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Reflections on Week One of the Ghomeshi Trial

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I posted on ABlawg last Monday on the legal consequences of choking in the sexual assault context, which I suggested would be a likely issue in the Jian Ghomeshi trial. The testimony at the first week of the trial indicates that the question of whether one can legally consent to sexual activity involving choking is less likely to be the focus than whether the sexual assaults actually occurred and / or whether there was consent to the sexual activity in fact. Much ink has been spilled on the scope of the cross-examinations of the two complainants (so far) by defence counsel Marie Henein and the consequences of her tactics for the rights of sexual assault victims and their willingness to come forward. I want to add my two cents worth by focusing on the scope of the rape shield provisions, the relevance of the relationship between the complainants and the accused, and the possibility of expert evidence in this trial.

Section 276 of the *Criminal Code*, RSC 1985, c C-46, is commonly known as the rape shield provision (along with section 277, which restricts evidence of sexual reputation), and provides as follows:

> **276.** (1) In proceedings in respect of [a sexual offence] … evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
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> > (*a*) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
> >
> > (*b*) is less worthy of belief.

One important point to note is that although this section is often described as restricting "sexual history" evidence, it includes evidence of sexual activity that occurred either before or after the sexual activity that is the subject matter of the offence. If the defence intends to lead sexual history evidence, for example in cross-examining the complainant, they must apply to the court for permission to do so. The court may only admit such evidence where it relates to:

> (*a*) … specific instances of sexual activity;
>
> (*b*) is relevant to an issue at trial; and
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> (*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice (s 276(2)).

The judge hearing the application must also have regard to several factors in deciding whether the sexual history evidence is admissible, including the right of the accused to make full answer and defence, society's interest in encouraging the reporting of sexual assault offences, the need

to reject discriminatory beliefs or biases, and the rights of the complainant to personal dignity, privacy, security of the person, and to the full protection and benefit of the law (s 276(3)).

Section 276 explicitly applies to "specific instances of sexual activity." Whether the complainant has engaged in sexual activity before or after the alleged offence with the accused (or others) must not, "by reason of the sexual nature of that activity", be considered relevant to whether she consented to the sexual activity in question or to whether she should be believed as a witness.

I would argue that the same rationale underlying this section should apply to communications and other conduct of a sexual nature in which the complainant engages, either before or after the alleged incident. For example, we should not consider her more likely to have consented on the occasion in question, or to be less credible, simply because she has engaged in sexualized communications with the accused after the fact. Our focus must still be on whether there was consent at the time of the alleged incident.

To hold otherwise would suggest that sexual assault is not possible in the context of an ongoing relationship – or at least that we should have heightened concerns about credibility and consent in that context. Take for example marriage, an example that one of the complainants, Lucy DeCoutere, raised in her testimony. In a spousal relationship, the parties may engage in consensual sexual activity or sexualized communications after an alleged incident of sexual assault, but this does not mean that a sexual assault did not occur. A complainant in this context may have all sorts of reasons for staying with her partner regardless of the assault, including dependency, fear, or even love. Nevertheless, we must still assess an alleged sexual assault by focusing on whether consent existed at the time of the incident, and to what specific sexual activity that consent existed, rather than drawing inferences of consent or lack of credibility based on the fact that the parties remain together and have sex or talk about sex. These are the requirements of section 276 of the *Criminal Code*, as well as consent provision in section 273.1 as interpreted in cases such as *R v Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 and *R v JA*, [2011] 2 SCR 440, 2011 SCC 28.

Unfortunately, courts in spousal sexual assault cases often allow sexual history evidence (including post-offence conduct) to "creep in" without application of section 276 of the *Criminal Code* (see Melanie Randall, Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law: Honest But Mistaken Judicial Beliefs (2008) 32 Manitoba Law Journal 144 at 158; Jennifer Koshan, The Legal Treatment Of Marital Rape And Women's Equality: An Analysis Of The Canadian Experience at 44-45). But these instances are contrary to the requirements of the *Criminal Code* and should be resisted or appealed where they occur. The relationship between the parties – whether it is dependent, romantic or professional – should not attenuate the application of the rape shield provisions, and should not influence inferences about consent and credibility even where there is post-offence contact or communication of a sexual nature. Any other interpretation risks undermining the interests that courts must consider in sexual history applications, including society's interest in the reporting of sexual assault offences, the need to remove discriminatory beliefs and biases from the fact-finding process, potential prejudice to the complainant's personal dignity and privacy rights, and the right of the complainant to personal security and to the full protection and benefit of the law.

Another useful way to think about the problems with relying on post-offence conduct is to ask how we would treat this kind of evidence in a case involving a different offence – for example, assault rather than sexual assault, which also includes the element of lack of consent. As argued by UBC law prof Isabel Grant in an interview with the National Post, "We wouldn't start questioning the victim about whether or not he likes being punched in the face. Was he dressed in a way that would invite punching in the face? Did he talk to the person after he was punched in the face? If you think about these arguments in other crimes, you start to see how absurd it is."

And further to my point about the many reasons why complainants may stay with their partners, or maintain contact with professional colleagues following a sexual assault (even intimate contact), we must recognize that victims of sexual assault have a diverse range of responses to being violated. Lori Haskell gave an excellent interview on CBC's The Current last week discussing the psychology behind reactions to sexual victimization. The Ghomeshi case may be an appropriate one for the Crown to call expert evidence to provide context to this issue. There are several examples of spousal sexual assault cases where expert evidence has been admitted by the court as useful to its understanding of the post-offence actions of the complainant (see The Legal Treatment Of Marital Rape And Women's Equality: An Analysis Of The Canadian Experience at 43). While expert evidence of this kind may be thought more appropriate in a jury trial, we should recall that judges sitting alone may be influenced by myths and stereotypes about how sexual assault complainants should act before and after the alleged offence (see e.g. my post on *R v Wagar*, 2015 ABCA 327). This is not to say that expert evidence should be required; the word of the complainant should be enough. But we are not (yet) living in a world where we can be confident of that.

All of the attention on the fact that the first two complainants in the Ghomeshi trial had contact and communications with him after the alleged incidents is therefore misplaced, should not be seen as relevant to whether they are believable or whether they consented to the alleged sexual assault, and might usefully be contextualized by expert evidence so that rationales contrary to the rape shield provisions are not imputed to their behaviour.

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