The Role of the Victim in the Criminal Justice System — Seminar Discussion Guidelines*

David LEPOFSKY**

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* Seminar discussion guidelines prepared by Mr. David Lepofsky and handed out to the participants to be used in the discussion groups. It has been included in the volume because it was felt the reader would find it interesting and thought provoking.

** C.M. LL.B., LL.M., Crown Counsel, Office of the Attorney General of Ontario, Toronto, Ontario.

This document sets out suggestions for facilitating the seminar discussions held on the subject of the role of the victim in the criminal justice system. This seminar was preceded by a large plenary panel discussion of broad issues concerning the role of the victim in the criminal justice system.

OBJECTIVES

This seminar seeked to provide to conference participants an opportunity to identify, and debate, cutting-edge issues concerning the role of the victim in the criminal justice system. It provides an avenue for considering, evaluating and applying the conflicting view points which were articulated by the plenary panel members prior to the seminar.

METHODOLOGY

To achieve this objective, the conference participants were divided into seminar discussion groups of approximately 20 persons, with one discussion leader. They were provided with three fact patterns to discuss. The fact patterns focus on three key players in our system of government which have power to influence the status and role of the victim in our criminal justice system as follows :

1. The first fact pattern focuses on the way in which a trial Judge can have an impact on the role of the victim, particularly through rulings on the admission of evidence pertaining to the victim.

2. The second fact pattern examines the role of the Crown prosecutor, particularly in exercising prosecutorial discretion.

3. The third fact pattern focuses on the role of parliament in reforming criminal law and procedure as it effects the status and role of the victim.

FACT PATTERN — CASE NO. 1

Mary is 17 and a high school student. She attended a rather wild party hosted by a classmate on a Saturday night. The party included dancing, alcoholic drinks, and some illegal drugs. Two days later, Mary contacted her community's rape crisis centre by phone. In a state of great stress, she reported that one of the guests at the party, Peter, aged 19, had offered her a ride home, and had sexually assaulted her in his car, leaving her off at her home in the early hours of the morning. She agreed to come into the Centre, and to speak to one of its crisis staff. Thereafter, she contacted the police to report the offence.

Peter was charged with sexual assault. At trial, his counsel indicated that the defence agreed that his client had sexual relations with Mary in his car that night, but contended that she had fully consented thereto. In cross-examination of Mary, the defence elicited that she had sought counselling from the Centre. It was also established

that she had filed a claim with the Criminal Injuries Compensation Board arising out of this incident. Her claim file included her disclosures about the offence, and about its psychological impact on her. She also admitted on cross that she had experienced a great deal of anxiety about sexual matters, and had secured psychiatric therapy in relation to this a few months before the offence.

The defence sought a subpoena for three items, namely :

a) Mary's file at the Rape Crisis Centre

b) Mary's file with the Criminal Injuries Compensation Board, and

c) Mary's file with her psychiatrist regarding her pre-offence counselling

Mary has retained counsel to seek to quash these subpoenas or otherwise resist production of these records.

1. Should Mary have standing to make representations to the court separate and apart from the Crown?

2. What position should the Crown take on Mary's request for standing?

3. What arguments could Mary and/or the Crown make in support of this motion?

4. What arguments could the defence make in support of the subpoenas?

5. How should the court rule?

Suggested Discussion Questions

Question 1 : Should Mary have standing to make representations to the court separate and apart from the Crown?

- This raises the question of whether and when a victim can become a party in a criminal proceeding, rather than simply being a witness. On the one hand, it would traditionally be argued that the proper party to the prosecution is the Crown, and not the victim. As such, the only party who can make submissions on this issue is the Crown. On the other hand, it can be argued that the victim has a discrete interest in this aspect of the proceedings, beyond the role of a mere witness. If, as is suggested further below, the victim can assert either the common-law privilege or constitutional right in relation to the requested documents, then it can be argued that the victim should have status to assert these claims.

Recently, criticism has been levelled at the protraction of criminal proceedings with the intervention of non-traditional parties. This is especially so in the case of

interventions by media representatives, seeking to object to publication bans. Media rights to intervene have recently been liberalized in *Dagenais* v. *CBC*.[1] Some argue in support of the traditional rule that there should be no intervenors in criminal proceedings, and that the only parties that should be before the court are the Crown and the accused. Others argue that even if there is some liberalization, this might properly include parties such as the media, but should not go so far as to include victims as intervenors. On the other hand, it can be argued that the victim has at least as much of an interest in the proceeding as does the media, and that if the media is to be given intervention status on a more liberal basis, the same should be so for the victim. This is so especially where, as here, the victim would intend to assert personal rights.

Moreover, it might be argued that the victim's interests would not necessarily be effectively represented by the Crown here. The Crown does not take instructions from the victim, and is not necessarily privy to the interests of the victim in relation to confidentiality here. Indeed, if the privilege is to be asserted over these materials by the victim, that privilege would preclude access to these materials both by the defence and by the Crown. If the Crown is supposed to represent the victim's interests here, the Crown would have to gain access to the assertedly-privileged materials. Once the Crown has such access, the defence would argue that they should have similar access to those materials in accordance with the Crown's disclosure obligations.

There is a second and related question you may want to reflect upon. If the victim is to be allowed to intervene, should legal aid be made available to the victim? The arguments in favour of this include the following :

- The victim has critical rights at stake.

- Normally, legal aid is never available to the victim, and yet the accused has relatively ready access to the legal aid funding if needed.

- The court will benefit from hearing adequate argument from both sides.

- It is not fair for the victim to have to pay for their own lawyer when the accused does not.

The arguments against allowing legal aid for victims included the following :

- The victim, unlike the accused, does not have his or her liberty at stake. The state is not trying to incarcerate the victim.

- The legal aid system is strapped as it is. There are going to be cutbacks for defence access to legal aid. This is not the right time to provide for greater burdens on the legal aid plan, to meet the needs of those who have never been entitled before.

- The Crown should be able to assist the victim in articulating their position.

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1. *Dagenais* v. *CBC* (1995), 94 C.C.C. (3D) 289.

- Counsel should be prepared to represent the victim on a voluntary basis if the victim cannot afford to pay themselves.

Question 2 : What position should the Crown take on Mary's request for standing?

Alternative positions include the following :

1. Taking no position on the ultimate question, but setting out the principles for the court to consider, including the pros and cons.

2. Supporting the victim's request.

3. Opposing the victim's request, especially if the defence is also opposing the victim's request.

4. Saying nothing whatsoever.

Arguments in support of each position include the following :

Regarding a "no position" submission, restricted to the applicable principles

- This frees up the Crown to not look like it is siding with either the accused or the victim on this conflict.

- The Crown can assist the court while remaining in a neutral role.

- At least the Crown will not be seen as ganging up against the victim.

- The Crown does not really have a 'direct stake' in the outcome of this issue.

- At the very least the power of the state should not be turned against the victim in this circumstance.

Regarding the option of supporting the victim :

- The Crown and the State have an interest in seeing the rights of victims expanded. A first step is to support their procedural entitlements in the proceedings.

- The Crown has a direct stake in the viability of the prosecution.

- There are good arguments to support the victim's status listed above.

- Even if the court finds against the victim on this point, this will be as a result solely of the submissions of the defence. This will not create a situation of antagonism between the Crown and the victim. Thus, if the

Crown has to later advance the victim's substantive arguments in opposition to disclosure of these documents, the Crown will not be in a difficult position in relation to the victim personally.

Regarding the option of siding with the defence :

- There may be arguments supporting the declining of intervention, particularly from the perspective of delays and further complications to the administration of justice, if victims were allowed to intervene.

- To the extent that the defence opposition is based on the accused's Charter Section 7 rights, then the Crown has an interest in seeing that these rights are properly honoured at trial. This will prevent the need for appeals and re-trials.

- The Crown is not duty bound to automatically side with the victim on all issues.

Question 3 : What arguments could Mary and/or the Crown make in support of this motion?

There are arguments in support of the victim's claims. These could include the following :

- Common-law privilege against interference with confidential relationships including those between the victim and the Sexual Assault Crisis Centre, the Criminal Injuries Compensation Board, and the victim's therapist.

- At common-law, confidentiality privilege applies if four conditions are met :

  1. The information was communicated in confidence.

  2. The confidence is core to the relationship between the victim and the recipient of the information.

  3. The relationship between the victim and the recipient of the information is one which, from society's perspective, should sedulously be fostered.

  4. The public interest in protecting and preserving this relationship outweighs the public interest in disclosure of the information in the circumstances.

- In applying this test, it might ge argued that the victim's relationship with each of the recipients of the information, namely the Sexual Assault Crises Centre, the Criminal injuries compensation board, and the therapist, is based on a core requirement of confidentiality. These are important relationships in society which should be protected and fostered. Given the speculative utility of this information to the defence, and the importance of the confidentiality to the relationship in question, the balance should tip in favour of non-disclosure.

- Additionally, it could be argued by the victim that there is a Charter Section 8 interest at stake here. Charter Section 8 protects all against unreasonable searches and seizures. Here the search and seizure is carried out by or under the authority of public officials, including the court. Section 8 seeks to protect a reasonable expectation of privacy. The victim can arguably establish that she had a reasonable expectation of privacy in her dealings with the Sexual Assault Crisis Centre, the Criminal Injuries Compensation Board and her therapist.

- Finally, the victim could argue that the information is simply not relevant. The criminal procedure in sexual assault cases has historically involved gross invasions of the dignity, rights and privacy of victims. Parliament has gradually intervened to try to avoid wide sweeping fishing expeditions that cut to the

core of the victim's privacy, and which bear little relevance to the facts and issue in the case. Here, though as mentioned below, the accused may rightly argue a right to full answer and defence, this does not involve a constitutional right to fish for the smallest minnows in the ocean.

- At the very least, the victim could argue that before any of this information is disclosed, the court should independently vet the records very carefully to make sure that nothing is disclosed unless absolutely necessary.

Question 4 : What arguments could the defence make in support of the subpoenas/disclosure?

- The evidence required is relevant to test the issue of consent.

- If there is any doubt as to the relevance and usefulness of these materials, the error should be in favour of full disclosure, because the accused runs the risk of imprisonment if convicted.

- The defence would argue that there is no common-law privilege here. It would argue that all four of the requirements for common-law confidentiality privilege have not been met including :

    - There is no indication that the disclosure to the recipients of this information was necessarily originated in full confidence. For example, disclosure to the Criminal Injuries Compensation Board and to the Sexual Assault Crisis Centre lead to open legal proceedings, either in the criminal justice system or through the Criminal Injuries Compensation Regulatory Process.

    - The importance of disclosure for the criminal process arguably outweighs the importance of protection of these relationships.

- If a privilege is found in this context, then this could substantially impair the defence in many criminal cases.

- The victim also has no Charter Section 8 claim here. There is no government action involved. Moreover, any disclosure of the documents would be preceded by independent judicial authorization, and hence the requirements of Section 8 have been met.

- The victim arguably has no legitimate expectation of privacy in relations to these disclosures because the victim knows or ought to know that this kind of information could be disclosed in a subsequent court proceeding.

Question 5 : How should the court rule?

At present, the authoritative decision of the British Columbia Court of Appeal in *R* v. *O'Connor (No. 2)*[2] sets out the substantive and procedural guidelines governing applications for production of the "medical records" of witnesses in criminal proceedings, usually complainants in sexual assault cases. The decision recognizes that there are many competing interests at stake in a trial judge's determination of such an application. In particular, the *O'Connor* court recognizes the strong privacy interests at stake in applications for production of medical records all apart from issues of statutory or common-law privilege. The Court ruled that where a person accused of a criminal offence is seeking access to the records of a witness or a potential witness in the proceedings there is an initial burden on that party to demonstrate the relevance of these records to his other defence. The court proposed a two stage procedure. First, the applicant must meet a threshold of showing that the medical records contain information which is *likely to be relevant* either to an issue in the proceedings or to the competence of the witness to testify. If this test is met, then the documents are to be disclosed to the Court. Second, the court reviews the documents to determine which of them are material to the defence, in the senses that without them, the accused's ability to make full answer and defence *would be adversely affected*. If this higher threshold is met, the court should then disclose the records to the parties, subject to such conditions as the court deems fit. The *O'Connor* decision suggests that an application is to be brought by way of a formal Notice and Motion supported by affidavits and that the Notice is to set out the order requested as the basis for the application. Notice of the Application and supporting material should be served on the Crown and the third party custodian of the records as well as the complainant or other witness having a privacy interest in the documents. These third parties are entitled to present evidence and argument on the application, though they are not compellable witnesses. Though the application can be heard by a pre-trial judge, it is preferable that the trial judge determines the application. Any party to the original application may apply for a variation of an order upon proper grounds.

On February 1, 1995, the Supreme Court of Canada heard arguments on the appeal brought by the defence from the decision of the Court of Appeal in *O'Connor*. Interventions by the Attorneys General of Canada and Ontario as well as by the Canadian Mental Health Association, the Canadian Foundation for Children, Youth and the Law and a coalition of groups made up of the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the Disabled Women's Network (DAWN) and Women's Legal Education and Action Fund (LEAF) focused on the issue of the procedural and substantive issues surrounding the disclosure of medical records in the context of a criminal prosecution. The appellants/accused argued that the advisory opinion of the Court of Appeal placed too great an onus on the accused seeking the production of material. He argued that the Court should reject the two part disclosure model developed by the Court of Appeal and rule that third party therapeutic records that are subpoenaed to the Court be disclosed to defence counsel subject to such conditions as the court sees fit for protecting the privacy interests of those who are the

2. *R* v. *O'Connor (No. 2)* (1994), 90 C.C.C. (3d.) 257.

subject of such records. The three Attorneys General intervenors argued that such material should only be available following a demonstration by an accused that the presentation of the evidence was likely necessary to a fair trial and that any showings short of that would fail to recognize the many competing interests at stake including the Section 7, 8 and 15 rights of all participants in the criminal process. Justice for children adopted an approach similar to that of the Attorneys General while the Canadian Mental Health Association argued principles of traditional privilege. Finally, the Coalition of Intervenors took the position that production of such material should never be granted given the confidential nature of the material and most importantly, the Section 15 interests of complainants. The Supreme Court of its own motion, elected to appoint *amicus curiae* to represent the decision of the British Columbia Court of Appeal. The decision is presently on reserve.

On June 19, 1995, the court heard a second appeal raising similar issues in what will likely prove to be a companion case to *O'Connor*. In *L.L.A.* v. *Beharriell* the issues were somewhat narrowed by the fact that the records sought in that case were those of two sexual assault crises centres. The appeal was one brought by the complainant from an order granting production of the records and pursuant to Section 40(1) of the *Supreme Court Act*. [3]The appeal by the complainant and custodian of the records to the Ontario Court of Appeal had been quashed for want of jurisdiction. The decision in this case is expected to be released at the same time as *O'Connor*.

FACT PATTERN — CASE NO. 2

Len and Paula are married with two children, Marcy aged 15 and Dina aged 10. They live in a small, closely-knit community where Len runs a prominent and successful business and enjoys a good reputation. He is active in his church and is considering running for public office.

A year and a half ago, Len had a very stressful period when his business was in trouble, and his brother was slowly dying of a painful condition. Len did not deal well with all of this pressure. He separated for a time from his wife, but they have since reconciled.

To the shock of the local community, Len was charged with two counts of assault causing bodily harm. The alleged victims were his wife and his older daughter Marcy. The offenses were alleged to have happened about one year ago, just before the period of the parents' separation. The case has proceeded to a preliminary inquiry where both victims testified, giving detailed description of how Len had attacked them. The Crown tendered medical evidence which showed that both complainants had suffered quite serious personal injuries which were consistent with an assault, but which could also have been accidentally caused. The community has heard none of these details as there is a pre-trial publication ban on the preliminary hearing evidence.

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3. *L.L.A.* v. *Beharriell*, R.S.C. 1985, c. S-26.

The family reconciled after the preliminary hearing. The trial date is fast approaching. The two alleged victims have asked the Crown to withdraw the charges. They say that Len is back to his old self, and that he poses no risk to others. They have only met the Crown and the police in the presence of their lawyer since the preliminary hearing, and have not been forthcoming with details. They pleaded that if the trial goes ahead, Len's life will be ruined. They claim now that the injuries were accidental, and the charges were a result of the matrimonial discord going on at the time. This specific statement was made in the presence of a police officer.

The Crown is satisfied that if the case proceeds, and if Paula and Marcy deny the offenses, the Crown could introduce into evidence their preliminary hearing evidence about the offence pursuant to the Supreme Court's hearsay exception principles enunciated in *R.* v. *K.G.B.*[4]

1. Should the Crown proceed to trial against Len with these assault charges?

2. If not, should Marcy and Paula be charged with public mischief?

This situation addresses the way in which the Crown's prosecutorial discretion can work for or against the interests of the victim, and considers the extent to which the victim's wishes should influence the Crown's exercise of prosecutorial discretion.

There are four options that are opened to the Crown in this case, and these are :

a) Proceed with the prosecution against the father, over the objections of the wife and daughter.

b) Withdraw the charges against the father, but proceed with mischief charges against the mother and/or daughter.

c) Proceed against the father, and only if unsuccessful, proceed against the mother and/or daughter for mischief.

d) Withdraw the charges against the father, but bring no charges against the mother and/or daughter.

The list of policy issues which this fact pattern raises include :

1. What criteria should govern the Crown's exercise of prosecutorial discretion?

2. To what extent should the desires of the victim or complainant play a part in the prosecutor's decisions?

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4. *R.* v. *K.G.B.* (1993), 79 C.C.C. (3d) 257.

3. What is the difference between the role of the Crown in deciding whether to proceed with these charges, and the role of the court in ruling on these charges? To what extent does this difference in function inform the way the questions should be approached here?

In answer to these questions, there are competing demands on the prosecutor in making this decision which include the following :

- Domestic violence is a serious problem. The Crown should be especially vigilant to ensure that suspicions of domestic violence are brought through the criminal justice system. Not only were the injuries serious, there was more than one victim, and another child at home.

- The criminal justice system has historically been insufficiently vigilant in addressing complaints of domestic violence.

- The court, and the whole criminal justice system, including the Crown, should be suspicious of recantations of domestic violence. The recantations are inherently suspect, due to the vulnerable position of victims. Here, there are 2 victims arising from the same incident both of whom are saying it was an accident and not providing details.

- The Crown can never be sure that the victim will continue to recant on the stand when under oath.

- Even if the family has reconstituted itself, there remains a public interest in pursuing instances of domestic violence which preceded the reconstitution of the family.

- The fact that the family has reconciled might be argued to be irrelevant at this stage of the process. It is a material factor for assessing a proper sentence.

- Public resources should not be wasted on a prosecution where the victim has already made it clear that they do not wish to testify and they recant.

- The prosecutor should be allowed to exercise an independent judgment on whether there is any hope of conviction. This evidence could be advanced through a reluctant witness and use of the *KGB* precedent or Section 715 of the *Criminal Code*. In these circumstances it is difficult to estimate the prospect of a conviction.

- To the contrary, it might be argued that "reasonable likelihood of conviction" should not be the prevailing criterion. If it were, many serious charges might not be brought to the attention of the court, with the possibility of appellate review, because of the reasonable expectation that a conviction cannot be secured at trial.

- The victim's and complainant's views should be taken into account by the Crown, but should not be the prevailing consideration. Criminal prosecutions

are not private proceedings, they are public proceedings. The Crown represents the interest of the public, of whom the victim or complainant is but one member. The victim or complainant should not be in the position of dictating the public interest.

- It might be argued that charges should not be laid against the mother and daughter unless the Crown has first attempted to prosecute the father and failed to secure a conviction because of the recantation. Short of this full series of events, it would be uncertain whether the assault actually did take place as alleged. Hence it would be only a matter of speculation whether public mischief actually did occur.

- The criminal justice system should not be brought to bear on the mother and/or daughter. If they were victims of violence, this would only serve to further their misery. If they were not victims of violence, it is undesirable that they should have made use of the criminal justice system. However, prosecution of them would send a bad signal to other true victims of violence who might fear prosecution if their testimony is ultimately not accepted.

- To the contrary, it can be argued that the mother and daughter should be prosecuted based on their recantations. This should at least be the case for the mother. Efforts at using the criminal justice system to advance a party's cause in a matrimonial dispute should not be condoned by the criminal justice system. Otherwise true victims may suffer.

- In favour of prosecuting neither the father nor the mother and/or daughter, are the following considerations :

    - Ultimately the state is uncertain here what actually happened. In such a situation, the chances are that any prosecution will lead to some serious risk of injustice by the wrong party being convicted. Where there is no possibility of realistically figuring what truly happened, the state should minimize any future harm from this event. The reconciliation of the family suggests that whatever wrong was done in the past either by the father or by the complainants has been resolved.

    - If the family is back together and functioning, absent of any material risk of future violence, society's best interest is in preserving the family unit as a functioning entity.

    - Scarce state resources should not be allocated to a case such as this where it is difficult to know what happened.

FACT PATTERN — CASE NO. 3

The Canadian Association of Crime Victims contends that the criminal law and criminal process in Canada are far too pre-disposed in favour of accused persons, and too unfair and burdensome to victims. They have petitioned the federal Justice Minister for the following amendments to the *Criminal Code*.

1. An amendment providing that whenever a person is charged with any offence involving violence, whether or not it involves a sexual offence, on the application of the complainant, the court shall permanently ban publication by the media of the

complainant's identity and any information that might tend to identify the complainant. The court shall advise the complainant at the earliest practicable time of the right to apply for such a publication ban;

2. The rules of evidence shall be amended so that the character of the complainant may not be the subject of attack in evidence by the defence unless the Crown or the complainant place the complainant's good character in issue. This shall not affect the specific rules governing cross-examination of a complainant in a sexual offence case on prior sexual history;

3. The complainant shall have the right to be present in court during the entirety of the trial of the charges, whether before or after the complainant testifies, and notwithstanding any order excluding witness from the courtroom, except when the court receives and rules on arguments regarding objections to the evidence of the complainant;

4. During sentencing proceedings, the complainant has the right to make submissions to the court either in person or by counsel on any matter relevant to sentencing including on the sentence to be imposed;

5. Where a person is convicted of a crime and sentenced to prison, and that person applies for parole or other form of interim administrative release during his or her sentence, the victim shall be notified of the application, and has a right to be heard, whether in person or by counsel, during any hearing or other proceedings considering the application. Where the person is released from custody on parole or at the end of their sentence, the victim has the right to be promptly notified of the time, date and location of the release.

This fact situation raises the question of what changes parliament might wish to make to the criminal justice system to advance the status of the victim or complainant in the criminal justice system. You might begin by noting that we have a tendency to take as a given the existing criminal justice system, and the role of the victim within that system. For the most part, changes to improve the status of the victim in the system have traditionally been made either through administrative changes in the prosecutor/police bureaucracy, or through judicial pronouncements. Rarely have legislative changes been made.

In this situation, we ask you to assume the role of legislative policy-makers and to consider a series of possible reforms to improve the status of the victim.

Option # 1 : *Publication bans over identity of any victim/complainant in a violence case, whether or not sexual violence is involved. At present, the* Criminal Code *requires a judge to ban media publication of the identity of a complainant in a sex offence case on application by the Crown or the complainant. Similar protection is not now legislatively extended by the Code to other adult complainants.*

Arguments in favour

- Need to increasingly recognize the privacy interests of victims.

- Will make victims more willing to come forward to report their victimization.

- The criminal justice system already imposes enough hardships on the victim. This enables us to diminish some of these hardships, without compromising any of the interests of the accused. Such publication bans do not have an adverse impact on the accused.

- Media coverage of victims has historically tended to be sensationalistic and reflects minimal media recognition of the privacy interests of victims, especially during vulnerable parts of legal proceedings.

- This proposal would involve minimal costs to the taxpayers.

Arguments against

- There is no real need for this proposal. We already have such a non-publication power in relation to sexual assault complainants. Sexual assault complainants are in a unique position because of the especially private nature of the testimony in those cases. There is no similar need in cases not involving sexual violence.

- Media coverage of victims has not tended to be sensationalistic. Criticisms of media coverage of criminal proceedings may be levelled on other issues, but it has not been a serious problem here.

- There is arguably insufficient evidence showing that people do not report crimes because of concerns of having their name published outside the sexual assault context.

- It is important that our criminal justice system be as open as possible.

- The accused's name can now be published. It is unfair not to have the victim or complainant have their name published as well, except in the exceptional circumstances of sexual assault cases.

Option # 2 : *Limitation on the scope of cross-examination of the victim on his or her character.*

Traditionally, the defence counsel has had broad latitude to attack the character of a complainant in cross-examination. The only significant restriction on the scope of

this cross-examination arises in sexual offence cases only, and pertains to attack on the complainant's character based on questions of his or her prior sexual history. In contrast, the rules of evidence preclude the prosecution from attacking the character of the accused, unless the accused puts his or her character in issue. To some, this creates an actual imbalance, or at least the perception of imbalance in the criminal trial process. This proposal seeks to redress this imbalance.

Arguments in favour

- The current system is unfair and one-sided.

- Attacks on the character of the complainant beyond the facts of the case are really irrelevant to the case, and can only serve to make trials unnecessarily long.

- This kind of cross-examination works particular hardships on complainants, and thus makes the participation in the criminal justice system even more traumatic. We should seek, where possible, to diminish that trauma, especially where it is possible to do so without prejudicing the accused's fair trial rights.

- The object of the trial should simply be to determine whether the specific facts occurred on a particular date, and not whether any particular victim has a good or bad character.

Arguments against

- Where credibility is in issue, the character of a witness is always relevant. An exception exists for the accused only to ensure that they are not convicted of a criminal offence merely for being a bad person. A reduction in the cross-examination scope for the complainant would interfere with the accused's right to make full answer in defence.

- It is justified to treat the complainant at trial differently than the accused. After all the accused is exposed to the possible deprivation of liberty. The complainant is not.

- Restrictions in the scope of cross-examination would have to involve judicial rulings on individual questions, and thus will provide for broader scope for appeals. In the end this will complicate the legal process and waste resources.

- There is no evidence that crime victims decline to report offenses because of the details of the rules of evidence as applied to the character of victims outside of sexual history. Crime victims are not aware of the details of these evidentiary rules.

Option # 3 : *Complainant's right to be present in the courtroom during all parts of the trial.*

At present the complainant is considered a witness and not a party to the criminal proceeding. As such he or she does not have the right to be present in the courtroom when there is an order excluding witnesses, except of course when the complainant themselves testify. As such, a situation can occur when the complainant is out of the courtroom during much of the time when the proceedings unfold. This proposal seeks to entitle the complainant, like the accused, to the right to be present in the courtroom throughout the proceedings, even if the complainant is not treated as a full party to the proceedings.

Arguments in favour

- Victims will have greater confidence in the administration of justice if they can see the whole case unfold.

- The risk of the victim tailoring his or her evidence can be diminished by the Crown calling the victim as first witness.

- It is rare that the defence ever calls the victim, and rare that the Crown ever calls the victim again in reply. As such, there will be no practical prejudice to the process in this approach.

- This approach has no cost associated with it, and would be easy to administer.

Arguments against

- If the complainant is given the status, then it would suggest that the complainant is more than a mere witness to the proceedings. This is inconsistent with the tradition in the criminal justice system.

- If the complainant is present in the courtroom at any time when they otherwise should be excluded by an order excluding witnesses, this will undermine the effectiveness or acceptability of their evidence. As such, this will play into the hands of the defence. It is better from the perspective of the victim as well as from the perspective of the accused that the victim be out of the courtroom except when they are permitted to be in the courtroom pursuant to an order excluding witnesses.

Option # 4 : *Victim entitlement to make submissions on sentencing*

At present, the victim has no right to make submissions to the court during oral argument on sentencing. At most, the victim can either testify during the sentencing proceedings, or submit a written victim impact statement. Neither provide the victim the opportunity to directly respond to the submissions on sentence which counsel for the convicted accused will make. Hence, this option proposes that the victim be afforded the opportunity to actually make submissions either in person or through counsel on the sentence to be imposed.

Arguments in favour

- This would give the complainant a limited party status during the sentencing proceedings, without having to give him or her status as a party during the trial process on the question of guilt or innocence.

- This will increase the confidence of the victim in the fairness of the sentencing process, and indirectly, the confidence of the public.

- The Crown does not necessarily speak for the victim. As such, it is insufficient to suggest that the Crown should be heard.

- This is not likely to cause any real prejudice to the accused. The accused through counsel can respond to any submissions that the victim makes.

- The fuller the sentencing process, the better quality will be the sentence.

Arguments against

- This will protract the sentencing process.

- Again, this is a departure from the traditional criminal justice format whereby the Crown is supposed to represent the public interest.

- The sentencing proceeding should not be turned into an opportunity for private retribution or revenge by the victim.

- Anything that the victim might wish to say to the court can be included in the testimony of the victim on sentencing, or in a written victim impact statement.

Option # 5 : *Victim's right to notification of parole application or release on parole. Victim's right to be heard during parole proceedings.*

At present, the victim has no legal right to notification of the fact that an offender has applied for parole, nor any legal right to be heard during the parole proceedings, nor any legal right to notification that the parole was granted and the time and place of the offender's release. Any notification of the victim of any of these matters is something which would only occur as a matter of administrative discretion by the prison or police bureaucracies. This proposal seeks to entitle the victim to greater knowledge about these proceedings, a greater opportunity to protect themselves when the offender is released, and an opportunity to make sure that their views are heard during the parole adjudication process.

Arguments in favour

- There is a dramatic lack of public confidence in the parole process. These steps would create new public confidence.

- The victim should be entitled to know whether they are exposed to any risk by virtue of the parolee's impending release.

- The quality of parole decisions would be improved if the victim has an opportunity to make submissions to the parole process.

- There is no major cost nor any major prejudice in any of these proposals.

- There is increased public concern that the public generally should be made aware when a serious offender has been released on the streets.

Arguments against

- These proposals include a massive new bureaucracy for notifying disparate victims across the country of the release or the possible release of offenders.

- The parole hearing is no place for the victim to be heard. The impact on the victim can be communicated to the parole board without needing the victim to be heard.

- The aim of the parole process is to determine whether the offender has rehabilitated himself or herself enough to be released. The victim is not in possession of any information which would assist in this process, in the ordinary course.

- Once an offender has served the punishment, it is not in the public interest to provide an avenue for them to be punished further.

- This scheme is not linked to any particular risk to a past victim assuming all offenders will re-offend.

- Once an offender has satisfied their sentence, that should end the matter. This proposal may result in the public as a whole attempting to punish persons further, since there is nothing to stop the notified victim from disseminating the information about the offender to the general public.

- Similarly, notification is likely to reduce or eliminate the effectiveness of parole, which is designed to further rehabilitation of the offender and assist them with reintegrating into society. This is because notification can result in

ostracism, hostility and other negative reactions and probably repeated moves by the parolee to escape this.

- This scheme is geared to only notify past victims of the offender. It is therefore under inclusive insofar as there may be many offenders who are a greater risk to the general public than to a past victim.

- This scheme does not distinguish between those offenders who are likely to re-offend and those who are not.