

OUTLINE OF EVIDENCE

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1. PRIOR TO MID 1970's: HOW DID THE LAW AND THE LEGAL SYSTEM RESPOND TO CHILD SEXUAL ABUSE?

- 1800's common law rules developed by male judges (and reinforced by early 20th century psychologists & Freud) premised on unreliability of children and female victims of sexual assault.
 - Child witness & child sexual abuse laws largely unchanged 1890 to 1988.
 - The justice system was not receptive to child sexual abuse: children viewed as presumptively unreliable; hard to prove abuse; general climate of disbelief; little or no training for police or prosecutors on how to investigate, recognize, and prove child abuse.
 - Difficult for children to testify
 - Had to demonstrate understanding of oath (common law)(Bala, 1992)
 - Need for corroboration made prosecutions very difficult as abuse almost always in private (*Canada Evidence Act*, s. 16, prior to amendment in 1988)
 - No accommodation & little support for child witnesses
 - Children who disclosed abuse to police and other authorities were often not believed
 - Legal rules reflected and reinforced popular perceptions.
 - "Discovery" of physical abuse in 1960's, and the enactment of child abuse reporting laws (Ontario, 1965). Little awareness of sexual abuse, within or outside the family.
 - Very few child welfare cases or criminal prosecutions involving sexual abuse; reporting rare; the response of the authorities made children reluctant to disclose.
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2. MID 1970's – MID 1980's: THE BEGINNINGS OF CHANGE

- Law did not change much, but awareness of the issue did.

- Starting in 1970's – The women's movement supported disclosures of adult female victims of sexual assault. This led to the 1983 changes in Canadian legislation, which included the following:
 - Rape becomes sexual assault
 - Husbands could be charged with the sexual assault of their wives
 - Rape shield provisions – questions regarding sexual history were reduced
 - Common law recent complaint rule abrogated
- These changes reflected more awareness and sensitivity towards adult female victims; legal changes and more support for victims led to increased prosecutions and made prosecutions less difficult. The understanding of issues surrounding children and changes in the law and processes to reflect these issues came later.
- Late 1970's & 1980's: "Discovery" of child sexual abuse, as adult survivors started to come forward to reveal abuse by trusted adults and institutional caregivers in prior decades
- 1980's: Research
 - Experimental research that children can be reliable witnesses if questioned appropriately about their own experience; later research on interviewing, suggestibility etc.
 - Clinical research on difficulties in getting disclosures; delayed & incremental disclosure
- The *Report of the Committee on Sexual Offences Against Children and Youths* ("Badgley Report") was released on August 22, 1984. (*Badgely Report: Summary*, 1984). It was the first significant Canadian research on the incidence of child sexual abuse and included recommendations for reform. The following are some of the key findings from the Report:
 - The incidence of child sexual abuse was higher than was widely understood;
 - The incidence of juvenile prostitution was higher than was widely understood.
- The following are some of the most significant recommendations from the *Badgley Report*:
 - Recommendations to change the substantive offence provisions to more fully capture exploitation by persons in authority;
 - Recommendations for changes to evidentiary and procedural law to facilitate the testimony of children in criminal prosecutions;
 - Recommendations for eliminating corroboration of child witnesses;
 - Recommendations regarding the improvement of investigation of child sexual abuse and better service provision for victims of child sexual abuse.

- The *Badgely Report* led to a much greater focus on the issues and pressure for legal reform.
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3. MID 1980's TO EARLY 1990's: FUNDAMENTAL SYSTEMIC CHANGES

- Late 1980's: the beginnings of awareness of the extent of institutional historical cases of child sexual abuse (Mt Cashel, St. George's Cathedral, Aboriginal residential schools; later cases involving private schools etc.)
- Generally, much increased recognition of problem; training of justice system professionals; however, still real variation in understanding of issues.
- Research on children's evidence began to appear (Bala, 1999; Schuman, Bala & Lee, 1999):
 - Experimental research that children can be reliable witnesses if questioned appropriately about their own experience; later research on interviewing, suggestibility etc.
 - Clinical research on difficulties in getting disclosures; delayed & incremental disclosure

i) Criminal Legislation: offences, evidence and procedure

- **Bill C-15, 1988: Amendments to the *Criminal Code* and the *Canada Evidence Act*** (Bala, 1988)
 - Bill C-15 included amendments to the *Criminal Code* that dealt with victims of child sexual offences and, in particular, changed the offence provisions to more adequately deal with breaches of trust and sexual exploitation of children.
 - It also added provisions to the *Criminal Code* to facilitate the testimony of children in court (video-taped evidence, closed circuit television, screens), and amended the *Canada Evidence Act* to eliminate the corroboration provision for unsworn testimony of child, and established a more realistic (lower) standard for competence to testify.
 - During the period of approximately 1985 – 1995, especially following enactment of Bill C-15, the Institute for the Prevention of Child Abuse ("IPCA") was involved in educating professionals in Ontario about the new child sexual abuse legislation, and training them to work more effectively in the justice system in respect of investigation, prosecution, prevention, and treatment of child sexual abuse. (Bala, 1988).
 - Additionally, there were better support services, training and more child-friendly courtrooms.

- Development of inter-agency protocols to respond to child abuse was beginning.
- **1990: The Report of the Special Advisor on Child Sexual Abuse (“Rogers Report”)** built on the Badgley Report and illustrated the need for better co-ordination & community responses.
 - The *Rogers Report* provided a more detailed analysis and set of recommendations for improving the investigation and prosecution of child sexual abuse cases, and recommended further legislative reforms, including ones that occurred in 1993.
- **1993: Amendments to Criminal Code offences & child witness reforms** (Bala, 1993). 1993 brought further changes, which were not as dramatic as those of 1988, but were still significant. These changes included:
 - Allowed for support workers to sit near to child in court;
 - Restricted in person cross-examination by accused without counsel;
 - New sexual offence provisions – e.g parental abduction.

ii) Common Law

- Evolution of common law: (Bala, 1992 & 1999)
 - *R v. Khan* (1990) – exception to the hearsay rule - facilitated the reception in criminal court of a child's out of court disclosures of child sexual abuse.
 - *R v. CRB* (1990) – similar fact evidence – facilitated the reception of evidence of other victims to support the allegations of child sexual abuse.
 - *R v. GB* (1990) – children's evidence not to be assessed as adult – credibility of child witnesses should not be assessed according to the standard of the “reasonable adult.”
 - *R .v RW* (1992) - abolition of common law warning of unreliability.
 - Greater scope for the admission of expert evidence about the disclosure of child sexual abuse (e.g. *R v. FEJ* (1990)).

iv) Overall

- a) More reporting; more effective legal and social responses; better understanding of dynamics of current and historical abuse cases;
- b) But child sexual abuse still hard to prove; Crown uncertainty about reasonable likelihood of conviction; particularly hard with historical allegations.

4. MORE RECENT CRIMINAL LAW REFORM

- Legislative reform of 2005, including the Bill C-2 child witness reforms (in force by January 2, 2006) (Bala et al, Criminal Reports, 2005)
 - Bill C-2 again reformed section 16 of the *Canada Evidence Act*, lowered the standard for competency (i.e. children do not have to answer questions about the meaning of telling the truth, lie or promise)
 - increased protection for children in respect of child pornography
 - and expanded situations in which video, closed circuit and screens can be used.

5. SOME HIGH PROFILE CANADIAN CASES

- A number of cases involving child sexual abuse have attracted significant public attention (though there are many less prominent cases).
 - Mount Cashel (late 1980's): Newfoundland institutional abuse case involving abuse by the Christian Brothers at child welfare facility. This situation led to an inquiry.
 - Anglican Cathedral in Kingston, Ontario (late 1980's): Adult survivors and children who were sexually abused by the choirmaster.
 - Ontario training Schools, such as Grandview, St. John's, and St. Joseph's (early – mid 1990's): Male and female adult survivors of sexual abuse that occurred while residing in juvenile correctional facilities.
 - Ken Deluca: A teacher with the Roman Catholic District School Board in Sault Ste. Marie, Ontario, who engaged in sexual misconduct with students during the period of 1972-1993. The emergence of his activities triggered "*Protecting our students: A review to identify & prevent sexual misconduct in Ontario Schools.*" (Also known as the "Robins Report")
 - Upper Canada College: Adult survivors of child sexual abuse. Civil and criminal proceedings ongoing.
 - Aboriginal Residential Schools: Abuse in residential schools by authorities of various religious backgrounds. This occurred throughout the country. Civil and criminal cases are ongoing.
 - Martensville (late 1980's – early 1990's): Allegations of abuse against caregivers and police officers arising out of a day care centre in Saskatchewan. In Martensville, despite one conviction for sexual assault being upheld, many allegations were determined to be false.

6. CONCERNS REGARDING FALSE ALLEGATIONS

- Although there have been many cases of proven allegations, there have also been a relatively small number of examples of Canadian cases that involved false allegations.
- Adults (poorly trained investigators, therapists) were source of some false allegations from children.
- Problems of suggestibility of children & under-trained investigators has led to some highly publicized incidents of false allegations (Bala, 1995).
- There are false allegations, but false allegations by children are less frequent than false denials by abusive adults.
- Some contexts have higher rates of false allegations:
 - Parental separation has higher incidence (Bala et al, 2006)
 - Post-1990 incidents of manipulative adolescents (e.g. false allegations against teachers, foster parents). Manipulative adolescents may make false allegations, but also are frequently genuine victims.
 - Unverified allegations for financial gain.
- There is a need to distinguish between the following:
 - False vs. unproven allegations
 - Malicious reports vs. honest mistake
 - Child initiated vs. adult induced

7. SOME CHALLENGES IN PROVING ABUSE IN COURT

i) Present Cases - Child witnesses (Bala et al, 2001)

- Lack of physical evidence and independent witnesses, memory of children, interviewing & communication of children, and suggestibility/contamination
- Understanding & comprehension of child (Schuman, Bala & Lee, 1999)
 - Confusion over details; sequencing
 - Inability of young children to answer questions about time, frequency etc.
- Children may be intimidated in court, even with accommodation
- Judges believe children less likely to lie in court than adults, but greater difficulty with communication, suggestibility etc. (Bala et al, Alberta Law Review, 2005)

ii) Historic abuse cases

- Memory/Contamination, and loss of records, physical evidence etc.
 - Adult survivors of abuse often have many problems, not limited to psychological problems, drug/alcohol problems or criminal records
 - Affects credibility and completeness of memories
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8. CIVIL LIABILITY AND ALLEGATIONS OF ABUSE AGAINST EMPLOYEES AND/OR VOLUNTEERS OF CHILD SERVING INSTITUTIONS

- Changes in tort law have facilitated civil suits by survivors against institutions. These changes include the following:
 - Limitation periods extended by caselaw and legislation
 - Possibility of institutional liability for negligence, vicarious liability
- The increased civil liability related to child sexual abuse had an impact on the response of public institutions and the community sector. This led to changes in policies of child serving organizations; screening, and better responses.
- Institutional responses:
 - In the late 1980's, governments began to develop policies & protocols that dealt with both the reporting of child sexual abuse, and also allegations against employees.
 - Role of Office of Child Advocacy
- Screening & development of policies in child serving agencies:
 - Began in the late 1980's and were, to some extent, modelled on those created by institutions.
 - "Put the Child First: A Guidelines Manual About Child Abuse for Officials" (A project of the Council of National Youth-Serving Organizations and the Canadian Council on Children and Youth: 1989) is an example. It included guidelines on how to report suspected child abuse and neglect, including child sexual abuse. It also discussed a screening process for employees and volunteers, and outlined a process for disclosure of allegations of abuse to staff and against staff.