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Edward L. Greenspan Q.C.

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THE NEW TRUTH: VICTIMS NEVER LIE

Edward L. Greenspan, Q.C.*

I am going to begin by making what some people, like Professor Benedet, may view these days as a totally outrageous statement. The crime of sexual assault — like other crimes — occasionally is the subject of a false accusation. Sometimes the entire story is fabricated. At other times, the degree of force or persuasion employed to obtain "consent" is exaggerated. At other times, the complainant may make a wrong identification as to his or her assailant. My simple point, which may offend certain people, is that there is a substantial risk that an innocent defendant will be wrongfully convicted. It is a plain fact that the rules of evidence have been changed to make it easier to convict defendants for sexual assault and harder to cross-examine the alleged sexual assault victims. These legal changes have not been without substantial costs to our criminal justice system.

Each change makes it both easier to convict the guilty for sexual assault and more difficult to acquit the innocent. As one civil liberties lawyer, concerned about the recent attitude towards accused sexual assaulters, put it, "Some people regard sexual assault [as] so heinous an offence that they would not even regard innocence as a defence." In our rush to put guilty sexual assaulters behind bars, we must never forget, under our principles of justice, the age-old aphorism that it is better for 10 guilty persons to go free than for even one innocent to be wrongly convicted.[1] This fundamental principle applies just as much to sexual assault as to other vicious crimes. We are constantly reminded that injustice is a two-way street. It is unjust for a guilty sexual assaulter to go free, but surely it is equally unjust for an innocent defendant to be wrongly convicted.

I have been troubled by the notion that when it comes to allegations of sexual assault, there is a strongly held view that complainants presumptively tell the truth. I have no doubt that many persons accused of sexual assault also tell the truth. When it comes to a serious crime, it appears that everybody may exaggerate or

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* Senior Partner, Greenspan, Henein and White, Toronto. This paper was originally presented at the April 6, 2001 conference entitled "2000 Constitutional Cases: Fourth Annual Analysis of the Constitutional Decisions of the S.C.C." sponsored by the Professional Development Program at Osgoode Hall Law School.

[1] Blackstone, *Commentaries on the Laws of England* (Philadelphia: Rees Welsh & Co., 1897), Book IV, Chapter 27, at 358.

misremember. The FBI statistic that annually around 8.6% of all reported forcible rapes were "unfounded" does not necessarily mean "fabricated," although it could mean that accusations have turned out to be made up. There are many reported cases of highly publicized serious sexual assault accusations that have turned out to be false. Truth-testing mechanisms in our criminal justice system must not be compromised in order to service politically correct ideology.

The entire history of the common law criminal justice system was that the rights of the accused were at the centre of the system, that the presumption of innocence and the rights of the accused were paramount. Blackstone wrote in the 18th century that "it is better that ten guilty persons escape than that one innocent suffer."[2] I was taught that this principle was at the heart of the criminal justice system.

In the 1963 Hamlyn Lecture Series, *The Proof of Guilt*, Glanville Williams explained why the rights of an accused were paramount when he dealt with evidence admissible for the defence that would not be admissible for the Crown. He essentially stated that it was his opinion that there should be a great difference between the position of the defence and that of the prosecution; that a miscarriage of justice should never be risked by shutting out any evidence for the defence even though it might be hearsay. That is why he pointed out that Crown counsel in England frequently take no objection to defence evidence even when they might technically be able to do so. And he concluded by saying it would be much better if the hearsay rule were not applied at all against the defence. That was at the heart of the common law. But the rules always had to be dealt with in favour of an accused person for the rules were a shield against false and wrongful convictions; the rules were never to be used as a sword against an accused person.

The purpose of the *Canadian Charter of Rights and Freedoms*[3] was to entrench the values of our criminal justice system: to protect the accused against the enormous power of the state and to protect us all against wrongful convictions. Gradually, the novel notion of victims' rights has poisoned the well of traditional criminal law values. The paramountcy of the rights of the accused has been replaced by notions of "balancing rights" in a criminal trial. The rights of the accused are now measured against the rights of the victims. The criminal trial is no longer a contest between the state and the individual. It is, as Professor Paciocco quite rightly states, a contest between the accused and the complainant in the area of sexual assault.[4] The use of the Charter to "balance" rights which are now all accorded equal weight, threatens to erode the fundamental concepts of the rights of the accused which have been at the heart of the criminal justice system. Nowhere is

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[2] *Id.*

[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[4] See Professor Paciocco's paper, "Competing Constitutional Rights in an Age of Deference: A Bad Time to Be Accused," in this volume of the *Supreme Court Law Review*.

this erosion clearer than in the context of the introduction of prior sexual history of a complainant in a sexual assault case.

Evidence of a prior consensual relationship between a defendant and a complainant is, of course, not conclusive proof of innocence. A man can certainly sexually assault a woman with whom he has engaged in consensual sex, and the prior sexual conduct does not justify, or even minimize, the crime. But surely the prior relationship is relevant evidence for the jury to consider as to whether the sexual encounter at issue was a continuation of the consensual relationship or a sexual assault. To me, this is a self-evident truth. To require the jury to decide the case as if it were a dispute between two strangers is to deny the fact-finder the essential context from which to judge who is lying and who is telling the truth. The notion that sexual assault victims deserve heightened protection begs the critical question: "Was the complainant indeed a sexual assault victim as she contended or was the defendant the victim of a false accusation as he contended?" Under our constitutional presumption of innocence, the legal system cannot assume the former in justifying a rule of evidence that denies the defendant the right to prove the latter.

In this debate, the genesis of rules excluding evidence of prior sexual history must be remembered. The introduction of rules which limited the admissibility of a complainant's prior sexual history in the *Criminal Code*,[5] were driven by a desire to deal with the problem of the "twin myths." Although the belief that a woman's prior sexual history was presumptively relevant to her credibility and to her likelihood to consent had been abandoned, courts routinely still admitted evidence of prior sexual history for these improper purposes. The statutory provisions in the *Criminal Code* were designed to deal with the admission of irrelevant evidence. In *R. v. Seaboyer*,[6] the Supreme Court of Canada concluded that the enacted legislation went too far and excluded potentially relevant evidence from the trier of fact. The now common language of "victims' rights" is conspicuously absent from the Supreme Court of Canada's judgment. In concluding that the provisions were too restrictive in that they exclude relevant evidence, the Supreme Court of Canada recognized the paramountcy of the rights of the accused and, in particular, the right to adduce defence evidence. In this regard, Madam Justice McLachlin (as she then was) stated as follows:

> The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must

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5 R.S.C. 1985, c. C-46.

6 [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321.

> substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.
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> These principles and procedures are familiar to all who practise in our criminal courts. They are common sense rules based on basic notions of fairness, and as such properly lie at the heart of our trial process. In short, they form part of the principles of fundamental justice enshrined in s. 7 of the *Charter*.[7]

The judgment in *Seaboyer* was grounded on two fundamental principles. It recognized the importance of the right of an accused to make full answer and defence, and the right of the accused to introduce relevant evidence. The focus of *Seaboyer* was on the fact that the provisions potentially excluded evidence which was relevant and might assist the trier of fact in coming to a conclusion regarding the guilt or innocence of an accused person. *Seaboyer* clearly recognized that prior sexual history, in certain circumstances, is a factually relevant issue. Unfortunately, the sentiments expressed in *Seaboyer* have been gradually and fundamentally eroded as notions of balancing rights have crept into our judicial terminology.

In 1994, the Supreme Court of Canada held in *Dagenais v. Canadian Broadcasting Corp.* that when two protected rights come into conflict, Charter principles require a balance to be achieved that fully respects the importance of both rights.[8]

Therein was born the notion of victims' rights being balanced against the rights of the accused. What has not been given due consideration is what cost will be paid by according equal weight to the rights of a complainant. The exclusion of factually relevant evidence relating to prior sexual history which may be embarrassing and thereby violate the rights of the complainant, will not only undermine the rights of the accused, it will undermine the very essence of our criminal justice system whose ultimate goal it is to obtain the truth. While balancing of rights may work in other contexts, balancing in the criminal justice system distorts the process.

Nowhere is this more clearly seen than in the recent Supreme Court of Canada case of *R. v. Darrach*.[9] As Mr. Justice Gonthier stated:

> One of the implications of this analysis is that while the right to make full answer and defence and the principle against self-incrimination are certainly core principles of fundamental justice, they can be respected without the accused being entitled to "the most favourable procedures that possibly could be imagined" (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362 …). Nor is the accused entitled to have procedures crafted that only take his interests into account. Still less is he entitled to procedures that would

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7 *Id.*, at 611 (S.C.R.), and at 391 (C.C.C.).

8 [1994] 3 S.C.R. 835, at 878.

9 [2000] 2 S.C.R. 443, 148 C.C.C. (3d) 97.

> distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial."[10]

Darrach is a clear abrogation of the principles set out in *Seaboyer*. While *Seaboyer* was concerned with reconciling the rights of the accused, the goal of the criminal justice system in truth-seeking and the exclusion of irrelevant evidence, *Darrach* focuses on the balancing of competing rights of the accused and the complainant.

In the framework of legal anthropologists, the unit of analysis of the adversary system is the individual "dispute," and the courts and the adversary trial are viewed by them as modern society's less than satisfactory substitute for the simpler and less alienating "methods of dispute resolution" in pre-modern societies. Whatever the validity of this approach in the civil law arena, it is entirely inapplicable in the area of the criminal law. I have found that none of the academic work within this framework demonstrates sufficient sensitivity to the important distinction between civil and criminal law, and its influence has begun to be felt in the realm of public policy.

It is essential to remember that the purpose of criminal law is not the resolution of disputes between individuals. In the law of tort, it is the individual suffering the delict who is conceived to be wronged. It seems not inappropriate, then, to think of a suit in tort as a method of resolving a dispute. The notion of competing claims clearly has a place in the context of civil law. In criminal law, though the act may be and often is a recognizable tort, the important difference is the notion that it is the state or the collective community that has been injured.

The substantive criminal law is not concerned with violations of the rights of individuals, but with violations of the collective interest in the security of the state, the safety of its citizens, or the shared morality of the community. A civil trial may be a fight between neighbours, each asserting his individual rights. In a criminal trial the state, on behalf of the community, accuses an individual of violating some collective value in the society.

But we as a society are not just concerned with the collective interest in protection from wrongdoers, which is the substance of our criminal law. We are equally interested in guarding our individual freedom and dignity for its own sake, which concern is embodied in the protections of our law of criminal procedure.

Because of the peculiar position of rights in a criminal case, an imbalance is created, or as Ronald Dworkin[11] thinks of it, an asymmetry. "[T]he geometry of a criminal prosecution, which does not set opposing rights in a case against one another, differs from the standard civil case in which the rights thesis holds

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10 *Id.*, at 461-62 (S.C.R.).

11 Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978).

symmetrically."[12] The Supreme Court of Canada, with its victims' rights-based analysis, has injected a symmetry which just does not belong in the criminal law.

William H. Simon has written a thorough, brilliant and devastating attack on the "ideology of advocacy."[13] Yet, as he almost admits, his criticisms are weakest against advocacy in criminal law. I suggest that it is this peculiar configuration of the sides in criminal cases, the prosecution, representing the collective values of our society, set against the defence, representing not only the individual defendant but the individualist values of our society, which gives him pause. And it is this which makes it critical that we never blur the distinction between criminal and civil law as we consider alternatives to the adversary system.

Similarly, legal philosopher Richard Wasserstrom, in an article critical of lawyers' adversarial ethics, senses that something in the nature of the criminal trial renders what he considers to be the "amoral behavior of the criminal defence lawyer ... justifiable [because of] the special feature of the criminal case."[14] Although Wasserstrom does not recognize that it is the "geometry" of rights in the criminal trial that makes the adversarial role of defence counsel not only tenable but crucial as the representative of certain individual values, he does note the following "special features":

> Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred ... [t]his coupled with the fact that it is an adversarial proceeding succeeds, I think, in justifying the amorality of the criminal defence counsel.[15]

It is because our well-being, both as individuals and as a society, depends not only on the collective interest in safety, but also on the individual values of freedom and dignity, with the individual values of freedom and dignity remaining paramount in order to protect us against wrongful or false convictions. The erosion of basic rules of evidence and the desire to treat the complainant and the accused on equal footing threatens to subvert the very protections that are at the heart of our criminal law.

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[12] *Id.*, at 100. H. Scott Fairly has attempted to challenge Dworkin's exception of criminal cases from his rights thesis due to the asymmetry of rights. He fails, however, because he ignores the distinction between tort and crime, and pits the rights of the victim against the rights of the defendant. See "The Asymmetry of Ronald Dworkin's Rights Thesis in Criminal Cases: A Troublesome Exception" (1980), 7 Pepp. L. Rev. 373.

[13] Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978), Wis. L. Rev. 29.

[14] Wasserstrom, "Lawyers as Professionals: Some Moral Issues" (1975), 5 Human Rights 1, at 12.

[15] *Id.*