

The Role of the Media in the Protection of Vulnerable Complainants

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When Eugene Meehan asked me to be on this panel, he first asked me to talk about the role of the media in the protection of vulnerable complainants, but then suggested I might think about whether the media does have a role in the protection of vulnerable complainants.

Quite clearly, the media does have such a role — but I must tell you I had to think long and hard about whether the media *should* have a role in the protection of vulnerable complainants.

I guess it could be argued that when it comes to court coverage, the media are just neutral third parties who sit back and simply dutifully record what transpires; that we are in fact not players in the drama that unfolds in front of us, but merely neutral watchers. But I think that view really minimizes our true function and ignores the vital role we play in shaping society's views on such things as the administration of justice. I think it also ignores the responsibility we have been entrusted with — by whom I'm not quite sure — as the eyes and ears of those members of the public, who, as Justice Cory of the Supreme Court of Canada noted in the Edmonton Journal case, are simply too busy with the every day necessities of life to attend court proceedings.

So, after some initial hesitation, I think I'm quite comfortable with the notion that the media should have some role to play in the protection of vulnerable complainants — most media outlets have a firm policy of not identifying sexual complainants, except in the rare cases where the complainant wants to be identified. This policy applies even at the pretrial stage, before the mandatory *Criminal Code* provision kicks in. This often leads to non-identification of the accused where his/her identity might, even in some tenuous way, lead to the identification of the complainant. I can tell you from personal experience that we more often err on the side of caution where the ID of the accused could in any remote way identify the complainant.

I would like to make a few comments on some of the ways that have been described to protect vulnerable complainants.

It will come as no surprise to you that I would urge extreme caution in considering such a drastic remedy as closing the courtroom — at least for the child's testimony. But even more than that, if it is concluded that this is the only possible way to facilitate the child's testimony, I would urge you to consider ways of accommodating the public's right to know at the same time.

For example, the child's testimony could be piped into an adjoining room via a video hook up. This is sort of the reverse of allowing the child to testify via video from another room. This will ensure that the child will feel secure, yet allow reporters to do their job of informing the public without further traumatizing the child.

As a very last resort, you could ensure that transcripts are available within a few hours so reporters will at least be able to read what the children have said. I must stress though that, as I am sure many of you on appeal courts realize, a transcript is a very poor alternative to actually being there and observing testimony first hand.

I would like to spend the rest of my two minutes talking about publication bans.

Contrary to what you might expect, I am not here to tell you, as some of my colleagues might, that publication bans should never be imposed. While I share the

concerns of many that they are being imposed too readily and with increasing frequency, I do concede that on the rarest of occasions they may be necessary as the only way to prevent harm.

I also must tell you, quite frankly, that I think I am more comfortable with judges making those decisions than with the editors of most large newspapers.

That having been said, I would like to share with you a few cautions about imposing publication bans. Here, I am talking about bans to protect vulnerable complainants or witnesses, not to protect the McCain brothers in their family business feud or the guy in B.C. who tried to stop the Fifth Estate from mentioning his decades-old marijuana conviction. In my books, they hardly qualify as vulnerable complainants.

I. REMEMBER WHO IT IS YOU ARE TRYING TO PROTECT — NOT THE ACCUSED BUT THE COMPLAINANTS

In my opinion, if the complainant does not want a ban on his/her identity, that should be the end of the matter.

I have several stories here of bans that were imposed on the publication of the identity of the accused, supposedly to protect complainants who, in fact, wanted no such bans.

WINNIPEG

At the request of the defence lawyer, Judge Arthur Rich of the Manitoba Provincial Court banned publication of the name of a University of Manitoba professor convicted of sexual assault.

This prompted the victim, now age 12, to appear on television with her face obscured to criticize the order. Accompanied by her mother, the girl said they went to court to protect others from the same abuse and that by keeping the man's name and profession a secret, the court might be exposing others to danger.

KITCHENER

The ban was requested by defence lawyer Bruce Ritter who argued it was necessary to protect the identities of the victims. Mr. Justice Ron Sills agreed, although the Crown opposed the ban.

Since when are defence lawyers paid to worry about the victims? I thought that was the Crown's job.

So, remember who it is you are trying to protect.

II. IF YOU ARE CONSIDERING IMPOSING A PUBLICATION BAN, BE PREPARED TO HEAR SUBMISSIONS FROM A LAWYER FOR THE MEDIA

I am not suggesting that we alone have a monopoly on knowing what is in the greater public interest. Far from it. Often, however, defence lawyers will ask for the ban to protect their clients. Busy Crown attorneys who have a million other things to worry about will go along with the request without giving it much thought and before too long it is a done deal.

All I am suggesting is that you allow a third voice into the equation, even at the risk of slightly prolonging or delaying proceedings. This may also require seeking out the media and serving notice of the ban application (the Supreme Court of Canada in its recent *Dagenais* ruling suggested that this procedure should be followed). I think, however, that in the end, the administration of justice will be better off if these things do not become automatic simply because they are the easy or convenient thing to do.

III. ENSURE THAT IN TRYING TO PREVENT ONE HARM, YOU DO NOT CREATE AN EVEN GREATER ONE

I guess I am thinking here of the recent Martensville sex abuse cases in Saskatchewan. A publication ban was imposed on all of the testimony of the children — the key witnesses — and anything they might have said to doctors, police, etc.

At one trial, a 21 year old woman was convicted and sentenced to two years in jail (recently overturned by the Saskatchewan Court of Appeal) and yet, we have no idea about the substance of the charges.

At another, a police officer had charges stayed when the complainants could not even pick him out in the courtroom and yet, we have no idea what he was alleged to have done.

Surely, a less draconian method could have been found to protect these children, to allow them to testify in peace and security, and yet ensure a fair and public trial for the accused. I am not sure that is what took place.

IV. WHEN IMPOSING A PUBLICATION BAN — BE PRECISE

Finally, if you are going to impose a publication ban, be precise. Be careful in the words you choose and be available for clarification when the media do not understand something. Too often, judges — and this has happened to me personally — just rattle off some order from the bench which we cannot possibly get down on paper. Please, take the

time, the extra few minutes to dictate the order or better yet, have it transcribed immediately so we can take it away and actually read it to our lawyers and editors. The first question they always ask is "what exactly did the judge say?". Believe me, a little extra time now may save all sorts of problems and misunderstandings, like contempt of court, later. There is a case going on right now down the street (Ottawa) in provincial court where a partial publication ban on a transfer hearing has been imposed. Media lawyers have been in front of the judge several times seeking clarification of exactly what can and cannot be published. It may be a little unwieldy and a bit time consuming but, ultimately, it is worth it.

Perhaps I can best illustrate the dilemma with a real-life horror story. It comes to you from Kingston, Ontario, during the lead up to the trial of two men charged with the 1991 murder of a woman at a gas bar.

Lawyers for the two men brought an application to move the trial out of Kingston because of the tremendous amount of publicity the case had already received in the city. As per usual the judge, Madam Justice Helen MacLeod of the Ontario Court of Justice (General Division), imposed a publication ban on the change of venue application.

The problem was that no one was quite sure what the judge was banning from publication. Kingston Whig Standard reporter, Michael Woloschuk, and a radio reporter, thought she had prohibited publication of the "fact of these proceedings". Even the court stenographer took down "facts". If this were so, it appears the reporters could say there had been an application to move the case but they could not report on the "*facts* of the application" — the evidence or lawyers' submissions.

Both reporters were confused about the order and sought clarification from the lawyers. The Crown attorney told Woloschuk, "You cannot publish anything or you'd better get used to the food at Quinte (Regional Detention Centre)". Woloschuk even attempted to get clarification from the judge and asked to see her in chambers. This was clearly the right — and gutsy — thing to do. Why take chances in such a high-profile case? But alas, the court clerk brought back a message from Her Honour that "the court had ordered a ban on publication and they should see their lawyers."

The Whig indeed consulted with their lawyers and, the next day, published a large picture of the two suspects being led into the courthouse with a cutline explaining the purpose of the hearing but providing no details about the argument or "facts."

As it turned out, a tape recording later revealed that what Madam Justice MacLeod had banned was publication of the "fact of these proceedings" — thus, there could not even be reference to the fact that the hearing took place.

The newspaper and reporter were charged by the Crown with contempt of court for violating Madam Justice MacLeod's publication ban.

Although another judge acquitted them several months later, this whole sorry episode could have been avoided had judge MacLeod simply clarified her order when she was asked to.