

How to Get Away with Rape: Charter Protections and the Right to a Fair Trial

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Abstract

This paper was originally written for Dr. Clare McGovern's Political Science 428 course *The Impact of the Canadian Charter of Rights and Freedoms*. The guidelines for this paper were to "assess the impact of the Charter on a specific area of Canadian law, advance and defend a thesis, and consider counter arguments using empirical evidence." Students were asked to question a legal principle having to do with the impact of the Charter, and either defend it or put forth a new legal principle that they thought courts in Canada should adopt instead. This is a condensed version of the original paper. It uses APA citation style.

Introduction

The incorporation of the *Charter of Rights and Freedoms* to the 1982 Constitution Act of Canada profoundly affected the relationship between the Canadian government and its citizens. With an overt intention to defend particularly vulnerable Canadians, the *Charter* effectively constrained the power of the state. The *Charter* requires that individual freedoms are only infringed upon if the state can convincingly substantiate that such interference is necessary for the greater good. On the course of this substantiation, the hoops to be jumped through by the government are designed to be narrow and many. Thanks to these hoops, the *Charter* has successfully defended vulnerable citizens and maintained the integrity of the criminal justice system time and time again.

However, in this paper, I will be arguing on behalf of the vulnerable population I assert the *Charter* has not only left behind, but even more, systemically neglected. In the specific arena of sexual assault cases, the safeties for a defendant come at the cost of protecting victims. Judicial discretion, which feeds

into the body of Canadian law as precedent, has similarly limited the scope of victim rights. With all of this in mind, I critically approach the *Charter of Rights and Freedoms* and investigate if the protection of one vulnerable population (defendants) has resulted in the simultaneous mistreatment of another (victims). Ultimately, I argue that Canadian courts should approach sexual assault trials differently than other criminal trials by assigning greater weight to the rights of the victim because of their uniquely vulnerable position.

Relevant Charter and Criminal Code Sections

I will specifically focus on the impact of s. 7 and s. 11(d) of the *Charter* as the foundation for increased accused's rights to disclosure by way of ensuring a fair trial. The constitutionally assured right to "life, liberty and security of person" (s.7), and to "be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" (s.11(d)), have been instrumental to the development of criminal defences since entrenchment in 1982. Going beyond the vast legal protections explicitly stated by s.7 and s.11, the further accused "right to full answer and defence" has been read into these sections and well established by precedent. This implicit right to defence was the undoing of the 1982 *Criminal Code* sections 276 and 277, commonly known as the 'rape shield' provisions, which were drafted to protect sexual assault victims from credibility attacks (Kostman, 2010, para. 2). However, the *Seaboyer* court determined this prohibition interfered with the paramount "ability to make full answer and defence" and was a violation of the *Charter* (Kostman, 2010, para. 4). Since this ruling, case law has obliged the Crown to disclose both inculpatory and exculpatory information to the accused (Cassim, 2009, p. 143).

Literature Review

As criminal justice systems around the world have evolved to parallel the increased acknowledgement of civil liberties, many democracies have begun to approach the issue of disclosure from a "right to fair trial angle" (Cassim, 2009, p. 130). While in many cases this paradigm shift is understood to be the appropriate reduction of power from potentially abusive government; the enhanced due process rights in sexual assault trials result in collateral damage. Sexual assault cases are

fundamentally unlike the traditional understanding of a criminal trial “as a battle between an individual accused and the powerful mechanisms of the state” (Cunliffe, 2012, p. 315). The unfortunate product of this unique situation has been that procedural rights intended to protect defendants “have operated not to vindicate the innocence of the male accused but to undermine and degrade the female complainant” (Murphy, 2000, p. 146).

In *Seaboyer* in 1991 at the Supreme Court of Canada (SCC), the original rape shield laws were invalidated for contravening s.7 and s.11(d) of the *Charter*. In Canada today, even following years of legal reform in this arena, an accused need only provide an affidavit swearing to the relevant evidentiary value of cross-examining a complainant on her sexual history to be allowed to do so (Devine, 2001, para. 8). This practice, which remains prohibited under the post-*Seaboyer* refined rape shield legislation (s.277), effectively puts the victim on trial and enhances prevalent rape myths by attempting to connect past sexual consent to a current assault (Randall, 2010, p. 402).

Defence counsel tactics have quickly evolved to take advantage of such *Charter* protections. For example, a tactic known as “whacking the victim”, which aims to humiliate the victim so much so that they no longer wish to proceed with charges, has become common practice in the pursuit of getting an accused off (Gotell, 2002, para. 5). This occurs at the preliminary inquiry stage, where the standard for what is ‘relevant evidence’ is much lower and the defence is able to extensively question the victim before the case moves onto trial (Gotell, 2002, para. 5). This disconcerting practice is not only incredibly demeaning but also reflects a system that is unconcerned with the victim’s reasonable expectation of privacy. Records can include psychiatric, medical, criminal, counselling, child welfare, adoption, employment, therapeutic, social services, personal diaries, or other confidential records (*Criminal Code*, s.278.1). It has been long recognized by many disturbed observers that effectively putting the victim on trial is “abusive, and distorts rather than enhancing the search for truth” (Marshall, 2004, p. 146). The privacy rights of complainants are massively overlooked in the interest of the accused’s right to a fair trial, even though a more moderated approach is available (Murphy, 2000, p. 148).

Argument

Today, the rape shield sections in the *Criminal Code* are so watered down by case law that they offer minimal benefit to victims. Throughout the 1990's, the case law responded to questions of right to fair trial in staunch objection to the rape shield legislation. *Mills* in 1999 and *Darrach* in 2000 began the SCC's trend towards moderation in sexual assault cases, but their victories did not translate into true reformation (Allen & Morton, 2001). The importance that the *Charter* places on protecting accuseds from state abuse is a significant and necessary objective, but wrongly undermines protections for complainants, and is a crucial proponent of the underreporting of sexual assault to the police (Randall, 2010, p. 410). While SCC rulings on the topic of disclosure speak of a "balancing test" of these rights, the victim never wins, and thus the test appears to be futile. The legal principle in practice by courts that clearly views accused rights to disclosure as paramount should be changed. I argue that sexual assault trials must assign diminished significance to the right to a fair trial where it conflicts with the victim's right to privacy. By allowing defendants to cross examine victims based on personal psychiatric, medical, criminal, relief centre, or other records, the complainant is effectively put on trial, and thus takes on a much different role than the traditional removed role for which the application of the *Charter* was envisioned. The balancing test of rights being used is partial to defendants, neglects victim's rights, and pays only lip service to the trauma of revictimization. I recommend the prohibition of obtaining complainant records be written back into the rape shield legislation, and such disclosure only be granted where significant and extenuating relevance of the evidentiary value be proven by the defence beforehand. If the courts were to view both defendant and complainant rights as of equal importance, the use of records to humiliate the victim would diminish. Where victims are being put on trial, legal protections for them must abound in response.

Case Law

Accused's rights within the domain of sexual assault were vastly broadened six years following the entrenchment of the *Charter* in the landmark case *R. v. Seaboyer* and partner appeal *R. v. Gayme*, which both went to the SCC in 1991.

Seaboyer and *Gayme* set a significant precedent for sexual assault trials by questioning the constitutionality of the *Criminal Code* s.276 and s.277 rape shield provisions (1985). These sections of the code aimed to protect victims of sexual assault by excluding them as compellable witnesses (*Criminal Code*, 1985, s.276&277). Speaking for the majority on this appeal, Chief Justice Lamer held that the accused's rights to life, liberty, and security of person, and right to a fair trial were breached by upholding these code provisions (*Seaboyer; Gayme*, 1991, para. 1). The court ruled that all future cases relying on such code sections might only be allowed when "the prejudice substantially outweighs the value of evidence" (*Seaboyer; Gayme*, 1991, para. 6). Since the invalidation of the code, s.277 has been updated to reflect the guidelines set out by the SCC. In the next few months, the court would also hand down a ruling asserting the "legal duty of the Crown to disclose all relevant information to the defence" in *Stinchcombe* that would have lasting implications for the personal records of sexual assault victims in the future (1991, para. 3).

Just two years later, in *R. v. Osolin*, the *Seaboyer* precedent was again upheld in the SCC. The case involving the kidnapping and sexual assault of a 17-year-old girl gained a conviction at the lower level court, only to be overturned and a new trial ordered by the SCC. Citing a s.11(d) violation as was done in *Seaboyer*, the court declared that in accordance with the right to a fair trial, the defence must be allowed to cross-examine the victim (*Osolin*, 1993, para. 5). The ruling referred to the "careful balancing of the accused's right to a fair trial against the need for reasonable protection of the complainant", asserting that though maintaining the privacy interests of the victim is an important objective, the complainant's psychiatrist's records "have been permitted to ensure a fair trial and avoid a miscarriage of justice" (*Osolin*, 1993, para. 5).

In *R. v. O'Connor*, the issue of the disclosure of complainant's medical, counselling, and school records resurged (*O'Connor*, 1995, para. 1). The SCC referred to the Crown's disclosure obligation established in *Stinchcombe*, stating that such obligations were "unaffected by the confidential nature of therapeutic records" (1995, para. 3). The *O'Connor* decision put forth a seven-point test to weigh the complainant's expectation of privacy against the rights of the accused to a fair trial

(1995). While the test takes into consideration the “potential prejudice to the complainant’s dignity, privacy, or security of person”, ultimately the personal records of the victim and the possible deleterious effects of disclosing them to the defence could not outweigh the accused’s right to a fair trial (*O’Connor*, 1995). In dissent, Justice McLachlin notably disagreed that the *Charter* did not guarantee “the fairest of all possible trials, but rather a trial which is fundamentally fair” (*O’Connor*, 1995).

R. v. Mills in 1999 established the precedent on the privacy versus fair trial debate that is still in place today. *Mills* instituted that judicial discretion be the defining factor when deciding how to properly and fairly “preserve the complainant’s privacy but also to ensure that the accused has access to the documents required to make full answer and defence” (*Mills*, 1999, para. 144). The case law set by *Mills* requires the defence to establish an evidentiary foundation verifying the likely relevance of inclusion (*Mills*, 1999, para. 144). This standard was upheld one year later in *R. v. Darrach* (2000) and remains the basis for judicial decisions in every court in Canada.

Methods and Limitations

I specifically chose to analyze six SCC cases as my method for a number of reasons. These cases set precedent in Canada in favour of the accused, despite federally passed rape shield legislation. I chose only SCC appeals because original rulings may not reflect the true outcome of the case. SCC rulings are binding on all other courts in

Canada, which provides a consistency of precedent regardless of the area or province from which the case originated. Furthermore, I selected cases occurring within the first 15 years post-*Charter* to accurately portray the immediate impact. However, this specific choice also provided the opportunity for bias to emerge in this research as very few sexual assault cases tried in Canada reach the SCC, which may have had a result on my findings. My selected cases do not represent the racial and socio-economic diversity of Canada, nor meaningfully unpack the impact of gender and racial inequality surely at play within this issue.

Results and Conclusion

Both the legal and social science evidence have supported my thesis. While the six SCC cases evidence that the law surrounding sexual assault trials continues to evolve, a general trend in greater favour of the accused has been made obvious throughout my research. Rape reform, instigated mainly by feminist lobby groups, has made substantial legal strides in areas such as codifying spousal rape, in the area of consent, and ‘honest but mistaken belief’. However, where the privacy rights of victims and the right to a fair trial for the accused come into conflict, the accused maintains the upper hand. This was evidenced by the SCC’s unwillingness to uphold rape shield legislation and diminish the privacy of the complainant to a troublesome balance of evidentiary relevance. The cases beginning in 1991 with *Seaboyer* mark the entrenchment of the *Charter* as the cause of this shift in law through sections 7 and 11. Social science evidence presented within the literature review cautions readers about the harms of ‘whacking the victim’ and how effectively putting the victim on trial completely undermines the objective of the criminal justice system, beginning with underreporting. Public opinion did not appear to have an impact on the court’s decisions in these compiled cases.

The *Charter* has been the source of increased defendant protection to the detriment of the complainant with regard to disclosure and the invalidation of the former rape shield provisions. The evidence of similar legal practice in Europe as well as the United States emphasizes how the trend towards enhanced civil liberties has in turn heavily bolstered due process rights. While alternative explanations such as prevalent rape myths and systemic sexism cannot be excluded from the possible causes, the SCC rulings seem to clearly demonstrate the majority role of the *Charter*. Arguments countering the legal principle I suggest do not support the notion that a greater harm would be caused by implementing more stringent requirements for accessing victim records. Where the defence need only meet the low burden of merely raising a reasonable doubt, an accused must be able to create some defence apart from humiliating the victim. Tightening the evidentiary burden for defence access to complainant records does not disallow an operational defence, thus still allowing a ‘fair trial’ as is necessitated by the *Charter*. I argued that sexual assault cases should be approached differently than other criminal

cases, given the increased involvement and vulnerability of the victim, as opposed to the typical removed role of the state. The practice of Canadian criminal courts to allow the disclosure of personal complainant records to defence is ultimately harmful and contravenes the rights of the victim.

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