relationships with Mr. Ghomeshi, not because their post-assault relationships intrinsically undermined their credibility. In my view, these criticisms largely misunderstand the core basis of Justice Horkins' reasons.

To be clear, I do not think that every inconsistency canvassed by Justice Horkins was material, and I do not think that everything that Justice Horkins highlighted supported the judgment. But, based on the record, there were, in my view, sufficient inconsistencies to support a reasonable doubt.

Second, Justice Horkins repeatedly asserted the importance of not imposing stereotypical assumptions on how a sexual assault victim should respond to abuse (though, as I discuss below, such assumptions still appear occasionally in his reasons).

In particular, Justice Horkins writes that "[t]he expectation of how a victim of abuse will, or should, be expected to behave must not be assessed on the basis of stereotypical models" (at para 43); "the Court must guard against assuming that seemingly odd reactive behaviour of a complainant necessarily indicates fabrication (at para 86); and "Courts must guard against applying false stereotypes concerning the expected conduct of complainants" (at para 135).

Indeed, Justice Horkins expressly rejects one of the most notorious rape myths – that credible sexual assault complainants will immediately report their assaults. He writes:

> The law is clear: there should be no presumptive adverse inference arising when a complainant in a sexual assault case fails to come forward at the time of the events. Each complainant articulated her own very valid reasons for not coming forward at the time of the events. The law also recognizes that there should be nothing presumptively suspect in incremental disclosure of sexual assaults or abuse (at para 126).

These are all welcome comments from the Court on assessing the credibility of sexual assault complainants, which stand in stark contrast to the extensive reliance on rape myths and overt victim blaming found in previous judicial rulings. I am very sympathetic to critiquing the more subtle ways in which a judgment can problematically assess a sexual assault complaint (indeed, I provide such a critique below). But I am also concerned by commentary that characterizes the *Ghomeshi* judgment as "painfully misogynistic", because conflating it with the other far more troubling judgments linked above fails to surgically identify its actual weaknesses in a manner that can translate into genuine reform.

Third, Justice Horkins explains how, with historical sexual assault claims, the Court should not be concerned about a complainant's ability to recall every minor detail surrounding the assault (though, again, as I discuss below, such concerns occasionally appear in his reasons).

In particular, Justice Horkins writes that "[a]n inability to recall the sequence of such a traumatic event from over a decade ago is not very surprising and in most instances, it would be of little concern" (at para 64) and "[t]he courts recognize that trials of long past events can raise particular challenges due to the passage of time. Memories tend to fade, and time tends to erode the quality and availability of evidence" (at para 125). This, too, is welcome commentary from the Court.

Fourth, Justice Horkins clearly distinguishes reasonable doubt from positively finding that these assaults never occurred. Specifically, he writes:

> My conclusion that the evidence in this case raises a reasonable doubt is not the same as deciding in any positive way that these events never happened. At the end of this trial a reasonable doubt exists because it is impossible to determine, with any acceptable degree of certainty or comfort, what is true and what is false (at para 140).

In other words, Justice Horkins declines the harder position that these complainants lied about being assaulted and adopts the softer position that, due to their inconsistencies, the veracity of their claims of assault is not beyond reasonable doubt – a reasonable conclusion based on the record before him, and a conclusion that carefully delineates the dishonesty he is actually identifying in his reasons.

In sum, Justice Horkins' judgment reached what I consider to be the correct decision based on the record before him, and, in the course of his reasons, made some positive observations on how the Court should assess sexual assault complaints.

Weaknesses of the Judgment

That being said, Justice Horkins' judgment also contained a number of dimensions worthy of criticism, including:

1. his reliance on stereotypical assumptions regarding the behaviour of sexual assault victims (despite his claim of not relying on such assumptions);

2. his reliance on unreasonable standards of memory for sexual assault victims (despite his claim of being understanding to such limitations, particularly in historical sexual assault claims); and

3. most alarmingly, his view that navigating the criminal justice system is "really quite simple".

First, Justice Horkins, despite claiming to appreciate the need to avoid stereotyping sexual assault complainants, applied certain stereotypes to the complainants' conduct in this case. Indeed, immediately after denouncing the use of stereotypes in assessing complainant credibility, Justice Horkins then applied those very stereotypes to LR:

> The expectation of how a victim of abuse will, or should, be expected to behave must not be assessed on the basis of stereotypical models. Having said that, I have no hesitation in saying that the behaviour of this complainant is, at the very least, odd (at para 43).

This passage is contained in the section of Justice Horkins' reasons titled "The Flirtatious Emails", and the "odd" (*i.e.* non-stereotypical) behaviour he is presumably referring to is LR flirting with Mr. Ghomeshi and sending him suggestive emails after her assault. It is undeniable that Justice Horkins' description of this behaviour as "odd" is rooted in the stereotype that credible sexual assault victims avoid their abuser at all costs after an assault (even though the contrary has been consistently documented in the context of sexual abuse, and even though such an expectation surely imposes absurd expectations on women assaulted by their ongoing partners (see here and here).

Justice Horkins similarly applied these stereotypes to Ms. DeCoutere. After quoting a passage from a sexually suggestive email she sent to Mr. Ghomeshi "within twenty-four hours" of her assault, Justice Horkins writes: "[t]here is not a trace of animosity, regret or offence taken, in that message" (para 84). This is despite the fact the Ms. DeCoutere repeatedly sought to explain how her post-assault conduct with Mr. Ghomeshi was rooted in a desire to "flatten the negative" *i.e.*

cope with the trauma of her assault (at paras 72, 82, and 86), another well-documented phenomena in cases of sexual abuse.

Most problematically, and with respect to all three complainants, Justice Horkins wrote the following:

> Each complainant in this case engaged in conduct regarding Mr. Ghomeshi, after the fact, which seems out of harmony with the assaultive behaviour ascribed to him. In many instances, their conduct and comments were even inconsistent with the level of *animus* exhibited by each of them, both at the time and then years later. In a case that is entirely dependent on the reliability of their evidence standing alone, these are factors that cause me considerable difficult when asked to accept their evidence at full value (at para 136; emphasis added).

In other words, Justice Horkins admits that the failure of these victims to fall within a stereotypical narrative of abuse directly contributed to their diminished credibility.

Justice Horkins claims to have reached his judgment on the basis of material inconsistencies throughout the complainants' testimony (at para 138), but the above references clearly illustrate that his reasons were influenced by the extent to which the significant post-assault contact between the complainants and Mr. Ghomeshi did not fit the stereotypical narrative of abuse that he expected. This is a significant deficiency in Justice Horkins' reasons, and a rape myth that continues to illegitimately undermine the credibility of sexual assault victims. Justice Horkins was critical of SD for not being forthcoming about details regarding her post-assault contact with Mr. Ghomeshi because she was worried it did not fit "the pattern" of abuse one might expect (see para 115). With comments like this from Justice Horkins, one can see why.

Second, Justice Horkins, despite claiming to be sensitive to the legitimate limitations on memory with historical sexual assault claims, at times demanded an unreasonable standard of precision of the complainants.

In particular, he viewed the following paragraph as purportedly illustrative of the insufficient precision in SD's account of her assault (at para 106):

> He had his hand - it was sort of - it was sort of his hands were on my shoulders, kind of on my arms here, and then it was - and then I felt his teeth and then his hands around my neck. … It was rough but - yeah, it was rough.
> Q. Were his hands open, were they closed?
> A. It's really hard for me to say, but it was just - I just felt his hands around my neck, all around my neck. … And I - I think I tried to - I tried to get out of it and then his hand was on my mouth, sort of smothering me.
> Q. Okay. I'm going to go back. So the hands were around your neck. How long were they around your neck?
> A. Seconds. A few seconds. Ten seconds. I don't even - I don't - it's hard to know. It's hard to know.
> Q. And did his hands around your neck cause you any difficulties breathing?
> A. Yes.

In my view, demanding that a victim recount the specific orientation of her abuser's hands and whether she was choked for three or ten seconds imposes an unrealistic burden on sexual assault complainants. Sexual assault is a deeply traumatic experience. How an individual copes with that experience may vary widely, and that coping may fragment and jumble details of the assault (see here and here). I am not saying that sexual assault complainants can forget every aspect of their assault because they were traumatized, and still be seen as reliable witnesses. But the threshold imposed by Justice Horkins displayed in the paragraph above is, in my view, too strenuous. To be frank, if I was asked for such details during a cross-examination about a sexual encounter from the previous night (let alone a non-consensual sexual encounter ten years prior), I would genuinely struggle to remember those details with the clarity demanded by Justice Horkins here. Sex is a fluid, complex, and occasionally unpredictable experience, and those factors are only exacerbated in the context of abuse. We cannot demand actuarial precision from sexual assault victims.

Third, and most alarmingly, Justice Horkins claimed that it is "really quite simple" for sexual assault victims to navigate the criminal justice system (at para 119). This is empirically false, and a shocking pronouncement by the Court. Many have thoroughly explored the immense complexities in navigating the criminal justice system, particularly for sexual assault complainants, and so there is no need for me to reinvent the wheel here. Needless to say, there are few (if any) tasks more complex than occupying the role of complainant in a sexual assault trial, and a characterization by the judiciary that this role is "really quite simple" is both unnecessarily insensitive to victims of sexual assault and factually incorrect. Indeed, this very case illustrates that one of the biggest barriers for sexual assault complainants (simply reporting the assault in the first place) was experienced by these complainants (see paras 23 and 54).

Similarly, Justice Horkins repeatedly criticizes the complainants' ability to assess relevance in the context of their own sexual assault trials. For example, Justice Horkins writes:

> It is difficult for me to believe that someone who was choked as part of a sexual assault, would consider kissing sessions with the assailant both before and after the assault not worth mentioning when reporting the matter to the police. I can understand being reluctant to mention it, but I do not understand her thinking that it was not relevant (at para 60).

Even more surprisingly, Justice Horkins writes:

> Another item in the new disclosure statement was the information that Ms. DeCoutere sent flowers to Mr. Ghomeshi following the Canada Day weekend in Toronto […] whether or not this behaviour should be considered unusual or not, this was very clearly relevant and material information in the context of a sexual assault allegation (at para 80; emphasis added).

The irony in these statements is that these "kissing sessions" and exchanges of flowers (or, similarly, a "yoga pose"; see para 34) are not relevant. Sexual assault is sexual touching without consent. And such an assault remains an assault whether or not consensual touching, yoga, or flowers surround it. The only reason these facts were (purportedly) relevant was because they were disclosed late, but they do not actually factor into the legal assessment of consent, which, arguably, explains why these facts were not disclosed in the first place. The nuances surrounding these facts and their relevance are complex enough for trained lawyers. Indeed, my own practice features frequent arguments between lawyers over the propriety of questions asked of witnesses

on the basis of relevance. To view this analysis as "simple" for sexual assault complainants is unreasonable, especially when one of the complainants admits to you that, in her understanding, sexual assault only occurs when you are "beaten to pieces […] broken and raped" (at para 54), clearly reflecting how (understandable) misconceptions about the legal definition of sexual assault by non-lawyers can be significant.

The further irony in Justice Horkins' above statements is that Justice Horkins' reasons ultimately vindicated SD's apprehension with full disclosure. Justice Horkins held that SD should have simply told "the whole truth", and yet that whole truth – that she had been sexually intimate with Mr. Ghomeshi after her assault – was presumably the basis on which Justice Horkins ruled that her behaviour was "out of harmony with the assaultive behaviour ascribed to [Mr. Ghomeshi]". SD's concern that this disclosure would undermine her credibility for falling outside "the pattern" one would expect of a sexual assault victim was, accordingly, justified. Furthermore, the post-assault sexual activity between SD and Mr. Ghomeshi could be seen as protected by the rape shield provisions of the *Criminal Code*, such that its relevance was subject to determination at trial, not for SD to assess beforehand.

In sum, despite reaching what I consider to be the correct conclusion, Justice Horkins' reasons contain multiple deficiencies that illustrate where reform efforts should be focussed.

Conclusion

An appreciation of the above strengths and weaknesses in the *Ghomeshi* judgment must be the starting point for our discussion on improving the Canadian administration of sexual assault laws.

Our pursuit of reforms must not resort to simplistic misrepresentations about alleged weaknesses in the current system. As Ms. Henein recently observed, our discourse surrounding sexual assault cannot be reduced to interpreting any conviction as "supporting" victims of sexual assault and any acquittal as "betraying" them (at 2:36-3:00), especially when such a reduction reveals the sexist double standard that characterizes Ms. Henein's place atop the criminal defence bar – a space in which women face myriad barriers – as a "betrayal" of women rather than as a significant feminist accomplishment.

Instead, our pursuit of reforms must distill the issues plaguing the current system and how to correct for them. And, to be clear, it is a "system" that we are seeking to reform. Ms. Henein is one of the most accomplished criminal defence lawyers in the country, an advocate few if any criminal accused have access to. Certain proposed reforms – like displacing the burden of proof or compelling an accused person to testify against themselves to assist the state in making its case – must be considered not in the context of Mr. Ghomeshi and his outstanding counsel (which represents a tiny minority of cases) but in the context of the myriad accused who have far fewer resources and against whom significant injustice may occur. Indeed, those simultaneously decrying the conviction of Steven Avery and the acquittal of Mr. Ghomeshi should pay close attention to how foundational reforms to our criminal justice system transcend the class, race, and gender of the accused.

In light of the above, how do the *Ghomeshi* judgment's weaknesses inform us of what reforms are needed?

First, Justice Horkins' occasional reliance on stereotypes and unreasonable standards for the complainants' memories indicate that broader use of judicial education and expert evidence may assist in improving the judicial process surrounding sexual assault. For example, Justice Horkins' reliance on stereotypes in this case may have been corrected with the addition of expert testimony explaining how victims often respond to sexual abuse.

Second, the performance of these complainants on cross-examination suggests that greater support and resources must be provided to sexual assault complainants throughout the criminal process: reporting to police, initial legal consultation, through trial, and being briefed about the overall process. Indeed, in Ms. Henein's view, the "one suggestion" for improving the administration of sexual assault is an increase in resources (at 11:16-12:51), though she felt the complainants in this case were properly resourced. Similarly, the complainants' own descriptions for why they did not report their assaults earlier (see paras 23 and 54) and their descriptions of the Court process itself reflect the need for greater support and resources for victims of sexual assault.

In the aftermath of the *Ghomeshi* judgment, many formal reforms have been proposed that relate to providing greater support and resources to victims of sexual assault:

1. Professor Alice Woolley recommends clarifying the role of the Crown in sexual assault prosecutions to provide greater guidance to sexual assault victims;

2. David Butt (counsel to one of the complainants in this case) recommends providing a system in which complainants have greater control over the legal process that resolves their complaints; and

3. Naomi Sayers and Samantha Peters recommend the creation of courts dedicated to exclusively hearing sexual assault cases.

All of these recommendations should be thoughtfully considered and further explored.

In addition to the above formal reforms, the desire to provide greater support to victims has translated, on social media, into the viral hashtag #WeBelieveSurvivors. And, subject to certain qualifications, I think this movement to show greater emotional support to victims of sexual assault is a positive informal reform, and one that may contribute to meaningful improvements in the administration of sexual assault laws. #WeBelieveSurvivors isn't (or, at least, shouldn't be) about disposing with sexual assault trials, in the same way #BlackLivesMatter isn't about diminishing the value of white lives. These movements, rather, are about deconstructing silent hierarchies that exist in our society and perpetuate tangible harm on marginalized communities. For that reason, I'm proud to say I believe survivors. Not because false complaints are impossible, but because that belief counteracts oppression mediated through a society which presumptively distrusts women in a forum where that trust is all they can rely on to seek justice.

Indeed, as Professor Mathen writes:

> [T]he interest in and the empathy demonstrated for the complainants must be harnessed into greater resources for those who are sexually violated, better legal education, and tools to wage the necessary fight against sexual assault as a social and cultural, not just legal, problem.

Mr. Ghomeshi's legal journey is not over. He will be back in trial this June on a separate charge of sexual assault. Hopefully, following the judgment in that second case, commentary will be more balanced, and in turn, more constructive in its proposals for reform. Even better, maybe we will see some of the above reforms in action at trial.