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The Virtues and Limits of the Representation of the "Man-in-trouble": Some Reflections on Jian Ghomeshi and Legal Ethics

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The scandal surrounding Jian Ghomeshi raises a myriad of legal questions across doctrinal areas: labour and employment; the jurisdiction of the court; criminal law; and legal ethics. Last week on ABlawg Joshua Sealy-Harrington wrote a post commenting on two of the criminal law questions – what is (and is not) relevant to assessing a sexual assault case, and how the presumption of innocence can co-exist with the empowerment of sexual assault victims (Jiango Unchained: A Discussion of the Narrative and Commentary Surrounding the Jian Ghomeshi Scandal).

Here I want to explore the legal ethics issues. My analysis will be necessarily tentative; we do not yet have sufficient information to characterize accurately the ethical issues that the situation presents. But even that tentative assessment provides an opportunity to reflect on the role of the lawyer representing a client in trouble, on the moral significance and importance of that representation, but also the challenges that can arise in identifying its limits.

Representing the Man-in-Trouble

Jian Ghomeshi is a "man-in-trouble": under investigation by the police, fired from his job, disdained by much of the public. Even a few months ago, before widespread public awareness of his conduct, Ghomeshi had some serious problems; two investigative journalists were looking into his conduct, and asking him questions about allegations of sexual assault and abuse. Further, those problems had legal significance: they put his employment and his liberty at risk.

While legal ethicists have debated ferociously the moral legitimacy of the standard conception of the lawyer's role – the lawyer's partisanship in the pursuit of ends for which she is morally non-accountable – most acknowledge the moral importance of the lawyer's representation of a client facing serious legal risks, even the apparently despicable and wicked client. David Luban connects that moral importance to the preservation of the client's dignity – ensuring that her story and account of her life can be told prior to the application of the law's judgment upon her (David Luban, "Lawyers as upholders of human dignity (when they aren't busy assaulting it"), *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 65-95). David Melinkoff put it this way:

> Cruelty, oppression, deception, unhappiness, worry, strain, incomprehension, frustration, bewilderment – a sorcerer's bag of misery. These become the expected.

> Then the saddest of all human cries: "Who will help me?" Try God, and politics, and medicine, and a soft shoulder, sooner or later a lawyer. Too many do.
>
> The lawyer, as lawyer, is no sweet kind loving moralizer. He assumes he is needed and that no one comes to see him to pass the time of day. He is a prober, an analyzer, a scrapper, a man with a strange devotion to his client. Beautifully strange, or so it seems to the man-in-trouble; ugly strange to the untroubled onlooker (*The Conscience of a Lawyer* (New York: West Books, 1973) at 270).

This is not to suggest that those of us who are not Ghomeshi's lawyers (or judges or arbitrators charged with hearing his case) need to have a particular care or concern for his troubles. People not judging or representing Ghomeshi do not need to offer him a presumption of innocence in relation to our moral judgment of his conduct and we are entitled to believe his accusers. We may wish to be fair and dispassionate as a matter of our moral values and commitments, but that moral commitment to fairness does not require us to disregard women's stories of violence and abuse. We may judge him as we see fit.

But Ghomeshi's lawyers are not us. Even if they too believe his accusers, their role is to protect his legal interests and to ensure his story – his subjective account of his conduct and his life – is told in the way that he would tell it. They are there to help him, not to judge him. Without a lawyer to present his story, the application of the law to Ghomeshi would humiliate him and deprive him of his dignity:

> Certain ways of treating people humiliate them; humiliating people denies their dignity. One of those humiliations consists in presuming that some individuals have no point of view worth hearing or expressing, and that is tantamount to denying the ontological heft of their point of view (David Luban, *Legal Ethics and Human Dignity* at 72).

Whatever he has done, Jian Ghomeshi has a point of view that he is entitled to have expressed in relation to the law's application to him and his circumstances.

The special role of lawyers in relation to their clients is part of what separates them from a PR firm. A PR firm has a concern with the client's interests, and may be involved in shaping and telling the client's story. But the PR firm's concern for the client can run out, and discovering a client has lied may cause the PR firm to withdraw – as was apparently the case with Ghomeshi and Navigator (see, "Jian Ghomeshi dumped by PR firm over lies, sources say").

By contrast, while a lawyer could withdraw from representation if a client has been deceptive, withdrawal requires a "serious loss of confidence between the lawyer and client" and even then withdrawal is not required (Federation of Law Societies (FLS) Model Code, Rule 3.7-2). Lawyers, especially criminal defence lawyers, understand and expect that clients will find it difficult to be truthful when facing serious legal problems, and a wise lawyer makes strategy aware of the possibility that the client has not been honest. And, of course, when a lawyer does withdraw from a representation she must do so in a way that will "avoid prejudice" to the client and must certainly not breach confidentiality so as to publicly justify her withdrawal (FLS Model Code, Rule 3.7-8). It is not for the lawyer to leak to the press that their client "lied to the firm" as was apparently done by Navigator (see "Jian Ghomeshi dumped…"). Morally questionable in a PR firm, such conduct would be morally outrageous and legally actionable in a lawyer.

This observation has some broader social significance, particularly in relation to access to justice. While I am basically untroubled by the proposition that legal services be provided by non-lawyers (i.e., people not licensed to practice law) I am quite troubled by pushing legal representation outside of the type of moral relationship that lawyers have with their clients. Ensuring access to justice through allowing or encouraging non-lawyers to provide legal services may require non-lawyers to have a relationship with their clients that, in its moral qualities, matches the lawyer-client relationship. Otherwise those clients may have access to legal help, but not justice.

Limits on Representing the Man-in-Trouble

The moral quality of the lawyer-client relationship does not, though, make the limits on that relationship self-executing. That the lawyer serves an important function in relation to the protection of the client's dignity does not grant the lawyer a license to do-whatever-it-takes-to-get-the-client-what-he wants. The lawyer is bounded at least by the limits of legality and, for legal ethicists like David Luban, by "serious moral obligation" as well (*Legal Ethics and Human Dignity* at 63).

In the case of Ghomeshi, two questions about the conduct of his lawyers have been raised: the decision to file the $50 million statement of claim against the CBC and the non-disclosure to the police of evidence given to them by Ghomeshi that may be evidence of a crime.

The Statement of Claim

With respect to the statement of claim, Howard Levitt wrote in The Financial Post that "Jian Ghomeshi's $50-million lawsuit against the CBC has everything to do with strategy and PR — but nothing to do with legal entitlement," going on to argue that the damages claimed were out of all proportion to anything that Ghomeshi could hope to recover and, in any event, the "suit will almost certainly be quickly struck down by the courts without Ghomeshi recovering a penny." ("Jian Ghomeshi's lawsuit is hopeless...").

Levitt's characterization of the statement of claim may not be accurate, but let's assume for the moment that it is, that the lawyers filed the claiming knowing that it is without merit, and that the purpose of the suit is purely for "strategy and PR".

If that is the case, then have the lawyers violated their ethical obligations? In particular Rule 5.1-2 of the FLS Model Code of Conduct (which exists in some form across all jurisdictions) requires lawyers not to file frivolous and vexatious claims:

> When acting as an advocate, a lawyer must not
>
> > (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party…
> >
> > (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct; …

Answering this question requires interpretation of the rule. How malicious must a proceeding be? How clear the client's motivations? Is maliciousness assessed in light of legal merit – i.e., the more meritorious a claim the more permissible are malicious intentions in bringing it? Is any extraneous motivation malicious, or can the motivation be simply extraneous to the legal claim the proceeding makes?
For the purposes of argument here I want to assume an almost worst case scenario – that the action is being brought with little or no legal merit, and that the reasons for bringing the action are wholly extraneous to the legal claim – to discourage victims from coming forward and to create a positive public image for the plaintiff. I will also assume, though, that the statement of claim does not contain factual statements that the lawyer knows to be false, but only that it makes baseless legal allegations and that it may include factual statements that are *in fact* false.

And with that almost worst case scenario I want to argue that this rule ought not to preclude a lawyer from filing such a suit if his client insists upon doing so. My argument will be that this is a "hard case," a situation where ethical principles conflict, no satisfactory answer is possible, and the "best" answer requires a lawyer to act in ethically troubling ways.

To begin, though, it must be noted that in filing such a suit the client faces serious legal risks: dismissal of the action as frivolous and vexatious, an award of solicitor-client costs against him and, in the worst case scenario, liability in an action for abuse of process. A competent and ethical lawyer must advise their client of those risks clearly and strongly. No client should proceed with such an action without understanding the legal risks that it presents.

But if the client persists in his instructions to file the suit, the lawyer faces a serious ethical dilemma. On the one hand, as was set out at the beginning, the lawyer's most fundamental obligation to a client is ensuring that the client's story is told before legal consequences are visited upon her. And that is the case even if the client's story is implausible and her case legally weak. Further, inherent in the structure of the rule of law is permitting those to whom the law applies to engage with the law's application, to argue about its requirements and to participate in its application. As Jeremy Waldron has observed, this structure of legality reflects its respect for the dignity, rationality and autonomy of those to whom it applies ("The Concept and the Rule of Law" (2008-9) 43 Ga J L Rev 1). Our legal system has ways of dealing with frivolous and vexatious claims – that is why bringing such claims poses serious risks for a client; it is not obvious that lawyers need to impose an additional barrier in respect of their own clients.

On the other hand, as noted, the lawyer is bound by the limits of legality. That you can tell a story in numbered paragraphs does not mean it creates a legally cognizable claim. Moreover, on the almost worst case scenario posited, the client's motivations are not the pursuit of the stated legal claim; this is not a test case. Rather, the client's motivations are the avoidance of damage to his reputation and discouraging other victims from coming forward. The law may recognize the client's dignity, autonomy and rationality, but it is not the law to whom the client is speaking in making his legal claim. Rather, he is trying to convince the public to think better of him, and to use fear of litigation to prevent complainants from coming forward.

These countervailing concerns do not eliminate the arguments in favour of filing the statement of claim. They simply make it impossible for the lawyer to have an untroubling resolution to the problem. The lawyer files the statement of claim or he doesn't; either choice has ethical benefits and costs associated with it.

To my mind the better choice is to file the statement of claim. The injury to the moral foundations of the lawyer-client relationship from the lawyer precluding the client's access to court is too great, and the judicial process has safeguards to ameliorate much (although by no means all) of the harm that filing of such claims can do. Given the law's moral attitude to those to whom it applies, a person should be preemptively denied access to the law's processes only in extreme circumstances. But making that argument doesn't make filing the statement of claim unproblematic. Filing the statement of claim may improperly dissuade complainants from coming forward, which is a morally troubling outcome. All this argument suggests is that filing the statement of claim is the better of two difficult choices for the lawyer in question.

As a final aside on this point, the courts seem to appreciate the difficulty for the lawyer who has a client who wishes to file a unmeritorious claim as demonstrated by their unwillingness to impose costs against lawyers who bring such claims (See Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Toronto: LexisNexis, 2011) at 75-81).

Disclosing Physical Evidence of a Crime

What about the evidence? According to media reports Ghomeshi and his lawyer provided the CBC with "texts, e-mails and photos of the radio host's sexual encounters" (See: Behind the CBC's Decision to Fire Ghomeshi). He is also reported to have provided them with "graphic videos" (See: Jian Ghomeshi showed CBC Video).

But as Professor David Tanovich immediately pointed out on Twitter, the lawyer who has physical evidence of a crime has a significant ethical problem. Lawyer-client confidentiality covers information provided by the client, including the client's property and records. A lawyer cannot, however, conceal evidence, and the lawyer who does so risks prosecution for obstruction of justice. Such a prosecution was conducted against Ken Murray, the lawyer who concealed videotapes that evidenced the crimes of his client Paul Bernardo. Murray was acquitted, but only because the judge had a reasonable doubt as to his *mens rea*; there was no question that the act of concealing the video tapes constituted obstruction of justice (See: *R. v Murray* 2000 CanLii 22378).

A potential difference that would be salient, however, is that in the Murray case there was no doubt about the evidentiary significance of the videotapes to the charges against Bernardo, and the videotapes were overwhelmingly inculpatory. Here the evidence was likely more ambiguous; while consent does not excuse an assault causing bodily harm (See Brenda Cossman's nice summary of the law in the Globe and Mail, here) it may be that the evidence did not indicate whether bodily harm resulted from Ghomeshi's acts. It may also have been consistent either with consent or its absence. Further, the lawyers may have assessed that while the evidence had an inculpatory aspect – evidencing bodily harm being inflicted – that they also had an exculpatory aspect – evidencing perhaps an absence of *mens rea* on Ghomeshi's part. They may also have believed that while as a matter of law consent is not a defence to bodily harm, that clear evidence of consent may be sufficient to preclude conviction in fact.

I have no idea whether Ghomeshi's lawyers (or the lawyers for the CBC, who would also have seen the evidence) acted properly in not disclosing it to the police. But the circumstances of the case do suggest the possibility that a lawyer faced with this dilemma may have to deal with facts more complicated than those faced by Murray: where the nature of the evidence, its inculpatory or exculpatory effect, and the likelihood of conviction on the basis of that evidence, may all complicate identifying what, exactly, the lawyer is supposed to do when the client gives it to him.

Conclusion

Like many Canadians, I have spent a great deal of time reading about Ghomeshi's situation. For the most part, my attention and concern has been on pointing out that women who do not go to the police cannot be assumed to be less credible than those who do, that the reasons for not reporting a sexual assault are significant and extraneous to the truth of the victim's story (see, e.g., this thread). I personally believe that Ghomeshi acted wrongfully in his treatment of those women and have found defences of his conduct in the media increasingly risible (see e.g., Blatchford and Black). But at the same time, I strongly believe in the moral rightness of the lawyers who represent him. He needs them. And the moral structure of law, its insistence on respect for the dignity of those subject to it, requires that representation.