December 30, 2016

Defending Rapists

By: Alice Woolley

Lawyers who defend people accused of sexual assault tend to be subject to one of two narratives in popular conversations, particularly on social media:

The critical narrative: Sexual assault is a violent and under reported crime. Our criminal justice system further victimizes complainants by treating their claims with unwarranted skepticism, and by degrading them both during the investigation of the crime and during the trial of the accused. Lawyers who represent an accused in sexual assault cases engage in morally suspect conduct, except in those (rare) cases where the accused is factually innocent. They directly participate in the victimization of complainants through cross-examination and the arguments they make in court.

The defending narrative: Everyone is entitled to the presumption of innocence. A lawyer who represents a criminal accused ensures the presumption of innocence is a reality, and that lawyer is entitled to be a zealous advocate on behalf of his or her client. Zeal requires doing whatever it takes to secure an acquittal, and the consequences of that for complainants are irrelevant, especially since many accused are innocent.

While these descriptions reflect extreme versions of each, they capture I think the essence of the two narratives. And they also reflect what I have observed in public reactions and commentary on the Ghomeshi trial and judgment, and to Marie Henein's defence of him, particularly on social media. The critical narrative focuses on the belief that Ghomeshi was factually guilty – the belief that he did in fact commit the physical and mental elements of the offences with which he was charged – and on the pain suffered by the complainants from the original events, through having to testify and be cross-examined, and the judgment that criticized them. The critical narrative sees Henein's conduct through the lens of the pain felt by the complainants, and holds her responsible for her part in it inflicting it.

The defending narrative focuses on the presumption of innocence. Whether or not Ghomeshi committed the offences, he was entitled to have them proved in court before being convicted. And in any event, he was acquitted. Henein's cross-examination was firm but fair, and it resulted in the complainants being shown to be inconsistent at best, and dishonest at worst. The defending narrative sees Henein's conduct through the lens of her protection of the rule of law, and the constitutional rights of her client. The emphasis is on Ghomeshi's acquittal; the experiences of the complainants are irrelevant or warranted.

Both of these narratives are deeply problematic, even if I agree with the defending narrative on the proposition that Henein's conduct of the Ghomeshi trial was ethical and appropriate. In particular, while they each rely on solid premises (the presumption of innocence; the re-victimization of sexual assault complainants), they undermine important and complex conversations about defending a criminal accused in a sexual assault trial, and in particular defending a factually guilty person accused of sexual assault.

The problem with the defending narrative is two-fold. First, it ignores the real and significant cost that the presumption of innocence inflicts on complainants in sexual assault trials, particularly with a factually guilty accused. The presumption of innocence does matter – it is crucial and cannot be sacrificed – but we also cannot ignore the cost that it imposes. A sexual assault trial is like if we cured cancer in one person by giving chemotherapy to another. That cure could be justified if it was the only way to effect it and the chemo-receiver consented, but no one should ignore the reality that one person is suffering harm in order to protect something of value to someone else. And, in the case of a factually guilty person accused of sexual assault, the complainant is being asked to suffer harm to protect something of value to the person who assaulted her. However justified and "right", there is something grotesque about that reality.

Second, and importantly, the defending narrative discourages important conversations about the boundaries of appropriate and inappropriate defence conduct in a sexual assault trial. Yes, the presumption of innocence is crucial, and an accused person is entitled to a vigorous defence. But an accused person is not entitled to a boundless defence; the lawyer's duty is one of zealous advocacy within the bounds of legality, not zeal unbounded. Most significantly, cross-examination is ethically limited by the requirement that it not be abusive or degrading, and that it substantively respects the rules of ethics and evidence: questions must have a good faith basis, and must explore matters that are relevant and admissible. Further, where a defence lawyer has knowledge of a client's factual guilt (actual knowledge, not merely a suspicion) there are limits on the defence the lawyer can bring. In essence, a lawyer cannot mislead the court, and knowledge of guilt makes certain arguments and testimony misleading. The lawyer cannot suggest an alibi or mistaken identity in the face of knowledge of the client's factual guilt.

The critical narrative also has two problems, and they are the flip-side of the two problems with the defending narrative. Just as the defending narrative ignores the cost to the complainants of a criminal trial, the critical narrative ignores the perspective of the accused. It does not recognize the importance of giving the accused an opportunity to be heard, to test the case made against him, and to ensure that his perspective is taken into account before he is punished. Even if an accused is factually guilty, that does not mean that he has no point of view for the system to take into account (as I discussed here). Further, the critical narrative treats all defence lawyer conduct as the same – viewing any cross-examination or assertion of innocence, regardless of how it is made or its respect for the boundaries of legality, as a wrongful infliction of injury on a victim. If the defending narrative risks leaving defence lawyers unconstrained, the critical narrative risks making the most careful and respectful defence lawyer seem like a wrongdoer.

Sexual assault trials pose a truly significant ethical challenge for our criminal justice system. Sexual assaults regularly occur without witnesses. Consent is often the central issue. As a result, proving a sexual assault frequently depends on the testimony of the complainant. Further, acquitting the accused can – even if that acquittal turns on the burden of proof – be construed as a finding that the complainant is a liar, is guilty in some way. Protecting the accused's presumption of innocence will almost always inflict harm on a complainant and, when the accused is factually guilty, it will be a harm added to the one the complainant has already suffered. The complainant suffers to protect the constitutional rights of an accused, and often an accused who assaulted her.

That trade-off is one that I think our system has to make in order to ensure the rule of law – that the state only punishes people who have been shown beyond a reasonable doubt to deserve it. But we cannot ignore the price that is paid for that outcome, and we have to be as careful as we can to ensure that that price is no greater than it has to be.

Which means that we have to be incredibly clear and careful about articulating and enforcing the ethical boundaries on defence lawyers in sexual assault cases. Both Elaine Craig and David Tanovich have done important work in this area. But more needs to be done to translate that work into practice, to better ensure that complainants suffer only that harm which the presumption of innocence requires. There are also difficult questions that have not yet been fully explored – the limits on representing a client who you know to be guilty are complicated to apply in many cases, but may be even more so in a sexual assault trial; do they preclude a lawyer from seeking permission to explore a complainant's past sexual history? Do they impose more stringent limits on a lawyer's ability to invoke rape myths (assuming doing so is ever acceptable)? These are difficult questions, and require thoughtful and nuanced consideration beyond what they have so far received.

All participants in the system need to be clear about where the boundaries are when defending sexual assault cases. Prosecutors need to object to improper questions and arguments by defence counsel. Judges need to sustain those objections. Defence lawyers need to refrain from asking improper questions or making improper arguments in the first place. And appeal courts need to condemn conduct by any participant in the justice system – lawyers or trial judges – that fail to respect or uphold those boundaries.

This post was originally published on Slaw.

This post may be cited as: **Alice Woolley** "**Defending Rapists**" (30 December, 2016), online: ABlawg, http://ablawg.ca/wp-content/uploads/2016/12/Blog_AW_DefendingRapists.pdf