

Using Conditional Sentences in Domestic Violence Cases

A New Brunswick Exploration

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Abstract

Conditional sentencing was introduced in Canada in 1996 and has since gained momentum in the justice system as an alternative to incarceration. The New Brunswick Advisory Council on the Status of Women (2006) reports a growing use of conditional sentences in woman abuse cases as well as a decrease in the average jail time imposed on convicted abusers. In this article, we explore the use of conditional sentencing in the Province of New Brunswick, comparing domestic violence cases for which a conditional sentence was issued against a random sample of domestic violence cases from the year 2004. Key variables examined included the nature of the previous criminal record (if any) of the accused, the level of violence used, the perception the victim has of her safety, and the relationship between the victim and the accused. Results indicate that none of the selected variables had a significant effect on the use of conditional sentencing.

Résumé

La peine avec sursis a été introduite au Canada en 1996; depuis, elle s'est progressivement imposée dans le système judiciaire comme une alternative à l'incarcération. Le Conseil consultatif sur la condition de la femme du Nouveau-Brunswick (2006) signale un usage croissant des peines avec sursis dans les cas de violence contre les femmes ainsi qu'une diminution de la durée moyenne de l'incarcération imposée aux agresseurs condamnés. Dans cet article, nous explorons l'usage de la peine avec sursis dans la province du Nouveau-Brunswick en comparant

les cas de violence domestique recevant une peine avec sursis à un échantillon de cas de violence domestiques pris au hasard à partir de 2004. Les variables essentielles examinées comprennent la nature du casier judiciaire antécédent de l'accusé (s'il y a lieu), la gravité de la violence utilisée, la perception de la victime quant à sa sécurité et la relation entre la victime et l'accusé. Les résultats indiquent qu'aucune de ces variables sélectionnées n'a eu un effet important sur l'usage de la peine avec sursis.

Introduction

Introduced in 1996 as a sentencing measure in the Criminal Code, conditional sentencing has been used as an alternative to incarceration. This measure was adopted in the context of what were considered high rates of incarceration in Canada in the 1980s. Following the report on sentencing measures led by the Canadian Sentencing Commission (Daubney, 1988), the Department of Justice introduced in 1994 Bill C-41 that came into effect on September 3, 1996. Bill-41 was to give options to the Courts allowing them to distinguish serious from less serious offenses and to broaden the range of sentencing alternatives (Ikonomov, 2001). However, legitimate concerns can be raised regarding the appropriateness of conditional sentencing in domestic violence cases. These crimes tend to be repetitive, often escalating in intensity and the issue of victim safety should be given careful consideration. This is especially true when abusers are to serve conditional sentencing in the same community as their victims because of the clear risk this can pose for the victim's safety. The New Brunswick Advisory Council on the Status of Women (2006) reported a growing tendency among judges to impose conditional sentences in woman abuse cases as well as a decrease in average jail time imposed on men who have been convicted of woman abuse. Given these findings, we explored the use of conditional sentencing in domestic violence cases from the Province of New Brunswick during the year 2004. We were interested in exploring the extent to which judges consider the nature of domestic violence issues in determining the appropriateness of issuing a conditional sentence. Since conditional sentences are served in the community, it is legitimate to question if and how the criminal justice system in New Brunswick provides adequate protection for women during the period covered by the conditional sentence. The question of safety is important as it is difficult to predict the risk of being re-assaulted by partners (Campbell, 2007; Hanson et al., 2007). Therefore, effective monitoring of the various conditions imposed in a conditional sentence is necessary.

In this article, we briefly describe Canadian conditional sentencing legislation and review recent studies on the topic. We discuss and compare charges as well as sentencing information for all available domestic violence cases in New Brunswick

where a conditional sentence was issued in 2004. Our comparison group is composed of a random sample of domestic violence cases from 2004 which did not receive a conditional sentence. Key variables used in comparing the two groups pertain to the nature of the previous criminal record (if any) of the accused, the level of violence used, the perception the victim has of her safety, and the relationship between the victim and the accused. Results indicate, somewhat surprisingly, that none of the selected variables used in the contrast had a strong and significant effect on whether or not conditional sentences are used. This is of concern given that one could expect that these variables would influence the use of conditional sentences as they relate to safety issues for the victims. We conclude by identifying potential issues in using conditional sentencing as a remedy in domestic violence situations.

What are conditional sentences? Conditional sentences were introduced as a sentencing option in Canada in 1996, and appear to have gained momentum in the justice system as an alternative to incarceration. The conditional sentence is described in section 742.1 of the Criminal Code:

Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- a) imposes a sentence of imprisonment of less than two years, and
- b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

The Supreme Court of Canada has stated that conditional sentencing must be considered for all offences for which an offender may receive less than two years imprisonment. The sentencing reform was a response to two reports that were conducted during the 1980s to review sentencing processes¹. The 1996 sentencing reforms (Bill C-41) substantially changed Part XXIII of the *Criminal Code of Canada*, and introduced an express statement of the purposes and principles of sentencing, provisions for alternative measures for adult offenders and a new type of sanction, the conditional sentence of imprisonment. Bill C-41, in general, and the conditional sentence in particular, were enacted to reduce reliance on incarceration as a sanction in sentencing.

As was pointed out earlier conditional sentencing in domestic violence cases is a growing trend among judges (New Brunswick Advisory Council on the Status

of Women, 2006). At the same time, the average jail time imposed on those convicted of assaults appears to have decreased. Knowing that a conditional sentence is served in the community, it is pertinent to ask if it is appropriate to use it in cases of domestic violence. It is certainly legitimate to try to monitor the use of conditional sentences in domestic violence cases. This article offers an exploration of the application of conditional sentencing to domestic violence offenders in New Brunswick during the year 2004. We will present data on domestic violence cases that were issued conditional sentences, and identify factors associated with the use of conditional sentences in domestic violence cases.

Literature Review

While the introduction of conditional sentence to the Canadian justice system took place over a decade ago, relatively little research has been conducted to describe its use in regard to different crimes. In particular, very few studies have considered the unique impact of such sentencing options in cases of domestic violence. Studies on conditional sentencing have focussed, for instance, on attitudes and perceptions of justice system professionals, on comparisons of the use of conditional sentences across Canada, and on reforming conditional sentencing.

Studies surveying the attitudes and perceptions of prosecutors and judges on conditional sentencing and its use in cases of domestic violence have found that both prosecutors and judges had serious concerns about the use of conditional sentences for domestic violence crimes (Neville, 1998). According to Neville (1998), most prosecutors have reservations about its use in domestic violence cases, but many see mitigating factors that may lead them to view a conditional sentence as justified. Some of these factors included first offence cases, cases where no injury was involved, and cases where the offender was remorseful and there was intent to seek treatment. However, without the presence and careful consideration of all mitigating factors, a conditional sentence may not be appropriate in domestic violence cases, especially when the offender has committed aggravated assault. Risk of re-assault of an intimate partner is a factor that needs to be taken into account in such sentencing.

In a study of judicial opinion on conditional sentencing, most judges felt that all domestic and sexual assaults should be excluded from the option of conditional sentencing (La Prairie, 1998). Crimes of violence, such as domestic assaults, are considered to be offences that are least appropriate for conditional sentences because of the need for punishments that serve the functions of repudiation and denunciation. Conditional sentences may send the wrong message and not provide a strong enough deterrent to offenders. However, certain circumstances would allow consideration of a conditional sentence in domestic violence cases, particularly an offender's remorse and intent to seek treatment, as mentioned above.

A national study on sentencing in 300 domestic violence cases (Palmer, 1999), revealed that conditional sentences were given in 6% of cases. The study also reviewed some of the considerations for assessing the appropriateness of conditional sentences for violent domestic offenders, and considered the fact that, while the disposition was intended as a solution to reducing the reliance on imprisonment for non-violent offenders, the statute does not currently exclude cases by offence categories (e.g. assaults). One of the challenges for the judiciary under this statute, as Palmer has pointed out, is the assessment of the risk posed by offenders to re-assault their partners. The *R v. Hogg* case (2004) in Manitoba is a good example of concerns about conditional sentencing. In this particular case, Gindin (2004) described how “[...] an offender received a two-year conditional sentence for brutal assault that resulted in the victim suffering extreme and permanent injuries. The Court of Appeal substituted a four-year term of incarceration [...] (Gindin, 2004, 143).”

The most comprehensive study on conditional sentencing was conducted in the first three years (1996-1999) after its inclusion in the Criminal Code (Roberts and LaPrairie, 2000). It showed that around 40,000 conditional sentences were given in Canada over the three-year period, including 1,500 cases in the Province of New Brunswick. Examining briefly the imposition of conditional sentences in domestic violence cases, Roberts and LaPrairie (2000) found that domestic and sexual assault crimes received the longest conditional sentences.

The *Family Violence in Canada* report by Statistics Canada (2004) released data comparing sentencing in domestic versus non-domestic violent crimes (data for this comparison was gathered from cities in four provinces over five years: Newfoundland, Ontario, Saskatchewan and Alberta). It showed that spouses are less likely to receive a prison term for a violent crime than those offending against a non-family member.

A report released by the Alberta Attorney General in 2003 highlighted the use of conditional sentences in cases of violent crime and often serious violent crime, despite written objectives to the contrary. One of the cases highlighted in this report involved a male offender who was convicted on four counts of assault against his wife. The accused had been convicted of assault against the same partner and was serving a conditional sentence when the re-assault occurred. Although the judge expressed serious concern for the safety of the victim, an additional conditional sentence of eight-months was imposed. Among other reforms, this Alberta report calls for limitations on the use of conditional sentences in violent crimes. Some amendments to the statute were incorporated in Bill C-9: An Act to amend the Criminal Code (conditional sentence of imprisonment) and received Royal Assent on May 31, 2007 (MacKay, 2006). The reforms restrict the use of conditional sentencing in cases of serious personal injury, including sexual assault (as

well as terrorism offences and criminal organization offences), when charges carry a sentence of up to ten years. In order to impose a conditional sentence in such cases, judges would have to explicitly describe the exceptional circumstances that led them to impose a conditional sentencing order despite the presumptions outlined in the new legislation.

There is thus relatively little research on, and mixed opinions about, the use of conditional sentencing. It remains unclear if and when such sentences might be the most appropriate choice for domestic violence offenders.

Methodology

Domestic violence situations are complex as they involve intimate partners who may or may not interact after an incident. Remedies to prevent the occurrence of further incidents and the importance of holding offenders accountable are among the priorities for everyone working on this issue. To attain a better sense of how conditional sentences have been used in domestic violence cases in New Brunswick and identify the determining factors for imposing conditional sentences, two groups of domestic violence cases for the year 2004 were created using New Brunswick Crown Prosecution files. Crown files were used because they contain the most detailed accounts, including such materials as police reports and victim impact statements. Files from 2004 (the reference year for this study) were used because they had been archived and were available to us. The two groups discussed in this article are comprised of (i) *all* domestic violence cases issued a conditional sentence in New Brunswick in 2004 and (ii) a comparison random sample of domestic violence cases not issued a conditional sentence. Cases were pre-defined from the Public Prosecutions², which flags cases as “woman abuse” according to the relationship status (as specified on the Prosecutor’s Information Sheet) and the charges. Charges included but were not limited to: assault, sexual assault, uttering threats, harassment, unlawful confinement, breaking and entering, and being unlawfully in a dwelling. Other charges, such as property damage or weapons possession, were often also laid for the same incidents and were found in cases of women abuse occurring in the domestic context. Information was reviewed from all domestic violence files available from 2004 for which a conditional sentence of imprisonment (referred to in this article as “Domestic CSO Cases”) had been issued.

To explore and describe the application of conditional sentences in domestic violence cases, a comparison group was established in the form of a random sample of domestic violence cases not issued conditional sentences. These offenders were issued a ‘conventional’ sanction such as a prison term or probation (referred to in this article as “Domestic Non-CSO Cases”). Analyses were conducted to compare Domestic CSO Cases against Domestic Non-CSO cases in order to discern similarities and/or differences among these two groups. The domestic Non-CSO Cases

were extracted by the Department of Public Safety. They consist of New Brunswick domestic violence cases from 2004 which included charges similar to those included in the Domestic CSO Cases.

The use of these two groups allowed comparisons on the basis of charges, plea, evidence, type of incident and degree of injury, victim's level of fear, relationship status, offender history, sentence and conditions of court order. Altogether, 40 sentences were tracked, including 23 domestic violence offenders who had been given a conditional sentence (Domestic CSO Cases) and 17 who had been given other (non-conditional) sentences (Domestic Non-CSO Cases or comparison group). According to a report by Public Safety (2005), 28 domestic cases resulted in a conditional sentence in 2004; therefore we can be confident that with 23 individuals we have a quasi-census of the cases in the conditional sentencing database. All 23 individuals in the Domestic CSO group were male. The approach taken was to track individuals rather than court cases. The reasoning behind this approach was that there are some domestic violence offenders that have multiple files in the database (often for the same victim). Generally, these consist of a breach incident, which often results in a new charge and a new file.

The Use of Conditional Sentencing

In the following pages, we discuss some major findings revealing similarities but also important distinctions in the use of conditional sentences compared with other types of sentences in domestic violence cases. We first focus below on charges. Are there differences between charges in domestic violence cases that would result in conditional sentence versus conventional sentences?

As shown in Table 1 on the next page, the charges for which conditional sentences have been issued vary in severity and physicality, from non-physical charges (such as threat and harassment charges as a result of stalking, verbal assaults, and unlawful entry), to physical assaults (such as common assault or assault with a weapon and/or causing bodily harm). The most frequent offense is 'common' assault (section 266 of the Criminal Code). The charges laid in non-CSO cases are listed on the right side of Table 1. It is worth noting that for CSO cases, offenders accused of common assault received an average term of 6.5 months, while the offenders accused of the more serious assault charges (with weapon or causing bodily harm) received a term that was in average less than half as long (3 months).

As can be seen from the table on the next page, the types of charges resulting in CSO and other types of sentences are not substantially different apart from three exceptions. First, issuing threats, harassment, and weapon and entry charges were less likely to receive conditional sentences (CSO) and more likely to be dealt with more traditional, non-CSO, sanctions (21% versus 47%). Second, assault charges with weapons or causing bodily harm were surprisingly (given the seriousness of

Table 1: Domestic Violence: Charges Receiving CSO and Non-CSO

| Type of Charge | CSO | | | Non-CSO (Various Types)* | |
|--|-----|-----------------|-----------------|-----------------------------|-----------------|
| | # | % of Charges | Average Term | # | % of Charges |
| Fears, threats, harassment, weapons & entry | 10 | 21 | 3.5 months | 15 | 47 |
| Property related charges | 3 | 6 | 1.5 months | 2 | 6 |
| Assaults charges (common) | 19 | 40 | 6.5 months | 14 | 44 |
| Assault charges (with weapons or causing bodily harm) | 7 | 14 | 3 months | 0 | 0 |
| Breach charges (undertaking, peace bond, probation) | 9 | 19 | 2 months | 1 | 3 |
| TOTAL | 48 | 100 | 3 months | 32 | 100 |

* Not all Non-CSO charges lead to jail time; therefore we are not presenting the "average term" for Non-CSO charges.

these charges) more likely to be sanctioned with a conditional sentence than a non-CSO (14% versus 0%). The opposite was expected. Third, breach charges were much more likely to be addressed by a conditional sentence (19% versus 3%). In some cases, conditional sentences were issued for breaches of conditional sentences already in place. This raises the question of the effectiveness of such sentences to hold offenders accountable for their acts. Looking at charges that were issued with conditional sentences we may well wonder how this type of sentence impacts victim's safety. The problem is that it is impossible to measure the use of conditional sentences with respect to victim's safety, as no information is collected in Crown Prosecutor's files on this matter. The most significant gap in interpreting the above distributions is that the information documented in the Crown Prosecutor's files provides no contextual or circumstantial material that would allow us to draw any conclusions about the inadequate usage of conditional sentencing by the judiciary.

For those not given a conditional sentence (Non-CSO), sentences varied from probation to serving time in custody. As seen in Table 2 on the next page, the most common sentence type for those *not* issued a CSO was custody (under 2 years) with probation (41%). To effectively assess the appropriateness of a sentence, it would be important to take into account if and how offenders are monitored for the duration of their sentences. By examining the Crown Prosecutor's files it is, again, unfortunately impossible to obtain a clear understanding of monitoring practices.

Table 2: Sentences in Non-CSO Files

| Sentence | # | Percent |
|---|----|---------|
| Peace bond* | 4 | 12 |
| Custody under 2 years + probation | 13 | 41 |
| Custody under 2 years, no probation specified | 9 | 28 |
| Probation | 6 | 19 |
| Total | 32 | 100 |

* There were some instances where a peace request accompanied the charges, and although they were found not guilty (or had the charge withdrawn) the peace bond order request was upheld.

Who are the Offenders Issued a Conditional Sentence?

Before we turn specifically to the issue of sentencing, let us say a word about pre-trial incarceration. In some cases, often depending on the severity of the act or the emotional state of the accused, the abuser is brought into custody prior to his first court appearance. While our data does not specify the length of this initial incarceration or whether he was granted bail (i.e., he may have simply been put in overnight to sleep off his intoxication and then released on a promise to appear); it does give an indication of a police officer's perception of the immediate threat posed by the abuser. Of the 23 offenders issued conditional sentences, less than half were placed in custody following the incident. Most of those whose crimes were not violent were not placed in custody, whereas half of those who inflicted some level of injury were placed in custody. Among those not given a conditional sentence for domestic violence crimes, 12 offenders were placed in custody after the incident (71%).

As noted previously, in many cases, there is a history of abuse with the same victim and offender, and the accused may have come before the court on charges for domestic violence in the past. In this section, we examine the issue of conditional sentences in these cases through two variables: prior violent offences by the accused and the existence of a peace bond at the time of the offence. Unless details have been included in the Crown Prosecutor's file, our data on prior record is currently limited to the charge itself (without the name of the victim). Among those offenders having received conditional sentences (Table 3 on the next page), over 80% had a criminal record and 70% had criminal records involving violence. Among individuals to whom a non-conditional sentence was given, 75% had a previous criminal record, and more than a third had criminal records involving violence. While the proportion of accused with a prior criminal record (as well as that for those with a criminal record involving violence) is a little larger among those

receiving a conditional sentence, the differences between the CSO and non-CSO groups in the table below are not statistically significant. Yet we would have expected the presence of a criminal record indicating violence to result in a lesser use of conditional sentences.

Table 3: Criminal Record of the Accused and Conditional Sentence Orders

| Criminal record of accused | CSO | | Non-CSO | |
|---|-----------|------------|-----------|------------|
| | Frequency | Percent | Frequency | Percent |
| No criminal record | 4 | 18 | 4 | 25 |
| Criminal record — no violence involved | 3 | 12 | 7 | 38 |
| Criminal record — violence involved (not domestic violence) | 9 | 41 | 1 | 6 |
| Criminal record — domestic violence involved | 7 | 29 | 5 | 31 |
| TOTAL | 23 | 100 | 17 | 100 |

Chi-square=7.60, d.f. =3, Not Significant.

Regardless of the conditions imposed, the effectiveness of sentences served in the community may rest, for the most part, on the level to which an offender is held accountable for his restrictions over the course of his term. While the sanction often differs from a probation order by the level of restriction, the primary difference is in the consequence of a breach. Unlike an offender on probation, who must be formally charged with a breach and have a show cause (bail) hearing, a breach of a conditional sentence order can place an offender directly in custody when brought back before the courts on the said charge. Most often they are required to serve the remainder of the sentence in prison. While the repercussions may be more severe, the extent to which they are enacted still depends on the ability of the justice system to devote sufficient resources to the supervision of these offenders.

Imposing Conditional Sentences in Domestic Violence Cases

Three main dimensions were considered in comparing conditional sentences and non conditional sentences cases: the physicality of the violent acts, the victim's fear and domestic violence history in the relationship, and relationship status among partners. These are of interest as we would hope that, in cases where physical violence has produced severe injury, the sentence would be rendered with the victim's safety in mind and conditional sentences would not be used. The same reasoning

pertains when victims state that they fear for their safety or their children's safety or when intimate partners continue to live together. Basically, we would expect that differences in sentencing would occur in light of these particular considerations in the lessened use of conditional sentences.

Physicality of violence and severity of injury. One would have expected that the higher the level of violence, the less likely would a conditional sentence be issued. In terms of the gravity of the injury, among domestic violence offenders given a conditional sentence for their crime, just over half (57%) of these resulted in a noted injury. By "noted injury" we mean that either the police made note or photographed a victim injury or these were reported in her statement. This compares to 44% among offenders not given a conditional sentence (Table 4). In sum, conditional sentence orders (CSOs) were issued in a slightly higher proportion in cases where injury was noted as compared to those where there was no documented injury (i.e., cases of threats, harassment, and attempted assault with no injury). While it is not statistically significant, this result suggests a relationship in the direction *opposite* to our expectation. At best, we can say that injury does not seem to be linked to sentencing decisions. Clearly, the level of physical violence does not seem to reduce the use of CSOs. This is somewhat surprising and a cause for worry for those concerned with the safety of victims.

Table 4: Levels of Violence and Conditional Sentence Orders

| Level of physical violence/threats | CSO | | Non-CSO | |
|--|-----------|---------|-----------|---------|
| | Frequency | Percent | Frequency | Percent |
| No <i>physical</i> violence directed toward victim | 0 | 0 | 3 | 19 |
| Threats of violence, but no violent act | 3 | 13 | 1 | 6 |
| Violence (or attempts) without visible injury | 7 | 30 | 5 | 31 |
| Violence with noted injury | 13 | 57 | 7 | 44 |
| TOTAL | 23 | 100 | 16 | 100 |

Missing Data: 1. Chi-square=5.04, d.f. =3, Not Significant.

Fear and prior domestic violence history. It is well-documented that victims of domestic violence fear for their safety or their children's safety after an incident has occurred (Barnett, 2000). In many police reports, which are included in Crown prosecutor files, the victims were asked whether they feared for their safety. Our

expectation was that conditional sentences would be less likely to be used when the victims expresses fear for her safety. With respect to the conditional sentence cases, among victims who were either asked about, or specified fear in their victim impact statement, 81% stated that they feared for the safety of either themselves or their children, compared to 71% of cases in which the offenders were not given a conditional sentence (Table 5 below). Based on the small groups available for this study, it appears that fear for her safety (or that of her children) by the victim is actually a little more common in CSO cases, while we would have expected differently. The difference, however, is not statistically significant and we must conclude for now that the victim's fear for her safety (or that of her children) is not correlated to the imposition of a conditional sentence, which is surprising and contrary to our expectation. The extent of the victim's fear for her safety, regardless of whether the sentence is conditional or without conditions, must remain a cause for concern, in view of the fact that research has shown that a victim's perception of risk is the most effective predictor of the reoccurrence of violence (Heckert and Gondolf, 2004).

One would think that information regarding safety issues would affect sentencing decisions by limiting the use of conditional sentences; yet conditional sentences were issued slightly more often in cases where victims indicated fear for their safety. It is thus difficult to assess the effect of the victim impact statements on sentencing³. Would a risk assessment of lethality have a stronger impact on sentencing decisions? We are unable to answer this question as risk assessments of lethality (Campbell, 2007; Drouin, 2006) were not utilized in domestic violence case files during the year 2004 in New Brunswick.

Table 5: Victim Safety and Conditional Sentence Orders

| Victim fears for her safety/ children's safety | CSO | | Non-CSO | |
|---|-----------|---------|-----------|---------|
| | Frequency | Percent | Frequency | Percent |
| Yes | 19 | 81 | 12 | 71 |
| No | 4 | 19 | 5 | 29 |
| TOTAL | 23 | 100 | 17 | 100 |

Chi-square=0.81, d.f. =1, Not Significant.

We now turn our attention to how the history of domestic violence in the relationship affects sentencing. Is it linked to sentencing, knowing that victims are stating safety concerns for themselves or their children? For the cases issued conditional sentences, in 82% either the victim or a witness identified that there had been a prior incident (or incidents) of domestic violence in the relationship, compared to 75% in cases issued conventional sentences (Table 6). Again, the

differences found in these two small groups failed to reach the level of statistical significance, but it is troubling to observe that the relationship was opposite to what one would hope to find: that CSO be more likely to be used in cases without previous history of violence in the relationship.

Table 6: Previous Domestic Violence and Conditional Sentences Orders

| Domestic violence history in the relationship | CSO | | Non-CSO | |
|---|-----------|---------|-----------|---------|
| | Frequency | Percent | Frequency | Percent |
| Yes | 19 | 82 | 13 | 75 |
| No | 4 | 18 | 4 | 25 |
| TOTAL | 23 | 100 | 17 | 100 |

Chi-square=0.23, d.f. =1, Not Significant.

In summary, based on this small sample gathered from the 2004 Crown Prosecutor's files in New Brunswick, no statistically significant sentencing pattern can be established in relation to the victim's individual safety or a history of domestic violence in the relationship and the use of conditional sentencing. Yet the directions shown by the data are of concern. We would have expected some indications that the presence of previous domestic violence or statements of fear from the victim about her safety would have led to a lesser use of CSO and to a greater use of custody under two years plus probation. This has not been the case.

Relationship status among partners. Given that most conditional sentences involve serving time in the community rather than in prison (usually under house arrest) there are obvious concerns with imposing conditional sentences if a victim is still cohabitating with the abuser. In domestic violence cases, it is common that by sentencing time, the state of the relationship has changed. Two different points in time are of interest with respect to relationship status and domestic violence: the relationship status at the time of the offence and cohabitation status at sentencing time. This study examined relationship status both at the time of the incident and at the time of sentencing.

In the cases reviewed for our reference year of 2004, the majority of the offenders sentenced to CSOs were in a relationship with the victim (Table 7 on the next page) at the time of the offence (48%) and in seven cases (40%), the offender and victim were still cohabitating at the time of sentencing. Another 38% were separated less than six months. The pattern is relatively similar in cases not receiving a conditional sentence: most were still in a relationship (40%), or separated less than six months (53%).

Table 7: Relationship Status and Conditional Sentence Orders

| Relationship status at the time of the offence | CSO | | Non-CSO | |
|--|-----------|---------|-----------|---------|
| | Frequency | Percent | Frequency | Percent |
| Still in the relationship at the time of the offence | 11 | 48 | 7 | 40 |
| Separated less than six months | 9 | 38 | 9 | 53 |
| Separated less than one year | 1 | 5 | 0 | 0 |
| Separated at least one year | 2 | 10 | 1 | 7 |
| TOTAL | 23 | 100 | 17 | 100 |

Chi-square=1.35, d.f. =3, Not Significant.

Cohabitation at the time of sentencing was more common in cases given a non-conditional sentence (53%) than among those issued conditional sentences (35%) (Table 8), suggesting that, as would be expected, judges are somewhat less likely to issue a conditional sentence to offenders who reside with the victim at the time of sentencing. The difference is once again not statistically significant, but the distribution is in the direction expected.

Table 8: Relationship Status of Partners and Conditional Sentence Orders

| Relationship status at the time of sentencing | CSO | | Non-CSO | |
|---|-----------|---------|-----------|---------|
| | Frequency | Percent | Frequency | Percent |
| Offender and victim are cohabiting | 8 | 35 | 9 | 53 |
| Offender and victim are separated | 15 | 65 | 8 | 47 |
| TOTAL | 23 | 100 | 17 | 100 |

Chi-square=1.31, d.f. =1, Not Significant.

While it may seem encouraging to observe that there is a slight tendency of not assigning a conditional sentence to those who cohabit with the victim, this finding must be interpreted with some caution. For instance, we know that very often in domestic violence relationships, the violence worsens after separation. Therefore the court's possible consideration of the absence of cohabitation as determinant for the appropriateness of a sentence served in the community is not necessarily good news given that the risk to the victim is difficult to assess regardless if she is still cohabiting or separated from the abuser at the time of sentencing.

Examples of Cases Issued Conditional Sentences in Domestic Violence Cases in New Brunswick

The information extracted from the Crown Prosecutor files provides a general description of patterns in sentencing. It is, however, difficult to understand how the information is connected and considered by a sentencing judge. Looking at some cases holistically may assist in our understanding of these patterns in conditional sentences for domestic violence cases. To illustrate some of the common patterns, the following are three examples of typical cases that were issued conditional sentences in New Brunswick.

In one instance, a man was charged with assault on his common-law partner for an incident in which he bit her on the face, wrists, and struck her on the head. The couple has a young child, and they were co-habiting at the time of the assault. Although the victim's statements indicated a history of domestic violence, and that she feared for her safety, the man was given a 90 day conditional sentence (with house arrest for the first 30 days).

In another case, an individual was charged with assault with a weapon and assault causing bodily harm. During the incident, he repeatedly kicked, punched, and held down the victim at knifepoint; the abuser was asking the victim to kill him with the knife that he held. Prior to his appearance in court, he breached the condition restricting him from contact with the victim. In this case, as in many others, the victim was in the process of leaving (she had just recently ended the two-year relationship and moved out on her own). She identified a history of domestic violence in their relationship, in which she was repeatedly kicked in the face and 'head-butted.' She stated that she feared for her safety. Her accused was issued a six-months jail term, to be served in the community, as a conditional sentence.

In a third case, a woman's ex-husband was charged with unlawful confinement and assault with a weapon (the assault with a weapon charge was later withdrawn) in an incident in which the victim was confined in her apartment at knifepoint for an entire day and prevented from going to work. The abuser ripped the telephone from the wall and stabbed it to pieces. He threatened to kill himself in front of her. He also assaulted and threatened a neighbour who tried to intervene. The victim identified a history of verbal abuse and increasing threats. He was issued a 12-months term, to be served as a conditional sentence.

Conclusion

Conditional sentencing was introduced in 1996 as an interesting alternative to incarceration at a time when the Federal government saw high incarceration rates as problematic. Its use in cases of domestic violence has not been thoroughly

studied in spite of the fact that its appropriateness might be questionable given concerns for the safety of the victim. This snapshot exploration of the use of conditional sentencing in domestic violence cases in the Province of New Brunswick provides a preliminary examination of the type of cases and circumstances in which it is used. However, much still needs to be learned before we understand why conditional sentences are deemed appropriate by the courts.

In the comparative data presented earlier based on a small number of cases, there are no statistically significant differences between conditional and non-conditional sentencing factors in terms of the *victim's safety*, the *status of the relationship*, and the *severity of the violence*. Moreover it is puzzling to find that the relationships (albeit non significant) are often in the direction opposed to what should be expected. At the very least, we can say that it does not appear that these variables are key determinants in the decision to impose (or not) a conditional sentence. The only comparison approaching significance is found in Table 8 when we look at whether or not the victim and offender are cohabitating (non-cohabitating offenders are more likely to receive a CSO). While this result appears to reflect a sentencing pattern which moves in the desired direction, it may still be interpreted as a cause for concern, as mentioned earlier. This suggests that some of the inherent dynamics of domestic violence relationships (including re-partnering with the offender) might not be duly considered at the time of sentencing.

Relationships tainted with domestic violence are not static, and are inherently volatile as the couple passes through different episodes of violence (Barnett, 2005). The risk of violence also often increases immediately after the couple has experienced a break-up (Sev'er, 2002; Johnson and Hotton, 2003) and, even if they are not together at the time of sentencing, the victim may be then even more at risk than before. The importance of considering this in sentencing cannot be overstated. If break-ups and reconciliations are the norm, then the current state of a relationship (cohabitation versus non-cohabitation) should not become the defining basis for decision making.

Some figures in the conditional sentencing dataset also merit further consideration. In particular, in over 80% of domestic violence CSO cases and 75% of domestic violence non-CSO cases, this was not the first incident of violence (Table 6). We also saw that over 80% of the victims in CSO cases and over 70% of the victims in non-CSO cases identified that they feared for their safety (Table 5). All those involved in the judicial process should be reminded to pay attention to the victim's perception of the danger as she is in the best position to assess the risk (Tyagi, 2003). One assumption that might be made here (though further research is needed) is that by the time the case reaches sentencing (usually months after the fact), some victims have reconciled with their partners and by then assess the level of danger differently. Given the often cyclical nature of abusive relationships however, this is not to say that the fear originally identified

by the victim has subsided entirely. In fact, it may have been one of the very causes of the reconciliation.

Similarly, the severity of the violence and prior convictions in domestic violence cases cannot be the only factors used in determining risk. In the course of our study, a domestic murder-suicide took place in New Brunswick. A man who was previously charged with threatening and assaulting his wife, and had just finished a probation term, murdered his wife before turning the gun on himself. Although this is not a conditional sentencing scenario per se, the case illustrates that the potential consequences of breached house arrests and probation orders in cases of domestic violence are significant and possibly lethal. This calls into question whether or not the risks of having such offender in the community are truly calculable.

At the very least, we can conclude that in domestic violence cases it is imperative that judges be provided with a full portrait of the case: the individuals, the relationship, and the history of the relationship, even more than for other violent crimes. Having this knowledge in each and every case, along with a comprehensive understanding of the dynamics of domestic violence, can shed light on sentencing measures to be used in domestic violence cases. The time lapse between an incident, charge, trial, and sentence is also of paramount concern in domestic violence cases in which the interim release of offenders are of serious concern, as is the risk of victims recanting their testimony. A new specialized court model, established in Moncton, New Brunswick in early 2007, aims to address these challenges (among others) in processing domestic violence cases in the justice system. The primary goal of the specialized domestic violence court in Moncton is to enhance victim safety while emphasizing offender accountability. This is translated into a quick response from the moment police services have determined that a domestic violence incident occurred, an immediate referral of the victim is made by police services to victim services, while an assessment of offender risk and court monitoring emphasize offender accountability.

While some understanding has been gained through this exploratory study using a small number of cases, further research is needed in order to understand two key aspects of the use of conditional sentence orders in more detail. First, decision-making processes used by judges need to be better understood. This understanding might be achieved by gathering the first-hand perspectives of professionals working with these cases, as well as from a review of court transcripts of sentencing. Second, there is a need to understand and evaluate the effectiveness of conditional sentencing in these cases. Judges have pointed out that adequate monitoring of conditional sentences is often a concern due to lack of resources (Comack and Balfour, 2004).

Even after more than a dozen years, the imposition of time served in the community under a conditional sentence remains controversial. Furthering our understanding of how, why, and with what consequences this sanction is used to address domestic violence, is essential to ensuring the safety of the victims. Further-

more, if conditional sentencing continues to be used, there needs to be appropriate support provided to victims and close supervision imposed on the offenders.

There is definitely room for the development of innovative programs and policies to ensure the proper supervision of conditional sentences served at home by an offender while the victim partner might be living in the same house. If a conditional sentence is an alternative measure to incarceration, an appropriate monitoring program should be developed to seriously monitor through the court the conditions attached to that conditional sentence. It would certainly provide better support to victims, but as well to offenders (via batterer treatment programs) who should be held accountable for their actions. Domestic violence is a complex issue and the imposition of a conditional sentence has to be accompanied by mechanisms allowing follow-up of individuals after sentencing in order to better ensure the safety of the victim.

Notes

- 1 Report of the Canadian Sentencing Commission (1987) and the House of Commons Standing Committee on Justice and Solicitor General (1988).
- 2 Domestic CSO Cases selection method: A list of all Crown files marked as Domestic Violence was cross-checked against a list generated by the court-based NB Justice Information System (JIS). We received what was considered a quasi-census with the exception of the 2004 cases yet to be archived and the potential omission of those having not been identified in the system as domestic cases due to the limitations of the relationship parameters on the provincial Prosecutor's Information Sheets.
- 3 The victim impact statement is a written statement made as part of the judicial legal process. The victim impact statement describes how the crime affected the victim. In cases reviewed in this study, victim impact statements were completed near or on the day of the incident.

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