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Child Witnesses in Sexual Abuse Cases: A Feminist Perspective

BY ©

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws.

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled **Child Witnesses in Sexual Abuse Cases: A Feminist Perspective** submitted by Heather M. Paton in partial fulfillment of the requirements for the degree of Master of Laws.

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I dedicate this thesis to my father David Paton, my mother Beth Paton, and my sister Foggi Paton.

ABSTRACT

As a consequence of the increasing numbers of reported cases of child sexual abuse, more children are now involved as witnesses in legal proceedings in which child sexual abuse is at issue. I examine the rules of evidence in child sexual abuse cases from a feminist perspective, and in order to do this I first examine various feminist approaches, with particular emphasis on radical and postmodern feminist writing. I also examine feminist theorizing about the meaning of child sexual abuse. The feminist approach interprets the evidentiary rules in child sexual abuse cases as providing a way for patriarchal society to continue to pay lip-service to the substantive prohibition against child sexual abuse. The focus of my thesis is the extent to which the legal system mirrors the exploitation of children by men, and excludes the voices of children. I examine the differing standards of proof which must be met in criminal and civil proceedings before the courts will recognize the existence of child sexual abuse. I also examine the rules of evidence governing the competency, corroboration, and credibility of child witnesses, the doctrine of recent complaint, and hearsay. I assess the extent to which reforms of the rules of evidence, including the introduction of the use of videotapes and closed-circuit television, facilitate the testimony of child witnesses in sexual abuse cases. Although the specific barriers to the reception of children's evidence have now been removed, the problem remains of fitting the needs of children into the traditional mold of the adversarial system, and of excluding prejudicial notions of child sexual abuse complainants which enter legal proceedings through the back-door of judicial reasoning.

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CHAPTER 1

THE RULES OF EVIDENCE IN CHILD SEXUAL ABUSE CASES

I INTRODUCTION

In the past two decades the widespread extent of child sexual abuse has surfaced into public consciousness. For possibly the first time there is concrete societal recognition that this constitutes a serious problem. As a consequence of the increasing numbers of reported cases of child sexual abuse, more children are involved as witnesses in the courts in child sexual abuse cases. This has strained the formal rules of evidence, which traditionally were not developed to accommodate child witnesses.

Children are a particularly vulnerable group in society by virtue of their physical, social, economic and political dependence on adults. As a feminist, I am concerned about the harm inflicted on sexually abused children at the hands of their abusers, almost all of whom are male. Children are silenced by men who exploit their power over children. I am concerned about the extent to which the legal system mirrors this abuse. I will explore the extent to which the legal system accommodates the voice of children and recognizes their claims to be protected against child sexual abusers.

The substantive legal protections are an important measure of societal recognition of the need to protect children from abusers. However, I have focused in my thesis on the rules of evidence as these frequently determine the outcome of litigation, by governing what evidence is put before the court, and what evidence is excluded from consideration. The rules of evidence are a measure of the extent to which children's accounts of sexual abuse are heard.

II AN EXAMINATION OF THE RULES OF EVIDENCE

(1) Scope of the Thesis

I will examine the rules of evidence in child sexual abuse cases in both civil and criminal proceedings. I will note the provincial legislation governing civil proceedings where child sexual abuse is at issue, with particular focus on the provincial legislation of Alberta.

(2) Goals of the Rules of Evidence

The rules of evidence control the admissibility of evidence before the court, and the manner in which such evidence is placed before it. In the words of McLachlin, J., in *R.* v. *Seaboyer and Gayme*[1]:

> It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence... In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground.

It is the task of the trial judge to balance the value of the evidence against its potential prejudice. In *R.* v. *Potvin*, La Forest, J., affirmed "the rule that the trial judge may exclude admissible evidence if its prejudicial effect substantially outweighs its probative

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[1] [1991] 2 S.C.R. 577 at 609 [hereinafter *Seaboyer*].

value"[2].

This discretion is subject to modifications from time to time by statutory provisions and the development of Constitutional principles. Professor McCormick notes other factors which may move the court to exclude relevant evidence[3]:

> [f]irst, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it. Often, of course, several of these dangers such as distraction and time consumption, or prejudice and surprise, emerge from a particular offer of evidence. This balancing of intangibles - probative values against probative dangers - is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized.

Another definition of what is relevant includes "whatever accords with common sense"[4]. Underlying the rules of evidence is an inherent faith in the ability of trial judges to make objective determinations of relevance.

(3) Critique of the Notion of Objectivity

L'Heureux-Dube, J., in *Seaboyer* challenged the notion of objectivity in the following

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[2] [1989] 1 S.C.R. 525 at 531.

[3] *McCormick's Handbook of the Law of Evidence*, 2d ed., (St. Paul: West Publishing, 1972) at 438-39.

[4] P.K. McWilliams, *Canadian Criminal Evidence*, 3d ed., (Aurora: Canada Law Book, 1990) at 3.

way[5]:

> [w]hatever the test, be it one of experience, common sense or logic, it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic. For the most part there will be general agreement as to that which is relevant and the determination will not be problematic. However, there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth.

In my thesis I will test the extent to which the rules of evidence in child sexual abuse cases constitute one area of inquiry where determinations of relevance are premised on stereotypical notions. I will examine *whose* values underly the development of the rules of evidence, and in whose interests the rules of evidence are applied.

III STRUCTURE OF MY THESIS

(1) A Feminist Hypothesis

Specifically, I will examine the rules of evidence from a feminist perspective. In order to do this I will first examine the nature of feminism and feminist claims, (see chapter 2). My overall aim is to test the validity of feminist claims, and to examine the extent to which they are borne out by the rules of evidence in child sexual abuse cases.

(2) Societal Recognition of the Existence of Child Sexual Abuse

In the past twenty years, the existence of child sexual abuse has been recognized as a serious societal problem. In chapter 3, I explore the extent to which the growing public awareness of child sexual abuse and subsequent challenge to male power has, in the

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[5] *Supra* note 1 at 646.

feminist analysis, been countered with a backlash in order to protect the male preserve of power over women and children. In chapter 4 I examine the development of civil and criminal legal protections against child sexual abuse. It is clear that reform of the substantive protections now afford child complainants more protection against their abusers. However, the feminist concern is that in practice this substantive protection is eroded by the rules of evidence.

(3) The Rules of Evidence

Although initially the courts were quite favourable towards the acceptance of the evidence of children[6], what is at issue is whether, as child sexual abuse increasingly became an issue, special procedural rules evolved in order to protect the (generally male) accused, at the expense of the interests of the predominantly female victims.

In chapter 5 I assess the differing standards of proof which must be met in the criminal trial, in child protection proceedings, and in parental custody disputes before the courts will recognize the existence of child sexual abuse. I examine how the high standard of proof in child sexual abuse cases reflects judicial distrust of children, and denial of the existence of child sexual abuse. In chapter 6 I examine the extent to which competency requirements create a serious impediment to the prosecution of child sexual abuse, as these frequently eliminate the child's testimony. This is a serious problem in child sexual abuse cases where typically there are no other witnesses and little physical evidence.

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[6] See W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (London: Cadell, 1795) at 214.

Another feature of child sexual abuse cases is the fact that often the central issue is a contest between the child and the alleged abuser as to who is more credible. The court's assessment of whether or not a child complainant is credible is frequently determinative of the case. In chapter 7 I examine the extent to which the courts require additional evidence supportive of the child's testimony before making a finding of child sexual abuse. Although there is no longer a formal requirement of corroboration, it is clear that there is a continuing practical requirement of corroboration. This continuing need for corroboration is the result of the high burden of proof in both civil and criminal proceedings. I explore the use of medical, expert and similar fact evidence to satisfy the burden of proof. Specifically I argue that the use of these forms of evidence reflects the insistence of legal discourse that children's accounts of abuse be translated into an acceptable "legal" account, and fails to take seriously their account in their own words. In chapter 8 I further explore the judicial assessment of the complainant's credibility in child sexual abuse cases. In particular I assess the judicial assumptions underlying the rules governing the admissibility and relevance of the child's sexual history in criminal cases. I assess the extent to which the "rape shield" laws, which seek to narrow the circumstances in which a complainant's past sexual history is admissible, control the judicial depiction of complainants in sexual cases as possessing a voracious and vindictive sexuality. In chapter 8 I also examine the doctrine of recent complaint, whereby in the absence of evidence that the complaint was made in a reasonable time after the occurrence of the incident, the court was bound to draw the adverse presumption against the complainant's credibility that she was fabricating the charge. This reflected the erroneous belief that a complainant of sexual abuse would complain at the first opportunity. This failed to recognize that children who have been sexually abused typically delay disclosure out of fear of the perpetrator, shame, or repression of memories. Although this rule has now been abrogated it is apparent that some judges continue to resort to this erroneous reasoning in determining the outcome of child sexual abuse cases.

The use of videotapes and closed-circuit television have been introduced in order to facilitate the testimony of complainants in child sexual abuse cases. In chapter 9 I assess the extent to which these reforms ensure the protection of sexually abused children. Of particular concern is the extent to which the reforms enable the voices of survivors of child sexual abuse to be heard in their own words. The reforms leave intact certain features of the adversarial system which are particularly disadvantageous to children, most notably cross-examination. Although the specific barriers to the reception of children's evidence have now been removed, the problem remains of fitting the needs of children into the traditional mold of the adversarial system, which remains the norm particularly in the context of the *Canadian Charter of Rights and Freedoms*[7].

IV CONCLUSION

The reforms of the substantive legal protections have been an important step to ensure that children are protected from sexual abuse. Similarly the removal of traditional

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

barriers to the reception of children's evidence represent a move to protect children and to recognize the dynamics of child sexual abuse. However, in chapter 10 I conclude that sexist conceptions about child sexual abuse complainants continue to enter legal proceedings through the back-door of judicial reasoning. Although it is important to continue to explore practical ways to better accommodate child witnesses in sexual abuse cases, the onus lies heavily on judges and legislators to educate themselves and to examine their socialization in order to ensure that the rape myths identified by feminists do not underly their application of the rules of evidence.

CHAPTER 2

A FEMINIST HYPOTHESIS

I INTRODUCTION

The subject matter of feminist inquiries is the unequal relation of women to men. There are many different feminisms, or feminist approaches. There are differences in methods, emphasis[1] and in conclusions reached. In this chapter I will explore the approaches of radical feminists and postmodern feminists. Second, I will outline several theories of child sexual abuse. I will then examine radical, psychoanalytic and postmodern feminist counter theorizing about child sexual abuse. Lastly, I will establish the feminist themes against which I will examine the rules of evidence governing the ability of children to serve as witnesses in child sexual abuse cases.

II FEMINIST APPROACHES

(1) Radical Feminism

The distinctive feature of radical feminism is its focus on the systemic sexual subordination of women by men. Radical feminists describe sexuality as a system of power relations between men and women[2].

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[1] Feminist perspectives are generally formulated in conjunction with, or on the basis of, various other socio-political theories, which gives rise to the identification of liberal feminism, marxist feminism, psychoanalytic feminism, socialist feminism, existentialist feminism, and postmodern feminism; see R. Tong, *Feminist Thought: A Comprehensive Introduction* (Boulder: Westview Press, 1989).

[2] See for example A. Dworkin, *Intercourse* (New York: Free Press, 1987), and C. MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989).

(a) the social construction of sexuality

Radical feminist analysis contains a critical awareness of sexual relations between men and women as a socially constructed system, rather than as a "natural" sphere of life[3]. Similarly, constructions of "the family" are seen as dependent on the social, historical, political and economic climate. What constitutes appropriate familial behaviour has varied throughout history, and is not an immutable and natural given[4]. It follows from this that the social, historical, political and economic context must be considered in attempting to understand the subordination of women by men[5].

Radical feminists claim that power disparities between men and women have fundamentally shaped the system of sexual relations. Men have procured for themselves the necessary power to control female sexuality, albeit in culturally variant forms. Feminists have focused on a number of factors which buttress male power, including the sexual division of labour[6], and the institution of marriage[7]. This analysis exposes the

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[3] Catharine MacKinnon for example states that "sexual meaning is made in social relations of power in the world", (*ibid.* at 129). In contrast she says that "the typical model of sexuality which is tacitly accepted remains Freudian and essentialist: sexuality is seen as an innate *sui generis* primary natural prepolitical unconditioned drive divided along the biological gender line, centering on heterosexual intercourse", (*ibid.* at 133).

[4] A point made by W. Breines & L. Gordon, "The New Scholarship on Family Violence" (1983) 8 Signs 490 at 492.

[5] Choice of method is not a value-free process, a point which has forcefully been made by postmodernists, (see below).

[6] Whereby women became primarily responsible for childrearing and domestic work. Gerda Lerner for example, documents the practice of the exchange of women and the sexual division of labour in developing societies in ancient Mesopotamia. On the basis of archaeological evidence, she concludes that the sexual division of labour in structured societies was based, not on biological necessity, but in the interests of men with power over other men and over all women; *The Creation of Patriarchy* (Oxford: Oxford University Press, 1986).

exploitative exercise of male power in the "private" relations between men and women, and within families, as expressed in the feminist insight that the personal is political[8]. Empirical studies reveal that it is generally *men* who are responsible for sexual abuse of women and children[9]. This raises serious questions about the construction of male sexuality within the male system of power.

(b) women and children as property

Radical feminists are critical of the exploitation of women, particularly sexual exploitation, as a result of women's powerlessness and male abuse of power. Women are treated as the personal property of men, and as a result the economic interests of the husband in his wife are protected, rather than protection of the bodily integrity or sexual autonomy of women[10]. A further consequence of the male appropriation of the

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[7] Susan Moller Okin describes the development of the ideology of the upper and middle-class sentimental nuclear family in Europe in the late eighteenth and early nineteenth century; "Women and the Making of the Sentimental Family" (1982) 11 Philos. & Pub. Affairs 65. The function and abilities of women were described, by Rousseau and Kant among others, in terms of being attractive to, and supportive of men in the private sphere of the family. Excluded from the public sphere on the basis of their supposed unsuitability, middle and upper class women were considered to be amply protected within the family, which was seen to be based on love. This construction of women rendered them increasingly powerless, as is illustrated by the work of Ronald Pearsall who documents the sexual exploitation of women and girls in the Victorian era; see *The Worm in the Bud: The World of Victorian Sexuality* (London: Weidenfeld & Nicolson, 1969).

[8] In the words of M. Gatens, *Feminism and Philosophy: Perspectives on Difference and Equality* (Bloomington: Indiana University Press, 1991) at 129:

> [the private/public split] creates the social space in which husbands or fathers can abuse wives and children with little fear of state interference: domestic violence and rape or incest are cases in point.

[9] See chapter 3.

[10] Lorenne Clark & Debra Lewis number among the feminists who have conceived of the position of women as property, in *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press, 1977). See also Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Schuster, 1975).

reproductive functions of women is that their children are also viewed as a form of property, and share in the subordinate status of women[11].

The priority of the patriarchal society is with protecting the property interests of the father in his family members from outside interference. As the family members are considered to be the father's property, they are not seen as warranting protection against his abuse of power. Within the patriarchal family, children are, to an even greater extent than women, at the mercy of male power. This analysis highlights the powerlessness of children within the family as the property of men.

(c) a critique of radical feminism

An important recent development within feminism, particularly among postmodern feminists, is the attempt to establish a dialogue which takes into account the differences between women. Some feminists have fallen into the trap of creating a universal and essentialist category of "women", despite the ostensible feminist aim of contextualization[12]. This has merely served to create yet another norm (generally a white, middle-class and heterosexist one) against which black or lesbian women (for

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[11] As Susan Brownmiller states, (*ibid.* at 218):

> For if women was man's wholly original corporal property, then children were, and are, a wholly owned subsidiary.

[12] This point is made by C. Powell *et al.*, "Open Letters to Catharine MacKinnon" (1991) 4 Yale J. of L. and Feminism 177 at 183, in response to C. MacKinnon, "From Practice to Theory, or What is a White Woman Anyway?" (1991) 4 Yale J. of L. and Feminism 13.

example) are deviations[13]. The experiences and viewpoints of women which do not conform to those of white, straight, middle-class women are suppressed. Ignoring the differences between women results in racist "whitewashing"[14] and heterosexism. In the words of Barbara Johnson[15]:

> ... as long as a feminist analysis polarizes the world by gender, women are still standing *facing* men... A feminist logic that pits women against men operates in the realm of heterosexual disourse... Of course, patriarchy has always played women off against each other and manipulated differences among women for its own purposes. Nevertheless, feminists must confront and negotiate differences among women - differences of class, race, culture, age, political affiliation, and sexual practices - if they are to transform such differences into positive rather than negative forces in women's lives.

Similarly it is necessary to be aware of children as individuals, as well as to recognize those aspects of their experience which they share in common. Children have certain features of their lives in common by virtue of their age, notably economic, social, and political dependence on adults. However, there are class, culture, gender, developmental and other individual differences between children which need to be recognized. Furthermore, radical feminist analysis perpetuates the construction of children as derivative of their parents: their position derives in particular from that of their (straight, married) mothers. There needs to be consideration of the position of children in their

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[13] As noted by R. Colker, "The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug" (1992) 105 Harvard L. Rev. 1084 at 1085.

[14] M. Frye, *The Politics of Reality: Essays in Feminist Theory* (New York: Crossing Press, 1983) at 115.

[15] "The Postmodern in Feminism" (1992) 105 Harvard L. Rev. 1076 at 1083.

own right.

(2) Postmodern Feminism

(a) postmodernism

According to Jane Flax, the postmodern approach is deconstructive in that it[16]:

> seeks to distance us from and make us sceptical about beliefs concerning truth, knowledge, power, the self, and language that are often taken for granted within, and serve as legitimation for contemporary Western culture.

Postmodernists are concerned with the criteria which governs the production of meaning, or, in the words of Linda Nicholson, "by which claims to knowledge are legitimated"[17]. Foucault uses the notion of discourse to explain the creation of meaning[18]. Discourse involves the twin operation of knowledge and power - knowledge is produced through rules, which emphasize certain aspects of experience at the expense of others, and govern what counts as knowledge. Power is the power to regulate what is known, and to separate the true from the untrue. The postmodern critique reveals that embedded in this ideal is a dichotomy: the result of labelling a certain principle to be the "truth" is the exclusion of other accounts as "untruths". Postmodernists undermine this by their contention that truth claims can only be legitimated by reference to self-referring criteria.

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[16] "Postmodernism and Gender Relations in Feminist Theory" in L.J. Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990) at 41.

[17] Introduction to *Feminism/Postmodernism*, (*ibid.*) 1 at 3. See also S. Razack, *Canadian Feminism and the Law: the Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) at 19-20.

[18] See M. Foucault, *Power/Knowledge*, ed. by C. Gordon (Brighton: Harvester Press, 1980) especially at 183-93.

The strategy of Enlightenment discourses is to establish universal principles, which conceals the fact that it is produced in a specific historical and social context. Postmodernists criticize the Enlightenment ideal of objective, rational knowledge, which derives from a conception of people as rational, stable, and unified selves. According to this construction, reason (the mind) is elevated as the more valuable route to knowledge, over desire or emotion, as well as the body.

(b) the alliance between feminism and postmodernism

L.J. Nicholson observes that there are "points of overlap"[19] between feminists and postmodernists which have facilitated feminist engagement with postmodern ideas. These commonalities include the postmodern and feminist critique of Enlightenment ideals, such as "the autonomous and self-legislating self; and criticism of objectivity and 'reason'"[20].

Feminist have made use of the postmodern notion of discourse in order to understand how legal, political, medical and other discourses have constructed women's identities and suppressed women's experiences. Writing by women of colour reveals that feminism has suppressed the viewpoints and experiences of women which do not conform to a western, middle-class, white norm. The postmodern exposure of the perspectivity of Enlightenment theories has been harnessed by feminists in the move away from essentialist notions of what it is to be a "woman".

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[19] L.J. Nicholson, *supra* note 16 at 5.

[20] *Ibid.*

(c) a critique of postmodern feminism

Feminists have criticized postmodernists such as Foucault for failing to address the question of *who* exercises power[21]. Feminists point out that men have historically aligned themselves with reason, in order to have access to the powerful public sphere of reason and culture[22]. As such they are able to act as subjects in their own right. In contrast women (and their derivative, children) have been relegated to the pre-social private sphere, and defined in terms of emotion, body and domesticity by virtue of their association with the "natural" spheres of reproduction and sexuality. The result is an object/subject split, according to which those lacking in power (women and children as objects) are constructed by, and are at the mercy of those with power (men as subjects). Women and children are denied their own authentic subjectivity and voice. Feminists reverse the focus by scrutinizing the consciousness of those with power[23].

The promise of postmodernism is the retrieval of previously excluded viewpoints, experiences and knowledge, including the viewpoints of children. However, the dialogue among feminists has raised a few concerns with respect to the alliance between feminism and postmodernism. There is suspicion of the motives of those who urge that the attempt to consolidate a solid sense of self and voice should be abandoned. In the words of

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[21] See C. MacKinnon, *supra* note 2 at 131; and N. Hartsock, "Foucault on Power: A Theory for Women?" in *Feminism/Postmodernism*, *supra* note 16 at 165.

[22] Catherine MacKinnon describes the objectivist viewpoint as the male perspective, whereby the speaker claims authority to describe 'reality' "on the basis of its alleged lack of involvement", (*ibid.* at 116).

[23] Carol Smart demands that those "who are the definers of knowledge... adopt a different consciousness"; see *Feminism & the Power of Law* (London, New York: Routledge, 1989) at 2.

Nancy Hartsock[24]:

> Why is it that just at the moment when so many of us who have been silenced begin to demand the right to name ourselves, to act as subjects rather than objects of history, that just then the concept of subjecthood becomes problematic?

Will the destabilizing of categories obliterate the concept of "woman" or "child" altogether[25]? What will it do to the concept of child sexual abuse? Will it undermine recognition of the concrete harm done to complainants of child sexual abuse[26]? How will the legal proceedings involving cases of child sexual abuse accommodate the postmodern challenge, which is to "make our categories explicitly tentative, relational and unstable"[27]? To what extent then will postmodern feminist themes enable children to be heard in their own voices? The notion of voice, which presumes the ability to speak, gives rise to a further question: the extent to which children who are pre-verbal are disqualified from the legal system[28].

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[24] *Feminism/Postmodernism*, *supra* note 16 at 163.

[25] A question raised by Nancy Hartsock, *ibid.* at 158.

[26] The harm suffered by sexually abused children is evidenced by survivors' accounts of child sexual abuse, which document the helplessness and anguish experienced as a result of child sexual abuse, both in childhood and into adulthood; see the Committee on Sexual Offenses Against Children and Youths, *Report of the Committee on Sexual Offences Against Children in Canada* (Ottawa: Supply & Services Canada, August 1984) [hereinafter the *Badgley Report*]. The effects on survivors of child sexual abuse include shame, low self-esteem and an inability to trust others. One survivor stated, (*ibid.* at 157):

> I felt guilt. Being unable to relieve myself of it with or through anyone, I carried this burden with me. In many ways, I am still insecure and unsure of myself because of these experiences...

Another personal account testifies to the pain endured by survivors of child sexual abuse, (*ibid.* at 160):

> Now that I am 22, I find it hard to believe that one person can torture another in such a painful and humiliating way. He felt that if anyone will get hurt, it will not be him. However, I am hurting in one of the worst ways possible.

[27] A. P. Harris, "Race and Essentialism in Feminist Legal Theory" in K.T. Bartlett & R. Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991) 235 at 239.

[28] And also those who have had pre-verbal experiences of sexual abuse.

III THEORIES OF CHILD SEXUAL ABUSE

Public attention has been only relatively recently drawn to child sexual abuse as a serious social problem[29]. Recently, the issue has been reignited by press coverage of cases involving male child victims[30]. The cynical view is that it is only when the public begin to appreciate that sexual victimization happens to males as well as females that attention is seriously paid to the issue[31].

(1) Theories of Sex Offenders as a Marginal Group

In general, the existence of sexual relations between adults and children have either been denied[32], or have not been recognized as inflicting harm on children[33]. Researchers and theorists have constructed sex offenders as a marginal group within society. They have

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[29] See chapter 3. My focus is on both extrafamilial and intrafamilial sexual abuse. There is no consensus in the literature or in judicial dicta as to what is an acceptable definition of child sexual abuse. It involves a wide range of behaviour, from sexual exposure, sexual fondling, through to sexual intercourse, as well as child pornography and prostitution. In defining child sexual abuse it is important to take into account the impact of the abuse on the victim.

[30] Most notably the incidents of child sexual abuse perpetrated on children residing at the Mount Cashel orphanage in St. Johns, Newfoundland, and child sexual abuse perpetrated by Roman Catholic priests.

[31] A point made by M.G. Brown, *Gender Equality in the Courts* (Winnipeg: Manitoba Association of Women and the Law, 1988) at 2.7.

[32] For example, the incest taboo has been described by anthropologists as universal; see Claude Levi-Strauss, *The Elementary Structures of Kinship* (Boston: Beacon Press, 1969); see also H. Maisch, *Incest* (London: Andre Deutsch, 1973) especially at 33-4.

[33] For example, the permissibility of sexual relations between adult men and children, particularly boys, in Greek and Roman societies, documented by Florence Rush, *The Best Kept Secret: Sexual Abuse of Children* (New York: McGraw-Hill, 1980) at 48; and advocates of man-boy love in the late twentieth century, (*ibid.* at 187).

been pathologized as sick and deviant people[34]. A related idea is that respectable family men are not involved in this type of activity. Other theorists have suggested that the sex offender abuses children because of his mother's overly seductive behaviour[35], or because his sexual needs are not being fulfilled by his wife[36]. Child sexual abuse has also been depicted as a "subcultural norm" within lower-class families, where there is overcrowding, and within certain cultures[37].

(2) Feminist Counter Explanations of Child Sexual Abuse

(a) male abuse of power

Feminists have contested theories which pathologize the problem of child sexual abuse

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[34] These took various historically specific forms: for example, at the turn of the century the perceived threat to children was the morally degenerate aristocrat; see C. Smart, *supra* note 23 at 52. Another example is L. Gordon's analysis of records of Boston child-saving agencies which indicates that between 1920-1970, child sexual abuse was actively reinterpreted. She notes that the locus of the problem was moved from home to the streets by the 1920s. The culprit was seen as the perverted stranger, and the victim as the sex delinquent; see "The Politics of Child Sexual Abuse: Notes from American History" (1988) 28 Feminist Review 56. See R. Von Krafft-Ebing, *Psychopathia Sexualis* (New York: Physicians & Surgeon Books, 1931) for a view of the offender as a psychopathic, feeble-minded moral degenerate.

[35] See R. Glueck, "Psychodynamic Patterns in Sex Offenders" (1954) 28 Psychiatric Quarterly 1.

[36] This is a feature of "family dysfunction theory" which derives from the work of De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults* (Englewood: American Humane Association, 1969) as noted by C. A. Ahlgren, "Maintaining Incest Victims' Support Relationships" (1983) 22 J. Fam. L. 483 at 494. Although this theory does acknowledge the existence of child sexual abuse, and rejects the idea that children are prone to fantasy, the explanation for the child sexual abuse is not sought with the male offender, but rather in some underlying family "dysfunction". To the extent that the father is considered responsible he is considered immature, and the victim is blamed for her "seductiveness" and complicity in the incest. The primary blame however is directed at the mother. To the extent that she knows about the abuse, or fails to realize the situation, she is seen as "colluding" in the abuse. Furthermore, she is blamed for failing to adequately fulfil her husband's sexual needs and is held responsible when he turns to his daughters for sexual gratification.

[37] See for example the British study of N. Lukianowitz of Irish working-class people. The author states that father-daughter incest was a "cultural phenomenon" precipitated by crowding; see "Incest" (1972) 120 Brit. J. Psychiatry 301 at 302.

and portray the sex offender as a sick, maladjusted individual[38]. Feminists have also contested theories which attempt to divert responsibility away from the perpetrator and place it on the victim or the mother[39]. Similarly there is feminist resistance to the notion that child sexual abuse is only a "subcultural norm" within lower-class families[40]. Feminists posit instead a construction of child sexual abuse deriving from the personal experience of women and children: the widespread exploitation by men of gender and generational inequalities in cases of both extrafamilial and intrafamilial child sexual abuse. Given this social context, feminists have problematized the notion of women and children's consent to sexual relations, a concept which implies equality between sexual partners[41].

Radical feminists draw attention to the fact that sex with children, particularly incest, is an established part of patriarchal society, despite legal prohibition. In fact, MacKinnon contends that child sexual abuse is entrenched in patriarchal society *because of* legal prohibition. "Assimilating actual powerlessness to male prohibition, to male power,

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[38] The studies indicate that children are in greater danger of sexual victimization from men they know; see chapter 2.

[39] An example of a theory which attempts to do this is Freud's "Oedipus complex" (see below). The more recent "family dysfunction theory" also focuses on the child and its mother, to the near-exclusion of the offender. Feminists question why mothers should have to protect their children from sexual abuse in the first place. Responsibility for the abuse is returned to the father who has exploited his position of power. The mother's "collusion" is reinterpreted as an indication of her powerlessness and dependence on the perpetrator for her own social and material survival. Feminists furthermore question the assumption underlying family dysfunction theory: that families are functional only when men's needs are met; see J. Herman, *Father-Daughter Incest* (Cambridge, Mass.: Harvard University Press, 1981) at 78.

[40] J. Herman & L. Hirschman note that this enables middle and upper class men to deny that child sexual abuse cuts across all classes; see "Father-Daughter Incest" (1977) 2 Signs 735 at 738.

[41] See chapter 3.

provides the appearance of resistance"[42] - while actually eroticizing the forbidden. Incest can hardly be said to be tabooed, in light of the research which indicates that it is in fact extremely common[43].

Feminist writers have made use of psychoanalytic theories to suggest that the sexual division of labour in child care with the mother as the primary caretaker perpetuates socialization of girls to identify with the submissive female role. Boys in contrast are encouraged to identify with the role of the father and to develop aggressive characteristics. The result according to Judith Herman is that[44]:

> [t]he adult male's diminished capacity for affectionate relating prevents him from empathising or identifying with his victim; without empathy, he lacks a major internal barrier to abusive action. At the same time, because other types of relationships are restricted, the need for a sexual relationship with a compliant and submissive female is exacerbated. Hence it is that adult men so frequently seek out sexual relationships not only with adult women who are younger and weaker than themselves, but also with girl children.

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[42] MacKinnon, *supra* note 2 at 133.

[43] J. Herman & L. Hirschman note that the incest taboo in a male-dominant family system and culture is observed in general quite rigidly by women, but honoured more in the breach by men. In patriarchal societies where the family structure is premised on male possession of women and children, the taboo against mother-child incest is stronger than the taboo against sexual contact with the daughter (or son) by the father. An infringement of the taboo on mother-child sexual relations is an affront to the position of the father, who wishes to ensure his continuing possession of his wife, and power over his children. However, as the power to enforce the taboo is vested in the father, the taboo against father-child incest does not carry as much weight. It is easy for the father to gain sexual access to the child through his position of power in the patriarchal family; (*supra* note 39 at 743). In the words of Susan Brownmiller, (*supra* note 10 at 218):

> Incest ... has hardly been the universal or uncompromising taboo that psychologists and anthropologists would have us believe; or rather it is superseded by a stronger, possibly older taboo - there shall be no outside interference in the absolute dictatorship of father rule.

[44] *Father-Daughter Incest*, *supra* note 38 at 56.

Other feminists are more concerned with the extent to which psychoanalysis is implicated in minimizing and denying the extent of child sexual abuse[45]. The research of Masson[46] suggests that Freud discovered an incidence of child sexual abuse in his examination of his patients. However, he took the view that such abuse could not possibly be so prevalent. In 1897 he wrote the following to his friend Fliess[47]:

> [t]hen there was the astonishing thing that in every case blame was laid on perverse acts by the father, and realisation of the unexpected frequency of hysteria, in every case of which the same thing applied, though it was hardly credible that perverted acts against children were so general.

Freud rejected his early "Seduction Theory" according to which children were victims of their parents' sexual advances, in favour of his theory of the Oedipus complex. The Oedipus complex attributed the allegations of abuse as the result of the child's desire to have sex with one parent, usually the parent of the opposite sex. Masson is of the view that even though Freud's change in theory required him to retract his previous "seduction"[48] theory, it was still a more comfortable step for Freud, both personally and professionally. This is because it enabled him to avoid questions about the behaviour of his own father and regain the acceptance of his colleagues who were resistant to the

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[45] Andrea Nye for example questions whether so much authority should be accorded by feminists to psychoanalytic theory; see *Feminist Theory and the Philosophies of Man* (New York, London: Routledge, 1988) at 157. Psychoanalytic feminist writings are a clear example of how feminist thought is constricted by the theory, in this case psychoanalysis, to which it is an addition.

[46] *The Assault on Truth* (Toronto: Collins, 1984).

[47] *The Origins of Psychoanalysis: Letters to Wilhelm Fliess, Drafts and Notes: 1887-1902* (New York: Basic Books, 1954) at 215.

[48] The term 'seduction theory' is itself misleading, as noted by Alice Miller "because it implies that the child is a mature sexual partner, which is not, and never can be, the case"; see *Thou Shalt Not be Aware: Society's Betrayal of the Child* (New York: Farrar, Strauss, Giroux, 1984) at 41.

notion of widespread child sexual abuse[49].

Freud faced a dilemma which is depicted by Andrea Nye as "a problem of inheritance - specifically inheritance from generation to generation of male aggression[50]". She interprets the Oedipus complex as a way for Freud to reconcile himself with the role of man and father.

(b) rape myths as a reflection of the male viewpoint

Feminist writings point to the existence of "rape myths" in the construction of the "typical" child sexual abuse complainant, by legal, political, medical and other discourses.

(i) chaste vs. unchaste females

According to feminist analysis, the interests of male power divide women into two types: chaste and unchaste[51]. When a chaste female makes a complaint of sexual abuse she is more likely to be taken seriously than unchaste women, as the latter are depicted as consenting to sexual relations. Male power has an interest in appropriating the exclusive

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[49] Alice Miller, a psychoanalyst, also documents Freud's ultimate betrayal of sexually abused children, and the repetition of the original trauma of sexual abuse by the psychoanalytic interpretation of the patient's "neuroses" in adulthood as unresolved libidinous childhood desires, rather than as a consequence of childhood sexual abuse, (*ibid.*). Her work takes seriously the trauma suffered by children as a consequence of sexual abuse, although she depicts the problem in gender-neutral terms, and fails to recognize that it is in general fathers, not mothers who are responsible for child sexual abuse.

[50] *Supra* note 44 at 158.

[51] Susan Edwards for example develops this theme of the division of women into two classes; see *Female Sexuality and the Law* (Oxford: M. Robertson, 1981) at 52-5.

services of women within the institution of the family, and to this end chaste females who are under the authority of a male protector are protected by the law.

Classist and racist stereotypes enter the construction of the "typical" complainant in a child sexual abuse case. The chaste female is a reflection of middle and upper-class expectations of the role of women and young girls. Unchasteness is seen as a pattern of working-class women[52]. Furthermore, white women are constructed as pure, sexless and virtuous, while black women in contrast are stereotyped as "savage and lustful"[53]. The feminist objection is that this fails to recognize that victims of child sexual abuse come from every race, culture and class[54]. Such stereotypes operate as a mechanism for the more powerful group of white men to protect their property interests in, and sexual access to, white women, to the exclusion of men of other races.

(ii) the false allegation

Females historically were constructed as being liable to make false allegations of sexual abuse against men out of spite, malice, revenge, or shame. Women were also perceived as being liable to make false allegations of sexual assault to extort money from men.

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[52] See S. Edwards, *ibid.* at 53-54.

[53] See D. Russell, *The Politics of Rape* (New York: Stein and Day, 1975) at 139.

[54] This point is made by M.G. Brown, (*supra* note 53 at 2.7). Diane Russell, in her 1977 study of 930 randomly chosen adult women residents of San Francisco, found that the prevalence in different racial groups of incestuous abuse of females under eighteen years of age was very similar. Similarly incestuous abuse was equally distributed among social classes; *Sexual Exploitation* (Beverly Hills: SAGE Publications, 1984) at 253.

Denial of the existence or extent of child sexual abuse has been facilitated by the theory of Freud that children fantasize about having sex with one parent, usually the parent of the opposite sex. Accounts of sexual abuse are interpreted as a product of the child's fantasies[55].

The growing public awareness of the existence of child sexual abuse over the past few decades has been countered with a recent revival of panic with respect to the false allegation. This has manifested most notably in child custody cases where mothers or feminist therapists are depicted as inciting children to make false accusations of child sexual abuse against fathers, in order to swing the balance in the mother's favour with respect to custody[56]. Feminism has been popularly aligned with the "anti-men" position, and this serves to discredit the therapist with a feminist outlook[57].

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[55] Similarly, women's accounts of rape are interpreted as being a product of their purported masochistic desire to be raped; see Edwards, *supra* note 50 at 100-6.

[56] See for example K. Hazelwood, "The Fathers Fight Back" *Alberta Report* (17 August 1992) 20; and R. Owen, "Abused by the System" *Alberta Report* (22 February 1993) 20.

[57] As for example in the "Cleveland" controversy in the United Kingdom in 1987, when the removal of large numbers of children from their homes in Cleveland because of suspected child sexual abuse prompted a government inquiry, which was carried out by Lord Justice E. Butler-Sloss; *Report of the Inquiry into Child Sexual Abuse in Cleveland 1987* (London: H.M.S.O., 1987). The popular press constructed the situation as an attack on the family by, most notably, Marietta Higgs, one of the paediatricians, who was associated with the "anti-men" feminist position; see M. Nava; "Cleveland & the Press: Outrage and Anxiety in the Reporting of Child Sexual Abuse" (1988) 28 Feminist Review 103. Not only did this cloud the real issues, (including problems with the methods of diagnosis used by the paediatricians), but more alarmingly this gave rise to widespread denial of the extent or even existence of child sexual abuse.

(iii) disclosure of child sexual abuse

With respect to the reporting of rape, a mythical belief which has long operated is that a victim of sexual abuse will be so upset that she will report it as soon as possible. This ignores the reality of many cases of child sexual abuse where, for many reasons peculiar to such cases, the victim is unwilling or unable to report such abuse. For example, the victim often experiences shame, and blames herself for the abuse[58]. She may wish to protect a family member and fears the considerable disruption on the family unit which follows a report of sexual abuse. She may, quite justifiably, fear that her report will be met with disbelief[59]. Often victims repress the memories of their abuse in order to protect themselves from the pain of the abuser's betrayal, and this delays reporting. As Dziech & Schudson note, frequently the child retracts her account of sexual abuse altogether[60]:

> [r]ecantation is the child's way of regaining at least some control, of protecting herself or himself and others threatened by the perpetrator. If a child is terrified by an abuser, denial is a way of saying, "I kept my promise. I didn't tell, not really." If disclosure has disrupted a child's life and created pain, anger, or chaos, denial is a means of banishing the trouble. Children's denial is also a tempting way for adults to make the problem appear to go away, but they can never trust it as proof that nothing happened. Once a child risks an account of abuse, the inevitable recantation must be judged in the total context of the child's statements and actions.

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[58] See A. Browne & D. Finkelhor, "Initial and Long-Term Effects: A Review of the Research" in D. Finkelhor *et. al*, eds., *A Sourcebook on Child Sexual Abuse* (Beverly Hills: SAGE, 1986) 143 at 149-50. However, responsibility for the abuse lies squarely on the abuser by virtue of the advantage he has taken of gender and generational inequalities, as noted by Breines & Gordon, *supra* note 4 at 528.

[59] See R. Summitt, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 Child Abuse and Neglect 177 at 186-87.

[60] B.W. Dziech & C.B. Schudson, *On Trial: America's Courts and their Treatment of Sexually Abused Children* (Boston: Beacon Press, 1989) at 56-57.

(iv) the child sexual abuser

The feminist approach criticizes the existence of myths about who is the typical child abuser. The feminist analysis is critical of the pathological model which allows society to continue to treat child abusers as special cases, and prevents any questioning of the power of "normal" men over women and children.

IV THE LEGAL ACCOUNT OF CHILD SEXUAL ABUSE

(1) The Role of Law: Reflective or Constructive?

Is law reflective of social constructions of children and gender, or is it creative in constructing our understanding of child sexual abuse complainants? It is part of my hypothesis that it is both.

Feminist writings criticize the sexist assumptions about complainants in child sexual abuse cases embodied in the rules of evidence. Most notably the legal rules reflect damaging psychoanalytic and medical constructions of women and children. At the same time, the law is itself instrumental in constructing the "typical" child sexual abuse complainant, and in disseminating sexist conceptions of the dynamics of child sexual abuse.

(2) Rape Myths embodied in the Rules of Evidence

In my thesis I will examine the extent to which the rape myths identified by feminists influence the development of the rules of evidence in child sexual abuse cases. Typically it is the case that there is no supporting physical evidence, and no witnesses, and the trial comes down to the word of the complainant against that of the male accused. In such a situation the rape myths weigh heavily against the female complainant[61].

(a) the treatment of chaste vs. unchaste complainants by the rules of evidence

I will examine the extent to which females who are unchaste and not under male protection are depicted by the rules of evidence as unworthy of legal protection.

(b) the false accusation

It is part of my hypothesis that the myth that females have a propensity to falsely allege sexual abuse has had a substantial influence on the rules of evidence[62].

(c) legal recognition of the dynamics of child sexual abuse

The feminist themes will be further tested by assessing the extent to which the rules of evidence ignore the dynamics of child sexual abuse. The feminist concern is that features

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[61] In the words of Justice L'Heureux-Dube in *Seaboyer* v. *R.*, [1991] 2 S.C.R. 577 at 650:

> The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e. who she should be in order to be recognised as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. If her victimization does not fit the myths, it is unlikely that an arrest will be made or a conviction obtained.

[62] In the words of Justice L'Heureux-Dube, (*Seaboyer*, *ibid.* at 653):

> It is assumed that the female's sexual behaviour, depending on her age, is under the surveillance of her parents or her husband, and also more generally of the community. Thus, the defence argues, if a woman says she was raped it must be because she consented to sex that she was not supposed to have. She got caught, and now she wants to get back in the good graces of whomever's surveillance she is under.

common to sexually abused children, such as delayed disclosure and recantation, run counter to the legal construction of the "typical" child sexual abuse case.

(d) the legal depiction of child sexual abusers

The motives and character of complainants in child sexual abuse cases undergo intense scrutiny. The question raised by the feminist hypothesis is why men are not similarly scrutinized[63].

(3) The Binary System of Law

I will examine the extent to which the notion of an objective truth, with a resulting system of binary opposites, is used by the law. Examples are the dichotomies of guilt/innocence, consent/non-consent, and the competing rights of the accused versus those of the child, (often defined as a lesser claim to an "interest" in avoiding stress of legal proceedings, for example) in criminal trials. It is part of my hypothesis that this system of binary opposites restricts the acceptable interpretations of a witness' account, and does not allow for differing viewpoints, which in turn reflects the power of law[64]. The claim to neutrality masks the underlying contextually situated social and historical points of view. Law provides the norm against which other accounts are measured, and

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[63] Susan Edwards makes the following point, (*supra* note 50 at 110):

> Male sadism, dominance and aggression are not invoked in an attempt to make sense of his behaviour, in the way that masochism and fantasy are introduced to make sense of hers.

[64] Robin West posits that modern legal theory relies on a notion of a separate, autonomous, rational self; see "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1 at 2. Angela P. Harris objects to this objective voice of law on the grounds that, (*supra* note 27 at 237):

> [t]his voice, like the voice of "We the People", is ultimately authoritarian and coercive in its attempt to speak for everyone.

accounts which do not measure up are silenced and invalidated. Individual differences between women and children are ignored; all are held up to the legal portrayal of a "typical" child sexual abuse victim by the evidential rules. The result is that all complainants in sexual abuse cases are required to fit the mold created by the law in order to receive legal protection.

(4) Conflicting Legal Aims

Feminists have exposed conflicting aims in judicial *dicta* and legislation, which disrupts the unitary notion of "law". Christine Boyle's analysis of the way in which the predominantly male legislators and judges have conceptualized the balancing exercise between competing values in child sexual abuse cases is an example of this[65]. She concludes that the law-maker has identified with one of two roles in child sexual abuse cases: as either the accused, or as the husband, father or brother of the woman assaulted. In his identification with the accused, the law-maker has been most concerned about the plight of the man who is falsely accused. To this should be added the male concern to preserve his patriarchal authority over his wife and children, which historically has involved unlimited sexual access. In the role of husband, father or brother of the victim, the concern was with the devaluation in property value of a wife or child. As Boyle states, the law-makers were[66]:

> not caught in any simple conflict between their own interests and those of women. They were caught in a dilemma with respect only to their own interests.

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[65] *Sexual Assault* (Toronto: Carswell, 1984) at 5.

[66] *Ibid.* at 10.

On the one hand women and children have been constructed as sexually passive, and in need of (male) protection. This is reflected in the introduction of tough penalties for rape and other sexual offences[67]. However, the complainant[68] of rape or child sexual abuse has also been portrayed at the same time as the seductress, a conflicting construction described by Susan Edwards as a "fundamental paradox"[69]. Children have been portrayed on the one hand as sexually innocent, and on the other, in Freudian thought, as sexually desiring of their parents (by virtue of the Oedipus complex). This reflects the overriding male fear of the false accusation. The fear of the false accusation has dominated rape and child sexual abuse trials throughout history, which suggests that the primary male identification is with the accused.

IV CONCLUSION

The feminist approach interprets the evidential rules in child sexual abuse cases as providing a way for patriarchal society to continue to pay lip-service to the substantive prohibition against child sexual abuse. The ineffectiveness of the substantive prohibition against child sexual abuse is evidenced by the fact that the rates of reporting sexual

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[67] See chapter 4.

[68] Although the word "complainant" is itself unsatisfactory as it has connotations of women nagging and complaining, I prefer it to the disempowering nature of the word "victim". Where appropriate I will use the word "survivor" in recognition of the strength of children who have survived the devastation and betrayal of sexual abuse. Throughout my thesis I will use female pronouns to signify the complainant, and male pronouns to signify the accused, as this reflects the fact that in general it is females who are sexually abused by men.

[69] *Supra* note 50 at 54.

offences are low[70], and the likelihood of an alleged offender being sent to trial and being convicted are minimal[71]. Hornek and Clark estimate that approximately only 14% of reported child sexual abuse cases are prosecuted[72].

The resulting substantive and procedural laws reflect a compromise between the conflicting interests of the male law-makers. However, according to the feminist account, they fail to protect the (female) complainant in her own right. She is only derivatively protected where the laws protect the (upper and middle-class, generally white) male interest in her economic value. Where no male has an economic value in her, she remains unprotected. This reflects the construction of women and children as existing only for the purposes of male power, and not in their own right.

An issue suggested by the postmodern feminist dialogue is the extent to which the rules of evidence in child sexual abuse cases perpetuate the notion of an objective "truth" at the expense of children's less powerful accounts of sexual abuse. The legal construction

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[70] The effectiveness of this is reflected in the frequent fear of victims that they will not fit the criteria, which deters them from reporting sexual abuse. The 1985 *Canadian Victimization Survey* reported that only 38% of incidents of sexual aggression were reported to the police; see Solicitor General of Canada, *Female Victims of Crime: Canadian Urban Victimization Survey* (Ottawa: Supply & Services Canada, 1985) at 2.

[71] For example, 54.7% of those charged with rape in 1971 were convicted of an offence, compared to an overall conviction rate for criminal offences in the same year of 86%, as reported by the Canadian Advisory Council on the Status of Women, *Report on Sexual Assault in Canada* by D. Kinnon (Ottawa: Queen's Printer, 1981) at 47. Survivors of child sexual abuse frequently do not report out of shame, fear and a sense of powerlessness, as reported by the *Badgley Report* (*supra* note 26 at 187-93).

[72] With a 50% guilty plea as these tend to be the strongest cases with corroborating evidence; See J. Hornek & P. Clark, "Child Testimony: Legal and Developmental Issues" (Paper presented to the Western Judicial Education Centre Conference, May 1990), [unpublished] at 31.

of the "typical" complainant reinforces the powerlessness of women and children. The stereotypes act as a warning: "deviant" behaviour results in denial of legal protection. In the following chapters I will examine the extent to which these stereotypes underly the rules of evidence. I will assess whether the rules of evidence in child sexual abuse cases bear out the feminist contention, that in order to sustain the system of male power, it is in men's interests to ignore or deny the existence and extent of child sexual abuse. I will then examine the extent to which the rules of evidence prevent children from developing their own authentic sense of self.

CHAPTER 3

SOCIETAL RECOGNITION OF THE EXTENT OF CHILD SEXUAL ABUSE

I INTRODUCTION

According to a feminist analysis it is in the interests of the male system of power to deny the existence and extent of child sexual abuse, as this exposes the exploitation of power by men and calls into question their role as men and fathers. In this chapter I will explore more fully the extent to which there has been societal denial of the existence and extent of child sexual abuse.

II SOCIETAL RECOGNITION OF THE PROBLEM

(1) Historical Recognition

Myers notes that prior to the past few decades, the existence of child sexual abuse has surfaced into public consciousness only three times and has been suppressed each time[1]. The work of Ambrose Tardieu, a French physician, drew attention to cases of child sexual abuse in his book, A Medico-Legal Study of Assaults on Decency[2]. In his later 1858-69 study of 11,576 cases of completed and attempted rape in France the issue was again prominent as nearly 80% of the cases involved girls aged 4-12 years of age.

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[1] J.E.B. Myers, "Protecting Children from Sexual Abuse: What Does the Future Hold?" (1989) 15 J. Contemp. Law 31.

[2] As discussed by J. Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Toronto: Collins, 1984) at 14-54.

However, as Myers notes[3], his work was rejected by his successors who asserted that children fabricate complaints of sexual abuse.

The issue emerged a second time in 1896 when Freud presented his seduction theory in a paper entitled *The Aetiology of Hysteria* to the Vienna Society for Psychiatry and Neurology. However, he ultimately retracted his belief in his patients' accounts of child sexual abuse, and attributed these to their childhood fantasies[4].

The work of Sandor Ferenczi, a member of the Vienna psychoanalytic circle and a close friend of Freud, drew attention once again to the issue of child sexual abuse in the 1930s. However, his work was rejected by his colleagues, including Freud, because of his recognition of child sexual abuse which threatened the male psychoanalytic profession, as this called into question the power of men over women and children[5]. It is evident that these short periods of recognition of child sexual abuse were promptly followed by a backlash, again burying awareness of child sexual abuse.

(2) Recent Recognition

In the past twenty years the existence of child sexual abuse has once again been recognized, this time as a serious societal problem. Several factors can be said to have

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[3] *Supra* note 1 at 32.

[4] As recounted by J. Masson, *supra* note 2.

[5] See Myers, *supra* note 1 at 53.

contributed to this awareness. Over the past century the child advocacy movement has agitated for changes in the way children are viewed, which is reflected in better labour laws, compulsory government education and child protection laws. The 1962 article by C. Henry Kempe, M.D., and his colleagues drew attention to the physical abuse of children[6]. As a result, laws requiring professionals and members of the public to report suspected cases of child abuse were introduced in the mid-1960s. The women's movement of the 1960s and 1970s provided a forum for survivors to recount their childhood sexual abuse by men, and fueled the insight that child sexual abuse is about male abuse of power[7]. Empirical studies substantiated the feminist contention that child sexual abuse occurs frequently, most notably David Finkelhor's 1979 study of 266 male and 530 female undergraduates at 6 New England colleges and universities[8], and Diane Russell's 1977 study of 930 randomly chosen women residents of San Francisco[9].

Reform of procedural and substantive law governing cases of child sexual abuse in Canada has largely been precipitated by the empirical data generated by the 1984 *Report of the Committee on Sexual Offences Against Children in Canada* chaired by Robin

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[6] See C. Henry Kempe *et al*, "The Battered Child Syndrome" (1962) 181 Journal of the American Medical Association 17. However, the description of children's injuries incurred at the hands of their parents as the "battered child syndrome" pathologized the battering parent, and concealed the fact that battering of children constitutes parental abuse of power.

[7] See for example L. Armstrong, *Kiss Daddy Goodnight* (New York: Hawthorne Books, 1978); K. Brady, *Father's Days* (New York: Dell Publishing, 1981).

[8] *Sexually Victimised Children* (New York: Free Press, 1979).

[9] *Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment* (Beverley Hills, California: SAFE Publications, 1984).

Badgley[10], which supports the view of child sexual abuse as a serious societal problem[11].

(3) Prevalence of Child Sexual Abuse

(a) definitions of child sexual abuse

Notions of what constitutes child sexual abuse are continually evolving, in an arena where definitions of child sexual abuse are highly contested. Russell for example focused on sexual *contact* between the perpetrator and child[12]. In contrast, the *Badgley Report* used a wider definition of sexual abuse which encompassed exposure (of the perpetrator's genitalia) and threats[13]. Definitions of child sexual abuse are a product of the social context. It follows from the feminist and postmodern aims to uncover suppressed

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[10] Committee on Sexual Offenses Against Children and Youths, *Report of the Committee on Sexual Offences Against Children in Canada* (Ottawa: Supply & Services Canada, August 1984) [hereinafter the *Badgley Report*].

[11] During the 1970s, the Canadian government funded a number of projects which focused on the question of abused and neglected children, but, as the *Badgley Report* concludes, minimal action was taken to implement the various recommendations, (*ibid.* at 124). The 1984 *Badgley Report* is the most comprehensive study of the prevalence of child sexual abuse in Canada: 2,008 people in 210 communities across Canada responded to anonymous questionaires.

[12] Russell used the following definition of incestuous child sexual abuse:

> Any kind of exploitative sexual or attempted sexual contact, that occurred between relatives, no matter how distant the relationship, before the victim turned 18 years old.

Her definition of extrafamilial child sexual abuse included:

> One or more unwanted sexual experiences with persons unrelated by blood or marriage, ranging from attempted petting to rape before the victim turned 14 years, and completed or attempted forcible experiences from 14-17 years.

See S.D. Peters, G.E. Wyatt & D. Finkelhor, "Prevalence" in D. Finkelhor *et al.*, eds., *A Sourcebook on Child Sexual Abuse* (Beverly Hills: SAGE, 1986) 15 at 54-9 for a summary of questions used in surveys to elicit histories of sexual abuse.

[13] As well as sexual acts involving any type of sexual touching of the person, which range from the touching, fondling and kissing of the parts of the body to oral, anal and vaginal penetration by a penis, finger or other object, (*supra* note 10 at 206).

viewpoints that the broader definitions of child sexual abuse, which take into account the experience of children, should be accepted. It is clear, however, that even on the narrow definition of child sexual abuse, there is widespread child sexual abuse[14].

(b) numbers of sexually abused children

The findings of the *Badgley Report* indicate that there is an epidemic of child sexual abuse in Canada. Their main findings are that[15]:

> [a]t sometime during their lives, about 1 in 2 females, and 1 in 3 males have been victims of unwanted sexual acts.

Children and youths appear to be disproportionately at risk from these types of sexual assaults. The Badgley Report states that[16]:

> [a]bout 4 in 5 of these incidents first happened to these persons when they were children or youths.

Historically there was silence surrounding victimization of male children, but this study makes clear that boys (roughly 1/3) suffer sexual abuse as well as girls. Furthermore, although the majority of children are first victimized when they were between the ages of 12 to 18 years, it is apparent that very young children are also the target of sexual

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[14] D. Finkelhor reported that 19% of the girls in his 1979 study were sexually involved with an adult before age 17; and 9% of the boys were sexually involved with an adult. 31% of Russell's sample reported at least one experience of sexual abuse by a relative before reaching the age of 14 years. 20% had been sexually abused by a nonrelative before reaching the age of 14; see the summary of findings documented by S.D. Peters, G.E. Wyatt & D. Finkelhor, *supra* note 12 at 20-1.

[15] *Ibid.* at 175.

[16] *Ibid.*

victimization[17].

(c) the perpetrators of child sexual abuse

It is clear that the preponderance of child abusers are male. The findings of the *Badgley Report* reveal that more than 95% of suspected offenders are male[18]. Victimization of boys is primarily perpetrated by men, and perpetrators of sexual abuse of girls are overwhelmingly male[19].

At the same time the *Badgley Report* recognizes that children now are frequently sexually active during their teens. The study, however, reveals that children are as likely to be victimized by someone of their peer group, as by someone older[20].

The survey conducted by the *Badgley Report* indicates that children are most at danger of being sexually assaulted by those they know[21]. The National Population Survey conducted by the *Badgley Report* found that 17.8% of child victims were assaulted by strangers. 48% of the victims were assaulted by acquaintances/friends. 9.9% were

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[17] *Ibid.* at 181.

[18] 98.8% of abusers were found to be male, and 1.2% were female, (*ibid.* at 215).

[19] The Badgley Report found that perpetrators of sexual assault against males were females in 3.1% of cases, (*ibid.* at 215). Females were also overwhelmingly assaulted by males (99.2% of perpetrators were male), (*ibid.*).

[20] *Ibid.* at 507.

[21] Exposures are excluded here, as these are typically committed by strangers, (*ibid.* at 250).

assaulted by close family members[22]; 8.4% were assaulted by other blood relatives falling outside the so-called "incest relationship[23]"; 2.5% were assaulted by other family members with whom the victim did not have a blood relationship[24]; 3% were assaulted by a guardian[25]; 1% by a person in a position of trust[26]; and 9.4% by persons falling within a miscellaneous category. The *Badgley Report* points to the opportunities created by such relationships or positions of trust for the abuser to take advantage of the victim[27].

The picture painted by the empirical data is bleak. It becomes obvious that it is predominantly men, particularly male acquaintances or family members, who sexually abuse both male and female children. The question raised by Myers is whether there will again be a backlash to this recent recognition of the extent of child sexual abuse[28].

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[22] This category was termed "incest relationship" and encompassed blood relatives to the child who were: father, mother, brother, half-brother, sister, half-sister, grandfather and grandmother, (*ibid.* at 216).

[23] This included uncle, aunt, nephew, niece and cousin.

[24] Such as adoptive parents and siblings, foster parents, and in-laws, among others.

[25] Males whose relationship to a female under age 21 was that of: step-father, foster-father and legal guardian.

[26] Such as a teacher, priest, and doctor.

[27] *Ibid.* at 532.

[28] *supra* note 1 at 31.

III CURRENT EVIDENCE OF BACKLASH

(1) False Allegations

In the past decade, false allegations of child sexual abuse have come to be associated with custody and visitation disputes. Suspicion of women is reflected in the prevalent image of the vindictive mother who prompts her child to allege sexual abuse by the father, in order to gain custody. Feminist therapists who testify to the occurrence of child sexual abuse are also under attack[29]. It has been said that they "brainwash children" in order to deprive men of the custody of their children[30]. The profound mistrust of women and children, especially female children, who make allegations of child sexual abuse in custody disputes provides evidence of a backlash.

Such misogynist attitudes are also present in the professional literature. A clear example of this is the article by Green[31] who demonstrates unwillingness to take seriously accounts of child sexual abuse, and attempts to divert responsibility away from the perpetrator and place it on the victim or the mother. He warns that false allegations in custody cases may occur where the child is "brainwashed" by a vindictive parent, (usually the mother), or "is influenced by a delusional mother who projects her own unconscious

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[29] See Jim Demers, "Abused by the System", *Alberta Report* (22 February, 1993) 20 who writes that "spurious sexual abuse charges [are] a preferred tactic of women in many custody disputes", (*ibid.* at 20).

[30] See K. Hazelwood, "The Fathers Fight Back" *Alberta Report* (17 August 1992) 21.

[31] A.H. Green, "True and False Allegations of Sexual Abuse in Child Custody Disputes" (1986) 25 Journal of the American Academy of Child Psychiatry 449.

sexual fantasies onto the spouse[32]". Green also alerts the reader to the Freudian view that allegations of child sexual abuse may be the result of the child's sexual fantasies which are directed onto the parents, most commonly in preadolescent or adolescent girls. Alternatively he states that the child may accuse the father of incest for revenge or retaliation[33].

Allegations of child sexual abuse may be more common where the parents are separated than where the family is together[34]. However, this in itself does not necessarily mean that there are more false allegations of child sexual abuse in custody cases. The studies on the rate of false allegations in custody cases have made a variety of findings, from 8%[35] to 36%[36]. Corwin *et al.* note however that caution must be exercised with respect to the methodology of these studies. For example, in clinical studies, the sample

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[32] *Ibid.* at 451. D.L. Corwin *et al.* raise the question of whether a mother's "natural and appropriate protective response [could] be misinterpreted as indicative of a paranoid or hysterical disorder"; see "Child Sexual Abuse and Custody Disputes" (1987) J. of Interpersonal Violence 91 at 101. From a feminist viewpoint this is more than a case of mere "misinterpretation", but rather reflects sustained denial of the existence and extent of child sexual abuse.

[33] *Ibid.* at 452.

[34] See D.L. Corwin *et al.*, (*supra* note 32 at 101). They quote the study by M. Mian *et al.*, "Review of 125 children 6 years of age and under who were sexually abused" (1986) 10 Child Abuse and Neglect 223. Mian *et al.* found that 67% of the children reporting intrafamilial abuse had parents who were separated or divorced, compared to 27% of those reporting extrafamilial abuse. In contrast however, N. Thoennes & P.G. Tjaden concluded that of the approximately 9 000 families with custody and visitation disputes served by the domestic relations courts in 8 American jurisdictions, only a small portion (2%) of these cases involved sexual abuse allegations; see "The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes" (1990) 14 Child Abuse and Neglect 151 at 153.

[35] See D.P. Jones & J.M. McGraw, "Reliable and Fictitious Accounts of Sexual Abuse of Children" (1987) 2 Journal of Interpersonal Violence 27 at 30.

[36] A. H. Green, *supra* note 31 at 449.

of the clinician's clients may not be representative of the typical child sexual abuse case[37]. Another problem derives from small samples, whereby if only a few cases are miscategorized. then this affects the reliability of the researcher's conclusions as to the rates of false allegations in child sexual abuse cases[38].

Clinical studies, such as that conducted by Green are limited insofar as "confirmation bias[39]", the clinician's theoretical perspective, affects the symptoms she or he is likely to identify as indicative of child sexual abuse. For example, Green is of the view that a child who demonstrates affection for his father has not been abused, and that the child who checks with his or her mother before proceeding with the account has been "brainwashed[40]". This again redirects the focus onto the mother, who is portrayed as delusional. Corwin *et al.* argue that the ambiguous feelings a child has for an abusing parent may result in contradictory behaviour towards that parent, and that young children who are in an ambiguous situation often reference an adult caretaker such as the mother[41]. Green states that use by the child of adult sexual terminology in describing the assault are indicators of false allegations. However, as Corwin *et al.* note, the child may have picked up adult sexual terminology from repeated interviews with adults[42].

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[37] Corwin *et al.*, *supra* note 32 at 93.

[38] *Ibid.* at 95-96.

[39] A term used by Corwin *et al.*, *ibid.* at 93.

[40] *Supra* note 31 at 454.

[41] *Supra* note 32 at 98-99.

[42] Corwin *et al.*, *ibid.* at 100.

Green also states that sexually abused children exhibit signs of child sexual abuse syndrome, (which he fails to define), contrary to findings that sexually abused children frequently display few physical symptoms of sexual abuse[43].

A crucial distinction is between unfounded or unsubstantiated allegations, and false allegations[44]. The fact that a case cannot be substantiated, due to insufficient evidence, does not necessarily mean that child sexual abuse did not occur. Yet this distinction is not always made apparent in the literature[45]. Jones and McGraw used this distinction in their study of 576 cases of suspected child sexual abuse made to the Denver Department of Social Services in 1983[46]. 53% of the reports were substantiated, and the remaining 47% were categorised as unfounded[47]. The unfounded category broke down into the following categories: 24% of the entire sample were cases with insufficient information to categorize; 17% were cases in which appropriate suspicion was substantiated through investigation; and only 6% of the entire sample were classified as

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[43] See L.R. Ricci, "Medical Forensic Photography of the Sexually Abused Child" (1988) 12 Child Abuse and Neglect 305 at 309.

[44] See Corwin *et al.*, *supra* note 32 at 94. David Finkelhor also makes this point; ("Is Child Abuse Overreported?" (1990) 48 Public Welfare 23 at 26), in response to D.J. Besharov, "Gaining Control over Child Abuse Reports" *Public Welfare* (Spring 1990) 34.

[45] Corwin *et al.*, (*ibid.*), criticize Green on the grounds that he fails to make this distinction.

[46] *supra* note 35.

[47] The classification system "avoided a simple true-or-false dichotomy" and instead considered "allegations along a spectrum extending from reliable accounts on the one hand to fictitious accounts on the other", (*ibid.* at 31).

fictitious, which included misperceptions as well as falsifications[48]. Three-fourths of the fictitious reports were made by adults, frequently in the context of a custody dispute[49].

While mothers more frequently allege sexual abuse by fathers in custody disputes, this may reflect the fact that males are disproportionately responsible for the perpetration of child sexual abuse[50]. Furthermore, allegations of child sexual abuse are also made by fathers against mothers, and other relatives, friends or acquaintances. The study of N. Thoennes and P.G. Tjaden found that the view of these cases as ones where mothers accuse fathers is oversimplified[51]. Allegations were made by mothers against fathers in 48% of the cases, against stepfathers in 6% of the cases, and against a third party in 13% of the cases. However, in 10% of the cases, the father alleged that the mother's new partner had abused his child; in 6% of the cases the father alleged abuse by a third party, and in 6% of the cases the father accused the mother herself. The allegation of

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[48] When cases with insufficient information were removed from the results, fictitious allegations constituted 8% of the sample.

[49] This categorization is also used by N. Thoennes & P.G. Tjaden in their study of a sample of 169 cases of sexual abuse allegations in contested custody and visitation cases drawn from domestic relations courts in 12 American jurisdictions. An assessment was only available in 129 cases of allegations of child sexual abuse, and of these, half were found to be likely to have occurred, in 33% it was unlikely to have occurred, and in 17% the investigator (a CPS worker or a court evaluator or both) could not determine whether abuse had occurred. They concluded, (*supra* note 34 at 161):

> allegations of sexual abuse among families in dispute over custody and visitation are no more likely to be determined false than are allegations of child sexual abuse in the general population.

L.J. Hlady & E.J. Gunter studied all children involved in custody access disputes seen by the Child Protection Service at British Columbia's Children's Hospital over a one-year period and reached a similar conclusion; see "Alleged Child Abuse in Custody Access Disputes" (1990) 14 Child Abuse and Neglect 591.

[50] As noted by Corwin *et al.*, *supra* note 32 at 93.

[51] *Supra* note 34 at 154.

abuse originated with someone other than the parent in 11% of the cases, including other relatives, teachers, physicians and parents.

Corwin *et al.* suggest that divorce may in fact provide an opportunity for the child to disclose the abuse, due to the decreased opportunity for the abuser to enforce secrecy, and increased willingness of the nonabusing parent to question the actions of the abuser[52]. They also suggest that the behaviour and characteristics of an abuser may contribute to the breakup of the marriage, as well as to the abuse[53]. This should be borne in mind when assessing allegations of child sexual abuse in custody and visitation disputes, to counter the misogynist attitudes with which such accounts are commonly greeted.

(2) Created Memory

A recent debate has arisen with respect to memories of sexual abuse which are repressed and subsequently recovered many years after the event. Research to determine whether false memories can be implanted and come to be believed as true is in its formative stages[54]. This is the new battle ground being drawn between experts in child sexual abuse proceedings.

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[52] *Supra* note 32 at 102.

[53] *Ibid.*

[54] As documented by L. Wright, "Remembering Satan-Part II" *New Yorker* (24 May 1993) 54 at 69.

IV CONCLUSION

An historical review of societal recognition of the existence and extent of child sexual abuse reveals a pattern of opening and closing awareness of child sexual abuse. Each period of recognition of child sexual abuse as a serious problem was subsequently followed by a backlash. Whether the present recognition of child sexual abuse will also be followed by a backlash currently hangs in the balance. Although there is presently raised consciousness of the existence and extent of child sexual abuse, at the same tir there are elements working to suppress public recognition of the harm suffered sexually abused children. Hornek & Clark estimate that currently only 14% of child sexual abuse cases are prosecuted[55]. In the following chapter I will examine the development of substantive legal protections against child sexual abuse, and the extent to which the criminal and civil law presently recognizes the problem of child sexual abuse.

[55] J. Hornek & P. Clark, "Child Testimony: Legal and Developmental Issues" (Paper presented to the Western Judicial Education Centre Conference, May 1990), [unpublished] at 31.

CHAPTER 4

DEVELOPMENT OF LEGAL PROTECTIONS AGAINST CHILD SEXUAL ABUSE

I INTRODUCTION

In this chapter I shall outline the purposes of the different legal proceedings in which the issue of child sexual abuse may arise. These proceedings include parental custody disputes in which there are allegations of child sexual abuse; child protection proceedings where child sexual abuse is the ground for state interference in the family; claims for damages by survivors of child sexual abuse; and the criminal prosecution of the child sexual abuser. I shall also outline the criminal law offences and examine whether they adequately prohibit child sexual abuse. I will assess the extent to which the criminal law has become responsive to the dynamics of child sexual abuse. My focus is on the attitudes of legislators and the judiciary towards child sexual abuse which is reflected in the development of the substantive offences.

II THE CIVIL CONTEXT

(1) Parental Custody Disputes

Child sexual abuse may be an issue in custody or access disputes between separating or divorcing parents, where one parent or a child makes an allegation of child sexual abuse against the other parent. In a custody case it must be shown that it is in the child's best interests to remain with one parent as opposed to the other[1]. The child does not,

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[1] The federal *Divorce Act* provides that decisions with respect to custody and access to the children of the marriage are to be made with the "best interests of the child" in mind; S.C. 1986, c.4, s.16(8). The provincial power over property and civil rights has enabled provinces to enact legislation in respect of the custody of and access to children of divorced and separated parents also. The Alberta *Domestic Relations*

however, have status as a party to the parents' application for custody. Frequently judges exercise their discretion to exclude the child from testifying on the grounds that they should not be drawn into the custody fight[2]. The result is that the mother's behaviour becomes the focus of the proceeding[3].

(2) Child Protection Proceedings

Child sexual abuse may also trigger a child protection proceeding which is brought by a state authorized protection agency.

As a result of the work of child protection agencies, child protection legislation has existed since the beginning of the century, but the problem of child sexual abuse has only featured explicitly in provincial child abuse legislation in the past decade. This is consistent with societal denial of the existence and extent of child sexual abuse[4]. Nicholas Bala notes that the field of child protection in Canada tended to operate on a relatively informal basis until the 1960s[5], until the identification of the battered child

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Act provides that the court may, in the case of judicial separation or divorce, "declare the parent by reason of whose misconduct the decree is made to be a person unfit to have custody of the minor children", R.S.A. 1980, c.D-37, s.54(1). Section 56 of the Act provides that the court may make any order it sees fit with respect to custody, taking into account the welfare of the minor, the conduct of the parents, and the wishes of both the mother and the father.

[2] See for example *Wakaluk* v. *Wakaluk* (1976), 25 R.F.L. 292 (Sask. C.A.).

[3] See chapter 5.

[4] See chapter 3.

[5] "An Introduction to Child Protection Problems" in N. Bala, J. Hornick & R. Vogl, eds., *Canadian Child Welfare Law* (Toronto: Thompson Educational, 1991) 1 at 3.

syndrome, and the 1970s and early 1980s' "discovery" of child sexual abuse. The new awareness prompted various changes in legislation, for example the required reporting of child sexual abuse[6].

The "child in need of protection" is a key concept in the child welfare legislation, as it provides the basis for state intervention in the family. Although the child welfare statutes were broadly framed, until quite recently none of them explicitly addressed child sexual abuse as a reason for state intervention[7]. The Alberta *Child Welfare Act*[8] now provides that a child is in need of protection if "the child has been or there is substantial risk that the child will be physically injured or sexually abused by the guardian of the child"[9], or if "the guardian of the child is unable or unwilling to protect the child from physical injury or sexual abuse"[10].

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[6] The *Child Welfare Act* of Alberta, S.A.1984, c-8.1, s.3(1), provides:

> Any person who has reasonable and probable grounds to believe and believes that a child is in need of protective services shall forthwith report the matter to a director.

Section 3(6) provides that in the event of failure to comply, a person will be liable to a fine of not more than $2000, and in default of payment to imprisonment for a term of not more than 6 months. The statute also offers the reporting person immunity from civil liability, unless the report was made maliciously or without reasonable grounds, (s.3(4)).

[7] For example, under the former *Child Welfare Act*, R.S.A.1980, c-8, (repealed by the *Child Welfare Act*, S.A.1984, c-8.1) a sexually abused child was covered by such general headings as "a child whose life, health or morals may be endangered by the conduct of the person in whose charge he is", (s.6(e)(xii)).

[8] S.A.1984, c-8.1.

[9] Section 1(2)(d).
Section 1(3)(c) of the Alberta *Child Welfare Act* provides that:

> a child is sexually abused if the child is inappropriately exposed or subjected to sexual contact, activity or behaviour.

[10] Section 1(2)(e). These provisions also reflect a move towards a less interventionist approach, whereby the grounds for state intervention are narrowed, a point made by D. Barnhorst & B. Walter, "Child Protection Legislation in Canada" in *Canadian Child Welfare Law*, (*supra* note 5) 17 at 21. The

The age at which a person ceases to be a "child" for the purposes of child welfare proceedings varies between jurisdictions. In Alberta the *Child Welfare Act* provides that a child is a person under the age of eighteen years[11]. In other provinces there is an absence of protection afforded young people of 16 or 17, where child protection applies only to children under 16 years of age[12].

Where a case of alleged child sexual abuse comes to the attention of the child protection agencies, it is left to their discretion as to which form of state intervention should be resorted to, and whether or not the police should be informed, as the child welfare legislation provides little guidance on this matter[13]. The child protection agency may

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harm is linked to the acts or omissions of the parents, and the risk of harm must be substantial.

[11] Section 1(1)(d).

[12] This is the case in Ontario, Nova Scotia, Newfoundland, Saskatchewan and the Northwest Territories. In Ontario and Nova Scotia an order can be made after the child turns 16 years of age if proceedings are commenced before the child attains the age of 16.

[13] The Alberta *Child Welfare Act* merely provides that in the event of a report of child sexual abuse the director of the child protection agency "shall cause the matter to be investigated" (s.5(1)). Section 2 of the Act provides that the court and all persons shall make any decision relating to a child who is in need of protective services with reference to various principles. These include the best interests of the child, the importance of the family (s.2(a)), and family privacy (s.2(c)), and the least intrusive means of protecting the child (s.e)(ii)).
There have been repeated calls for coordination between the child protection services and the police in order to better protect children from child sexual abuse; see the Committee on Sexual Offenses Against Children and Youths, *Report of the Committee on Sexual Offences Against Children in Canada* (Ottawa: Supply & Services Canada, August 1984) [hereinafter the *Badgley Report*] at 33. See also *Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada: Reaching for Solutions* by R. Rogers (Ottawa: Supply & Services Canada, 1990) [hereinafter the *Rogers Report*] at 58. The *Badgley Report* discovered "enormous difference of opinion in providing these services as to whether the child welfare law or the criminal law should be invoked", (*ibid.* at 34). A lack of coordination between the various agencies further harms the sexually abused child. The investigation of sexual abuse is impeded by the confusion over roles and conflicting aims of the different agencies, and results in the child having to endure repeated interviews; see the *Badgley Report*, (*ibid.* at 626).

apply for an apprehension order to take the child into care pending trial[14]. Alternatively an order for supervision of the child and the person with whom the child is residing may be obtained[15]. An abused child may be separated from his or her parents by a temporary[16], permanent[17] or private guardianship order[18]. Frequently an interim custody hearing will be conducted, in which interim custody and access decisions are made with respect to the adjournment period, pending the full hearing.

All Canadian child protection statutes provide for court review of these orders, which are brought where there is a change of circumstance. In Alberta the rights of parents to initiate reviews are restricted to situations of supervision and temporary wardship[19]. In

[14] Under section 17 of the Alberta *Child Welfare Act*.

[15] Under section 26 of the Alberta *Child Welfare Act*.

[16] Under section 15 of the Alberta *Child Welfare Act*. This allows for the possibility of the child's return to his or her parent.

[17] This is provided by section 32 of the Alberta *Child Welfare Act*, and may be granted where:
(a) the child is in need of protective services or is the subject of a temporary guardianship order,
(b) the survival, security or development of the child cannot be adequately protected if the child remains with or is returned to his guardian, and
(c) it cannot be anticipated that the child could or should be returned to the custody of his guardian within a reasonable time.

[18] The concept of private guardianship has been developed in Alberta where a proposed guardian, such as a foster parent, who has had the continuous care of a child for a period of more than 6 months, can apply to the court to be the child's guardian in lieu of the public authority under section 49(1) of the *Child Welfare Act*.

[19] There is a system of Appeal Panels in Alberta the decisions of which can be appealed to the Court of Queen's Bench. These were established in 1984, and amended in 1989, in response to the decision of *B.M. and M.M.* v. *R.* (1985), 45 R.F.L.(2d) 113 (Alta.Q.B.). The authority of these panels was confirmed in *Tschritter* v. *Children's Guardian for Alberta* (1989), 19 R.F.L. (3d) 1 (Alta.C.A.). The new panels can receive an application from the child (no minimum age limit), the parent/guardian, or from foster parents who have had the child for 6 of the last 12 months, (*Child Welfare Act*, S.A. 1984, c.C-8.1, s.86, as.am.). More recently the Alberta *Child Welfare Amendment Act* provided a further avenue of appeal to the Court of Queen's Bench if parties are dissatisfied with the Appeal Panel decision, (S.A. 1988, c.15,

contrast to a review, an appeal may be brought on the grounds that the trial judge made an error of law, disregarded significant material evidence or made a clearly wrong decision[20]. Appeal courts generally defer to the discretion of the trial judge, who is said to be better placed to review all the evidence, as he or she has the opportunity to review the demeanour of witnesses, and listen to the arguments of counsel over a period of time[21]. This approach defers a great deal to the discretion of the judges at the trial level.

Feminists have expressed concern that removal of sexually abused children from their home in order to protect them from a family member punishes the child rather than the offender, and advocate removal of the offender instead[22]. An order restraining an abuser from residing with a child, or from contacting or associating with the child may be obtained under section 28(1) of the Alberta *Child Welfare Act*, provided a child has been apprehended or is the subject of a temporary or permanent guardianship, and the director has "reasonable and probable grounds to believe that a person has... sexually abused the child, or is likely to... sexually abuse the child".

The method of intervention chosen by child protection agencies depends on social

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s.38 & 39).

[20] *Per* Virtue, J., in *M.* v. *Director of Child Welfare and Children's Guardian* (1987), 4 R.F.L. (3d) 363 at 370 (Alta.Q.B.). See also *New Brunswick (Minister of Social Services)* v. *G.C.C.* (1988), 85 N.R. 10 at 14.

[21] See McEarchern, C.J.B.C., in *Bartesko* v. *Bartesko* (1991), 31 R.F.L. (3d) 213 at 214-5 (B.C.C.A.); see also Spence, J., delivering the decision of the Supreme Court in *Adams* v. *McLeod*, [1978] 2 S.C.R. 621 at 625.

[22] See for example C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 53.

workers' beliefs about the meaning of child sexual abuse within the family. A "family-centred approach" is applied by some child protection agencies[23]. This approach acknowledges the existence of child sexual abuse, but interprets this problem as a symptom of underlying family dysfunction. The primary aim is to maintain the family unit, and is dependent on the voluntary cooperation of the abuser to enter therapy. Feminists criticize this approach as it fails to address the fundamental power imbalance within the family. Frequently mothers are held responsible for the family "dysfunction" rather than the abuser who has exploited his position of power[24].

(3) Claim for Damages for Child Sexual Abuse

The child who is a victim of sexual abuse, or his or her guardian, can bring a civil suit for monetary damages. Adult survivors of child sexual abuse are more likely to be the plaintiffs in such cases than children[25]. The reasons for this are that children often do not disclose until later in life due to fear of the perpetrator or shame, or may repress the

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[23] This is identified by the *Badgley Report, supra* note 13 at 624.

[24] See M. Macleod & E. Saraga, "Challenging the Orthodoxy: Towards a Feminist Theory and Practice" (1988) 28 Feminist Review 103. The *Badgley Report* also identified the application of a "child centred" approach by some child protection agencies, according to which primary attention is paid to the child, and in cases where offenders reside with the child, they are required to leave the home, (*ibid.* at 620-23). They conclude that the "child centred approach" has strengths, but are of the view that "[t]he family-oriented approach... may be more sophisticated about the psychosocial dynamics of families", (*ibid.* at 627). This fails to recognize the vulnerable position of the sexually abused child within the family, and also the fact that abusers are generally unwilling to take responsibility for their actions by voluntarily entering therapy.

[25] See D. Brillinger "Child Awarded $25 000 for Sex Abuse by 'Family Friend'" *The Lawyers Weekly* (11 October 1991) 20.

memories of child sexual abuse[26]. Furthermore, they may not have an adult to assist them with bringing such a claim, particularly where their abuser is their primary caretaker[27]. One major drawback is that the financial obligation of pursuing this remedy falls on the female plaintiff, who may suffer further hardship if the offender has no assets to satisfy a judgment.

Alternatively, the victims of child sexual abuse can seek damages from their provincial Criminal Injuries Compensation Board. A conviction in respect of the sexual abuse need not have been obtained, although it must be proved on a balance of probabilities that the abuse occurred. However, this is only of use if victims actually know about this option, and bring their claim within the limitation period. Furthermore damages cannot be obtained from the C.I.C.B. in respect of incidents which occurred prior to the Board's establishment (no Board was established prior to 1970). A final limitation noted by the *Rogers Report*[28] is that the awards tend to be small as the Boards frequently focus on the absence of physical injury, without recognizing the longterm therapeutic needs of child sexual abuse survivors.

[26] See R. Summitt, "The Child Sexual Abuse Accommodation Syndrome" (1987) 7 Child Abuse and Neglect 177 at 183. The Supreme Court recently recognized that sexually abused children often make late disclosure in *K.M.* v. *H.M.*, [1992] S.C.J. No. 85 (Q.L.). In this case the plaintiff at age 28 sued her father for damages for incest initiated by him when she was 10 or 11 years old. The Supreme Court held that the tort claim, although subject to limitations legislation, did not accrue until the plaintiff was reasonably capable of discovering the wrongful nature of the defendant's actions and the nexus between those acts and the plaintiff's injuries. In this case, that discovery occurred only when the plaintiff entered therapy, and the lawsuit was commenced promptly thereafter.

[27] See D. Brillinger, *supra* note 25.

[28] *Supra* note 13 at 74.

III THE CRIMINAL CONTEXT

Historically the criminal law was the primary tool used to deal with the child sexual offender[29]. Feminists debate the utility of resorting to the criminal law in order to deal with the problem of child sexual abuse[30]. Criminal sanctions send a denunciatory and punitive message to child offenders that society will not tolerate child sexual abuse, and may also serve to protect children by incarcerating offenders.

(1) Pre- 1980

Prior to the enactment of *An Act to amend the Criminal Code and the Canada Evidence Act* in 1987[31], there were few offences directed specifically at child sexual abuse; instead, the behaviour concerned featured in a number of overlapping legal offences, most of which were developed with adult rather than child complainants in mind[32].

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[29] See N. Bala, *supra* note 5 at 6.

[30] See for example E. Woodcraft who supports the use of criminal proceedings as one way in which society says child sexual abuse is unacceptable; "Child Sexual Abuse and the Law" (1988) 28 Feminist Review 122 at 123. See the contrasting view of L.G.M. Clark, "Feminist Perspectives on Violence Against Women and Children: Psychological, Social Service, and Criminal Justice Concerns" (1989-90) 3 Can. J. of Women & L. 420. She states, (*ibid.* at 424):

> [t]he criminal justice system... does not deal effectively with offenders and does not deal at all with the victims.

[31] S.C. 1987, c.24 [now R.S.C. 1985 (3d Supp.), c.19].

[32] The Committee on Sexual Offences against Children and Youths concluded from their historical review of the sexual offences that:

> [there] is an unevenness in the protection afforded to children. Some of this is due to the limitations of the concepts used in the offences, and some is due to the fact that some offences were developed without any particular consideration being given to children as victims;

see the *Badgley Report*, *supra* note 13 at 301.

(a) rape

The offence of rape was described by Sir William Blackstone as "the carnal knowledge of a woman forcibly and against her will[33]", which was punishable at one time with death under English[34] and Canadian law[35].

A feminist concern was that the offence of rape served more to protect the proprietary interests of men in their wives and children than to protect the interest of women and children in their bodily security and autonomy[36]. Feminists suggested that the rationale for rape laws was to compensate men for the devaluation of their proprietary interest in their wives and daughters. Notwithstanding the harsh penalties for rape, the view of

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[33] *Commentaries on the Law of England*, vol.4 (London: Cadell, 1795) at 210.

[34] *Ibid.* at 211, Blackstone writes that:

> Rape was punished by the Saxon laws... with death...
> [However], this was afterwards thought too hard: and in its stead another severe, but not capital, punishment was inflicted by William the conqueror; viz. castration and loss of eyes; which continued till after Bracton wrote, in the reign of Henry the third.

[35] In *An Act for Consolidating and Amending the Statutes in this Province relative to Offences Against the Person*, 1841, Prov. C. 1841, c.27, s.16, it was provided that every person convicted of rape "shall suffer death as a felon". In 1869, as part of the federal consolidation of the criminal laws, it was again provided that rape was punishable by death (see *An Act respecting Offences Against the Person*, S.C.1869, c.20, s.49). The alternative punishment of imprisonment for life, or for any term not less than 7 years was later provided by *An Act to amend the Act respecting Offences Against the Person*, (S.C.1873, c.50, s.1.); and in 1921 whipping was also included as a punishment for rape by *An Act to amend the Criminal Code*, S.C. 1921, c.25, s.4; this latter provision was repealed by the *Criminal Law Amendment Act*, S.C.1972, c.13, s.70. The death penalty for rape was only abolished in Canada in 1954, (*Criminal Code*, S.C.1953-54, c.51, s.136).

[36] See L. Clark & D. Lewis, *Rape: the Price of Coercive Sexuality* (Toronto: Women's Press, 1977) at 124. The proprietary nature of the offense, and of marriage, was reflected in the fact that, until only very recently, English and Canadian law refused to countenance the possibility that a husband could force his wife to have sexual intercourse with him against her will. Wives were deemed to have consented irrevocably to sexual intercourse with their husbands at the marriage ceremony. Section 143(b)(ii), which provided that it was rape where a man obtained consent to sexual intercourse from a female who was not his wife by impersonating her husband, explicitly protected the interests of the husband victim; (*Criminal Code*, R.S.C. 1970, c.34).

unchaste females as "damaged goods" (and therefore as unworthy of the protection of the law), and the myth that females falsely allege rape[37], undermined the application of the law of rape.

The *Criminal Code* of 1892[38] provided for the first time a definition of rape, which was preserved in virtually the same form until its repeal in 1983[39]. It was provided that a male person commits rape when he has sexual intercourse with a female person who is not his wife[40]:

(a) without her consent, or
(b) with her consent if the consent
i) is extorted by threats or fear of bodily harm.
ii) is obtained by impersonating her husband, or
iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

The offence of rape inadequately protected sexually abused children, as typically child sexual abuse involves forms of sexual activity falling short of full intercourse[41]. The

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[37] In the words of Lord Atkin in *Mattouk* v. *Massad*, [1943] A.C. 588 at 591:
It is... common for young women in cases of this kind to attempt to save appearances by alleging that they were forced to consent...

[38] S.C. 1892, c.29, s.266.

[39] Rep. by *An Act to amend the Criminal Code in relation to Sexual Offences and other Offences against the Person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C.1980-81-82, c.125, s.6.

[40] *Criminal Code*, S.C. 1892, c.29, s.266(1); R.S.C. 1970, c.34, s.143, as rep. by S.C. 1980-81-82, c.125, s.6. Furthermore, it was provided that no male under fourteen years of age was capable of committing rape, S.C. 1892, c.29, s.266(2).

[41] See the *Badgley Report*, *supra* note 13 at 208.

offence reflected the male assumption that the focus of sexual activity is penetration, notwithstanding that women and children experience other "lesser" forms of sexual activity as equally invasive.

(b) indecent assault

The 1869 *Offences Against the Person Act* introduced the offence of indecent assault on a female[42]. The same Act provided for the offence of indecent assault on a male[43]. In 1890 it was provided that[44]:

> it is no defence to a charge or indictment for any indecent assault on a young person under the age of 14 years to prove that he or she consented to the act of indecency.

The penalty for indecent assault on a male was more severe (ten years imprisonment), than that for indecent assault on a female (two years imprisonment), which reflected a lesser acknowledgement of the harm done to females[45].

The assault model also failed to provide protection to sexually abused children due to its

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[42] S.C. 1869, c.20, s.53. The offence of attempted carnal knowledge of a girl under twelve also appeared initially in this section. The modern form of the offence of indecent assault on a female was in the *Criminal Code*, R.S.C. 1970, c-34, s.149, and was repealed in January 1983 and replaced by the sexual assault offences.

[43] S.C.1869, c.20, s.63. The modern offence was contained in section 156 of the *Criminal Code*, R.S.C. 1970, c-34, s.156, and was also repealed in January 1983.

[44] *An Act further to amend the Criminal Law*, S.C.1890, c.37, s.7.

[45] This differential in sentencing provisions may also have been due to the fact that the offence of indecent assault of a male appeared in the same section with attempted buggery, and assault with intent to commit buggery, actions which were perceived as more threatening by the male legislators; see *An Act respecting Offences Against the Person*, S.C. 1869, c.20, s.64. The act of buggery was itself a separate offence in s.155 of the *Criminal Code*, R.S.C. 1970, c-34. Section 155 also prohibited bestiality.

lack of clarity as to what behaviours it covered, and its inapplicability to certain behaviours. Most notably it was inapplicable to cases where the perpetrator invited the child to touch him or her, but neither touched nor threatened to touch the child in return[46]. The *Badgley Report* found that such actions are a very common form of child sexual abuse[47]. The indecent assault offences were repealed as part of the 1983 reforms, and replaced by the sexual assault offences[48].

(c) incest

The predecessor of the modern offence of incest was introduced by the federal Parliament in 1890[49], which provided for a punishment of fourteen years' imprisonment[50], and whipping for male offenders[51]. Prior to the 1890 Act, several of the provinces enacted

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[46] In the English case of *Fairclough* v. *Whipp*, [1951] 2 All.E.R. 834 (K.B.D), the Court held that where the accused only invited the child to touch him there was no assault, and as a result the question of indecent assault did not arise. This was followed in the Canadian case of *R.* v. *McCallum*, [1970] 2 C.C.C. 366 (P.E.I.S.C.).

[47] *Supra* note 13 at 236.

[48] The offence of buggery (now termed anal intercourse) remains in s.159 of the *Criminal Code*, R.S.C. 1985, c.C-46, and has been decriminalized between husband and wife, or any two people over eighteen years of age, when engaged in private, s.159(2)(a)-(b). The offence of gross indecency under s. 157 of the *Criminal Code* states that:

> Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.

There was similarly no statutory definition of "gross indecency", and it encompassed a wide range of behaviours. It is now repealed by *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C.1985 (3d Supp.), c.19, s.2. The concept of indecency also appears in s.173 of the *Code*, which prohibits indecent acts in a public place, or in any place, with intent thereby to insult or offend any person.

[49] *An Act further to amend the Criminal Law*, S.C. 1890, c.37, s.8.

[50] Section 155(2) of the modern *Code* similarly provides that incest is an indictable offence punishable with up to fourteen years imprisonment.

[51] The punishment of whipping for male offenders was removed in 1972 as part of the general abolition of corporal punishment, by the *Criminal Law Amendment Act*, S.C.1972, c.13, s.70.

statutes prohibiting incest[52].

Section 155 of the *Criminal Code*[53] provides that:

> [e]very one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

Section 155(4) provides that half-siblings are also within the prohibited degrees of consanguinity[54].

A major limitation with the offence was that the female child could be convicted of the offence also, despite the fact that she was the innocent victim of the perpetrator's abuse of his power. The situation was not improved by the provision, first introduced in 1890[55], that where the court is satisfied that the female person[56]:

> committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse, the court is not required to impose any punishment on her.

The result of this was that a victim of incest potentially had to suffer the determination of guilt in addition to the grave harm caused by the sexual act itself. The 1985 *Criminal*

[52] The English history of the offence of incest is somewhat different. It was only in 1908, with the passage of the *Punishment of Incest Act* that incest was formally prohibited in Britain. Prior to this, incest was dealt with by the ecclesiastical courts which were essentially moribund, (see V.Bailey & S.Blackburn, "The *Punishment of Incest Act* 1908: A Case Study of Law Creation" [1979] Crim.L.R. 708; and S.Wolfram, "Eugenics and the *Punishment of Incest Act* 1908" [1983] Crim.L.R. 508).

[53] R.S.C. 1985, c.C-46.

[54] This derives from a 1934 amendment, (*An Act to amend the Criminal Code*, S.C.1934, c.47, s.6).

[55] *An Act further to amend the Criminal Law*, S.C.1890, c.37, s.8.

[56] R.S.C.1985, c.C-46, s.155(3).

Law Amendment Act provided[57]:

> No accused shall be determined by a court to be guilty of an offence under this section if the accused was under restraint, duress or fear of the person with whom she had the sexual intercourse.

The studies on the incidence of incestuous relations indicate that incestuous relations frequently do not involve full sexual intercourse, but that these "lesser" forms of sexual involvement are no less abusive[58]. However, the offence does not protect the child from these earlier acts because of its requirement of sexual intercourse. Furthermore the focus of this offence on certain blood relationships excludes other relatives such as uncles, and "surrogate" fathers (such as a mother's new boyfriend).

(d) sexual intercourse with a female of previously chaste character

The feminist contention that only previously chaste females were deemed worthy of legal protection was borne out by the offence of sexual intercourse with a female of previously chaste character. In 1886 it was provided that any person who seduced and had illicit connection with any girl between the ages of twelve and sixteen who was of previously chaste character, or who attempted this, was guilty of an offence punishable with up to two years' imprisonment[59]. In 1890 the age of consent was raised to fourteen years of

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[57] R.S.C.1985 (1st Supp.), c.27, s.21.

[58] Typically the sexual activity begins with the perpetrator, generally an older male family member, fondling the child and from there progressing to more serious sexual acts, possibly over a long period of time; see the *Badgley Report*, *supra* note 13 at 208.

[59] *An Act to Punish Seduction, and Like Offences, and to Make Further Provision for the Protection of Women and Girls*, S.C.1886, c.52, s.1(1).

age[60], and the seduction offence was made to apply to girls between fourteen and sixteen[61]. Furthermore, in 1920 a provision was introduced whereby the jury was to compare the accused's conduct with that of the complainant, and acquit the accused if the evidence did not show that the accused was "wholly or chiefly to blame"[62].

The more recent section 146(2) of the *Code*[63] provided that it was an offence for a male person to have sexual intercourse with a female who was not his wife, was fourteen or fifteen years of age, and was of "previously chaste character", regardless of whether he believed that she was sixteen years of age or more. The "comparison of blame" provision was retained in s.146(3). Section 151 of the *Criminal Code* prohibited the seduction by a male person eighteen years or more, of a female person who was sixteen years or more, but fewer than eighteen years of age, who was "of previously chaste character". These two offences were repealed in 1987[64].

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[60] *An Act further to amend the Criminal Law*, S.C.1890, c.37, s.12.

[61] *Ibid.* s.3.

[62] *An Act to amend the Criminal Code*, S.C.1920, c.43, s.17.
The burden of proving that the female person was not of previously chaste character was placed on the accused in the 1955 revision of the *Criminal Code*, S.C. 1953-54, c.51, s.131(3). Also it was provided in 1934 that sexual intercourse by the accused with the girl on a prior occasion shall be deemed not to be evidence that she was not of previously chaste character, (*An Act to amend the Criminal Code*, S.C. 1934, c.47, s.9). These two provisions were repealed in January 1983.

[63] R.S.C. 1970, c.C-34.

[64] By *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c.24, (now R.S.C. 1985 (3d Supp.), c.19) s.1.

(e) statutory rape

The statutory rape laws expressed an absolute prohibition of sexual intercourse with young females. In 1869, *An Act respecting Offences Against the Person*[65] provided that it was a federal criminal offence to have sexual intercourse with a girl under the age of ten, punishable with death[66]. Two to seven years imprisonment was provided where the girl was between ten and twelve[67]. The most recent prohibition on sexual intercourse by a male person with a female under fourteen[68], who was not his wife, was provided by s.146(1) of the *Criminal Code*[69], which was punishable with imprisonment for life. This was repealed in 1987[70].

Statutory rape laws did provide some protection for young girls insofar as they demonstrated societal disapproval of exploitation of the vulnerability of young girls. They also remedied some of the harm to women caused by the inadequate protection afforded by rape laws, and incest laws[71], and to this extent they were supported by some feminists.

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[65] S.C. 1869, c.20.

[66] S.C.1869, c.20, s.51. This punishment was reduced in 1877 to a term of imprisonment for life or for any term not less than five years, (S.C. 1877, c.28, s.2.).

[67] S.C. 1869, c.20, s.52-3.

[68] Whether or not he believed that she was fourteen years of age or more.

[69] R.S.C. 1970, c.34.

[70] *An Act to amend the Criminal Code and the Canada Evidence Act*, (*supra* note 64), s.1 and s.2.

[71] Although it should be noted that statutory rape laws also required full intercourse.

On the other hand, however, these offences were paternalistic in that they prescribed a sexually passive role for young females, and restricted the sexual autonomy of young females. As it was seen as socially desirable for young men, but not young women to be sexually active, the double standard was preserved. Furthermore, as Olsen notes[72], some young women served as partners to these sexually active young men, who faced no such legal prohibition on sexual activity, and as a result women were divided into two classes, the chaste and virtuous, and the immoral. Only the former were seen as being worthy of protection.

Some feminists opposed these laws on the ground that both male and female children should be protected. The statutory rape laws, which protected exclusively female children, were advocated as protecting the unique characteristic of females to be exposed to the harm of pregnancy and abortion[73]. However, this did not address the social inequalities which to a large extent contributed to these problems. Male coercion and illegitimate use of authority were part of the social context which made female reproductive capacities a disability instead of an asset. The focus on the biological capacities of females was unhelpful insofar as it defined females according to their reproductive capacities, as a "commodity" to be protected, and perpetuated the view of women as passive.

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[72] F.Olsen "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 Texas L. Rev. 387 at 402.

[73] See for example the *Badgley Report*, (*supra* note 13 at 51).

(f) specific conduct prohibited

There were only a few instances where the criminal law explicitly recognized situations where the vulnerability of women and children were exploited. Various offences prohibited the form of pressure known as "seduction" (as opposed to sexual intercourse *per se*), such as the offence of guardian-ward seduction. Section 153 of the *Criminal Code* prohibited sexual intercourse between a male person and his step-daughter, foster daughter[74], or female ward, or female employee or subordinate of previously chaste character who was under the age of twenty-one[75]. These offences were first introduced into Canadian law in 1890[76]. A comparison of blame provision was made applicable to the latter offence in 1920[77], and was retained in the more recent s.153(2) of the *Code*[78].

Several other situational offences should be noted. Section 152 of the *Criminal Code* made it an indictable offence, punishable by imprisonment for up to two years, for any male person twenty-one years or older to seduce, under promise of marriage, an unmarried female person of previously chaste character who was less than twenty-one

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[74] R.S.C. 1970, c.34, s.153(1)(a).

[75] R.S.C. 1970, c.34, s.153(1)(b)(i)-(iii).

[76] *An Act further to amend the Criminal Law*, S.C.1890, c.37, s.4.

[77] *An Act to amend the Criminal Code*, S.C.1920, c.43, s.17.

[78] R.S.C. 1970, c.C-34.

years of age[79]. The former section 148 of the *Criminal Code*, which was repealed in January 1983, provided that it was an indictable offence for any male person who, under circumstances that did not amount to rape, to have sexual intercourse with a female person who was not his wife, and who was, or whom he knew or had good reason to believe was, feeble-minded, insane or was an idiot or imbecile[80]. Section 159 of the *Code* provided that it was an indictable offence for any male person who was the owner, or master, or who was employed on board a vessel, to have illicit sexual intercourse with a female passenger[81]. These offences were, however, narrowly drawn to fit fact-specific situations, and therefore provided limited protection to sexually abused children.

(2) Post-1980

(a) the three-tiered offence of sexual assault

Bill C-127[82], which was proclaimed in force on January 4, 1983, repealed the offense of rape and attempted rape, and in its place created three separate offences: sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, and

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[79] R.S.C. 1970, c.34. This originated from an 1886 provision, *An Act to Punish Seduction, and like Offences, and to make further Provision for the Protection of Women and Girls*, S.C.1886, c.52, s.2.

[80] This originated in an 1886 provision; see *An Act to punish seduction, and like offences, and to make further provision for the Protection of Women and Girls*, S.C.1886, c.52, s.1.

[81] Section 170 prohibited the parent or guardian of a female person from procuring her to have illicit sexual intercourse with a person other than the procurer, or from receiving the avails of the defilement of the female person. Section 171 of the *Criminal Code* made it an offence knowingly to permit a female person under the age of eighteen to use premises, of which one is the owner, occupier or manager, for the purpose of having illicit sexual intercourse with a particular male person or with male persons generally.

[82] *An Act to amend the Criminal Code in relation to Sexual Offences and other Offences against the Person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82, c. 125.

aggravated sexual assault[83]. This is part of the trend of gender-neutrality in the law, and is probably necessary in order to protect the offences from constitutional challenge[84]. The primary advantages of the reforms would appear to be the elimination of the requirement of penetration[85], and removal of spousal immunity.

(i) rape as violence not sex

The idea behind the reforms is to encourage reporting by reducing the stigma traditionally experienced by victims of rape[86]. Rape is reclassified as an act of violence, rather than sex[87], a position supported by some feminists[88]. However this is disputed

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[83] *Criminal Code*, R.S.C. 1985, c.C-34, ss. 271-273.

[84] This is important insofar as protection is extended to male victims of sexual offences, but as C.L.M. Boyle *et. al* note in *A Feminist Review of Criminal Law* (Ottawa: Supply & Services Canada, 1985) at 14:

> Taking a crime that men commit and making it gender-neutral is not 'removing' gender discrimination, while passing effective laws which increase the physical safety of women would do so.

[85] However P. Nadin-Davis raises the question of whether penetration will still be of significance with respect to severity of sentencing, in "Making a Silk Purse? Sentencing: The 'New' Sexual Offences" (1983) 32 C.R. (3d) 28 at 34.

[86] See the 1985 Canadian Victimization Survey which documents the low rate of reporting of sexual aggression; Solicitor General of Canada, *Female Victims of Crime: Canadian Urban Victimization Survey* (Ottawa: Supply & Services Canada, 1985) at 2. Survivors of child sexual abuse frequently do not report out of a sense of shame, fear and a sense of powerlessness; see the *Badgley Report*, (*supra* note 13 at 187-93).

[87] According to s.265(2), the common definition of assault in s.265 of the *Code* is applicable to the sexual assault offences. Section 265(1) provides:

> A person commits an assault when
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> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

by feminists such as Andrea Dworkin and Catharine MacKinnon, who argue that this analysis merely serves to mask the relations of domination and subordination which are integral to all sexual relations between men and women, by distinguishing the more overtly unequal acts of sexual intercourse as violence[89]. The focus on violence may reintroduce by the back door the notion that sexual assault requires proof of force, which is particularly inappropriate in the context of child sexual abuse[90].

(ii) the definition of "sexual"

The New Brunswick Court of Appeal in *R.* v. *Chase*[91] held that secondary sexual characteristics such as breasts are not included in the definition of sexual. However, the Supreme Court overruled this decision, and held that[92]:

> the test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: 'Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer.

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[88] See for example Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Schuster, 1975); and L. Clark & D. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977) especially at 124.

[89] In the words of Catharine MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635 at 646:

> [t]he point of defining rape as "violence not sex" or "violence against women" has been to separate sexuality from gender in order to affirm sex (heterosexuality) while rejecting violence (rape). The problem remains what is has always been: telling the difference.

[90] See for example the judgment of the Supreme Court delivered by Cory, J., in *R.* v. *McCraw* (1991), 66 C.C.C. (3d) 517. Although the psychological harm suffered by rape victims was recognized, it was observed at 526 that:

> [v]iolence and the threat of serious bodily harm are indeed the hallmarks of rape.

[91] (1984), 40 C.R. (3d) 282.

[92] [1987] 2 S.C.R. 293 at 302.

The Court went on to say that of relevance is[93]:

> [t]he part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force. ... The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

In *R.* v. *K.B.V.*[94] the accused appealed his conviction of sexual assault for grabbing his 3 year old son in the genital area. He did this to discipline him rather than for sexual gratification. The Supreme Court noted that the absence of sexual gratification is only one of many factors to be considered. As a result the Supreme Court upheld the appellant's conviction on the basis that the assault was such that the sexual integrity of the appellant's son was violated.

(b) the introduction of offences specific to child sexual abuse

Bill C-15 was proclaimed by the Federal Government on January 1, 1988[95]. It created the new offences of sexual interference[96], invitation to sexual touching[97], and sexual

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[93] *Ibid.*

[94] [1993] S.C.J. No. 78 (Q.L.).

[95] *An Act to amend the Criminal Code and the Canada Evidence Act*, *supra* note 64.

[96] Now section 151 of the *Criminal Code*. This provides that the offence of sexual interference is committed where any person:

> who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years. This is punishable by

exploitation[98], following much of the *Badgley Report's* recommendations. These offences replace some of the more archaic fact-specific offences[99], and represent the first sustained legislative attempt to formally prohibit the sexual exploitation of children by virtue of abuse of power.

Under s.150.1(3) a young offender aged twelve or thirteen may not be tried for an offence under section 151 or 152 or subsection 173(2), unless he is in a position of trust or authority towards the complainant or is a person with whom the complainant is in a

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> imprisonment for a term not exceeding ten years, or summarily.

[97] Section 152 provides that:

> Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of fourteen years, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

The *Badgley Report* found that such an invitation is especially typical of an ongoing sexual abuse situation, (*supra* note 13 at 236). This is an improvement on the old law, under which the offender could not be charged with sexual assault unless he touched the child. This is also a hybrid offence which is more flexible than the former offence of gross indecency which was strictly indictable.

[98] Section 153 provides protection from sexual exploitation to boys and girls between 14 and 18 by someone in a position of trust or authority over them, or with whom they are in a relationship of dependency:

> Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who
> (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or
> (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
> (2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

[99] Bill C-15 repealed the offences of sexual intercourse with a female under 14; seduction of a female between 16 and 18; seduction under promise of marriage; sexual intercourse with a stepdaughter and other; and with a female employee, and seduction of female passengers on vessels.

relationship of dependency. The *Badgley Report* found that children are just as likely to be sexually victimized by someone their own age as by an older person[100], and the question remains as to whether sections 150.1(2) and 150.1(3) will legitimate situations which actually involve coercion. Much depends on how the courts define a "position of trust or authority". The thirteen year old babysitter, for example, who fondles the child he is babysitting is a relatively clearcut example of abuse of position, but the case of a girl who submits to sexual activity because of the social pressure and physically larger stature exerted by her male peer is less clear.

Several other provisions of the new Act should be noted. A new offence of exposing genitals to a child under 14 years was created[101]. This responds to the finding of the *Badgley Report* that exposures are the most common form of "unwanted sexual act". The report also found that, contrary to popular opinion, these acts are potentially harmful in themselves, and also are frequently followed by an actual sexual assault[102]. Section 170 (the offence of a parent or guardian procuring sexual activity) is now gender-neutral, and amended to prohibit the procuring in general of any sexual activity prohibited by the

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[100] *Supra* note 13 at 507.

[101] Now s.173(2) of the *Criminal Code*, R.S.C. 1985, c.C-46. This provides that:

> Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction.

[102] *Supra* note 13 at 236-237.

Code with a person other than the parent or guardian[103]. Section 171 (the offence of a householder permitting sexual activity) is similarly made gender-neutral, and broadened to prohibit the permission of any sexual activity prohibited by the *Code*[104].

(3) The Defences

(a) consent

With respect to complainants older than fourteen years, consent was a defence to rape. It is clear from the case law that the criterion of force has often been used as a measure of consent[105]. The myth that rape involves a violent attack by a stranger resulted in the

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[103] It provides:

> Every parent or guardian of a person under the age of eighteen years who procures that person for the purpose of engaging in any sexual activity prohibited by this Act with a person other than the parent or guardian is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, if the person procured for that purpose is under the age of fourteen years, or to imprisonment for a term not exceeding two years if the person so procured is fourteen years of age or more but under the age of eighteen years.

[104] It provides:

> Every owner, occupier or manager of premises or other person who has control of premises or assists in the management of control of premises who knowingly permits a person under the age of eighteen years to resort to or to be in or on the premises for the purpose of engaging in any sexual activity prohibited by this Act is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, if the person in question is under the age of fourteen years, or to imprisonment for a term not exceeding two years if the person in question is fourteen years of age or more but under eighteen years.

[105] The definition of rape in the eighteenth century included the use of force as a requirement, see Blackstone, *supra* note 33 at 210. In the words of Catharine MacKinnon, judicial decisions reveal that "acceptable sex, in the legal perspective, can entail a lot of force"; *Towards a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989) at 173. Section 265(3) provides that the victim does not consent by virtue of the use, or threatened use of fraud, or as a result of the exercise of fraud or authority. The emphasis on force and fraud fails to confront the problem of everyday social coercion of females by men. The new s.273.1 of the *Code*, introduced by *An Act to amend the Criminal Code*, S.C. 1982, c.38, specifies additional (nonexhaustive) factors which negate consent. It is provided that no consent is obtained for the purposes of sections 271, 272, and 273, where (among other things), the agreement is expressed by the words or conduct of a person other than the complainant; the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; and the complainant expresses, by words or conduct, a lack of agreement to continue to engage in the activity. The

expectation that the non-consenting victim would display substantial physical injury and have forcibly resisted her attacker[106]. This virtually rendered the offence of rape inapplicable to cases of child sexual abuse. Frequently there is no physical evidence of the abuse, as typically the sexual activity progresses gradually. In general the offender need not resort to violence in order to abuse the young person, but need only rely on his social power or authority.

Carol Smart's insight is that the binary logic of consent/non-consent does not allow for ambiguities in a complainant's account of rape[107]:

> Hence a woman may agree to a certain amount of intimacy, but not to sexual intercourse. In the legal model, however, consent to the former is consent to full intercourse.

Furthermore, feminists have problematized the notion that women and young people can give full consent to sexual relations. This suggests that the parties are negotiating from equal positions at arms length, and fails to recognize the sexual coercion of women and children by men. The feminist critique of consent seems particularly applicable in relation to child-adult sexual relations: given the present subordinate social position of children within the family, and their social, economic, political and physical dependence on adults, it is impossible for them to "consent" to sexual relations in any real sense.

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concern is that the judges will not recognize the complainant's lack of consent where her ability to express lack of consent has been completely eroded by virtue of the social context of male coercion.

[106] As noted by Professor C.Backhouse & L.Schoenroth, "A Comparative Survey of Canadian and American Rape Law" (1983) 6 Can.-U.S. L.J. 48 at 66-67.

[107] *Supra* note 22 at 34.

(b) the accused's belief in the complainant's consent

The offence of rape required that the perpetrator knew that the female was not consenting, or was reckless as to whether she was consenting or not[108]. However, by a 3:2 majority, the House of Lords held in *Morgan* that the accused's belief in the woman's consent need not be reasonable, but merely honest. The reasonableness of that belief was held only to be relevant as to whether the accused actually held the belief or not. This was followed by the Supreme Court of Canada in *R.* v. *Pappajohn*[109], and was codified in s.265(4) of the *Criminal Code*[110].

The feminist charge is that this reflected the male assumption that their subjective viewpoint represented the objective or entire reality of a situation[111]. The defence of honest but mistaken belief imposed no incentive on the accused to inquire into the state of mind of the complainant, but sanctioned coercive male conduct under the guise of "honest belief" and allowed him to presume consent in the absence of what was required

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[108] *Per* Lord Hailsham in the English case of *D.P.P.* v. *Morgan*, [1975] 2 All E.R. 347 at 362 [hereinafter *Morgan*].

[109] [1980] 2 S.C.R. 120.

[110] R.S.C. 1985, c.C-46, as am. by S.C. 1980-81-82-83, c.125, s.19. This provides:

> Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[111] Catharine MacKinnon observes that this defence "affirmatively awards men with acquittals for not comprehending women's point of view in sexual encounters". The end result is that the complainant did not consent to sex and was therefore raped, but not by a rapist, (*supra* note 105 at 182-3).

to be quite forcible resistance from the complainant[112]. This required the complainant's account to fit the myth that a rape always involves a brutal struggle with the perpetrator, and ignored the reality that often the complainant's strategy is non-resistance, particularly in the case of a child[113].

The defence of honest albeit unreasonable belief in consent has now been abolished by the new s.273.2 of the *Criminal Code*[114], which provides that:

> it is no defence to a charge of sexual assault that the accused believed that the complainant consented to sexual activity where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting[115].

From a feminist perspective, the concern is that male assumptions as to how they may obtain consent to sexual intercourse will simply be incorporated into the standard of

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[112] Elizabeth Sheehy states in "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1990) 21 Ottawa L.Rev. 151 at 173:

> The standard it creates cannot distinguish between submission, consent to male advances, and mutually desired sexual interaction, focussing as it does solely on the accused's perception of the event. It is thus clearly possible, as *Pappajohn* and later cases illustrate, for an accused who has used a weapon or threats of violence,... or who has acted in concert with other men, to blithely assert, and possibly to succeed with a mistake of fact defence.

She notes at 160 that this defence was admitted in recent cases where in fact the evidence suggested extremely coercive behaviour on the part of the accused. The defence was admitted in *R.* v. *Laybourn* in which case a prostitute, who negotiated for sex with one of the accused, was confronted by all three accused in the motel room, [1987] 1 S.C.R. 782; and in *R.* v. *Wald*, where the defendants used a gun, meat cleaver, and attempted to strangle the victim, [1989] 3 W.W.R. 324. The defence was similarly admitted in *Sansregret* v. *R.*, [1985] 1 S.C.R. 570, in which case the defendant broke into his ex-girlfriend's house and threatened her with a weapon: in order to placate him she agreed to have sexual intercourse. The courts failed, however, to "recognize the unreality" of the defence theory in these cases.

[113] As is noted by E. Sheehy, *ibid.* at 174.

[114] Introduced by *An Act to amend the Criminal Code*, S.C. 1992, c.38.

[115] Section 273.2 also provides that it is not a defence to a charge under s.271, 272 or 273 where the accused's belief in the complainant's consent arose from the accused's self-induced intoxication, or recklessness or wilful blindness.

reasonableness. Furthermore, the new section requires that "the circumstances known to the accused at the time" must be taken into account in determining whether the accused took reasonable steps to ascertain whether the complainant was consenting. This reintroduces a subjective notion into what is ostensibly an objective test. It needs to be recognized that the perpetrator need not have used a weapon or behaved in an aggressive manner to nullify consent, as male social stature alone may obviate consent.

(c) defences available where the complainant is under 14

The offences prohibiting sexual intercourse with young females presumed that young girls would consent to sexual intercourse, but rendered their consent irrelevant[116]. Further, in 1892 it was provided that the accused's belief concerning the girl's age was also irrelevant[117].

Bill C-127[118] retained the notion that persons under a certain age generally could not consent to sexual activity[119]. Bill C-127 also recognized that consensual sexual activity

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[116] Section 140, for example, provided that the consent of the female to sexual intercourse was no defence, (R.S.C. 1970, c-34). See also the viewpoint of J. Tregarthen, a barrister, who wrote in 1915 that, in most cases of an offence against a girl between the age of 13 and 16 with her consent, "the girl is a conspirator rather than a victim, and any subsequent statement is in the nature of a confession rather than a complaint"; *The Law of Hearsay Evidence* (London: Stevens & Sons, 1915) at 131.

[117] S.C. 1892, c.29, s.269 and s.270.

[118] Enacted as an *Act to amend the Criminal Code in relation to Sexual Offences and other Offences against the Person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c.125, s.6.

[119] Section 271(2) of the *Code* provided:

> Where an accused is charged with an offence under subsection(1), or section 272 or 273 in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years

could take place between adolescents in certain limited circumstances[120]. Section 271(2) stated that where an accused was charged with any of the three sexual assault offences, consent was not a defence where the complainant was under fourteen years of age "unless the accused [was] less than three years older than the complainant". The problem was that the "close in age" defence applied to all three sexual assault offences, and countenanced highly abusive behaviour. To some extent this was rectified by the new section 150.1(2), introduced by Bill C-15, which provides that:

> (1) Where an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.
>
> (2) Notwithstanding subsection (1), where an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is twelve years of age or more but under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused
> (a) is twelve years of age or more but under the age of sixteen years;
> (b) is less than two years older than the complainant; and
> (c) is neither in a position of trust or authority towards the complainant nor is a person with whom the complainant is in a relationship of dependency.

Such a complainant can no longer consent to the more serious sexual activity falling within s.272 and s.273. However, despite the limitations on the defence of consent, the question is whether, to the extent that it is available, it will reintroduce the problems surrounding the issue of consent which women have encountered with respect to rape

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older than the complainant.

[120] However, because the new law decriminalizes consensual sexual activity for persons aged 14-18, the effect of maintaining anal intercourse [s.154(1)] as an offence for 14 to 18 year olds is to legitimate heterosexual activity for adolescents while prohibiting homosexuality.

law. The *Badgley Report* argued forceably against such a "close in age" defence, as their findings revealed the[121]:

> sheer comparability in the types of sexual acts perpetrated by offenders who were either younger than, less than three years older than, or more than three years older than their victims.

The dilemma for feminists is that[122]:

> in conditions of sexual inequality, women are oppressed by both sexual freedom and societal control of sexuality. Sexual freedom turns out to be freedom for men to exploit women; the burden of social control of sexuality falls primarily upon women.

This illustrates the limitations of law reform, which can only go so far in addressing the underlying social issues which perpetuate the sexual coercion of females. Although criminal law prohibitions are important insofar as they indicate that society will not tolerate child sexual abuse, they are only part of the solution to the problem of male sexual domination of women and children.

(d) defence of due diligence with respect to the complainant's age

Bill C-15 provided that the accused will not be able to claim he believed the victim was over the age of 14 unless "reasonable steps" were taken to ascertain the victim's actual

[121] The Committee also found from their National Police Force Survey that "proportionately, offenders who were less than three years older than their victims were appreciably more likely to use threats or force...than offenders who were more than three years older than their victims", (*supra* note 13 at 507).

[122] F. Olsen, *supra* note 72 at 430.

age[123]. However, judicial decisions to date have generally embodied a very male notion of what constitutes "reasonable steps", as is reflected in judicial *dicta* to the effect that "[s]ometimes it will not take much[124]". In R. v. *Hayes* MacKenzie, J., suggested that in some circumstances the only step a reasonable person would be required to take to ascertain the age of another person would be simply to look at him or her[125].

IV CONCLUSION

The substantive offences historically failed to protect sexually abused children. The traditional requirements of penetration and force failed to take into account the dynamics of child sexual abuse, and reflect a very male notion of sexual relations. Offences were directed at the protection of male proprietary interests in virtuous females. There was little recognition of the inequality in the social power between a child and adult. The statutory rape offences which rendered irrelevant the consent of the child, constructed the child as otherwise consenting; similarly the offence of incest constructed the child as being capable of consenting to inherently unequal sexual relations. The offences

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[123] s.150.1(4) reads:

> It is not a defence to a charge under s.151 or 152, ss.160(3) or 173(2), or s.271, 272 or 273 that the accused believed that the complainant was fourteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

s.150.1(5) reads:

> It is not a defence to a charge under s.153, 159, 170, 171 or 172 or subsection 212(2) or (4) that the accused believed that the complainant was eighteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

[124] Mitchell, J.A., in *R.* v. *R.S.M.* (1991), 69 C.C.C. (3d) 223 at 226 (P.E.I.C.A.).

[125] (1991), 12 W.C.B. (2d) 457 (Alta. Q.B.).

frequently blamed the child for sexual abuse rather than adult men who abused their power, as for example in the "comparison of blame" provisions.

The *Criminal Code* now provides a new arsenal of offences which prohibits child sexual abuse more directly. Although this is to be welcomed, a feminist concern is that interpretation of the new offences by old prejudicial beliefs (as for example in the case of the due diligence defence with respect to the age of the complainant), may erode this protection. Another feminist concern is that in practice the substantive offences are undermined by the rules of evidence. This concern is the focus of the following chapters.

CHAPTER 5

BURDENS OF PROOF IN CHILD SEXUAL ABUSE CASES

I INTRODUCTION

In this chapter I will assess the differing standards of proof which must be met in the criminal trial, in child protection proceedings and in parental custody disputes, before the courts will recognize the existence of child sexual abuse. My aim is to examine the beliefs about child sexual abuse underlying the application of the various standards of proof in child sexual abuse cases.

II BURDENS OF PROOF

(1) In the Criminal Trial

The criminal trial is premised on adversarial principles, according to which the two sides (the Crown and the accused) present their opposing accounts in front of an impartial judge[1]. Evans, J.A., canvassed the assumptions underlying the adversarial system in the following way[2]:

> [t]his procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matter in controversy.

In a criminal trial the paramount consideration has traditionally been the rights of the accused, the reason for this being that the liberty and freedom of the accused is at stake.

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[1] The complainant in child sexual abuse cases is relegated to the position of Crown witness.

[2] *Phillips* v. *Ford Motor Company* (1971), 18 D.L.R. (3d) 641 at 661 (Ont.C.A.).

Section 11(d) of the *Canadian Charter of Rights and Freedoms*[3] entrenches the right to be presumed innocent until found guilty. The high criminal burden of proof also reflects this concern: the onus of proof is on the Crown to prove the guilt of the accused beyond a reasonable doubt. The Ontario Court of Appeal in *R.* v. *Campbell* stated that "reasonable possibilities in the accused's favour may give rise to reasonable doubt"[4]. In other words, even where the evidence strongly indicates that the accused committed the offence, a possibility otherwise is resolved in favour of the accused.

In child sexual abuse cases this burden of proof often renders it impossible to prove an allegation of abuse. Typically there is no physical evidence in child sexual abuse cases due to late disclosure, and as the perpetrator generally abuses the child in private there are no witnesses. As a result the case against the accused often rests on the child's account of sexual abuse against the denial of the accused.

In this situation, the existence of the "third alternative" in applying the "reasonable doubt" rule undermines the child's account. In *R.* v. *W.(D.)*[5] the Supreme Court held that the trial judge was incorrect in directing the jury that in order to render a verdict they must decide between the complainant's account or the accused's account. The trial judge stated that if the jury believed the complainant, they were to convict the accused.

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

[4] (1978), 38 C.C.C. (2d) 6 at 22 (Ont. C.A.).

[5] (1991), 63 C.C.C. (3d) 397 (S.C.C.).

On the other hand, if they believed the accused's evidence, they were to acquit. The Court held that this excluded "the third alternative", to which the trial judge *must* alert the jury[6]:

> namely, that the jury, without believing the accused, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to his guilt.

The majority and minority judgments agreed with this requirement, but differed as to whether this was in fact what the trial judge had conveyed to the jury. Sopinka, J., with the concurrence of McLachlin, J., (in the minority), was of the view that there was a reasonable doubt as to the credibility of the complainant in this case, in the absence of strong corroborative evidence[7]:

> The complainant is 16 years old [and the accused's niece], an unemployed dropout, and after leaving her parents' home has since been thrown out of several friend's homes. As the defence has made clear, she did not complain of these incidents immediately after they occurred despite numerous opportunities to do so, and indeed went back to the accused's house after both drives. She claimed that she returned because she had left her purse behind. Furthermore, it was the position of the defence that the allegations were made out of spite because the accused had ordered the complainant from his home: because of his and his wife's very constrained financial situation, they simply could not afford to have guests.

The judgment suggests that because she is at 16 "an unemployed dropout", she is not a credible witness. Her account of sexual abuse is eliminated due to the fact that she ran away from home and has transient friendships. These are in fact indicators of child

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[6] *Ibid.* at 409.

[7] *Ibid.* at 400.

sexual abuse[8], but are instead interpreted to discredit her account. This substantiates the feminist contention that women who live outside of traditional male protection fail to obtain legal protection. It also reflects a middle and upper class bias against the unemployed. Further it reflects denial of the existence and dynamics of child sexual abuse.

The courts' application of the reasonable doubt rule is fueled by the "rape myths" identified by feminists, which disqualify the complainant's account of child sexual abuse. In *R.* v. *K.(V.)* the British Columbia Court of Appeal held that the trial judge properly directed himself to the various factors which could raise a reasonable doubt as to the complainant's credibility. These factors were said to include the propensity in some cases of child sexual abuse complainants to lie out of self-interest, self-exculpation or vindictiveness[9]. In *R.* v. *Bercier a.k.a. Tucker*[10] the only evidence of sexual assault was provided by the account of the two complainants, aged 5 and 11. This was met by the accused's simple denial. The trial judge believed the complainants, despite some vagueness in dates and a suggestion that the complaint may have originated from one of

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[8] As noted by A. Browne & D. Finkelhor, "Initial and Long Term Effects: A Review of the Research" in D. Finkelhor *et al.*, eds., *A Sourcebook on Child Sexual Abuse* (Beverly Hills: SAGE, 1986) 143 at 151-52.

[9] (1991), 68 C.C.C. (3d) 18 at 29 (B.C.C.A.), quoting Lord Morris of Borth-y-Guest in *Director of Public Prosecutions* v. *Hester*, [1973] A.C. 296 at 309 (H.L.):

> There may in some cases be motives of self-interest, or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse. Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood.

[10] (1992), 120 A.R. 393 (C.A.).

the mothers as a result of a "family feud". The judge convicted the accused. The Court of Appeal quashed the accused's conviction on the grounds that the trial judge's approach[11]:

> may well have inhibited him from objectively considering whether or not the evidence of [the accused], in all of the circumstances, would raise a reasonable doubt.

The Supreme Court in *R.* v. *R.C.*[12] also alerted to the existence of the "third alternative". The Court upheld the minority judgment of Rothman, J.A., from the court below[13], and restored the accused's conviction. Rothman, J.A., held that it would have been preferable for the trial judge to have given reasons for rejecting the accused's testimony. However, he held it was not essential by virtue of the fact that the trial judge gave a detailed explanation for believing the complainant, the accused's denials did not raise a reasonable doubt, and the frailties of a child's testimony were considered.

(2) In the Civil Context

(a) in custody disputes

In a custody case it must be shown that it is in the child's best interests to remain with one parent as opposed to the other. In practice however, divorce cases are highly adversarial, and often the interests of the child are subordinated to the conflicting

[11] *Ibid.* at 395.

[12] [1993] S.C.J. No. 52 (Q.L.).

[13] *R.* v. *R.C.*, [1992] A.Q. No. 1022 (Que. C.A.) (Q.L.).

interests of the parents. An allegation of child sexual abuse inevitably heightens the adversarial nature of the proceedings. As Nicholas Bala and Jane Anweiler observe, when an allegation of child sexual abuse is made within a parental custody dispute[14]:

> the focus of the inquiry shifts away from the best interests of the child towards an investigation of whether the abuse actually occurred.

In some cases the courts have held that the parent alleging child sexual abuse in a custody dispute is required to prove it according to the ordinary civil standard of proof, on the balance of probability[15]. However, in other cases the courts have accepted suggestions that the degree of certainty must be commensurate with the gravity of the allegations. For example, Kirkland, J., in *Re. C.A.S., Belleville, Hastings & Trenton and H.*, a combined child protection and custody application involving an allegation by the father of sexual abuse by the mother's common law partner, required "certainty beyond question" due to the lifetime stigma attaching to such a finding[16]. Underlying this requirement of an extremely high standard of proof is distrust of children, and an

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[14] "Allegations of Sexual Abuse in a Parental Custody Dispute: Smokescreen or Fire?" (1987) 2 Fam. L.Q. 343 at 343. In support of this they quote Labrosse, J., in *O.* v. *O.*, (1980), 30 O.R. (2d) 588 at 592-593, 17 R.F.L. (2d) 336 at 340-341 (H.C.):

> If one aspect of this case had to be singled out, it would have to be the mother's allegation that K [the child] told her that he had sex with his father. This allegation is emphatically denied by the father. In my view a finding at trial that this allegation is true would be determinative of the issue of custody. A father who is guilty of such a despicable act would be unfit to have custody of a son. If, on the other hand, there is a finding at trial that this allegation is not true but a fabrication on the part of the mother, it seems to me that it could be equally determinative. Is a mother who is capable of such a vile accusation fit to look after her son?

[15] See *H.* v. *J.* (1991), 34 R.F.L. (3d) 361 at 365 (Sask Q.B.).

[16] (1984), 27 A.C.W.S. (2d) 158 (Ont. Fam. Ct.).

unwillingness to take seriously accounts of child sexual abuse[17]:

> [t]he danger in validating such an allegation on the words of a four-year-old child, even in the context of all the sociological protective devices, is perilous.

Although some judges have been prepared to err on the side of caution to protect children from any risk of being sexually abused, others are more concerned to protect the position of accused fathers, who it is said face the "unfair onus" of answering those allegations[18].

The burden of proof is increased by the necessity of refuting what amounts almost to a judicial presumption that allegations of sexual abuse are fabricated in parental custody disputes. The literature indicates that false allegations may be more common where the allegation of sexual abuse derives from a parent[19]. However, the problem of underreporting is far greater than is the problem of false allegations[20]. In *M.(C.)* v.

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[17] *Ibid.* at 158.

[18] See *Flannigan* v. *Murphy* (1985), 31 A.C.W.S. (2d) 448 (Ont. Master). In this case Master Cork stated (*ibid.*):

> Certainly, the raising of such an allegation as child abuse, against the other party in the action, is a most formidable and potentially damaging weapon against the recipient of those allegations, and to my view it is extremely doubtful that, when once raised, a recipient party can indeed answer those allegations to the complete and total satisfaction of everyone concerned thereafter. Perhaps then this raises a very unfair onus on the recipient party to answer the allegations, but as I have stated, I believe it then inherent on the court that it should respond to the answering party as fully as possible, so as to offset the initial unfortunate results of those allegations put on the responding party.

[19] See D.P. Jones & J.M. McGraw, "Reliable and Fictitious Accounts of Sexual Abuse of Children" (1987) 2 Journal of Interpersonal Violence 27. They found that of the 6% of 576 cases of suspected child sexual abuse made to the Denver Department of Social Services in 1983 which were false allegations, three-fourths of these were made by adults, frequently in the context of a custody dispute.

[20] See Solicitor General of Canada, *Female Victims of Crime: C[illegible]ian Urban Victimization Survey* (Ottawa: Supply & Services Canada, 1985) at 2.

M.(G.)[21] a four year old child stated that she had been sexually abused by her father during access periods. Wallace, J., first noted that the mother's sister had herself been sexually abused, an allegation which "must certainly have been a topic of discussion within the family in the weeks immediately preceding [the child's] disclosure". With respect to the child's disclosure Wallace, J., then raised the following questions[22]:

> Had the child been privy to or overheard conversations which served as the basis for her own complaints? Did Grandmother H., from her own preoccupation with the subject within her own family, unwittingly or deliberately suggest abuse to C? Did the H. family, in its, perhaps overzealous, support of the applicant [the mother], recognize and use an allegation of sexual abuse as a lethal weapon in this already acrimonious custody/access dispute? Had the applicant so alienated the children from their father that C. felt compelled to fabricate the sexual complaint in order to please her mother?

Another prejudicial belief which is present in the caselaw is the notion that feminist therapists "brainwash" children[23]. This frequently derives from a misunderstanding of the nature of disclosure. Disclosure by a child of sexual abuse should be understood as a process evolving over a period of time[24]. It is often necessary for a therapist to develop rapport with a child before they will feel safe enough to disclose sexual abuse. Frequently children recant due to pressure from family, shame and fear of the

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[21] (1992), 40 R.F.L. (3d) 1 (Ont. U.F.C.).

[22] *Ibid.* at 4.

[23] See J. Robb, "Evidence Issues in Child Sexual Abuse Cases" (Paper presented to the Canadian Bar Association Mid-Winter Meeting, 1993). [unpublished] at 13-14.

[24] See J. Robb, *ibid.* at 45.

perpetrator[25]. These features of the disclosure process have, however, been interpreted by the courts as evidence that the therapist compelled the child under pressure to make an allegation[26].

Furthermore, the case law reflects a tendency to penalize mothers for pursuing an allegation of child sexual abuse against the father, where this is ultimately unproven on the balance of probabilities. The assumption tends to be that if an allegation is unproven it has been made maliciously by the mother. This underlies the comments of Labrosse J. in *O.* v. *O.* that[27]:

> the mother is very interested in the outcome of these proceedings, and I cannot disregard the possibility that the alleged statement is very convenient for her.

It is important for the courts to support investigations undertaken as a result of a mother's honest fear that her children are being sexually abused, even if no sexual abuse is ultimately found to have occurred. An example of the punitive judicial approach towards mothers who allege child sexual abuse is *Bartesko* v. *Bartesko*, in which case the allegations of sexual abuse of the children were not proven, and the mother lost custody of her children. The British Columbia Court of Appeal observed that[28]:

> the decision in this case relating to custody was reached mainly because, firstly,

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[25] See R. Summitt, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 Child Abuse and Neglect 177 at 187.

[26] J. Robb (*ibid.*) observes that this was accepted in *D.* v. *D.*, (3 November 1989), (Alta. Q.B.) [unreported]. In this case it was stated that the therapy of a child abuse treatment centre is almost a "brainwashing procedure".

[27] *Supra* note 14 at 593.

[28] (1991), 31 R.F.L. (3d) 213 at 215 (B.C.C.A.).

> the learned trial Judge decided that the mother was 'rather manipulative and inclined to depart from the truth when it suits her'.

The Court of Appeal upheld the decision of the trial Judge, in effect confirming that the trial Judge's assessment of her character justified depriving her of the custody of her children. This judgement loses sight of the fact that what is to be determined in custody cases is what is in the child's best interests.

Even where an allegation of child sexual abuse is proven on the balance of probabilities, the cases indicate that an abusive parent may still get access to the child. In *H.* v. *J.* Guerette, J., found that on the balance of probabilities the father sexually abused his son, and despite this awarded supervised access to the father on the basis that this was in the child's best interests[29].

(b) in child protection proceedings

In *(H.)D.R.* v. *Superintendent of Family & Child Services* the British Columbia Court of Appeal described child protection proceedings in the following way[30]:

> While the inquiry provided for by the Act is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings it is not an adversary proceeding and there is no *lis* before the court. It is an inquiry to determine whether a child is in need of protection and, as the statute directs, the safety and well-being of the child are the paramount considerations.

In a child protection case what is at issue is whether the child is at risk of harm. As in parental custody disputes the courts have generally required that an allegation of child

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[29] (1991), 34 R.F.L. (3d) 361 (Sask Q.B.).

[30] (1984), 41 R.F.L. (2d) 337 at 340 (B.C.C.A.).

sexual abuse be proven on the balance of probabilities[31]. Some courts have even accepted the argument that where the allegations concern a risk of child sexual abuse, a lower standard of proof applies[32].

However, child protection legislation has been interpreted in Alberta to require a higher standard of proof in cases where child sexual abuse is alleged. Russell, J., in *Re: L.(N.), T.(L.) and J.(L.)*[33] was of the view that s.1(2) of the Alberta *Child Welfare Act*[34] requires both reasonable and probable grounds before the court will accept an allegation of child sexual abuse. She stated that[35]:

> [i]t is not sufficient that the probability of the allegations being true is high; they

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[31] see for example *P.(N.)* v. *Regional Children's Guardian*, [1989] A.J. No. 938 (Q.L.), a case involving competing claims for private guardianship of a child, in which Lomas, J., of the Alberta Court of Queen's Bench stated:

> In my opinion that matter is to be determined in the ordinary civil standard of proof and does not require any higher or greater degree of probability than the ordinary standard. To demand proof to a higher degree of probability because sexual abuse is alleged could in my opinion place the child at risk, and the court is not entitled to subject the child to that risk considering the paramount consideration, the best interests of the child.

[32] For example, Proudfoot, J., in *Superintendent of Family and Child Service* v. *M.(B.) and O.(D.)* (1982), 37 B.C.L.R. 32 at 40 (B.C.S.C.) stated:

> While I say the test to be applied is, on the balance of probabilities, as to what is in the best interests of the child, no such test exists when we deal with the element of risk of injury.

One question is the extent to which the application of evidentiary rules in child protection proceedings may be less stringent due to a class bias against people who do not meet a middle class standard of living. It is possible that in these cases the courts are more willing to believe in accounts of child sexual abuse by virtue of the erroneous assumption that child sexual abuse is a lower class phenomenon.

[33] (1986), 72 A.R. 241 (Prov. Ct.).

[34] Which defines a child as being in need of protective services:

> if there are reasonable and probable grounds to believe that the survival, security or development of the child is endangered because... the child has been or there is substantial risk that the child will be... sexually abused by the guardian of the child; or the guardian of the child is unable or unwilling to protect the child from... sexual abuse.

[35] *Supra* note 33 at 252.

> must also be reasonably true. Moreover, the section prescribes the sufficiency of the evidence required in that the court must be satisfied that the child is endangered as a result of a particular event or condition. The court must be satisfied that it is both reasonable and probable that the particular event or condition has occurred or exists.

This standard is difficult to meet, particularly in light of the unwillingness of the courts to accept the word of the child where there is no corroborating evidence.

(3) Simultaneous Criminal and Civil Proceedings

Sometimes there may be simultaneous criminal and civil proceedings. In theory criminal and civil proceedings are quite distinct, and an acquittal in a criminal case should not affect a civil proceeding where there is a lower standard of proof. The *Rogers Report* notes[36], however, that criminal defence counsel and sometimes Crown Attorneys are concerned that the prior giving of evidence in a civil case may "prejudice" the criminal prosecution. However section 13 of the *Charter* provides that no evidence given by accused persons in a civil hearing can be used against them in subsequent criminal prosecutions.

From the perspective of the child it is generally preferable to ensure their protection and determine questions of where they are going to live as quickly as possible in the civil hearing. Another consideration is that despite the fact that the burden of proof is much higher in criminal cases, some Family Court judges are influenced by a prior acquittal,

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[36] *Reaching for Solutions: The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada* by R. Rogers (Ottawa: Supply & Services Canada, 1990) at 72.

which has a prejudicial impact on civil proceedings where child sexual abuse is an issue[37]. In light of this it is apparent that civil cases should be tried first[38].

III CONCLUSION

The high burden of proof in child sexual abuse cases in both civil and criminal proceedings reflects judicial distrust of child complainants and an unwillingness to believe accounts of child sexual abuse. The standard of proof, combined with the judicial unwillingness to accept the word of a child on its own merits, fails to take into account the dynamics of child sexual abuse where typically there are no other witnesses and little physical evidence. The extent to which competency requirements pose a further impediment to the admission of children's evidence in child sexual abuse cases is the focus of the following chapter.

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[37] See the *Rogers Report*, (*ibid.*).

[38] It was also recommended that where there is a transcript available from a prior criminal trial for child sexual abuse, this should be admissible without necessarily requiring witnesses to be heard again, (*ibid.* at 73).

CHAPTER 6

COMPETENCY REQUIREMENTS

I INTRODUCTION

Frequently in child sexual abuse cases the child is the sole witness, and it is extremely important that the child be able to testify as to what occurred. Sopinka, Lederman & Bryant observe that[1]:

> The general rule is that every person is competent to testify in any case, civil or criminal. However, by reason of certain disqualifying rules, individuals who possess relevant and primary knowledge may be precluded from testifying.

In this chapter I will examine the development and application of these "disqualifying rules" to children, and the extent to which they have been precluded from testifying as a result. I will also assess whether the competency requirements have as a result prejudiced the prosecution of child sexual abuse cases and impeded the protection of sexually abused children.

II COMPETENCY REQUIREMENTS IN THE CRIMINAL CONTEXT

(1) The Oath

(a) the oath as a requirement

The competence of children to give evidence traditionally focused on an inquiry as to whether or not they understood the nature of an oath. It appears that at one time the

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[1] J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 577-78. At common law there were rules against the admission of the testimony of certain categories of persons, including the parties to an action, the spouses of the parties, those who were convicted of certain crimes, and those who were incapable of taking an oath; see S.A. Schiff, *Evidence in the Litigation Process*, vol.1, 2d ed. (Toronto: Carswell, 1983) at 144.

courts would admit the unsworn evidence of children, as is recorded in a passage written by Sir Matthew Hale[2]:

> If the rape be committed upon a child under twelve years old, whether or how she may be admitted to give evidence may be considerable. It seems to me, that if it appear to the court, that she hath the sense and understanding that she knows and considers the obligation of an oath, tho she be under twelve years, she may be sworn... But if it be an infant of such tender years, that in point of discretion the court sees it unfit to swear her, yet I think she ought to be heard without oath to give the court information, tho singly of itself it ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable; and my reasons are, 1. The nature of the offense, which is most times secret... 2. Because if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet ... there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those, that swear they heard her say so...

Blackstone also was quite willing to accept children's evidence on the grounds that "infants of very tender years often give the clearest and truest testimony[3]".

However, this more liberal approach was superseded by the case of *R.* v. *Brasier*[4], which established the common law requirement that all witnesses, both adults and children, take an oath before testifying. In that case 12 Justices quashed the defendant's conviction for assault with intent to commit rape of a seven year old girl. At trial the complainant had not been called as a witness, and the complaint had been presented to the court in the form of reported statements made by the infant to others, including her

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[2] *The History of the Pleas of the Crown*, vol. 1, ed. by S. Emlyn (London: Nutt & Gosling, 1736) at 634-635.

[3] *Commentaries on the Laws of England*, vol. 4 (London: Cadell, 1795) at 214.

[4] (1779), 168 E.R. 202.

mother. It was unanimously stated by the Justices that "no testimony whatever can be legally received except upon oath", and therefore that if a child witness were found incompetent to take an oath "their testimony cannot be received[5]".

Adult witnesses were presumed to understand the nature of an oath, but in the case of "children of tender years", a term used by the courts to refer to children under fourteen years[6], the presumption was that they did not understand the nature of an oath. As a result the judge had to conduct an inquiry[7] in order to determine whether the child understood the nature of an oath.

(b) the nature of an oath

In *Brasier* it was held that only where a child had "sufficient knowledge of the nature and consequences of an oath" would the child be permitted to testify[8]. Robertson, J.A., in *R.* v. *Antrobus* adopted the "nature and consequences" test in *Brasier*, and held that in order to be competent to give sworn testimony, a child was required to believe both in the existence of God and that she would be punished by God if she did not speak the

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[5] *Ibid.* at 202-3.

[6] See *R.* v. *Antrobus* (1946), 87 C.C.C. 118 (B.C.C.A.), *R.* v. *Nicholson* (1950), 98 C.C.C. 291 (B.C.S.C.), and *R.* v. *Armstrong* (1959), 125 C.C.C. 56 (B.C.C.A.).

[7] See *R.* v. *Surgenor* (1940), 27 Crim. App. Rep. 175.

[8] *Supra* note 4 at 200.

truth[9].

In some cases, in order to facilitate the admission of the child's testimony, the judge could give the child instruction as to the nature and consequences of the oath[10]. However, some judges did not allow such instruction, as in *R.* v. *Williams*[11]. In this case Patterson, J., would not allow an 8 year old child, who had received religious instruction from a minister, to testify, because he was of the view that[12]:

> the effect of the oath on the conscience of the child should arise from religious feelings of a permanent nature, and not from instruction recently communicated for the purposes of a trial.

Ronda Bessner observes that the requirement that the child understand the nature and consequences of the oath operated[13]:

> as a substantial barrier to the admissibility of the testimony of many child

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[9] *Supra* note 6 at 119-20. The historical importance of the oath, in a fact-finding process heavily reliant on oral testimony, was that it would bind the witnesses' conscience through fear of divine retribution. Those incapable of taking an oath initially encompassed persons who were not Christians ("infidels"), or whose religion forbade the taking of the oath on the Christian gospel. This was later modified to allow witnesses who believed in a god, (albeit not the Christian god), and a system of divine rewards and punishments, to take the oath. In *Omychund* v. *Barker* (1744), 26 E.R. 15 (Ch.), it was held that Gentoos could give sworn testimony, as Christians did not have a monopoly on the concept of the oath, which was deemed to be "a religious sanction which mankind have universally established", (*per* Lord Chief Justice Lee, *ibid.* at 31[illegible] [illegible] was further held that the form of the oath could be adapted to meet the particular religious requi[illegible]

[10] As st[illegible] [illegible] v. *Hawke* (1975), 22 C.C.C. (2d) 19 at 29 (Ont. C.A.); see also *R.* v. *Budin* (1981), 32 O.R. 1 at [illegible] [illegible].A.).

[11] (1835), 7 C. & P. 320.

[12] *Ibid.* at 143.

[13] "The Competency of the Child Witness: A Critical Analysis of Bill C-15" (1988-89) 31 Crim. L.Q. 481 at 485.

> witnesses. A child who did not understand the nature of an oath, or did not believe that he or she would suffer divine retribution if he or she told falsehoods, was precluded from being sworn and therefore from testifying at a trial. This common law rule was responsible for many unsuccessful prosecutions of individuals charged with sexual offences and other crimes involving violence against children.

Although children as young as five took the oath[14], in many cases this requirement created a serious impediment to the prosecution of child sexual abuse cases by eliminating the child's testimony[15].

(c) the distinction between sworn and unsworn evidence

In order to alleviate the difficulties posed by the oath requirement, it was modified in Britain by an 1885 statute which provided on charges of "unlawfully and carnally knowing" a girl under 13, or of attempting to do so, the evidence of a child witness or complainant could be received even though unsworn. This unsworn evidence, however, was required to be corroborated "by some other material evidence in support thereof implicating the accused[16]". An 1890 Canadian Act enacted a similar provision with respect to the offences of unlawful carnal knowledge of a girl under 14, or an attempt

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[14] See *Strachan* v. *McGinn* (1936), 50 B.C.L.R. 394 (S.C.), in which case a child of five years and nine months was sworn. In *R.* v. *Brasier* (*supra* note 4), the Justices held that a child under seven years could be sworn.

[15] As is illustrated by the case of *R.* v. *Travers* where, on a trial of the accused for an assault, with intent to rape the 6 year old complainant, the court refused to admit the child's evidence on the grounds that the child could not be presumed to distinguish right from wrong; (1726), 93 E.R. 793 (K.B.). The other reason given for children's incapacity to take the oath was that they were deemed to be incapable of incurring criminal liability, and therefore would not attract the more immediate perjury charge if they were to lie.

[16] *Criminal Law Amendment Act* 1885, 48 & 49 Vict., c.69, s.4 (U.K.).

to do so, and of indecent assault on a female[17]. In 1893 the *Canada Evidence Act*[18] extended the distinction between children's sworn and unsworn evidence to all federal proceedings[19]. This was the predecessor to the recently amended section 16 of the *Canada Evidence Act* which provided[20]:

> (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer..., understand the nature of an oath, the evidence of the child may be admitted, though not given on oath, if, in the opinion of the judges..., the child is possessed of sufficient intelligence to justify the admission of the evidence and understands the duty of speaking the truth.
>
> (2) No case shall be decided on the evidence admitted under subsection (1) alone, but must be corroborated by some other material evidence."

(d) the interpretation of the former section 16

The question raised by these provisions was whether they governed the admissibility of sworn evidence as well as unsworn evidence, or whether children should be sworn according to the test established in *Brasier* and *Antrobus*[21].

In the case of *R.* v *Bannerman* the Manitoba Court of Appeal held that section 16

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[17] *An Act further to amend the Criminal Law*, S.C. 1890, c.37, s.13. A comparable provision was incorporated in the 1892 *Criminal Code*, S.C. 1892, c.29, s.685.

[18] S.C. 1893, c.31, s.25.

[19] The *Canada Evidence Act* applies to all federal offences and federal divorce proceedings. The distinction between sworn and unsworn evidence also featured in the *Juvenile Delinquents Act*, (S.C. 1908, c.40, s.15).

[20] R.S.C. 1985, c.E-10.

[21] As noted by R. Bessner, *supra* note 13 at 483.

Evidence Act required that the witness possessed sufficient intelligence to justify the reception of the evidence, and understood the duty of speaking the truth. The decision of *Fletcher* greatly minimalized the difference between the standard of competency for giving sworn evidence, as compared to that for giving unsworn evidence[26]. In an attempt to clarify the distinction, it was stated that, in order for a child to testify under oath[27]:

> The important consideration is whether the child has a sufficient appreciation of the solemnity of the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.

Where a child's evidence was admitted unsworn, several detrimental consequences resulted, despite the minimal difference between the two tests for sworn and unsworn evidence. First, section 16(2) required corroboration in the case of the unsworn evidence of children prior to conviction. Similarly, section 586 of the *Criminal Code* provided that[28]:

> No person shall be convicted of an offence on the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

This requirement posed a major difficulty in child sexual abuse cases, where it was typically the case that the child was the only witness and there was no medical or other

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[26] As noted by R. Bessner, *supra* note 13 at 491.

[27] *Per* Brooke, J.A., in *Budin*, (*supra* note 10), quoting Bridge, L.J., in the English case of *R.* v. *Hayes*, [1977] 2 All. E.R. 288 at 290-1.

[28] R.S.C. 1970, c.C-34, as rep. by *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c.24, s.15.

evidence to corroborate the child's account[29].

Second, the courts made it even harder for a child to give unsworn evidence by inventing an arbitrary age limit below which even the unsworn testimony of a child could not be received. In *R.* v. *Wallwork*, Goddard, L.C.J., stated that it was undesirable that a child as young as five should be called as a witness[30]. This was echoed in *R.* v. *Wright*, in which case the English Court of Appeal stated that in only exceptional circumstances should a very young child be called[31].

The arbitrary age below which the courts were reluctant to admit the unsworn testimony of children ran against the intent of the statutory provisions to allow children of whatever age to give unsworn testimony. The reason for the decision in *Wallwork*, which was a case of incest, appears to be that the child in that case took the witness stand but was unable to say anything, possibly (although this is not explicitly stated) because of fright. This is not an uncommon reaction of children to the formality of the courtroom and the stress of facing the accused[32]. The courts however failed to acknowledge the extent to which the criminal trial procedure rendered children speechless. Instead, the circum-

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[29] See R. Summitt, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 Child Abuse and Neglect 177 at 181.

[30] (1958), 42 Cr. App. Rep. 153 at 161.

[31] (1990), 90 Cr.App.Rep. 91 at 92 (C.A.).

[32] As noted by J. Spencer & R. Flin, *The Evidence of Children: The Law and the Psychology* (London: Blackstone Press, 1990) at 70.

stances of this individual case was hardened into a rule of practice in *Wright*, a case of indecent assault of a five year old.

This rule of practice was only recently overruled in *R.* v. *Z.*[33], in which case the English Court of Appeal ruled that the criteria for allowing the unsworn testimony of a child to be admitted[34] had to be satisfied on a case by case basis[35], and that no blanket rule as to age applied. Similarly, the Supreme Court in *Khan* held that the age of a child is not a determinative consideration in deciding whether a child is a competent witness[36]. This indicates an increased judicial willingness to accept the unsworn testimony of children.

Third, the test for unsworn evidence under the former section 16(1) required that the child be "possessed of sufficient intelligence to justify the admission of the evidence". Traditionally the evidence of children was regarded with suspicion, as they were assumed

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[33] [1990] 2 All. E.R. 971 (C.A.).

[34] Section 38(1) of the *Children and Young Persons Act* (U.K.), 1933, c.12, provides that:

> Where, in any proceedings..., any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of th evidence, and understands the duty of speaking the truth.

[35] *Per* Lord Lane, C.J., [1990] 2 All. E.R. 971 at 973 (C.A.).

[36] In this case the trial judge refused to let a child of four years and eight months to testify regarding a sexual assault upon her when she was three and one-half years old. McLachlin, J., (*supra* note 25 at 539) stated that:

> ... the trial judge erred in letting himself be swayed by the young age of the child. Were that a determinative consideration, there would be danger that offences against very young children could never be prosecuted.

to be unable to distinguish fact from fantasy[37], and were believed to be extremely suggestible[38]. The legal profession similarly stereotyped the witness abilities of children. In *R.* v. *Kendall* the Supreme Court stated that children are deficient in their capacity of observation, in their capacity of recollection, and in their ability to understand questions and frame answers, and that they lack moral responsibility[39].

Recent psychological studies indicate that these assumptions regarding children's capacity to recall events accurately are too simplistic, and fail to acknowledge that adults also suffer from memory defects in recalling events[40]. John Yuille observes that a further problem is that[41]:

> [t]he transposition of literature from this field to the eyewitness area is often done in an uncritical and decontextualized manner. The result is a collection of generalizations about children that are inaccurate or in need of qualification.

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[37] See G.S. Goodman, "Children's Testimony in Historical Perspective" (1984) 40 J. of Social Issues 9 at 11; also M. Johnson & M. Foley, "Differentiating Fact from Fantasy: The Reliability of Children's Memory" (1984) 40 J. of Social Issues 33 at 34.

[38] As noted by E. Loftus & G. Davies, "Distortions in the Memory of Children" (1984) 40 J. of Social Issues 51 at 51-3.

[39] [1962] S.C.R. 469 at 473.

[40] Johnson & Foley observe that there is evidence "that young children sometimes notice potentially interesting things that older children and adults miss", (*supra* note 37 at 35). At least one case confirms that very young children are able to give reliable evidence about traumatic events. David Jones relates the case of a 3-year-old girl who in 1983 was kidnapped, sexually abused, and dropped into a cesspit, to be found still alive 70 hours later; [1987] Crim. L.R. 667. Five days later in an interview with police she described her kidnapping, and identified the man from a group of 6 photographs provided by police. Her evidence was later confirmed by the suspect himself who confessed to the kidnapping, (*ibid.* at 677-81).

[41] *Child Victims and Witnesses: the Social Science and Legal Literature* (Ottawa: Dept. of Justice, 1988) at 17-18.

The suspicion with which children's evidence was regarded, resulted in judicial unwillingness to admit children's testimony, which impeded the prosecution of child abusers. Following *Kendall* it became mandatory for judges to warn juries as to the dangers of convicting an accused based on the uncorroborated evidence of a *sworn* child witness[42]. As Bessner states[43]:

> When the veracity of children is questioned by law enforcers, judges and society in general, children become easy targets for victimization.

(3) Affirmation

Further statutory modifications allowed witnesses whose religion, or whose "conscientious scruples"[44], forbade them from taking an oath to affirm[45]. Affirmation was placed

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[42] See for example *R.* v. *Tennant and Naccarato*, in which case the Ontario Court of Appeal held that as the trial judge had failed to warn the jury of the frailties of the evidence of 3 children who were sworn as witnesses, the convictions for murder of each of the appellants must be set aside, and a new trial was ordered; (1975), 23 C.C.C. (2d) 80 at 87-8 (Ont. C.A.).

[43] *Supra* note 13 at 502.

[44] It is not clear whether "conscientious scruples" under the *Canada Evidence Act* covers the case of an atheist who objects to taking an oath, and the caselaw is conflicting. In *R.* v. *Leach*, [1966] 1 O.R. 106 (C.A.), the Court interpreted the phrase to include the case of an atheist. In contrast, in *R.* v. *Sveinsson* (1950), 102 C.C.C. 366 (B.C.C.A.), the Court equated "conscientious scruples" with "religious scruples". Under the *Alberta Evidence Act*, R.S.A. 1980, c.A-12, the atheist may affirm by virtue of section 18(1)(c), "on the ground that the taking of an oath would have no binding effect on his conscience".

[45] This was first provided in England by the *Evidence Amendment Act*, (U.K.), 1869, c.68, s.4., to allow Quakers, whose religion prohibits the taking of an oath, to affirm. Section 15(1) of the *Canada Evidence Act* provides:

> Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the court... shall permit that person, instead of being sworn, to make his solemn affirmation..., and that solemn affirmation shall be of the same force and effect as if that person had taken an oath in the usual form.

Section 18(1) of the *Alberta Evidence Act* provides:

> If, in an action or on an occasion when an oath is required or permitted, a person called as a witness, or required or desiring to give evidence..., objects to taking an oath or is objected to as

on the same footing as oath-taking. This continued the trend of reducing the categories of persons who were prohibited from testifying. The Ontario Court of Appeal in *R.* v. *Walsh*[46] held that the rationale for the provision enabling the witness to affirm is that the oath does not bind conscience, rather than that the witness is mentally incompetent, or has a disposition to lie. The court stated that where a person has a "disposition to lie", this moral defect "goes to credibility only, and not to competency[47]". Where the witness is intellectually impaired and as a result does not understand the nature of an oath, he or she may be affirmed provided the witness understands the duty to tell the truth[48].

The authorities were conflicting as to whether children who were unable to understand the nature of an oath could be affirmed provided they understood the duty to tell the truth. In *R.* v. *Budin* Jessup, J.A., in the Ontario Court of Appeal stated, without reasoning, that the right to affirm under the *Canada Evidence Act* did not extend to a

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> incompetent to take an oath, if the presiding judge... is satisfied that the witness or deponent objects to being sworn
> (a) from conscientious scruples
> (b) on the grounds of his religious belief, or
> (c) on the ground that the taking of an oath would have no binding effect on his conscience,
> the witness or deponent may make an affirmation and declaration instead of taking an oath.

[46] (1979), 45 C.C.C. (2d) 199 (Ont. C.A.).

[47] The latter "moral qualification to testify" was stated to be "especially lacking in persons who are insane, and in children", (*ibid.* at 205). The categorization of children with the mentally insane is part of a tradition of distrust towards children's evidence. The Court held that the witness, who was found to be a sociopath, and a satanist, should be allowed to affirm. The witness had testified at the *voir dire* that he would tell the truth according to whether he felt like it or not, that he was aware of the possible perjury charge if he failed to tell the truth, and that in that case he would tell the truth. His propensity to lie went to credibility.

[48] As was held in *R.* v. *Hawke* (1975), 22 C.C.C. (2d) 19 (Ont. C.A.); see also *R.* v. *T.C.D.* (1988), 61 C.R. (3d) 168 (Ont.C.Ct.).

child of tender years[49]. However, in *R.* v. *Connors* the Alberta Court of Appeal held that where a child had a sense of the moral obligation to tell the truth, she could be affirmed[50].

(4) Reform of Section 16

Section 18 of Bill C-15 repealed s.16 of the Canada Evidence Act and substituted the following[51]:

> 16(1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
> (a) whether the person understands the nature of an oath or a solemn affirmation; and
> (b) whether the person is able to communicate the evidence.
> (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence may testify on promising to tell the truth.
> (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.
> (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
> (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

The new section 16 is an attempt to clarify the law and remove past impediments to the

[49] (1981), 32 O.R. 1 at 3 (C.A.).

[50] (1986), 71 A.R. 78 at 80 (Alta. C.A.).

[51] *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c.24, (now R.S.C. 1985 (3d Supp.), c.19) s.18, (proclaimed by the Federal Government on January 1, 1988).

reception of children's evidence. Reception of a child's evidence is no longer dependent on whether she understands the technical and outdated concept of the spiritual consequences of an oath. Further, the section confirms that a child may affirm, and need no longer demonstrate that she believes in God in order to testify. In the case of unsworn evidence, Robins, J.A., in the Ontario Court of Appeal in *Khan* stated that[52]:

> to satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, understands the necessity to tell the truth, and promises to do so.

(a) the child's ability to communicate

In all cases it must be shown that the child has an "ability to communicate[53]". One issue arising from the new section is how this requirement will be understood and assessed by the courts in the context of a criminal trial. It has been observed that frequently a child may be more easily able to communicate in an informal setting, and that the formal atmosphere of a courtroom may intimidate a child into silence[54]. Further, the answer and question formula of cross-examination may be difficult for a child[55]. It is submitted

[52] (1988), 64 C.R. (3d) 281 at 288-89.

[53] It should be noted that the courts have rejected the suggestion that there is a duty on the trial judge to inquire into the competency of a young child at the time of the alleged occurrence before permitting the child to give evidence; the test is whether the child is competent to testify at the time of trial: see *R.* v. *Donovan* (1991), 65 C.C.C. (3d) 511 at 517-18.

[54] Spencer & Flin, *supra* note 32 at 225.

[55] Spencer & Flin note the various features of cross-examination which may impede the child's ability to give a full account of events, (*ibid.* at 226). These include the defence lawyer's strategy of suggesting the witness is lying, making rapid jumps from topic to topic, and the "cross-examiner's trick of extracting half an answer to a question", whereby the witness has no time to give vital qualification to her answer.

that the courts should ensure that the formal setting and methods of examination of the child do not in themselves silence the child and thereby result in the disqualification of a child's evidence. The requisite "ability to communicate" needs to be interpreted taking into account the linguistic and development abilities of children on an individual and age-appropriate basis. Most problematically however, this requirement reflects the inability of the criminal trial, with its reliance on oral evidence, to adequately protect the pre-verbal child.

(b) the inquiry under section 16

It is apparent from the decision of the Saskatchewan Court of Appeal in *R.* v. *D.(R.R.)*[56] that judges must be careful to follow the procedure set down in section 16 in admitting the evidence of children. In this case the trial judge had established that the child "understood the simple everyday duty to speak the truth[57]", and allowed her to testify unsworn. However, it was held that the trial judge had failed to conduct an adequate inquiry specifically directed as to whether the child understood the nature of an oath or affirmation[58], as he assumed she did not. The Court of Appeal held that the words of section 16(1) which provide that "the court *shall*... conduct an inquiry", mandate an inquiry by the judge into the child's understanding of the nature of an oath or

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[56] (1989), 69 C.R. (3d) 267 [hereinafter *D.(R.R.)*].

[57] *Ibid.* at 272.

[58] That is whether the child had a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the [ordinary] duty to tell the truth, (*ibid.*).

affirmation.

Nicholas Bala criticizes this interpretation of section 16 on the grounds that[59]:

> while the failure to conduct an inquiry into a child's capacity to testify is clearly in error, there appears to be no harm in not conducting 2 inquiries. There is no prejudice to the accused if the party calling the child as witness indicates to the court that the inquiry into the child's capacity is being waived...
> Furthermore, it is arguable that the trial judge in *D.(R.R.)* engaged in this combined inquiry, and was satisfied that the child lacked the capacity to give evidence under oath, but had the capacity to testify on promising to tell the truth.

Second in this case the Court found that the trial judge had failed to formally ask the child to "promise to tell the truth[60]". Bala is of the view that as the judge directed the child's attention to the importance of telling the truth, and the child clearly understood the meaning of telling the truth, there was arguably an implicit promise from the child to tell the truth[61].

The result of this overly technical reading of section 16 is that at the retrial the judge will go through the formality of the section 16 inquiry, and then proceed to go through all the evidence again with probably the same outcome at the end of the retrial, which

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[59] "*D.(R.R.)*: Too Strict Interpretation of the New Procedure for the Qualification of Child Witnesses" (1989) 69 C.R. 276 at 277-78.

[60] *Supra* note 56 at 274.

[61] *Supra* note 59 at 278.

unnecessarily imposes considerable further stress on the young complainant[62].

The decision of *D.(R.R.)* to the effect that the inquiry under section 16(1) is mandatory was followed by the Ontario Court of Appeal in *R.* v. *Krack*[63]. However, in that case the Court applied the curative provision of section 686(1)(b)(iv) of the *Criminal Code*[64] which provides:

> On the hearing of an appeal against a conviction... the court of appeal
> (b) may dismiss the appeal where
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby...

It was stated, however, that the courts will only apply section 686 on a case-by-case basis where the accused's right to a fair trial is not prejudiced. In this case, it was held that the failure to conduct the inquiry was a procedural error in view of the fact that the complainant was 13, and that he had been sworn at the preliminary inquiry, had no trouble communicating his evidence, and that counsel appeared to be content that the witness understood the nature of an oath[65]. The court doubted however, whether this curative provision could have been applied in the case of *D.(R.R.)*.

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[62] See N. Bala, *ibid.* This similarly is a problem resulting from the decision in *R.* v. *Demerchant*. Here the New Brunswick Court of Appeal directed a new trial as to whether the appellant had touched the child for a sexual purpose contrary to s.151 of the *Criminal Code*. The trial judge had allowed a 6 year old to testify, sworn after being satisfied that the child understood the duty to tell the truth and the ability to communicate the evidence. The Court of Appeal, however, held that the judge should have satisfied himself that the child understood the nature of an oath as well; (1991), 116 N.B.R. (2d) 247 at 256-261 (C.A.).

[63] (1990), 56 C.C.C. (3d) 555 (Ont. C.A.).

[64] R.S.C. 1985, c.C-46.

[65] *Supra* note 63 at 560-561.

There is still some confusion in the case law as to the new test for admission of a child's sworn testimony. On the one hand, the decision of *R.* v. *R.* suggests that the test is whether the child understands there is an obligation to tell the truth[66]. On the other hand, several cases suggest that the child must understand not only a moral obligation to tell the truth, but also must understand the heightened duty arising from the solemnity of the occasion which binds conscience[67].

Another problem with the present competency requirements under section 16 is that the courts have tended to give less weight to children's evidence where it is given unsworn[68]. There is no justification for this in light of the fact that the distinction between sworn and unsworn evidence has been virtually eroded, with resulting prejudice to the reception of the unsworn evidence of children.

Lastly, the requirement that all children under 14 must be the subject of a judicial inquiry under section 16 perpetuates the assumption that children are inherently unreliable. This is not borne out by the modern psychological studies, and conflicts with the recent move to assess child witnesses on an individual basis. Further, once again children are grouped with persons whose mental capacity is challenged[69]. It is beyond the scope of my thesis

[66] (1989), 71 C.R. (3d) 113 (N.S.C.A.).

[67] See *R.* v. *D.* (1989), 47 C.C.C. (3d) 97 (Sask. C.A.); *R.* v. *Leonard* (1990), 54 C.C.C. (3d) 225 (Ont. C.A.); and *R.* v. *Krack*, *supra* note 63.

[68] See for example *R.* v. *Demerchant* (1991), 116 N.B.R. (2d) 247 at 260 (C.A.).

[69] As noted by R. Bessner, *supra* note 13 at 495.

to assess the competence of mentally disabled persons, but it is submitted that different considerations apply to mentally disabled persons, and that this categorization perpetuates traditional assumptions about the unreliability of children's evidence.

III COMPETENCY REQUIREMENTS IN CIVIL PROCEEDINGS

The provincial statutes similarly imposed a duty on the judge to determine the competency of children under 14, and featured the distinction between sworn and unsworn evidence. Most of the provinces have not followed the lead of Bill C-15, and retain the traditional test for the admission of unsworn evidence according to which it must be shown that the witness "is possessed of sufficient intelligence... and understands the duty of speaking the truth"[70]. Furthermore, the requirement that unsworn evidence be corroborated is also retained[71].

The move to relax the competency requirements has been less significant in civil proceedings by virtue of the fact that frequently judges discourage the involvement of

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[70] *Evidence Act*, R.S.N. 1970, c.115, s.15A; *Family and Child Services Act*, R.S.P.E.I. 1974, c.F-2.01, s.30(2) (applicable only to protection proceedings but no corroboration required); *Evidence Act*, R.S.O. 1980, c.145, s.18; *The Manitoba Evidence Act*, R.S.M. 1987, c.E150, s.24; *Alberta Evidence Act*, R.S.A. 1980, c.A-12, s.20; *Evidence Act*, R.S.Y.T. 1986, c.57, s.22, 15; and *Evidence Act*, R.S.N.W.T. 1974, c.E-4, ss.23, 17; *Evidence Act*, R.S.N.B. 1973, c.E-11, s.24 (corroboration requirement of s.24(2) repealed by S.N.B. 1990, c.17, s. 5); *Evidence Act*, R.S.N.S. 1989, c.154, s.63.

[71] B.C. and Saskatchewan adopted Bill C-15's "ability to communicate" test for unsworn evidence and abolished the requirement of corroboration; see *Miscellaneous Statutes Amendment Act (No. 2), 1988*, S.B.C. 1988, c.46, s.29, enacting *Evidence Act*, R.S.B.C. 1979, c.116, s.82; and *The Saskatchewan Evidence Amendment Act, 1989*, S.S. 1989-90, c.57, s.4, re-enacting *The Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16, s.42; enacting ss.42.1-42.3. Quebec made similar amendments in 1989 but these are restricted to protection cases, see *Youth Protection Act*, R.S.Q., c. P-34.1, ss.85.1, 85.2, as en. S.Q. 1989, c.53, s.8; the traditional competence and corroboration rules apply in other family matters, *Code of Civil Procedure*, R.S.Q., c. C-25, ss. 295, 299, 301.

It would be preferable if the presumption were reversed to allow children's evidence to be admitted as a matter of course, with the question of the reliability of their evidence going to weight[76].

Furthermore, the less restrictive admission of children's testimony must be accompanied by greater judicial and public understanding of the dynamics of child sexual abuse cases. These attitudes towards the evidence of children will be the focus of the following chapters.

[76] As proposed by Spencer & Flin, *ibid.* at 62.

CHAPTER 7

CORROBORATION REQUIREMENTS

I INTRODUCTION

In most child sexual abuse cases, the word of the child is pitted against that of the alleged perpetrator. As a result, the complainant's credibility is of critical importance. In this chapter I will assess the extent to which a child's testimony of sexual abuse is accepted on its own merits by the courts. What evidence do the courts require in addition to the child's testimony before making a finding of child sexual abuse?

II HISTORICAL BACKGROUND

The general rule of the common law is that one person's evidence is sufficient to found a conviction, as long as the witness is sufficiently believable[1]. The only exceptions to this, until the end of the nineteenth century, were the requirements of a plurality of witnesses in the case of treason[2] and perjury[3].

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[1] See A.A. Wakeling, *Corroboration in Canadian Law* (Toronto: Carswell, 1977). Prior to the seventeenth century, jurors acted not only as triers of facts, but also as witnesses, and so there was in fact more than one witness. Wakeling explains that as the jurors were drawn from the local population, they were expected to draw on their personal knowledge of the facts. When their witness function was reduced in the seventeenth century, a general requirement of a plurality of witnesses was not adopted, as the oath was no longer perceived as an inherently reliable method for locating the truth irrespective of the witnesses' character. In contrast, the canon or civil law requires more than one witness to prove a criminal charge, due to the historical reliance placed on multiple oaths, (*ibid.* at 8-10).

[2] In the case of treason, the requirement that at least two witnesses testify derives from a statute enacted in 1547 (St. 1 Edw. 6, c.12, s.22) by Edward VI in order to assure his political rivals that arbitrary charges would not be brought against them, (see Wakeling, *ibid.* at 13-14). This requirement is preserved in the modern *Code*, R.S.C. 1985, c.C-46, s.47(3):

> No person shall be convicted of high treason or treason on the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

(1) Introduction of Corroboration Requirements

In the late nineteenth century there was erosion of the general common law rule as a result of judicial and legislative suspicion that the evidence of certain categories of witnesses was inherently unreliable. The courts required corroborating or supporting evidence before accepting the evidence of certain categories of witness. The categories of witnesses subject to this requirement included accomplices to the offence charged; children of tender years, particularly when giving unsworn evidence; and victims of sexual offences, who predominantly were female[4].

(a) rationale

The primary rationale for the requirement, in the case of children or female complainants in sexual cases, was clearly the belief that women and children, particularly female children, lie[5]. Judicial statements were frequently made to this effect, for example Lord Atkin in *Mattouk* v. *Massad* stated[6]:

> It is... common for young women in cases of this kind to attempt to save appearances by alleging that they were forced to consent... It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated

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[3] This requirement is retained in section 135 of the modern *Code*, (R.S.C. 1985, c.C-46):

> no person shall be convicted of an offence under section 132 [perjury] or section 133 [making false statements in extra-judicial proceedings] on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

[4] See J.G. Hoskins, "The Rise and Fall of the Corroboration Rule in Sexual Offence Cases" (1983) 4 Can. J. of Fam. Law 173 at 176.

[5] See J. Spencer & R. Flin, *The Evidence of Children: The Law and the Psychology* (London: Blackstone Press, 1990) at 168.

[6] [1943] A.C. 588 at 591.

> story of girls of this age in charging men with sexual intercourse. No doubt, there is no law against believing them, but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law.

This belief that women and children lie out of "motives of self-interest, or of self-exculpation; or of vindictiveness"[7]; or out of "undiluted sexual fantasy"[8] was echoed in three English House of Lords cases[9]. The basic mistrust of the testimony of complainants in sexual cases was reflected in the attention Blackstone drew to the importance of "concurring circumstances" which would support the account of a complainant, although he did not express this in terms of a rule[10]. He similarly drew attention to the importance of "concurrent testimony" where a child of tender years testified to a sexual offence[11]. This was also not phrased in terms of a rule, but this would appear to be because of Blackstone's trust in the ability of the jury system to weigh the evidence of the witness. The suspicion of female complainants of sexual

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[7] *Per* Lord Morris of Borth-y-Gest in *D.P.P.* v. *Hester*, [1972] 3 All.E.R. 1056 at 1059 (H.L.) [hereinafter *Hester*].

[8] *Per* Lord Hailsham in *D.P.P.* v. *Kilbourne*, [1973] A.C. 729 at 748 (H.L.).

[9] See *Hester* (*supra* note 7), *Kilbourne* (*ibid.*), and *D.P.P.* v. *Spencer*, [1986] 2 All. E.R. 928 (H.L.).

[10] See Sir W. Blackstone, *Commentaries on the Laws of England*, vol.4 (London: Cadell, 1795) at 214:

> And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stands unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.

[11] *Ibid.* at 214.

offences was stated more directly by Hale[12]:

> [it] must be remembered that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.

This is refuted, however, by the low rates of convictions for charges of sexual abuse[13]. Fear of false accusations and denial of the extent of child sexual abuse underlie these assertions that sexual allegations are difficult to rebut[14].

Child sexual abuse complainants were doubly disadvantaged, as they were subject to corroboration requirements imposed on them not only as complainants of sexual offences, but also were subject to corroboration requirements imposed on them because of their youth. The construction of children's testimony as unreliable derived in part from the

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[12] Sir M. Hale, *History of the Pleas of the Crown*, vol.1, ed. by S. Emlyn (London: Nutt & Gosling, 1736) at 629.

[13] The problem is rather one of low rates of reporting of sexual abuse. The 1985 *Canadian Victimization Survey* reported that only 38% of incidents of sexual aggression were reported to the police; see Solicitor General of Canada, *Female Victims of Crime: Canadian Urban Victimization Survey* (Ottawa: Supply & Services Canada, 1985) at 2. Furthermore, J. Hornek & P. Clark estimate that approximately only 14% of reported child sexual abuse cases are prosecuted; see "Child Testimony: Legal and Developmental Issues" (Paper presented to the Western Judicial Education Centre Conference, May 1990), [unpublished] at 31.

[14] See Spencer & Flin, *supra* note 5 at 168. They state that whether or not *in fact* corroboration requirements discouraged convictions for sexual offences, (or discouraged courts from taking action in civil child protection proceedings) is not known, (*ibid.* at 172). The findings of the empirical studies conducted on this point are inconclusive, in part due to methodological problems; see for example the L.S.E. Jury Project, "Juries and the Rules of Evidence" (1973) Crim. L.R. 208. This study found that in fact more juries convicted when the corroboration warning was given than when it was not, but this finding is weakened by an inadequate sample and the fact that no actual defendant's future was at stake. See also the Canadian study by V.P. Hans & N. Brooks, "Effects of Corroboration Instructions in a Rape Case on Experimental Juries" (1977) 15 Osgoode Hall L.J. 701. It is submitted that the corroboration requirement imposes a large impediment to the prosecution of child sexual abuse cases where typically there is little physical evidence and no witnesses.

Freudian view that children have sexual fantasies directed at their parents, and are unable to distinguish fantasy from reality. More recently suspicion has centred on the role of the mother or feminist therapist in custody and visitation disputes[15], with the result that further evidence of child sexual abuse is required beyond the testimony of the child.

(2) The Meaning of Corroboration

The case of *R.* v. *Baskerville*[16] provided a very restrictive definition of corroboration, which governed criminal cases for several decades. Chief Justice Reading, in delivering the judgment of the court stated that[17]:

> ...evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

In civil cases, in contrast, the corroboration had to induce a rational state of belief in a witness, a less exacting standard than that in criminal cases[18].

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[15] For example, Labrosse, J., in *O.* v. *O.* (1980), 30 O.R. (2d) 588 (Ont. H.C.), stated with respect to an allegation of sexual abuse in the context of a custody dispute, (*ibid.* at 593):

> [t]he mother is very interested in the outcome of these proceedings, and I cannot disregard the possibility that the alleged statement is very convenient for her.

[16] [1916] 2 K.B. 658.

[17] *Ibid.* at 667.

[18] See Middleton, J.A., in *R.* v. *Silverstone*, [1934] O.R. 94 at 98 (C.A.). This more general meaning of corroboration in civil cases was also part of the statutory provisions requiring corroboration in civil cases. See for example the *Alberta Evidence Act*, R.S.A. 1980, c.A-12, s.20(2):

> No case shall be decided on [a child's unsworn testimony] unless the evidence is corroborated by other material evidence.

(a) in the criminal context

(i) there must be testimony independent of the complainant

The requirement of "independence" posed an insurmountable hurdle in many sexual abuse cases, particularly where the victim was a child, and no one but the child and perpetrator were present when the abuse was committed. In *Hubin* v. *R.*[19], a case which involved a charge of carnal knowledge of a girl under the age of fourteen, the young girl, who had accepted a ride with the accused, was able to report the license plate number of the car, and could identify a cushion found in the car bearing that number. The Supreme Court, however, held that these details depended for their evidentiary value upon her account, and did not constitute independent testimony tending to connect the accused with the crime[20].

The complainant's injuries may be held to constitute corroboration, but such evidence has traditionally been treated with suspicion. In *R.* v. *Mudge* the Saskatchewan Court of Appeal stated that the trial judge improperly stressed the condition of the complainant's ripped clothes and injuries, as[21]:

> he fails to take proper account of the possibility that notwithstanding any resistance made by her at first, as evidenced by those matters, she may have ultimately yielded to the prisoner's advances to the extent of giving a real consent.

Women and children were required to be quite considerably injured before they were

[19] (1927), 48 C.C.C. 172 (S.C.C.).

[20] *Ibid.* at 173.

[21] (1930), 52 C.C.C. 402 at 405 (Sask. C.A.).

believed. These attitudes posed even more of a hurdle in the case of child sexual abuse where there is even less likelihood of physical injury or of resistance than where the victim is an adult. As R. Summit states[22]:

> [l]ike the adult victim of rape, the child victim is expected to forcibly resist, to cry for help and to attempt to escape the intrusion. By that standard, almost every child fails.

This standard failed to take account of the helplessness and fear of a child, who by virtue of the adult's position of social and physical power, was generally unable to actively resist. In many cases of child sexual abuse, where the abuser exposed or fondled himself or the child, there was typically no physical evidence.

Evidence of a complainant's emotional demeanour was held to constitute independent corroborating evidence. In *R.* v. *Redpath*[23] for example, Parker, L.C.J., held that where a seven year old girl's distressed condition was viewed by an independent bystander after she was assaulted on a moor, this could amount to corroboration. He also stated that a girl's distressed condition on making a complaint to her mother might be capable of amounting to corroboration, but that the jury should attach little, if any, weight to this, as "[t]he girl making the complaint might well put on an act and simulate distress[24]." The defence in *Murphy & Butt* v. *R.*[25] similarly suggested that the complainant could

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[22] "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 Child Abuse and Neglect 177 at 183.

[23] (1962), 46 Cr.App.R. 319.

[24] *Ibid.* at 321.

[25] [1977] 2 S.C.R. 603.

have feigned hysteria or injured herself to provide support for her story. In response to this suggestion, Spence, J., said that "the determination of whether that has occurred is essentially the task of the jury[26]".

Judicial attitudes not only denied validity to the distress of the sexual abuse complainant, but also required the complainant to display distress in an immediate and stereotypical manner. Frequently the child sexual abuse complainant has a delayed reaction to the abuse. Summit describes how the sexually abused child learns to accommodate the abuse[27]. The accommodation patterns, whereby the child feels responsible for keeping the family together, frequently only breaks down many years after the abuse began, when finally upon entering adolescence the girl begins "acting-out". However, according to de Grandpre, J., in *Murphy*, this probably would not provide adequate corroboration[28]:

> where the complainant exhibits the emotional distress a very considerable time after the incident... the independent character of the evidence is very doubtful and courts have very properly excluded it from consideration as corroboration required by the provisions of the *Code*.

(ii) the evidence must relate to a material particular of the crime

Wakeling suggests that the earlier cases established the principle that there must be

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[26] *Ibid.* at 71.

[27] He describes the syndrome in terms of five categories: 1) secrecy, 2) helplessness, 3) entrapment and accommodation, 4) delayed, conflicted and unconvincing disclosure, and 5) retraction, (*supra* note 22 at 181-85).

[28] *Supra* note 25 at 613.

corroboration on each essential element of the offence which is in dispute[29]. However, the judgment of Mr. Justice de Grandpre in *Warkentin* v. *R.*[30] was ambiguous on this point. Any uncertainty was removed by the majority of the Supreme Court in *Murphy*, in which it was stated that "what is required to be corroborated is a material particular of the *evidence* of the complainant[31]". In this case a 16 year old girl alleged that she had been raped by the two appellants in their basement suite. Only one defendant, Murphy, admitted having intercourse with the girl, and as this was not a gang rape situation, her emotional condition was, according to the dissenting judge, Chief Justice Laskin, only corroborative of the issue of consent with respect to Murphy, but considered in isolation was not corroborative with respect to the disputed intercourse with Butt. However, the majority held that the complainant's emotional condition was *capable* of being corroborative of the complainant's story with respect to Butt, although whether or not it was in fact corroborative was a question for the jury[32]. In *R.* v. *Chayko*[33] however,

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[29] *Supra* note 1 at 28-29.

[30] [1977] 2 S.C.R. 355. As Wakeling notes, it was unclear whether he was of the view that the corroborative evidence need only support one of the issues dependent on the complainant's testimony, or whether the probative value of the corroborative evidence on all the issues in dispute need only be slight, (*ibid.* at 31).

[31] *Supra* note 25 at 615.

[32] See also the interpretation of section 586 of the *Criminal Code* by the Supreme Court in *R.* v. *B. (G.) (No. 1)*. Section 586 of the *Code*, R.S.C. 1970, c.C-34, (rep. by *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c.24, s.15), provided that:

> No person shall be convicted upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

In this case there was corroborating evidence that the assault took place at the time and place which the 5 year old complainant alleged, but there was no evidence, apart from the complainant's identification of the accused, that identified the accused as the perpetrator. Wilson, J., for the majority of the Court stated that if there was additional evidence that corroborated the complainant's evidence in a material particular, with or without implicating the accused, the veracity of the witness would be strengthened, as opposed to requiring that the identity of the accused be corroborated, [1990] 2 S.C.R. 3 at 28. She preferred the less the Alberta Court of Appeal required corroboration of "at least one material particular of the story which, if true, implicates the accused[34]", as opposed to any suggestion that a general bolstering of the complainant's credibility was enough, without reference to particular issues.

(iii) the evidence must connect the accused with the crime

Another ground on which the complainant's statements as to the identity of the car in *Hubin* were held not to constitute corroboration was because they were said to relate solely "to the identity of the accused without connecting him with the crime[35]".

(b) the changing definition of corroboration

The trend in the English courts has been to reject the strict definition of corroboration derived from *Baskerville*. As Lord Hailsham stated in *Kilbourne*, "corroboration is not a technical term of art, but a dictionary word bearing its ordinary meaning[36]." This trend was followed in *R.* v. *Vetrovec*, in which case Dickson, J., delivering the judgment of the Supreme Court stated that what was important was evidence that confirmed the

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strict interpretation by virtue of the fact that, (*ibid.* at 28-29):

> [s]ince the only evidence implicating the accused in many sexual offences against children will be the evidence of the child, imposing too restrictive a standard on their testimony may permit serious offences to go unpunished and perhaps to continue.

[33] (1985), 12 C.C.C. (3d) 156 (Alta. C.A.). See also *R.* v. *Jackson* (1988), 58 Alta. L.R. (2d) 207 (Alta.C.A.).

[34] *Per* Kerans, J.A., *ibid.* at 171.

[35] Quoting Reading, L.C.J., in *Baskerville*, *supra* note 16 at 665.

[36] *Supra* note 8 at 741.

story of the complainant, and convinced the judge that she was telling the truth[37]. Although evidence which implicated the accused tended to support the belief that the complainant was telling the truth, "it cannot be said that this [was] the only sort of evidence which [would] accredit the accomplice"[38]. The civil test of whether the evidence was capable of inducing a rational belief in the suspect witness was invoked. It should be emphasized, however, that despite the relaxing of the definition of corroboration, Dickson, C.J.C., did not challenge the reason for the corroboration requirement itself, which, in sexual abuse cases, was that complainants tend to lie.

(3) When was Corroboration Required?

(a) two forms of the corroboration requirement

The corroboration requirement took one of two forms. One form was provided by several statutory provisions which made proof of certain offences incomplete without corroboration. The case could only be put to the jury on the evidence of the one suspect witness where the judge had first determined that there was evidence capable of constituting corroboration. Alternatively, as a matter of practice in certain cases, the judge warned the jury of the dangers of convicting solely on the testimony of one witness in the absence of corroborating evidence. The judge was required to draw the jury's attention to the evidence which might constitute corroboration if believed. Where the cautionary warning was given, the jury were nonetheless able to convict on the uncorroborated

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[37] [1982] 1 S.C.R. 811 at 825-26.

[38] *Ibid.* at 829.

testimony of the suspect witness provided they were satisfied that the burden of proof was met. The corroboration requirements only came into play if the witness was found to be credible in the first place[39]. This credibility assessment in itself posed a hurdle for the successful prosecution of sexual abuse cases due to assumptions about the unreliability of complainants in sexual abuse cases[40].

(b) sexual offences

(i) the statutory requirement of corroboration

The English *Criminal Law Amendment Act 1885*[41] created the sexual misdemeanours of procuration[42], procuring defilement of a female by threats, fraud or drugs[43] and unlawful carnal knowledge of a girl under the age of thirteen[44], but provided that the evidence of one witness must be corroborated "in a material particular by evidence implicating the accused". The Canadian *Act to Provide for the Punishment of Seduction, and to Afford Protection to Women and Girls*[45], which created the offences of seduction of girls twelve to sixteen, carnal knowledge of idiots and imbeciles, seduction under

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[39] Lord Hailsham stated that "corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible", in *D.P.P.* v. *Kilbourne*, (*supra* note 8 at 746).

[40] See *Mattouk* v. *Massad*, (*supra* note 6); *Hester*, (*supra* note 7); and *Kilbourne*, (*ibid.*).

[41] (U.K.), 48 & 49 Vic., c.69.

[42] Section 2.

[43] section 3.

[44] Section 4.

[45] S.C. 1886, c.52.

was directed specifically at *female* complainants[51].

The more recent section 139[52] required corroboration in the cases of sexual intercourse with the feeble-minded or insane female, incest, seduction of a female between 16 and 18 years of age, seduction under the promise of marriage, sexual intercourse with a female ward or employee, seduction of female passengers on vessels, parent or guardian of a female person procuring her defilement, and procuring. Section 139 was repealed in 1983 by Bill C-127[53]. In its place section 246.4 provided that where the accused was charged with an offence under sections 150 (incest), 157 (gross indecency), 271-73 (the sexual assault offences), no corroboration was required for a conviction and the judge should not instruct the jury that it was unsafe to find the accused guilty in the absence of corroboration.

However, the question remained as to what the position was in relation to other sexual offences not mentioned in section 246.4, such as buggery, the seduction offences, and sexual intercourse with an underage female[54]. Furthermore, the 1983 reforms did not affect the requirement of corroboration for a young person's testimony in section 586 of

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[51] This was repealed in 1974 by the *Criminal Law Amendment Act*, S.C. 1974-75-76, c. 93, s.8.

[52] *Criminal Code*, R.S.C. 1970, c.C-34.

[53] En. as *An Act to amend the Criminal Code in relation to Sexual Offences*, S.C. 1980-81-82, c.125.

[54] As noted by the Committee on Sexual Offences Against Children and Youths *Report of the Committee on Sexual Offences Against Children in Canada* (Ottawa: Supply & Services Canada, August 1984) at 380 [hereinafter the *Badgley Report*].

the *Code*. As noted by the *Badgley Report*, the 1983 reforms did not go far enough to improve the position of the child sexual abuse victim[55].

(ii) the warning rule

Prior to the enactment of the statutory requirement of corroboration in 1955 for common law offences such as rape, attempted rape, and indecent assault, it became the "rule of practice" in England for courts in such cases to give a cautionary warning of the dangers of convicting on the uncorroborated testimony of the complainant. Turgeon, J.A., in the Saskatchewan Court of Appeal in *R.* v. *Ellerton* stated that this was "a rule of practice well established at common law and therefore binding upon our Courts"[56]. In *R.* v. *Mudge* the Court said that this rule of practice had now become "a rule of law", and went so far as to say that putting the evidence of a complainant on the same footing as an ordinary witness amounted to a "miscarriage of justice[57]". Underlying these judgements was blatant prejudice directed specifically against female witnesses. In contrast, in the case of sexual offences which could only be committed against males, the corroboration rule was invoked by virtue of the fact that the boys were accomplices, rather than that they were sexual complainants[58]. The rule was a huge obstacle to the

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[55] *Ibid.*

[56] [1927] 4 D.L.R. 1126 at 1127 (Sask C.A.).

[57] *Supra* note 21 at 403.

[58] See Hoskins, (*supra* note 4 at 181). He notes that in *R.* v. *Baskerville*, (*supra* note 16), a case of gross indecency involving male complainants, there was no suggestion that corroboration was required because of the sexual nature of the offence alleged.

successful prosecution of sexual abuse cases, as not only were the requirements of corroboration stringent and difficult to meet, but also where the appellate courts held that the judge had failed to give an appropriately worded warning, convictions were frequently quashed[59].

The warning rule was subsequently enacted in statutory form in the 1955 revision of the *Criminal Code*[60]. The mandatory corroboration requirement formerly required in the case of statutory rape since 1925, was replaced by the warning requirement[61]. This provision also, as Hoskins notes[62] ended any uncertainty as to whether the corroboration warning applied in the case of indecent assault.

The fear and suspicion of female complainants was more overtly reflected in the 1955 section, as section 134 explicitly directed the warning requirement against "the female

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[59] See Hoskins, *ibid.* at 177. See also *R.* v. *Nowell*, [1983] 3 W.W.R. 328 (B.C.C.A.); *R.* v. *Galsky*, [1930] 1 W.W.R. 690 (Man. C.A.).

[60] *An Act respecting the Criminal Code*, S.C. 1953-54, c.51. The new section 134 provided:

> Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 136 [rape], 137 [attempted rape], subsection (1) or (2) of section 138 [sexual intercourse with a female under fourteen or between fourteen and sixteen] or subsection (1) of section 141 [indecent assault on a female], the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

[61] The mandatory corroboration requirement provisions were re-enacted in section 131 of the *Code*, (S.C. 1953-54, c.51), minus the statutory rape provisions which were made subject to the warning rule. The offence of incest was made subject to the mandatory corroboration requirement under s.131.

[62] *Supra* note 4 at 187.

person in respect of whom the offence [was] alleged to have been committed". The gender of the complainant was the prime concern of this section, as opposed to earlier provisions which required corroboration "upon the evidence of one witness[63]".

Section 142, the most recent legislative form of the warning rule, was repealed in 1975[64], but the common law warning rule continued to be applied in the case of other sexual offences such as gross indecency[65]. Also the mandatory rule in section 139 remained.

However, in the case of *R.* v. *Camp*[66] the Ontario Court of Appeal held that section 142 gave the rule of practice, which required a cautionary corroboration warning in all sexual cases, the force of a rule of law with respect to the offences specified, and constituted an alteration of the law[67]. Dubin, J.A., who delivered the judgment of the court, was

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[63] As noted by Hoskins, *ibid.* at 184.

[64] R.S.C. 1970, c.C-34, rep. by S.C. 1974-75-76, c.93, s.8.

[65] In *R.* v. *Cullen* (1975), 26 C.C.C. (2d) 79 (B.C.C.A.), the accused was charged on counts of gross indecency, and the British Columbia Court of Appeal held, (*ibid.* at 81), that although the offence was not one included in section 142:

> section 142 merely changed what had been a common law rule of practice for cases involving sexual offences, into a rule of law, but it did not codify the law completely so as to exclude the long-recognised need for a warning in other sexual cases.

[66] (1977), 79 D.L.R. (3d) 462 (Ont. C.A.).

[67] Within the meaning of section 7(2) of the *Criminal Code* which provided that:

> [t]he criminal law of England that was in force in the province immediately before the first day of April 1955 continues in force in the province except as altered, varied, modified, or affected by this Act or any other Act of the Parliament of Canada.

This was also supported by section 35(a) of the *Interpretation Act*, (R.S.C. 1970, c. I-23), which provided:

> Where an enactment is repealed in whole or in part, the repeal does not
> (a) revive any enactment or anything not in force or existing at the time when the repeal takes

of the view that the reasons for Parliament's repeal of section 142 was[68]:

> to remove the mandatory nature of the charge required to be given to the jury by the Judge, which arbitrarily casts doubt on the credibility of all complainants who were the alleged victims in the enumerated offences, as well as to remove the requirement of the complex distinction which the former section required.

However, Dubin, J.A., also stated that although the trial judge should avoid referring to the technical concept of corroboration as a result of this change in the law, it should not prevent the exercise of the trial judge's[69]:

> well- established right to comment on the evidence and to assist the jury as to the weight that they should give to it. There will be many cases in which the evidence, as it unfolds, will dictate to the trial Judge the wisdom of instructing the jury for the reasons so full expressed in *R.* v. *Hester*..., and *D.P.P.* v. *Kilbourne*... as to the caution that they should exercise if they are founding a conviction upon the evidence of the complainant alone.

The Court of Appeal approved the trial judge's direction, which made reference to how[70]:

> it is often easy for the woman to say that she did not consent, that is that she was raped in circumstances in which it would be very difficult for the man to defend himself.

As a result it was said to be dangerous to convict without independent evidence[71].

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effect.

[68] *Ibid.* at 471. He expressed doubt with respect to the decision in *R.* v. *Cullen.*

[69] *Ibid.*

[70] *Ibid.* at 472.

[71] See also *R.* v. *Riley* (1978), 42 C.C.C. (2d) 437 (Ont.C.A.). In this case Dubin, J.A., applied his own reasoning in *Camp* and overturned a conviction for rape on the basis that the trial judge, in exercising his discretion, had failed to include a caution "as to the risk of relying solely on the evidence of the complainant", (*ibid.* at 440). See also *R.* v. *Firkins* (1977), 37 C.C.C. (2d) 227, in which case the British Columbia Court of Appeal adopted the reasoning in *Camp.*

The 1987 *Act to amend the Criminal Code and the Canada Evidence Act*[72] definitively rejected any formal corroboration requirements in sexual offence cases. The new section 274 of the *Code* provides that:

> Where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

(c) the testimony of children

The child sexual abuse complainant was in addition also subject to corroboration requirements by virtue of the fact that she was a child. These requirements were closely bound up with the tests which determined whether or not a child could testify under oath[73].

The former section 16 of the *Canada Evidence Act* provided that the unsworn evidence of a child "must be corroborated by some other material evidence[74]". The corroboration requirement for children's unsworn evidence was discriminatory, and particularly failed to make sense when the two tests for sworn and unsworn evidence merged.

The former section 16 of the *Canada Evidence Act* derived from late nineteenth century

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[72] R.S.C. 1987, c. 24 [now R.S.C. 1985 (3d Supp.), c. 19].

[73] As noted by the *Badgley Report*, *supra* note 54 at 377.

[74] R.S.C. 1985, c.E-10. The requirement of corroboration was not retained in the new section 16 (introducted by S.C. 1987, c.24, s.18) which governs the admission of children's unsworn evidence.

provisions, which admitted the unsworn evidence of children when testifying to certain sexual offences. The *Criminal Code* of 1954[75] extended the requirement of corroboration beyond charges of carnal knowledge and indecent assault to all cases where the unsworn testimony of children was received in a criminal case. The more recent section 586 of the *Code* provided that:

> No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

This was repealed as part of the 1987 reforms[76].

In the case of the sworn evidence of children of tender years, the judge as a rule of practice warned the jury that it was dangerous to base their decision on the sworn evidence of a child witness unless it was corroborated, but that they might do so if they were satisfied as to the appropriate standard of proof[77]. Judson, J., in *R.* v. *Kendall* stated that[78]:

> The basis for the rule of practice which requires the Judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity of understand questions put and frame intelligent answers. 4. His moral responsibility.

These assertions were insufficiently supported by evidence, and this refusal to accept

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[75] S.C. 1954, c.51, s.566.

[76] Rep. by S.C. 1987, c.24, s.15.

[77] See *R.* v. *Pitts* (1912), 8 Cr. App. R. 126; *R.* v. *Campbell*, [1956] 2 Q.B. 432; *R.* v. *Parkin*, [1922] 1 W.W.R. 732 (Man. C.A.); and *R.* v. *Taylor* (1970), 75 W.W.R. 45 (Man. C.A.).

[78] [1962] S.C.R. 469 at 473.

children's testimony on its own merits rendered children even more vulnerable to sexual assault.

(d) children as accomplices

A cautionary warning with respect to the evidence of accomplices was given to the jury, and this became a rule of law in the twentieth century[79]. Accomplices came to be viewed as unreliable because it was thought that they would lie in order to direct blame away from themselves, or as revenge against the other parties to the crime.

The witness first had to satisfy the definition of "accomplice" in order for the corroboration requirements to apply. Martland, J., delivering the judgment for the majority in *Horsburgh* v. *R.* stated that an accomplice is *particeps criminis*, or in other words, "one who shares or co-operates in a criminal offence[80]". This case involved several counts of contributing to juvenile delinquency by the accused, who had encouraged several teens to commit sexual acts amongst themselves. The majority held that it did not matter that the children were not themselves convicted of the offence, thus rejecting the proposition of Evans, J.A., in the Court of Appeal that a child could not be an accomplice where the offence was specifically directed at the protection of children. The majority of the Supreme Court placed blame for the sexual activity on the

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[79] See *Baskerville*, in which case Lord Reading said, (*supra* note 16 at 663):

> this rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation, this Court has held that, in the absence of such a warning by the judge, the conviction must be quashed.

[80] [1967] S.C.R. 746 at 756.

children, and suggested that[81]:

> [i]t would be natural that children making such confessions of their own misconduct would be only too anxious to seek excuse in attempting to put, whether it be to foist or not, the blame on the adult accused.

As a result of this extended definition of accomplice, the judge was required to warn the jury of the dangers of convicting on the uncorroborated evidence of the children. The majority failed to recognize the dynamics of child sexual abuse: the exploitation by the adult of his position of power, by virtue of which the child could not be said to have had any real choice as to whether or not to participate in the activity.

However, Dickson, J., in *Vetrovec* objected to the mandatory corroboration warning required for accomplices, on the grounds that the judge should examine the witness on a case by case basis, as opposed to pidgeon-holing the witness according to rigid categories[82]. As a result of this decision, a warning is no longer required simply because a witness is an accomplice. As Hoskins notes, it is clear that the *obiter dicta* was intended to apply generally to all witnesses, except where a statutory requirement was in force[83].

III A CONTINUING CORROBORATION REQUIREMENT?

The reforms repealed the formal requirements of corroboration in both sexual offences

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[81] *Ibid.* at 778.

[82] *Supra* note 37 at 823.

[83] *Supra* note 4 at 205.

cases and for children's evidence, at least in the federal jurisdiction. Notwithstanding the abolition of these requirements, is there a continuing practical requirement of corroboration?

The Supreme Court in *R.* v. *W.(R.)* stated that[84]:

> [t]he repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case.

Although the Supreme Court recognized that children's evidence is no longer to be treated as inherently reliable[85], the Court's full examination of all the supporting evidence in this case points to the importance of corroboration to support the child's account[86].

The high burden of proof in criminal proceedings, and the existence of the "third alternative" results in a practical need for corroborating evidence in order to prove the existence of child sexual abuse beyond a reasonable doubt.

It is evident that despite the repeal of the warning rule, and the move away from formal corroboration requirements, judicial suspicion of complainants in sexual abuse cases reemerges in the exercise of judicial discretion to express an opinion on the child

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[84] (1992), 13 C.R. (4th) 257 (S.C.C.).

[85] *Ibid.*

[86] As noted by N. Bala, "*R.W.*: More Sensitivity to Child Witnesses" (1992) 13 C.R. (4th) 270 at 272.

complainant's credibility. In *R.* v. *K.(V.)*[87], a case in which the accused appealed his conviction of sexual assault of the 11 year old complainant, the British Columbia Court of Appeal outlined with approval the various factors which the trial judge had taken into account in assessing the credibility of the complainant's story. These included "the fourfold mental difficulty" of the child witness mentioned by Judson, J., in the *Kendall* case, as well as any "motives of self-interest, or of self-exculpation, or of vindictiveness" as described by Lord Morris in *Hester*. These factors would provide "an evidentiary basis upon which it would be reasonable to infer that the witness's evidence is or may be unreliable"[88]. The factors cited which would support this evidentiary basis continue to be based on outdated and prejudicial assumptions about the propensity of child complainants to make false allegations.

(1) Corroboration Requirements in Civil Proceedings

Corroborating evidence is also important in civil proceedings where child sexual abuse is an issue. It remains a requirement under the majority of the provincial Evidence Acts prior to acceptance of the child's unsworn testimony[89]. Frequently the child does not

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[87] (1991), 68 C.C.C. (3d) 18 (B.C.C.A.).

[88] *Ibid.* at 29-30.

[89] See for example the *Alberta Evidence Act*, R.S.A. 1980, c.A-12, s.20. Only British Columbia and Saskatchewan have abolished the requirement of corroboration in civil proceedings; see *Miscellaneous Statutes Amendment Act (No.2)*, S.B.C. 1988, c. 46, s.29, en. *Evidence Act*, R.S.B.C. 1979, c.116, s.82; and *The Saskatchewan Evidence Amendment Act, 1989*, S.S. 1989-90, c.57, s.4; reenacting *The Saskatchewan Evidence Act*, R.S.S. 1978, c.S-16, s.42, enacting ss.42.1- 42.3. In *H.(D.R.)* v. *Superintendent of Family and Child Services* the British Columbia Court of Appeal held that the provision of the B.C. *Evidence Act* requiring corroboration of a child's unsworn testimony only applies where a child actually testifies; (1984), 41 R.F.L. (2d) 337 at 342. This was rejected by Russell, J., in *Re: N.(L.), T.(L.) and J.(L.)*, who was of the view that the courts should apply the same approach to both hearsay evidence

testify, and corroborating evidence is essential to prove child sexual abuse. It remains a practical requirement in order to satisfy the raised burden of proof where there are allegations of sexual abuse, particularly in the highly adversarial context of a custody dispute between separating parents[90].

The courts in both civil and criminal proceedings are increasingly willing to admit out-of-court allegations of sexual abuse by children following the Supreme Court decision in *R.* v. *Khan*[91]. Where the child is too young or traumatized to testify, statements made to a third party are a valuable source of evidence. In a criminal trial, however, this is now accompanied by a special warning of the need for caution before accepting hearsay evidence which is uncorroborated[92], regardless of the fact that for hearsay to be admissible in the first place it must be both necessary and reliable. In civil proceedings it has been held that in weighing hearsay evidence the court must consider the circumstantial guarantees of its trustworthiness, which includes the availability and

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and to the child's oral testimony. She held that in both cases the evidence has to be corroborated by some material evidence; (1986), 72 A.R. 241 at 255 (Prov. Ct.).

[90] See N. Bala & J. Anweiler, "Allegations of Child Sexual Abuse in a Parental Custody Dispute: Smokescreen or Fire?" (1987) 2 Fam. L.Q. 343 at 343.

[91] [1990] 2 S.C.R. 531. The rule against hearsay prohibits the admission of out-of-court statements offered in evidence to prove the truth of the matter asserted; see *McCormick on Evidence*, 3d ed., E. Cleary, ed. (St. Paul: West Publishing, 1984) at 729. The courts have created exceptions to the rule against hearsay, and these were further broadened by the decision of the Supreme Court in *Khan*, (see chapter 8). McLachlin, J., stated that in order for hearsay to be admitted, the tests of necessity and reliability must be satisfied.

[92] As was held by the Ontario Court of Appeal in *R.* v. *A.(S.)* (1993), 11 O.R. (3d) 16 at 21.

strength of corroborating evidence[93].

(2) Methods of Satisfying the Practical Requirement of Corroboration

(a) medical evidence

Sexually transmitted diseases and other physical injuries may be corroborative of child sexual abuse[94]. Such evidence is, however, open to attack by the defence who may argue that the physical symptoms are also consistent with some other cause, thus raising a doubt as to the existence of child sexual abuse[95].

(b) expert evidence

Increasingly the courts are accepting that the emotional and psychological harm caused by child sexual abuse may manifest itself in a cluster of factors: from bedwetting, nightmares and regression, in younger children, to running away, drug use, self-destructive behaviour, and difficulties in maintaining relationships in older children and

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[93] See *Re: N.(L.), T.(L.) and J.(L.)*, *supra* note 89 at 255-56.

[94] According to the American Academy of Pediatrics Committee on Child Abuse and Neglect, the presence of gonorrhea and syphilis in a child indicate almost certain sexual abuse; chlamydia and herpes are probable indicators of sexual abuse; bacterial vaginosis and *candida albicans* are uncertain indicators of sexual abuse, see I.J. Moore, "STDs in Children are a Significant Problem" *Family Practice* (17 February 1992) 26.

[95] As for example in *R.* v. *Donovan* (1991), 65 C.C.C. (3d) 511 (Ont. C.A.), in which case the physician testified that although the conditions he observed in the child complainant, (inflammation of the genital area and an obsession with feces), were more likely to exist in abused children, they could also exist in children who had never been abused. The Court held that the medical evidence was equivocal in nature and not corroborative of child sexual abuse, (*ibid.* at 530).

dynamics of child sexual abuse. This is welcome insofar as the complainant's "acting out" behaviour will be understood as consistent with child sexual abuse, to counter the traditional judicial view that these characteristics undermine the child's credibility.

However, there are also several potential drawbacks. As Jim Robb observes, use of expert evidence may well give rise to a battle of the experts in both divorce/custody proceedings and in criminal trials[101]. The defence in criminal trials will seek to exploit the conflicting positions within the medical/psychological professions as to the existence and diagnosis of child sexual abuse. Experts whose views are in line with Green and Besharov will be called to rebut Crown evidence[102]. Feminist therapists who recognize the widespread existence of child sexual abuse will be subject to rigorous cross-examination by the defence, whose tactics will be to suggest bias and "brainwashing" of children. As Jim Robb notes, these defence tactics fail to recognize that disclosure within a therapeutic context is a process which often occurs over a period of time[103]. This reflects the power of law to disqualify less powerful claims to knowledge where these different voices threaten those with power[104].

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[101] He notes that experts should expect extensive cross-examination at the qualification stage, which may be a problem as there are few programs which specialize in child sexual abuse, (*supra* note 98 at 44).

[102] See A.H. Green, "True and False Allegations of Sexual Abuse in Child Custody Disputes" (1986) 25 Journal of the American Academy of Child Psychiatry 449, who warns that false allegations in custody disputes may occur where the child is "brainwashed" by a vindictive mother. See also D.J. Besharov, "Gaining Control over Child Abuse Reports" *Public Welfare* (Spring 1990) 34, who fails to recognize that "unfounded" reports of child abuse do not necessarily mean that sexual abuse did not occur; (see chapter 2).

[103] *Supra* note 98 at 44.

[104] See C. Smart, *The Power of Law* (London, New York: Routledge, 1989).

Vizard notes that some consultants are no longer prepared to see children because of their treatment by the courts[105]. Carol Smart observes that children do not have this choice to opt out of the legal process[106]:

> If a professional can find it so damaging to encounter the power of law, what must it mean for the already victimized child that her or his reality is so dismissed?

The result is that development of therapeutic methods of helping sexually abused children will be impeded, and therapy will be put on hold in order to avoid any suggestion in a criminal trial that there has been "tainting" of the child's evidence by a therapist.

Another problem is that the use of expert evidence may pathologize the experience of children who have been sexually abused[107]. Summitt's description of the dynamics of child sexual abuse as the "sexually abused child accommodation syndrome" suggests that to be sexually abused is to be mentally ill. This overlooks the fact that sexual abuse is about male abuse of power. Further, the child will be subject to intensive cross-examination on her personal life and sexual history in order to determine whether she meets the profile of the sexually abused child. In the words of Sherene Razack[108]:

> [p]roof that is dependent on empirical validation is incompatible with the telling

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[105] "Interviewing Young, Sexually Abused Children - Assessment Techniques" (1987) 17 Family Law 28 at 32. See also J. Robb, *supra* note 98 at 45.

[106] *Supra* note 104 at 58.

[107] Feminists have made similar criticisms of the use of expert evidence of "rape trauma syndrome"; see A.M. Delorey, "Rape Trauma Syndrome: An Evidentiary Tool" (1990) 3 Can. J. Women & Law 531 at 547-549.

[108] *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) at 25.

> of personal stories, stories that may require a narrative rather than a scientific mode and where the social and historical context of the tale is critical to our understanding of it.

Use of expert evidence underlies the basic nonacceptance of accounts of abuse by children in their own words.

(c) similar fact evidence

Child sexual offenders frequently have a propensity to reoffend[109], and evidence of past incidents of abuse may support a more current allegation of abuse against an alleged abuser. The Supreme Court liberalized the use of similar fact evidence in *R.* v. *B.(C.R.)*[110]. The Court rejected any attempt to categorize the admissibility of similar fact evidence, and held that past incidents of sexual abuse by the alleged perpetrator would be admissible where such evidence was sufficiently probative to outweigh its prejudice to the party against whom it was led[111]. McLachlin, J., for the majority of the Court stated that[112]:

> [i]t is well established that similar fact evidence may be useful in providing corroboration in cases where identity or *mens rea* is not in issue. Andrews and Hirst ...write:
>
> A third important use of similar fact evidence is to provide corroboration, particularly in cases involving sexual offences or offences against children, where

[109] See D. Finkelhor, "Abusers: Special Topics" in *A Sourcebook on Child Sexual Abuse*, (*supra* note 96) 119 at 129-132.

[110] (1990), 55 C.C.C. (3d) 1 (S.C.C.).

[111] *Ibid.* at 22-23.

[112] *Ibid.* at 27, quoting J. Andrews & M. Hirst, *Criminal Evidence* (London: Waterlow Publishers, 1987) at 337.

> the law either requires corroboration or requires the judge to warn the jury of the dangers of convicting in its absence. In many such cases there may be no possibility of mistaken identification, nor, if the witness is to be believed, any doubt as to the criminality of the acts committed. The only doubt will then be whether the complainant is indeed telling the truth.

As Jim Robb notes, the Court failed to mention the fact that the mandatory requirement of corroboration or of a warning has now been eliminated by the 1987 reforms to the *Criminal Code* and the *Canada Evidence Act*[113]. The Court emphasized that similar fact evidence would be particularly useful in sexual abuse cases with credibility as a central issue, where it is the word of the child against that of the accused[114].

The increased admissibility of similar fact evidence signals recognition that past incidents of abuse are evidence of a propensity to abuse. Similar fact evidence, however, may be used to suggest that child abusers are members of a small, aberrant group of extraordinary personalities. In *R.* v. *Mohan*[115] the accused, a physician, was charged with four counts of sexual assault on four of his female patients aged 13 to 16. A psychiatrist was allowed to testify that the behaviours in question could only flow from a significant abnormality of character of an unusual and limited class. Finlayson, J.A., held that where the Cr[illegible]n introduces similar fact evidence, the defence is equally entitled to lead evidence that th[illegible] [illegible]ts are not similar and that it is unlikely that they were all committed

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[113] *Supra* note 98 at 36.

[114] *Supra* note 110 at 27-28.

[115] *Supra* note 97.

by the same perpetrator[116]. Furthermore, the reliance of the courts on similar fact evidence in child sexual abuse cases underlies the unwillingness of the courts to accept the word of the child on its own merits.

IV CONCLUSION

Despite the repeal of the mandatory requirement of corroboration and the cautionary warning, it is clear that in child sexual abuse cases there is a practical requirement of corroboration. This continuing need for corroboration is the result of the high burden of proof in both civil and criminal proceedings. Medical, expert and similar fact evidence are used to satisfy the burden of proof. The pitfalls of these forms of evidence lie in the power of law to invalidate the practice of feminist therapists, and to pathologize child sexual abuse by naming it a "syndrome". The reliance on these forms of evidence highlights the insistence of legal discourse that children's accounts of abuse be translated into an acceptable "legal" account, and fails to take seriously their account in their own words.

The fear of the vindictive, lying child underlies this continuing *de facto* requirement of corroboration, which is reflected in the exercise of the judicial discretion to warn of the dangers of accepting the uncorroborated word of the child in individual cases. In the following chapter I will further explore the extent to which these and other "rape myths" underly judicial assessment of the complainant's credibility in child sexual abuse cases.

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[116] *Ibid.* at 298.

In particular I will assess the judicial assumptions underlying the rules governing the admissibility and relevance of the child's sexual history in criminal cases.

CHAPTER 8

CHARACTER EVIDENCE: THE RELEVANCE OF THE COMPLAINANT'S SEXUAL HISTORY

I INTRODUCTION

In this chapter I will outline the rules governing the admissibility and relevance of the complainant's sexual history. The focus of this chapter is to examine the extent to which the courts and legislatures utilize the "rape myths" identified by feminists, in constructing the "typical" child sexual abuse complainant, particularly in criminal trials.

II THE CRIMINAL TRIAL

(1) The Common Law

The general rule at common law forbids the introduction of evidence of the witness' character. One exception to this is that evidence of the complainant's past sexual history has traditionally been admissible at common law in trials of rape or indecent assault charges[1] in relation to two issues, credibility of the witness and consent[2].

(a) the relevance of the complainant's past sexual history in relation to consent

The issue of consent is a fact in issue (i.e. one which must be proved by the defence) and it followed from this that the complainant was bound to answer certain of the defence's

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[1] See *Gross* v. *Brodrecht* (1897), 24 O.A.R. 687 at 689.

[2] The evidence of character which is admitted in the case of witnesses other than rape victims is generally admitted only in mitigation of homicide and assault, where self-defence or provocation is argued in defence. Rarely is it used to argue "no crime", as is the case in rape trials; see R. Pattenden, "The Character of Victims and Third Parties in Criminal Proceedings other than Rape Trials" [1986] Crim. L.R. 367 at 367-70.

questions about her past sexual history, and her testimony could be contradicted by evidence produced by the defence. With respect to the issue of consent, the complainant could be questioned by the defence about all aspects of her relationship with the accused, including any acts of sexual intercourse either before[3] or after[4] the incident complained of, as this was said to bear directly on whether the alleged act of intercourse took place without the consent of the complainant[5]. The admissibility of this evidence was based on the assumption that because the complainant consented to intercourse with the defendant in the past, she would be more likely to have consented to the act in question[6]. This assumption decreases women's sexual autonomy as it renders their refusal to have sexual intercourse on subsequent occasions with the same man less likely to be taken seriously.

The complainant could not be compelled to answer questions about specific sexual acts with persons other than the accused, because sexual activities of the victim with other men did not necessarily have any bearing on whether the complainant consented to sexual intercourse with the defendant, but only went to credibility[7]. She could, however, be asked questions relating to her general reputation for chastity, which she was compelled

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[3] As was held in *R.* v. *Martin* (1834), 172 E.R. 1364; *R.* v. *Cockcroft* (1870), 11 C.C.C. 410; and *R.* v. *Riley* (1887), 16 C.C.C. 191 (Ct. of Crown Cases Reserved).

[4] See *R.* v. *Aloisio* (1970), 90 O.W.N. 111 (C.A.).

[5] *Per* Osler, J.A., in *R.* v. *Finnessey* (1906), 10 C.C.C. 347 at 351 (Ont. C.A.).

[6] As was stated by Lord Coleridge in *R.* v. *Riley*, *supra* note 3 at 194.

[7] *Per* Osler, J.A., in *Gross* v. *Brodrecht*, *supra* note 1 at 689.

to answer. Evidence as to the complainant's general reputation was deemed relevant on the basis that an "unchaste" complainant would be more likely to consent to sexual intercourse, irrespective of the circumstances or the person. As a result, the opinion of a witness that the complainant was a prostitute[8], or of "loose character or notorious for want of chastity or for indecency[9]" was admissible. In *R.* v. *Tissington*[10] for example, upon a charge of rape, Lord Chief Baron Abinger allowed witnesses to be called to prove "indecency" on the part of the child complainant who was between the ages of ten and twelve.

A feminist objection to the admission of such evidence is that this permitted the moral judgment that such a complainant was not worthy of the protection of the law[11]; this effectively deprived those most in need of protection, such as child prostitutes, of any protection of the law[12]. Furthermore, these rules rendered complainants vulnerable to innuendo and gossip, as well as to being forever judged by their past sexual history. A

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[8] See *R.* v. *Clay* (1851), 5 C.C.C. 146; *R.* v. *Bashir and Manzur* (1970), 54 Cr. App. R. 1; and *R.* v. *Krausz* (1973), 57 Cr. App. R. 466.

[9] As is stated in the headnote of *R.* v. *Greatbanks*, [1959] Crim. L.R. 450; and *R.* v. *Moulton*, [1980] 1 W.W.R. 711 at 719 (Alta. C.A.). See also *R.* v. *Krausz*, in which case it was held that evidence that the complainant was a woman who "was in the habit of submitting her body to different men without discrimination, whether for pay or not" was admissible, (*ibid.* at 474).

[10] (1843), 1 C.C.C. 48.

[11] See for example Constance Backhouse, "Nineteenth Century Canadian Rape Law 1800-92", in D.H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1983) 223 at 225.

[12] A. Browne & D. Finkelhor note that there is evidence linking child sexual abuse to prostitution; see "Initial and Long-Term Effects: A Review of the Research" in D. Finkelhor *et al.*, eds., *A Sourcebook on Child Sexual Abuse* (Beverley Hills: SAGE, 1986) 143 at 161-62.

prime example of this is the case of *R.* v. *Clay*[13], in which case a witness was allowed to testify that twenty years before the alleged rape, the complainant was reputed to be a prostitute. Other questions going to general reputation included whether or not the complainant was on the pill, whether she had ever had an illegitimate child, or an abortion, whether she had ever been treated for venereal disease, the age at which she first had sexual intercourse, how many men she had had sexual intercourse with, and whether she was married to the man with whom she was living[14]. These questions provide ample evidence for the charge of critics[15] that very often it was the complainant, and not the accused, who was on trial.

(b) the relevance of the complainant's past sexual history in relation to credibility

As Marilyn Stanley notes[16], at common law the witness could be cross-examined in order to attack his or her credibility where there are reasonable grounds for this. The defence can show bad character which relates to untruthfulness; however, in no other offence is evidence of the complainant's past sexual conduct used to show untruthfulness[17].

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[13] (1851), 5 C.C.C. 146.

[14] As documented by Justice E.L. Haines, "The Character of the Rape Victim" (1975) 23 Chitty's Law Journal 57 at 57.

[15] See for example S. Leggett, "The Character of Complainants in Sexual Charges" (1973) 21 Chitty's L.J. 132 at 132.

[16] *The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127* (Ottawa: Supply & Services Canada, 1987) at 80.

[17] Rosemary Pattenden notes that the veracity of other witnesses may be challenged on the grounds of criminal convictions, misconduct which has not resulted in a conviction, and even their disreputable associates, but not on the grounds of past sexual history; (*supra* note 2 at 373). As Elizabeth Sheehy states,

Chief Justice Richards in the then leading Canadian case of *Laliberte* v. *R.*[18] held that in relation to the issue of credibility, (in other words, as to whether or not the complainant should be believed), questions as to the complainant's sexual activities with named persons other than the accused could be asked[19]. However, as credibility is only a collateral issue[20], the defence was bound by the complainant's answer. Furthermore, the complainant was not bound to answer the question, although she would seldom be aware of this as the trial judge did not have to instruct the complainant as to her right not to answer[21]. The "privilege" of the complainant not to answer a question of this kind was subject to the ultimate discretion of the trial judge. Few trial judges exercised their discretion to prevent complainants from having to answer degrading questions[22]. The assumption behind this rule was that a chaste woman would be more likely to be truthful than an unchaste women - this rested on the value judgment that "unchastity" denoted immorality which led to dishonesty[23].

"[t]he victim's past history has clearly been used in rape trials in a most unique fashion"; see "Canadian Judges and The Law of Rape: Should the Charter Insulate Bias?" (1990) 21 Ottawa L.Rev. 151 at 162.

[18] (1878), 1 S.C.R. 117.

[19] This was followed in *R.* v. *Basken and Kohl* (1974), 21 C.C.C. (2d) 321 at 337 (Sask. C.A.); and in *R.* v. *Finnessey* (1906), 10 C.C.C. 347 at 351 (Ont. C.A.).

[20] Matters are collateral to the main issue when they do not constitute an essential element of the offence with which the accused has been charged; see *R.* v. *Holmes and Furness* (1871), 12 C.C.C. 137.

[21] See *Laliberte*, *supra* note 18 at 131.

[22] As was noted by Justice E.L. Haines, *supra* note 14 at 58-9.

[23] As Neil Brooks states:

> This reasoning, based as it is on a causal relationship between sexual conduct and veracity, reflects a rather primitive notion of human behaviour;

see "Rape and the Laws of Evidence" (1975) 23 Chitty's L.J. 2 at 5.

Critics of this rule hypothesised that the collateral issue rule put the complainant in a double bind. If the complainant answered that she had been sexually active with other named individuals, this information was used not to illustrate her honesty, but rather to determine whether she was the type of complainant deserving of the protection of the law, regardless of whether or not she was actually raped[24]. However, if she refused to answer, the court might be led to conclude that she was being evasive, and be less willing to believe her testimony. Regardless of her answer, the very fact that the question was being posed might lead the jury to suspect that there was some truth behind the allegation[25]. Katherine Catton designed an experiment to test these propositions[26]. Subjects were asked to imagine that they were jurors and had to assess the guilt of an accused in a scripted hypothetical rape case[27]. In the control condition jurors received no information about the past sexual history of the rape victim, while other jurors did receive information about her past sexual history[28]. She concludes[29]:

> It is clear... that when jurors heard information regarding an alleged rape victim's prior sexual history with named persons, whether this information was confirmed

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[24] See Katherine Catton, "Evidence Regarding the Prior Sexual History of an Alleged Rape Victim - Its Effect on the Perceived Guilt of the Accused" (1975) 33 U. of T. Fac. L. Rev. 165 at 168.

[25] As suggested by S. Leggett, *supra* note 15 at 134.

[26] *Supra* note 24.

[27] [illegible] as to determine the sentence, and express feelings on the "justness" of the accused being found g[illegible] and being sentenced to prison for the given average term.

[28] There were four experimental conditions giving varying responses of the complainant in response to questions regarding her past sexual history with named persons: a) denial of the allegations; b) judge refused to allow the questions; c) victim admitted the relations even though the judge informed her she did not have to answer the questions; d) victim refused to answer the questions after the judge told her she did not have to.

[29] *Ibid.* at 173.

> or denied, this information decreased their perceived guilt of the accused in comparison with the situation where no information relating to the victim's supposed sex life was heard. This decrease in the perceived guilt of the accused varied directly with the 'amount' of negative information presented about the victim.

This study indicates that evidence of the complainant's past sexual history is used to make a character assessment as to whether the complainant deserves to be protected by the rape laws[30]. As the traditional basis for the rape laws is the protection of "chaste" women, the jurors may reason that no harm is done where the accused rapes an "unchaste" woman.

(2) The Relevance of the Complainant's Sexual History in "Statutory Rape" Trials

(a) in relation to consent

Consent was not a defence to the absolute liability offences such as sexual intercourse with a female under fourteen[31]. However, under section 146(2), which prohibited sexual intercourse with a female between fourteen and sixteen, it was part of the substantive definition of the offence that the victim be "of previously chaste character". This,

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[30] Similar conclusions have been reached by American studies. See for example G.D. Lafree *et al.*, "Jurors' Responses to Victims' Behaviour and Legal Issues in Sexual Assault Trials" (1985) 32 Social Problems 389. Lafree concluded from his post-trial interviews with 331 jurors, that, where consent was at issue, (*ibid.* at 397):

> [t]hey were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, drank or used drugs, or had been acquainted with the defendant - however briefly prior to the alleged assault.

H.S. Feild & L.B. Bienen studied the responses of 1,056 adults to scripted, hypothetical rape cases with various combinations of victim, defendant and crime characteristics; see *Jurors and Rape* (Lexington, Mass.: Lexington Books, 1980). They concluded that the effect of sexual history evidence was more complex than originally thought, as the introduction of the victim's past sexual experience interacted with other factors such as race of the victim or defendant. However, they do note that, (*ibid.* at 118):

> [a]long with race of the defendant, sexual experience of the victim proved to have important effects on juror decision making as it was involved in four of the seven significant interactions.

[31] R.S.C. 1970, c-34, s. 146(1).

while rape of "unchaste" females, living in untraditional roles was not prohibited.

(b) in relation to credibility

The Freudian belief that children's accounts of sexual abuse are the product of their fantasies worked to the disadvantage of both chaste and unchaste child complainants alike. Judicial statements to the effect that children indulge in sexual fantasies and commonly make false allegations were common[37]. The most extreme position was that taken by John Henry Wigmore, who recommended that[38]:

> No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.

L.B. Bienen argues that Wigmore used falsely reported data to support this assertion, and to present it in a purportedly objective way[39]. Wigmore's comments are specifically aimed at young girls. He appears to have been influenced by the views of Freud, who

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[37] For example Salmon, L.J., in *R.* v. *Henry and Manning* (1968), 53 Cr. App. R. 150 at 153, stated that:

> human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons ...and sometimes for no reason at all.

[38] J.H. Chadbourn, ed., *Wigmore on Evidence*, vol.3A, rev. ed. (Boston: Little, Brown, 1976) 736 (section 924a).

[39] See "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence" (1983) 19 Cal. W.L. Rev. 235. For example, Wigmore relied on the 1915 monograph "Pathological Lying, Accusation and Swindling" by William and Mary Healy, which presents a selection of cases taken from a population of juvenile delinquents. Bienen notes that not only does Wigmore generalize about all females on the basis of a select group characterized as "abnormal", but that these cases derive from a larger group of one thousand juvenile delinquents, out of which the Healys themselves concluded that only "8 or 10 of the 1000 were genuine cases of pathological lying, (*ibid.* at 246). Furthermore, Bienen analyses the cases characterized as false allegations due to the child's sexual fantasies by the Healys and Wigmore, and concludes that in fact the details of these cases, (such as venereal disease and acting-out behaviour), suggest that sexual abuse did in fact occur, (*ibid.* at 249).

promoted the assumption that children were unreliable sources of information due to their purported tendency to fantasize. The Oedipus complex, which explained children's accounts of sexual abuse as a product of the child's supposed sexual fantasies, allowed men to ignore male abuse of power, and to alleviate their guilt[40].

This question of fabrication of sexual abuse and sexual fantasies of children continues to be an issue in recent cases. In *R.* v. *Hedstrom*[41], for example, a young boy's evidence to the effect that he had imagined that the accused was in his presence when he was not, as well as what were apparently false accusations made by him of sexual activity between his brother and the accused seven years earlier, were relevant factors to be considered when assessing the complainant's credibility[42]. In *R.* v. *K.(V.)* the Court held that although there is no longer a corroboration requirement[43]:

> [this] does not limit the trial judge's well-established right to comment on the evidence and to assist the jury as to the weight that they should give to it. There will be many cases in which the evidence, as it unfolds, will dictate to the trial judge the wisdom of instructing the jury for the reasons so fully expressed in *R.* v. *Hester*, and ...*Kilbourne*, as to the caution that they should exercise if they are founding a conviction upon the evidence of the complainant alone.

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[40] In the words of Andrea Nye, in *Feminist Theory and the Philosophies of Man* (New York, London: Routledge, 1988) at 162:

> Freud's theory begins from the fact of women's oppression. It is both a defence against the guilt that oppression occasions and a rationalization of continued oppression.

[41] (1991), 63 C.C.C. (3d) 261 (B.C.C.A.).

[42] Toy, J., for the British Columbia Court of Appeal stated, (*ibid.* at 272-3):

> That evidence ... may ... lead the trier of fact to the conclusion that [the boy] is not be to believed, not just because he is a potential liar or fabricator, but that he may have honestly imagined that the appellant was in places and did things when that was just not so.

[43] (1991), 4 C.R. (4th) 338 at 346-7 (B.C.C.A).

Attention was drawn to Lord Morris's judgment in *Hester*[44], who warned of cases of self-exculpation, vindictiveness and imagination of sexual complaints. It is clear that the judicial right to comment on the weight to be given to evidence of the complainant allows for Freudian beliefs about the unreliability of child witnesses to enter through the back door, notwithstanding the supposed abolition of the corroboration requirement and the arbitrary assumptions on which it rested.

(3) Introduction of Character Evidence by Other Methods

Outside of these common law rules of evidence relating to consent and credibility, another "backdoor" method used by defence counsel to introduce evidence of the complainant's past sexual history, was the use of innuendo in exploring the complainant's account of the incident, in both rape and "statutory rape" trials. An example of this is given by G.R. Goodman, of the cross-examination of a sixteen year old girl in a preliminary inquiry in 1974 in Winnipeg, a portion of which is reproduced below[45]:

> Q. And I take it you couldn't see the person's face when he was supposedly licking you.
> A. No, I couldn't.
> Q. I see. How do you know he was licking you"
> A. I could feel that.
> Q. What could you feel?
> A. His tongue.
> Q. How do you know it wasn't his finger?
> A. I don't know. You can tell.
> Q. Oh, you can tell. I see. How can you tell? What's the difference in feeling between a tongue and a finger?

[44] [1972] 3 All. E.R. 1056 at 1059 (H.L.).

[45] "Proposed Amendments to the Criminal Code with Respect to the Victims of Rape and Related Sexual Offences" (1975) 6 Manitoba L.J. 275 at 276-77.

> A. I don't know. You can just tell.
> Q. Have you ever had someone lick you before?
> A. No.
> Q. No?
> A. Shakes head.
> Q. Have you had someone ever put his finger in your vagina before?
> A. What has that got to do with it?
> Crown Attorney: That's quite true. I don't want to object to these questions, but they are not really questions I don't think that would be of any assistance to the accused and they are to a certain extent harassing to the witness.
>
> The Court: It's a very pertinent substance on this charge, unless the lady has so alleged in her evidence in response to your question that this is what has happened.

The judge held that defence counsel's questions were permissible as, according to his interpretation, they related to the witness's evidence of the incident leading up to intercourse. However, as Goodman notes[46]:

> ...is it not cross-examination as to her character when defence counsel asks whether someone had licked her before or whether someone had put his finger in her vagina before? Or is her character impugned only when she is asked whether she had previous sexual intercourse; thereby distinguishing the tongue and the finger from the penis?

This line of questioning was extensively pursued by defence counsel in the preliminary inquiry, with resulting trauma to the complainant. At trial the complainant, who was subpoened, left the court after only a few minutes of questioning by Crown counsel, with the result that the trial judge directed the jury to acquit. Although the trial judge has ultimate discretion to exclude questions, examples such as this indicate that the complainant very often could not rely on judicial discretion for protection against harassing and embarrassing questions of the defence. Furthermore, this form of

[46] *Ibid.* at 297.

questioning turns the trial itself into "little more than a pornographic form[47]".

II REFORM

The common law rules were linked to low reporting rates[48]. Studies have shown that founding rates[49] for sexual assault offences were low, in part because of prejudice of the police against rape complainants[50], and the reinforcement of these attitudes by the courts. L. Clark and D. Lewis found that the police classification of cases as founded or

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[47] As stated by Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 39-40:

> ...the woman's story *gives pleasure* in the way that pornography gives pleasure. The naming of parts becomes almost a sexual act, in that it draws attention to the sexualized body. But her account, distorted by the cross-examining techniques of the defence counsel, does not only sexualize her, it becomes a pornographic vignette.

[48] The 1985 *Canadian Victimization Survey* found that only 38% of incidents of sexual aggression were reported to the police. 44% of the respondents to the survey said that the reason they had not reported was because they had anticipated a negative response by police and judicial officers. This reason for not reporting was given more often by victims of sexual offences than by victims of non-sexual offences; see Solicitor General of Canada, *Female Victims of Crime: Canadian Urban Victimization Survey* (Ottawa: Supply & Services Canada, 1985) at 2-4.

[49] Founding is the process by which a charge becomes the subject of a police investigation. Just because a case is classified as "unfounded", does not necessarily mean that an offence did not occur. A charge may be unfounded for various reasons, as noted by L. Clark and D. Lewis in their survey of 116 rapes of females over fourteen reported to the Metropolitan Toronto Police Department in 1973; see *Rape: The Price of Coercive Sexuality* (Toronto: Women's Educational Press, 1977). For example, unfounding occurs where the victim wishes to cease investigation, where there is insufficient evidence to proceed, or as a result of police prejudice to the effect that the complainant will not make a suitable witness; (*ibid.* at 36-7).

[50] As is evidenced by the study of L.L. Holmstrom and A.W. Burgess, who surveyed the progress through the criminal justice system of 146 complainants admitted to the emergency wards of Boston City Hospital during a one year period in 1972-3; see *The Victim of Rape: Institutional Reactions* (New York: John Wiley & Sons, 1978). They found that "the police have in their minds an image of the ideal rape victim and the ideal rape case", which includes a victim who was forced to accompany the assailant, was previously minding her own business, a virgin, sober, stable emotionally, upset by the rape, and who did not know the offender, (*ibid.* at 43). Roberts notes that:

> The founding rate for the earlier offence of rape was lower than the comparable statistic for other crimes of violence such as assault or homicide. In 1982 ... the founding rate for rape was 70%. For assault it was 94%,

Sexual Assault Legislation in Canada: An Analysis of National Statistics, #4 (Ottawa: Supply & Services Canada, 1991) at 4.

unfounded reflected practical considerations of how successfully cases could be prosecuted if they went to court. Furthermore, even where a complaint of rape was founded, what data there was indicated that the likelihood of an alleged offender being sent to trial and being convicted was minimal[51]. The impediments to successful prosecution of sexual abuse cases led to pressure for reform in the 1970s and 1980s.

(1) Section 142

On April 26, 1976, the corroboration requirements of the former section 142 were repealed, and a new section 142 was enacted to introduce procedural changes in response to the criticisms of the common law rules relating to admissibility of the complainant's past sexual history[52]. The new section 142 required that where an accused was charged with rape, attempted rape, statutory rape or indecent assault, the accused had to give written notice to the prosecution if evidence of the complainant's sexual history was to be put forward, either by way of cross-examination of the complainant, or by other evidence, with sufficient particulars of the evidence to be adduced[53]. The judge was required to hold a hearing *in camera*, in the absence of the jury, to determine the relevance and admissibility of such evidence, in accordance with the discretionary

[51] In 1971, there were 2,107 reported rapes in Canada. Of these, 1,230 were founded by the police. 119 persons were charged, and only 65 of the accused were convicted of rape or a lesser charge. In other words, 54.7% of those charged with rape in 1971 were convicted of an offence, compared to an overall conviction rate for criminal offences in the same year of 86%, as reported by the Canadian Advisory Council on the Status of Women, *Report on Sexual Assault in Canada* by D. Kinnon (Ottawa: Queen's Printer, 1981) at 47.

[52] R.S.C. 1970, c.C-34, as am. by *Criminal Law Amendment Act*, 1975, S.C. 1974-75-76, c.93, s.8.

[53] Section 142 (1)(a).

guideline in section 142(1)(b). Many commentators have noted that although the intention behind section 142 was to increase the protection of the complainant, in fact it was interpreted by the courts in such a way as to increase the right of the accused to cross-examine the complainant as to her past sexual history[54].

The notice requirement was intended to prevent the complainant and prosecution from being taken by surprise, and to limit the defence to the matters set out in the notice. The interpretation of what was reasonable notice, however, did not always allow the Crown a great deal of time to prepare the complainant, as for example in *R.* v. *McKenna, McKinnon and Nolan*[55]. In that case the notice under section 142 was received by the Crown on the afternoon of November 2nd, 1976, and the Court held that reasonable notice had been received for the Crown to interview the witness with respect to the facts set out in the notice, despite the fact that the preliminary inquiry was set for 10:00 am the following day.

Section 142(1)(b) required the judge to admit evidence of the complainant's past sexual history if he

> [was] satisfied that the weight of the evidence [was] such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant.

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[54] For example Stanley, *supra* note 16 at 86.

[55] (1976), 32 C.C.C. (2d) 210 (Prov. Ct., Crim. Div.).

The Supreme Court in *R.* v. *Forsythe*[56] held that due to the wording of this section, credibility was now an issue of fact, and no longer merely a collateral issue. As a result, the complainant could no longer refuse to answer questions about her past sexual conduct with persons other than the accused, and the defence could put forward other witnesses to contradict her testimony[57]. Furthermore, the Court held that the complainant was a compellable witness at the *in camera* hearing, and that the judge would only dispense with calling the complainant in a very rare case[58]. The conclusion of the Supreme Court was that there was a "trade-off" in the enactment of section 142, by which the complainant could be protected from answering questions about her previous sexual experience with other named persons, and in return the accused could both compel and contradict her answer[59], an approach which Christine Boyle criticized as an unfortunate "tit-for-tat" approach[60], and one which rendered the rape victim reliant upon the discretion of the trial judge. In essence this judicial interpretation of the section

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[56] [1980] 2 S.C.R. 268. Prior to the decision of the Supreme Court of Canada in *R.* v. *Forsythe*, there were varying readings of this section by the courts, due to its ambiguous wording. For example, the view of McDermid, J.A., in *R.* v. *Moulton* (1980), 51 C.C.C. (2d) 154 (Alta. C.A.), was that the provision required the trial judge to weigh the evidence himself as if he were a jury before allowing otherwise admissible evidence to go to the jury. In contrast, the majority in that case (Clement and Lieberman, J.J.A.), were of the view that the provision merely directed a trial judge to ensure that the defence kept within the existing rules of evidence, but that the ultimate responsibility for making findings of fact with respect to the credibility of the complainant was still the function of the jury. The Supreme Court in *Forsythe* upheld the reading of the majority in *Moulton*.

[57] *Ibid.* at 276.

[58] *Ibid.* at 279-280.

[59] *Ibid.* at 276.

[60] "Section 142 of the Criminal Code; A Trojan Horse?" (1981) 23 Crim. L. Q. 253 at 258-59.

undermined any benefit to complainants[61].

(2) Bill C-127: the Introduction of Sections 276 and 277

Section 142 was repealed as part of the 1983 reforms[62]. In its place sections 246.6 (which became section 276), and 246.7 (now section 277), of the *Criminal Code* were enacted as an attempt to eliminate sexual discrimination by addressing the fears of complainants that they would be subjected to harassing questions with respect to their past sexual conduct. Section 276 prohibited the admission of evidence of the complainant's sexual activity with any person other than the accused on a non-discretionary basis, which was subject to three exceptions; where evidence was led in rebuttal, went to identity, or related to consent to the sexual activity that took place on the same occasion as the sexual activity that formed the subject-matter of the charge. Section 277 provides that:

> In proceedings in respect of an offence under s.271, 272 or 273 [the sexual assault offences] evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

(a) the applicability of these provisions to child complainants

Section 150(1), which came into effect on January 1, 1988, retains the notion that

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[61] As was noted by Wilson, J., in her dissenting judgment in *R.* v. *Konkin*, [1983] 1 S.C.R. 388 at 396:

> In effect section 142, instead of minimizing the embarrassment to the complainants, increased it.

[62] By the *Act to amend the Criminal Code in relation to Sexual Offences and other Offences against the Person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s.6.

persons under a certain age generally cannot consent to sexual activity[63]. However, consent is still an issue for young people over fourteen years of age. Furthermore, section 150(2) provides that:

> Notwithstanding subsection (1), where an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is twelve years of age or more but under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused
> (a) is twelve years of age or more but under the age of sixteen years;
> (b) is less than two years older than the complainant; and
> (c) is neither in a position of trust or authority towards the complainant nor is a person with whom the complainant is in a relationship of dependency.

Where the defence of consent is available with respect to a complainant under fourteen years the provisions governing admissibility of the complainant's past sexual history apply. Under section 277 the child's sexual reputation is not admissible in proceedings in respect of the sexual assault offences for the purpose of challenging her credibility. The question is whether sexual reputation evidence is admissible in relation to other sexual offences involving children.

(b) the constitutional challenge to sections 276 and 277: seaboyer

The constitutionality of section 276 and 277 was challenged in *R.* v. *Seaboyer and Gayme*[64]. The Supreme Court in this case upheld section 277, but the majority held that

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[63] This section was introduced by *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c.24 (now R.S.C. 1985 (3d Supp.), c.19) s.8. Prior to this, consent was a defence to the more serious offences under section 272 or 273.

[64] [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*]; see discussion below.

section 276 violated section 11(d) and section 7 of the *Charter*[65]. Justice McLachlin, writing for a majority of seven, was of the view that section 276 precluded the admission of relevant and material evidence. Although she praised the goals of the legislation[66], she was of the view that section 276 was overbroad in its exclusion of evidence of the complainant's past sexual history.

The majority judgment conceived of the constitutional challenge to the criminal justice system in terms of the need to protect the individual against the state[67]. This requires that the accused be able to call all "probative" evidence in cross-examination. McLachlin, J., said it was necessary to distinguish the different uses to which such evidence could be put, and gave some examples of where section 276 could be used to exclude potentially "relevant" evidence[68]. Furthermore, despite being motivated by constitutionally protected purposes, the majority ruled that section 276 failed to meet the minimum requirements of section 1 of the *Charter*.

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[65] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Section 11(d) provides:

> Any person charged with an offence has the right... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independant and impartial tribunal.

Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[66] She noted that the legislative goals were to abolish sexist assumptions (such as that "unchaste" women are more likely to lie), to encourage reporting of sexual assault by complainants by eliminating harassing cross-examination, and to protect complainants' privacy, (*supra* note 64 at 598).

[67] As noted by A. Acorn, "*R.* v. *Seaboyer*: Pornographic Imagination and the Springs of Relevance" (1991) 3 Constitutional Forum 25 at 27.

[68] *Supra* note 64 at 613-16.

In contrast, Justice L'Heureux-Dube concluded that the three exceptions in section 276 adequately provided for the admission of such evidence[69]. Her dissent was a quite unusual piece of judicial writing which took a contextual approach. She made use of empirical accounts of the bias of the criminal justice system, at the stages of reporting, prosecuting, and trying of sexual offenses, to demonstrate the prevalence of sexist myths about rape complainants, and to support her conclusion that the statutory provision did not infringe section 7 or section 11(d) of the *Charter*[70]. Given the social context, Justice L'Heureux-Dube's conclusion was that the so-called "relevance" of evidence of the complainant's past sexual history in practically every case derived from misogynist myth, and as a result its admissibility needed to be heavily restricted.

In Justice McLachlin's opinion, the availability of the defence of honest, albeit unreasonable, belief of the accused in consent[71] required that the accused be able to show that the basis of his honest belief in the complainant's consent was "sexual acts performed by the complainant at some other time or place[72]". This, however, relied on the sexist assumption that a female who was perceived to be "easy", (as defined by her past

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[69] Arguments have also been made to the effect that the three exceptions are in fact too wide in admitting the complainant's past sexual history, particularly section 276(1)(c); see for example C.Boyle who raises the possibility that this exception could be used to admit such evidence in the context of a gang-rape, (*Sexual Assault, supra* note 32 at 138). She comments that section (1)(c):

> seems to endorse the view that it is non-culpable to think that sexually active women are 'fair game' for everyone, if only on the same occasion.

[70] Or failing that, that it could be upheld under section 1 of the *Charter.*

[71] As adopted in *Pappajohn* v. *R.*, [1980] 2 S.C.R. 120, and codified in the former section 265 of the *Code*, R.S.C. 1985, c.C-46.

[72] *Supra* note 64 at 613.

sexual conduct, and nontraditional behaviour and demeanour at the time of the rape), was more liable to consent to sexual intercourse[73]. This permitted the interpretation of the woman's conduct from a male point of view, with resulting blame on the victim for having "provoked" the accused's behaviour by her conduct. In contrast, Justice L'Heureux-Dube in her dissent was of the view that the exception in section 276(1)(c) amply provided for this defence without the need to strike down the entire provision[74].

Justice McLachlin was also of the view that evidence of the complainant's past sexual conduct was potentially relevant where the accused wished to show that the complainant had some motive for fabricating the allegation. As an example of this she suggested the case of a father who was accused by his daughter of sexual abuse[75]. The supposed situation is that he had discovered an incestuous relationship between his daughter and her brother, and that he had put an end to this, and, in retaliation, the daughter accused her father of sexual abuse. According to Justice McLachlin, the daughter's past sexual conduct was admissible to enable the father to explain fabrication, and it was not used simply to infer consent. However, as was stated by Justice L'Heureux-Dube in her

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[73] As was argued in *R.* v. *Wald*, in the following terms, [1989] 3 W.W.R. 324 at 357 (Alta. C.A.):

> ...her reputation is that she is easy and the word that they would use to describe it in everyday language, to put it bluntly, is slut. And one or more of them will say that she also has a reputation for having been easy in terms of consenting to sex with more than one man at the same time...

[74] She wrote (*supra* note 64 at 689):

> ...any evidence excluded by this section would not satisfy the 'air of reality' that must accompany this defence", except through acceptance of sexist myths about the meaning of sexual experience.

See also Dawson, who argues that the third exception to the exclusionary rule in section 276(1)(c) is in fact a further codification of the defence; "The Construction of Relevance" (1988) 2 C.J.W.L. 310 at 320.

[75] She referred to the case of *State* v. *Jalo*, 557 P.2d 1359 (Or. Ct. App. 1976), as an example of this.

Justice McLachlin was also concerned that the belief that children are sexually inexperienced might result in the jury believing that the defendant did in fact commit the offence[79]. It is sometimes the case that the child has in fact previously been sexually abused by an adult, but not by *this* defendant. It may occasionally be the case that because of the trauma of the abuse, the child accuses a "screen" person. The problem is that the courts often fail to distinguish between a child's prior sexual history, and prior sexual abuse. Often a child's previous abuse is interpreted as an indication that it was the child who was the aggressor, for example as in *R.* v. *LeGallant*, in which case the defence maintained that the complainant (a thirteen year old boy), was the aggressor in earlier encounters with several adult men when he was eleven years old[80]. Rarely is an abused child's sexual behaviour acknowledged by the courts to be a symptom of the abuse itself ("acting-out"), but is rather taken as further evidence of the seductive, vindictive nature of the child. As Kim Steinmetz notes, the result of this lack of understanding[81]:

> leads to the unpalatable result of the child witness being subjected to intense and harsh cross-examination by defense counsel with respect to his or her prior, often

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[79] She noted that in the case of young complainants, *supra* note 64 at 614-15:

> where there may be a tendency to believe their story on the ground that the detail of their account must have come from the alleged encounter, it may be relevant to show other activity which provides an explanation for the knowledge.

[80] (1985), 47 C.R. (3d) 170 (B.C.S.C.) at 175-6. In this case McLachlin J. for the British Columbia Supreme Court accepted the "relevance" of this evidence. As Sheehy notes, (*supra* note 17 at 169), it is incongruous:

> that conduct involving several adult men and an eleven year old child which resulted in criminal convictions should be proferred as the *child's* sexual history.

See also *R.* v. *Greene* (1990), 76 C.R. (3d) 119 (Ont. Dist. Ct.) at 122.

[81] See "*State* v. *Oliver*: Children with a Past; The Admissibility of the Victim's Prior Sexual Experience in Child Molestation Cases" (1989) 31 Arizona L. Rev. 677 at 678.

traumatic, sexual experiences.

Even where a child has been sexually active, introduction of this history will in general be reliant on outdated myths and assumptions. It should therefore be excluded in order to prevent the value judgment that this child complainant, because of his or her past sexual history, is not deserving of the protection of the law. To avoid these problems, the courts must restrict the manner in which information that the child witness has independent knowledge of sexual matters is put before the court, and must avoid subjecting the child to extensive and traumatic cross-examination on the details of his or her prior sexual history or abuse[82].

Justice McLachlin was also of the view that evidence as to patterns of sexual conduct might be relevant, though she said this needed to be subject to careful scrutiny[83]. However, despite scrutiny of such evidence, what is deemed to be "similar" patterns of sexual conduct derives from pornographic themes, and rape myths[84]. It rests on the fallacious assumption that where the complainant had consensual sexual relations in the past in circumstances which are said to be similar to those of the alleged offence, she

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[82] As is suggested by Steinmetz, *ibid.* at 691-694.

[83] *Supra* note 64 at 615.

[84] For example, in *R.* v. *Oquatq* Marshall, J., drew a comparison with the use of similar fact evidence in cases of self-defence and provocation. He stated, (1985), 18 C.C.C. (3d) 440 (N.W.T.S.C.) at 450-1:

> A useful analogy can be drawn, I think, from the cases where self-defence and a propensity for violence on the part of the victim are raised. In these cases, evidence of the victim's character for violence is admissible to show the probability of the victim having been the aggressor and to support the accused's evidence that he was attacked by the victim.

This analogy makes use of the sexist assumption that a complainant who is sexually active "asks for it" by her nontraditional behaviour, in the way that a violent person provokes another to attack them in self-defence.

would then have consented to the incident complained of. But as Justice L'Heureux-Dube stated, "...consent is to a person and not to a circumstance[85]". Having consented previously in "similar" circumstances, the "unchaste" complainant's future ability to withhold consent is reduced by this reasoning[86]. Furthermore, Dawson raises the following question[87]:

> What if the 'deviance' was experienced or practiced by the woman as a 'hallmark' of a subordinated sexuality of a 'survival' sexuality that originated in patterns of sexual abuse?

Yet it is open to the courts to interpret such behaviour as evidence of "similar" sexual conduct.

The differing judicial accounts of what is "relevant" evidence with respect to the complainant's past sexual history illustrates what Sheehy terms the "indeterminacy" of this concept[88]. It further illustrates the extent to which they are the outcome of "rape myths" embodied in personal and cultural beliefs, rather than the outcome of an

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[85] *Supra* note 64 at 685.

[86] Justice McLachlin once again raised the spectre of the false allegation, by posing Tanford and Bocchino's example of the extortion trial, where under the similar fact rule it would be permissible for the defence to adduce evidence to the effect that the accused, a woman prostitute, had in the past extorted money from her clients by threatening to charge them with rape if they did not pay her more money. She quotes their reasoning with approval in her judgment:

> [i]f the woman's sexual history is relevant enough to be admitted against her when she is a defendant, entitled to the protections of the *Constitution*, then certainly it is relevant enough to be admitted in a trial at which she *is merely a witness, entitled to no constitutional protection*;

(see J. Tanford & A. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980) 128 U. Pa. L. Rev. 544 at 588, emphasis added).

[87] *Supra* note 74 at 325.

[88] *Supra* note 17 at 153.

"objective" and impartial judicial assessment of relevance[89]. The comments of Marshall J., in his judgment in *R.* v. *Oquatq* provide an illustration of the way in which the "test for judicial truth" was conceived of as a neutral exercise, even when the use of sexist assumptions was actually admitted. He stated[90]:

> Now, then, in logic, is sexual indulgence outside of marriage or established relationships... logically probative of consent on a particular occasion? ... [it] is logically probative. The problem is that this assumption or probability, if you like, that a woman would on this occasion have consented, because she is sexually more active denies both autonomy and dignity to women... What one must realize, though, is that our test for judicial truth is based on probabilities. This is, of course, both fallible and flawed. It may also show, in a specific case, rank prejudice; but we use it.

The law eliminates certain accounts of abuse of children and women, and accepts other accounts which fit more closely into what Carol Smart terms its "binary logic[91]", which conceives of issues in terms of opposites, such as guilt and innocence; consent and non-consent. As such it has no room for the "ambiguities" of complainants' varying accounts of sexual abuse.

(3) The New Section 276

New statutory provisions governing the admissibility of the complainant's sexual history

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[89] As T.B. Dawson notes, (*supra* note 74 at 315):

> ...far from there being objective standards of assessment, what is relevant must be seen as determined through specific policy choices that reflect the subjective perspectives and contextual assessments of the people or institutions constructing these standards.

Several other writers make the same point; see for example Justice L'Heureux-Dube (*Seaboyer*, *supra* note 64 at 667), and Sheehy, (*supra* note 17 at 160-170).

[90] *Supra* note 84 at 450.

[91] *Supra* note 47 at 42.

in sexual assault cases came into effect on August 15, 1992[92], in response to *Seaboyer*. The new s.276 of the *Criminal Code* vests discretion in the judiciary to determine whether or not the complainant's past sexual history is relevant in sexual assault cases. The section provides that in exercising this discretion judges must consider a number of factors, including the right of the accused to make full answer and defence, society's interest in encouraging the reporting of sexual assault offences, the potential prejudice to the complainant's personal dignity, and any other factor that the judge considers relevant. The new s.276.1 of the *Criminal Code* provides that on application to the judge on behalf of the accused, the judge shall hold a hearing, with the jury and public excluded, to consider whether or not evidence of the complainant's past sexual activity is admissible under s.276. It is further provided by the new s.276.2 that the complainant is not a compellable witness at the hearing and that the judge shall provide reasons with respect to the admissibility of this evidence. Subject to these guidelines, and to previous judicial decisions (particularly *Seaboyer*), the decision of admitting the complainant's past sexual history is in the hands of the trial judge.

It is clear that the concept of "relevant" evidence is not a neutral one, but one which has been used to impose a certain worldview. It follows from this that we need to be explicit about the choices that we are making in admitting sexual history evidence of complainants. The requirement under the new s.276.2 that the judge provide written reasons for his or her determination as to the admissibility of the complainant's sexual history will

[92] Introduced by *An Act to amend the Criminal Code*, S.C. 1992, c.38.

facilitate review of judicial choices in this area.

The new s.276 provides that evidence of the complainant's past sexual history can no longer support an inference that the complainant is more likely to have consented to the sexual activity which is the subject matter of the charge, or is less worthy of belief. However, the judiciary must make a concerted effort to confront their own prejudices to ensure that this biased reasoning does not enter the process through the back door. Justice McLachlin in *Seaboyer* went so far as to suggest that the sexist "rape myths" directed at complainants of sexual assault are now in fact "discredited[93]" and are no longer accepted by judges and juries. As a result she was satisfied that decisions with respect to the admissibility of the complainant's past sexual history should be left to judicial discretion. This conclusion was ironic in light of her own judgment, which made use of many of these myths. In contrast, Justice L'Heureux-Dube drew upon empirical data to substantiate her conclusion that stereotype and prejudice are still prevalent in the processing and trying of sexual assault complaints.

The defence of honest but mistaken belief has now been abolished by the new s.273.2 of the *Criminal Code*, which provides that it is no defence to a charge of sexual assault that the accused believed that the complainant consented to sexual activity where the accused did not take reasonable steps, in the circumstances known to the accused at the

[93] *Supra* note 64 at 630.

time, to ascertain that the complainant was consenting[94]. The question is how the judiciary will interpret what constitutes "reasonable steps" and whether this will merely incorporate the former low threshold whereby evidence of past sexual activity sufficed to prove consent.

III CONCLUSION

Judicial discretion as to the admissibility of the complainant's evidence will play a big role in the new legislative scheme. Historically the exercise of judicial discretion in this area has been antithetical to the goal of eliminating sexual discrimination, and in order to change this judges need to educate themselves and examine their own socialization to ensure that they do not resort to prejudicial reasoning in admitting evidence of the complainant's sexual history.

Feminists have criticized the way in which women have been equated with their sexuality, to the exclusion of other aspects of their persons[95]. Feminists have also themselves fallen into this trap, partly as a result of engaging with other discourses which define women in this way. This is also a danger of a chapter which responds to the legal depiction of complainants in sexual cases as possessing a sexually voracious and vindictive sexuality. Because there is such a large focus on the complainant's sexuality

[94] This section also provides that it is not a defence to a sexual assault charge where the accused's belief in the complainant's consent arose (i) from the accused's self-induced intoxication, or (ii) recklessness or wilful blindness.

[95] See for example J. Flax, *Thinking Fragments: Psychoanalysis, Feminism, and Postmodernism in the Contemporary West* (Berkeley: University of California Press, 1990) at 179.

in child sexual abuse cases a feminist response is put on the defensive instead of the offensive. In chapter 8 I assess the extent to which a postmodern feminist approach provides a way forward to allow children to speak with their own voice, outside of patriarchal constructions.

IV THE DOCTRINE OF RECENT COMPLAINT

(1) Introduction

As part of the 1983 reforms, Parliament enacted the following provision[96]:

> The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated.

In order to explain the effect of this section I will firstly review the history of the doctrine of recent complaint.

(2) The History of the Doctrine of Recent Complaint

The common law doctrine of recent complaint was an exception to the general rule of evidence known as the rule against self-serving statements, self-confirmation or narrative. As a general rule, witnesses' previous out-of-court statements which were consistent with his or her evidence at trial were excluded. The logic behind this was that there was no reason to doubt the credibility of the witness. Acceptance of out-of-court statements was inconsistent with the adversarial system and its reliance on oral testimony as the chief means of proving information. Another reason was that admission of such evidence would unduly delay the proceedings[97].

Other exceptions to the rule against self-serving statements include evidence of prior identification of the accused by a witness; evidence offered in rebuttal of an allegation

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[96] S.C. 1980-81-82-83, c.125, s.19.

[97] See D. Watt, *The New Offences Against the Person: The Provisions of Bill C-127* (Toronto: Butterworths, 1984) at 177.

that the witness recently fabricated the allegation; and evidence admitted as part of the *res gestae*[98]. As Gisela Ruebsaat notes, prior consistent statements admissible under the first two exceptions, as well as under the doctrine of recent complaint, go to support the credibility of the witness, whereas prior consistent statements which are part of the *res gestae* are admissible to prove a fact in issue[99].

The doctrine of recent complaint was initially specific to sexual offences involving female complainants[100], and in matrimonial offences where an allegation of cruelty was being made. It was later extended to sexual offences involving complainants of both sexes and to all sexual offences, including those where consent was not an issue. The Crown had to show that the complaint was made in a reasonable time after the occurrence of the incident. In the absence of this evidence, the court was bound to draw the adverse presumption against the complainant's credibility that she was fabricating the charge[101]. This doctrine derived from the early common law requirement tha. the complainant of sexual assault raise a "hue and cry" soon after the assault[102]. It reflected the fear of the false accusation, and the belief that a "virtuous" female would complain at the first

[98] G. Ruebsaat, *The New Sexual Offences: Emerging Legal Issues* (Ottawa: Supply & Services Canada, 1987) at 59.

[99] *Ibid.*

[100] See W.E. Hume-Williams, ed., *Taylor on Evidence*, 11th. ed. (London: Sweet & Maxwell, 1906) at 401.

[101] See Blackstone, *Commentaries on the Laws of England*, vol.4 (London: Cadell, 1795) at 213-4.

[102] See Blackstone, *ibid.* at 211.

opportunity[103]. The disadvantage this posed to the complainant in child sexual abuse and rape trials is evident when one considers the factors which often prevent the child from making a complaint, such as fear of the perpetrator, (who is often a person the child relies on for their material survival), embarrassment, blaming oneself, or repression of memories.

Before a complaint was admissible, certain conditions had to be met, which were outlined in the case of *Timm* v. *R.*[104]. Whether or not the conditions were met was assessed by the trial judge at a *voir dire.*

First there had to be evidence of the actual existence of a "complaint". Sometimes the argument was raised to the effect that inconsistencies between the complainant's version of the complaint compared with the recipient's version of the complaint meant that there was no complaint with which to confirm the complainant's credibility[105]. In *R.* v. *Timm* the rape victim testified that she had complained to her sister that the accused had hurt her, whereas her sister testified that the complainant had used the word 'rape'. Despite this the Supreme Court held that evidence of the complaint was admissible, as the fact that the victim did not remember what she had said beyond her initial statement did not preclude the Crown from leading evidence of what she had in fact said.

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[103] As noted by Gisela Ruebsaat, *supra* note 98 at 59.

[104] [1981] 2 S.C.R. 315 at 337.

[105] See *R.* v. *Shonias* (1974), 21 C.C.C. (2d) 301 (Ont. C.A.).

Second, the complaint was required to have been made at the first reasonable opportunity after the offence[106]. The cases illustrate that what was reasonable was defined in favour of the male accused. In *R.* v. *Elliott*[107], for example, the complainant, a boy, had complained to three people one month after the alleged incident. A majority of the court held that the complaint was not made at the first reasonable opportunity as it was a case "where opportunity and time [had] been given to devise and set forth an untrue accusation[108]".

Third, the complaint could not have been elicited by questions of a leading or intimidating character[109]. As Stanley notes[110], the caselaw on this point indicated that the recipient of the complaint was required to be careful of what questions she or he asked the complainant.

If the victim made no complaint, or the details of her complaint did not meet these

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[106] See *Timm* v. *R.*, *supra* note 104 at 337.

[107] (1928), 49 C.C.C. 302 (Ont. C.A.).

[108] *Ibid.* at 308. See also *R.* v. *Boyce*, in which case the complaint was made two days after the alleged assault, and this was held to constitute a failure to complain at the first reasonable opportunity (although the complainant's outcry at the time of the alleged incident was heard by a third party and this was held to reduce the significance of her failure to complain at the first reasonable opportunity); (1975), 23 C.C.C. (2d) 16 (Ont. C.A.); and also *Chesney* v. *Newsholme*, [1908] P. 301, in which case Sir Dibdin held that a full and detailed complaint by a boy to his mother, 24 hours after the assault, was inadmissible.

[109] See *R.* v. *Timm*, *supra* note 104; *R.* v. *Moore and Grazier* (1971), 1 W.W.R. 656 (B.C.C.A.); *R.* v. *Muise* (No. 2) (1975), 11 N.S.R. (2d) 222 (N.S.S.Ct., Appeal Div.); *R.* v. *Kulak* (1979), 46 C.C.C. (2d) 30 at 38 (Ont. C.A.); and *R.* v. *Waddell* (1975), 28 C.C.C. (2d) 315 (B.C.C.A.).

[110] *The Experience of the Rape Victim with the Criminal Justice System prior to Bill C-127* (Ottawa: Dept. of Justice, 1987) at 43.

conditions, the judge was required to instruct the jury to draw an adverse assumption with respect to the victim's credibility. If, on the other hand, the complaint was deemed admissible, the judge was required to instruct the jury that this evidence went only to credibility, and not to support a fact in issue[111].

Where the complaint did not meet the conditions for admissibility, there was conflicting authority as to whether the complainant could explain her reasons for her failure to complain within a "reasonable time[112]". Even if the complainant was allowed to so testify she was still put on the defensive, having to rebut the implication of false allegation that would otherwise be drawn.

(3) Current Admissibility of Evidence of Recent Complaint

Despite the abrogation of the doctrine of recent complaint[113], it is unclear under section 246.5 as to whether evidence of recent complaint may be admissible under any of the other exceptions to the rule against narrative. In *R.* v. *Colp*[114] the Nova Scotia County

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[111] See for example Cartwright, J., in *R.* v. *Thomas*, [1952] 2 S.C.R. 344 at 357:

> the complaint was not admitted as proof of the facts asserted, but was admitted to show the consistency of the complainant's testimony.

[112] As noted by Gisela Ruebsaat, *supra* note 98 at 59. She refers to *R.* v. *Mace* (1975), 25 C.C.C. (2d) 121 (Ont. C.A.); *R.* v. *Kistendey* (1975), 29 C.C.C. (2d) 382 (Ont. C.A.); *R.* v. *Walters* (1980), 53 C.C.C. (2d) 119 (Ont. C.A.). D.F. Dawson maintains that according to rules of practice, the complainant was allowed to so testify; see "The Abrogation of Recent Complaint: Where Do We Stand Now?" (1984) 27 Crim. Law. Q. 57 at 65-7.

[113] Although this section refers to *sexual assault* cases, presumably section 246.5 abrogates the doctrine in all the sexual offence cases to which it formerly applied (consensual and nonconsensual), and not just to the three sexual assault offences, as they had not yet been enacted in 1983.

[114] (1984), 36 C.R. (3d) 8 (N.S. Cty. Ct.).

Court held that although the Crown is no longer obliged to lead evidence of recent complaint, such evidence can be put before the court at the choice of the Crown. In this case, the court held that the complaint was made at the first reasonable opportunity, and as a result it was admitted by virtue of the *res gestae* exception. The court was also of the view that a complaint can be admissible in order to rebut a defence allegation of recent fabrication against the complainant.

In *R.* v. *Page*, Ewaschuk, J., of the Ontario Supreme Court agreed that a complaint can be part of the *res gestae*, although the complaint must be "a spontaneous exclamation[115]" in order to be part of the *res gestae* (rather than made at the first reasonable opportunity, which was the test used in *Colp*). If admissible, evidence of the complaint as part of the *res gestae* can be directly tendered by the Crown[116].

The court in *Page* also agreed that where the defence alleges recent fabrication, the Crown can lead evidence of recent complaint to rebut this suggestion. As Justice Ewaschuk noted, recent fabrication[117]:

> refers to the fact that the complaint was not made at the first reasonable opportunity, in other words that it was fabricated or invented after the time normally expected to complain.

This may be suggested by the defence either directly, or through innuendo. It is clear

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[115] (1984), 40 C.R. 85 at 92.

[116] See *Page*, *ibid.* at 89.

[117] *Ibid.* at 90.

from this that the abrogation of the doctrine does not prevent the defence from suggesting false allegation. The difference now is that there is no positive duty on the Crown to introduce such evidence. Furthermore, in the absence of such evidence, there is no obligation on the trial judge to instruct respecting adverse inferences[118]. However, defence counsel is still entitled to cross-examine the complainant on her failure to make a recent complaint, and to ask the jury to draw an adverse inference from it[119].

It is only after such an allegation has been made that the Crown can introduce evidence of recent complaint in rebuttal. However, this may not help the child sexual abuse survivor because often child sexual abuse survivors only complain many years later. At this point it is then open to the defence to suggest that the survivor made it up because his or her suggestibility was preyed upon by a therapist. The courts have effectively revived the assumption underlying the doctrine of recent complaint, that a complainant who did not complain at the first "reasonable" opportunity is a liar.

Gisela Ruebsaat convincingly argues[120] that section 246.5 should be read as a universal abolition of the adverse inference which the courts have traditionally drawn from a complainant's failure to complain at the first "reasonable" opportunity. Defence counsel

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[118] See *Page*, *ibid*.

[119] The Court in *Page* also held that, should the contents of a complaint not be admissible under any of the other exceptions to the rule against narrative, evidence of the fact that it was made did not offend section 246.5 and was therefore admissible.

[120] *Supra* note 98 at 64.

should be prevented from using a complainant's "failure" to make prompt complaint in order to support an allegation of recent fabrication.

(4) Conclusion

Despite the abrogation of the doctrine of recent complaint, it is apparent from the caselaw that judges are still prone to accepting the prejudicial reasoning that absence of recent complaint is evidence of fabrication. An example of this is provided by the reasoning of Nasmith, J., in *R.* v. *T.S.*[121], a case which involved a complaint of alleged sexual assault on a 3 year old (to which the complainant testified as a 12 year old). Nasmith, J., stated that it would be dangerous to convict by virtue of the fact that:

> [i]f this extraordinary behaviour was actually going on over a period of months, it seems surprising to me that no earlier mention was made of it within the family by this bright little girl and no resistance to the baby sitter was observed at any time before he moved away.

This clearly offends the abrogation of the doctrine of recent complaint, and is prejudicial to sexually abused children who frequently delay disclosure.

[121] [1993] O.J. No. 153 (Ont. Ct. Just. Prov. Div.) (Q.L.). See also *R.* v. *Voudrack*, [1992] N.W.T.R. 267 (N.W.T.S.C.) (Q.L.).

CHAPTER 9

THE REFORMS

I INTRODUCTION

It is part of my hypothesis that judicial and legislative lawmakers wield the power of determining what counts as knowledge. The law legitimates certain methods of determining the "truth" where there are conflicting stories, and delegitimates other methods. In this chapter I will examine more closely the distinctive features of the adversarial system, and their underlying rationales. I will conclude with an assessment of the extent to which recent reform of the law of evidence governing children's evidence modifies the traditional adversarial system, and the extent to which reform resolves some of the problems posed by feminist theory.

II THE ADVERSARIAL SYSTEM

(1) Cross-Examination

Each witness is examined "in chief" by the party calling him or her, who attempts to draw from the witness information supportive of his case. The witness is then cross-examined by the other side, in order to draw information which is damaging to the opposition's case, or to at least dent the witness' credibility. The idea is that "the truth" will emerge from this clash of opposing accounts.

Much value has been placed in cross-examination as a method to discover the "truth" of the matter. The statement of Wigmore that cross-examination is "the greatest legal engine ever invented for the discovery of truth"[1] has often been quoted by judges and other legal writers. This reflects the notion that legal methods of examination used by lawyers are capable of extracting a "true" account of events from a witness.

(2) Confrontation

The right of the accused to confront his accuser stemmed from the public outcry following the trial of Sir Walter Raleigh[2], and serves to exclude *ex parte* affidavits and ensure cross-examination. It also allows the judge and jury to view the demeanour of the witness, which was seen as necessary by virtue of the belief that this would enable a jury to assess whether or not a witness is telling the truth. Another reason often given for the right of confrontation is that[3]:

> [i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back'.

It is apparent from the caselaw that the right of confrontation is not an absolute right, (see below).

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[1] J.H. Chadbourn, ed., *Wigmore on Evidence*, vol. 5, rev. ed. (Boston: Little, Brown, 1976) 32 (s.1367).

[2] And was provided by legislation (11 & 12 Vic., c. 42.) as is noted by J. Robb & L. Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1988) 27 Alta. L. Rev. 327 at 346. Sir Walter Raleigh was not allowed to call witnesses and was convicted of treason primarily on affidavit evidence.

[3] *Per* Scalia J. in *Coy* v. *Iowa*, 108 S. Ct. 2798 at 2802 (1988). He went on to say:

> The face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

(3) Right of the Accused to be Present at his Trial

This right is contained in section 577 of the *Criminal Code*[4], subject only to the proviso that the defendant can be excluded if he or she is unruly[5]. Robb and Kordyban outline the two principles protected by the right of attendance[6]:

> (a) the principle that an accused has a right to hear the case to be met and to answer (including the right of cross-examination), and (b) the principle of fairness and openness which requires that an accused be present so that first hand knowledge of the proceedings may be acquired.

(4) The Rule against Hearsay

In child sexual abuse cases, a combination of the competency requirement and the stress of the adversarial system often prevents the child from testifying. The result is that frequently allegations of sexual abuse made by a child to a social worker, family member, or friend provide the only source of information as to whether or not abuse occurred, particularly in the absence of medical evidence. However, such out-of-court statements by the child have traditionally been inadmissible by virtue of the rule against hearsay.

The rule against hearsay prohibits the admission of out-of-court statements offered in

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[4] R.S.C. 1985, c.C-46.

[5] As stated in *R.* v. *Ginoux* (1971), 15 C.R.N.S. 117 at 119 (C.A. Que.), *per* Brossard, J.A.

[6] *Supra* note 2 at 347, summarising the principles set out by Dubin, J.A., in *R.* v. *Hertrich et al.* (1982), 67 C.C.C. (2d) 510 at 537 (Ont. C.A.).

evidence to prove the truth of the matter asserted[7]. This follows from the rationale that, in order to ensure reliability of evidence, several requirements must be met. First, the evidence must be given under oath, the assumption being that this impresses upon the witness the obligation to tell the truth. Second, testimony must be given in open court in order for the witness' demeanour to be assessed. This also reflects the belief that the solemnity of the proceedings and presence of the accused will encourage truthfulness[8]. A third and primary factor is the adversarial requirement that the witness must be available to be cross-examined by the opposing party[9]. Out-of-court statements generally do not meet any of these requirements. Another concern is the danger that the out-of-court statement will be incorrectly reported to the court[10].

(a) exceptions to the rule against hearsay

This rule however, in some cases, excluded arguably helpful evidence, and the courts developed many exceptions to the rule, justified, according to Wigmore, on the grounds

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[7] See E. Cleary, ed., *McCormick on Evidence*, 3rd. ed. (St. Paul: West, 1984) at 729. It should be noted that in the twelth century jurors were expected to act on their personal knowledge of the events. The hearsay rule was a development of the seventeenth century, in part a response to the trial of Sir Walter Raleigh; see M. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Sexual Abuse Prosecutions" (1985) U. of Miami L. Rev. 19 at 62.

[8] R.J. Delisle, *Evidence Principles and Problems* (Toronto: Carswell, 1984) at 202.

[9] *Ibid.* at 726-7. D.A. Rollie Thompson notes that the rule is "founded on the adversary system of litigation"; see "Taking Children *and* Facts Seriously: Evidence Law in Child Protection Proceedings - Part I" (1988) 7 Can. J. of Fam. L. 11 at 45. See also E.M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv. L.R. 177.

[10] As noted by R. Park, "A Subject Matter Approach to Hearsay Reform" (1987) 86 Mich. L.R. 51 at 55.

of necessity and reliability[11]. In general out-of-court allegations of sexual abuse by children failed to fit any of these exceptions, which were narrowly drawn in adherence to adversarial principles, and furthermore were developed, as Thompson notes[12], in a system which treated the evidence of children as inherently suspect.

Recently the Canadian courts have expanded some of the existing exceptions to the hearsay rule, in order to admit out-of-court allegations of sexual abuse by children. The exception that has been most frequently invoked to admit children's out-of-court statements in child sexual abuse cases is the exception which admits a statement made in reaction to a startling event (*res gestae*)[13]. Traditionally strict contemporaneity of the

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[11] *Wigmore*, *supra* note 1 at 253. McCormick characterizes the exceptions as falling into two main categories: where out-of-court statements are admitted whether or not the declarant is available to testify because they are at least as reliable as court-room testimony, (for example declarations as to physical sensations, the reliability of which are ensured by contemporaneity); and the admission of out-of-court statements only if the declarant is unavailable to testify, where unavailability has generally been defined in restrictive terms, as in the admission of dying declarations, (*supra* note 7 at 753).

[12] *Supra* note 9 at 46.

[13] Hearsay may also be admissible through an expert to establish the basis of the expert's opinion, although not as proof of a fact in issue, (see *R.* v. *Abbey*, [1982] 2 S.C.R. 24). As a result of *R.* v. *Lavallee*, [1990] 1 S.C.R. 852, the requirements for the admission of hearsay under this exception may have been implicitly relaxed. The majority of the Supreme Court held that *Abbey* did not stand for the proposition that each specific fact must be proven before expert evidence could be accepted. The Court approved the admission of "battered wife syndrome" evidence on a defence of self-defence to murder. Lavalee herself never testified; rather the basis of the defence was established by Lavalee's testimony to the police and the expert testimony of a psychiatrist, who relied extensively on interviews with Lavalee. Wilson, J., was of the view that "as long as there is some admissible evidence to establish the foundation of the expert's opinion", the opinion is admissible and hearsay considerations go only to weight, (*ibid.* at 889-91).
Other exceptions allowing for admission of a child's out-of-court statements include the past recollection recorded exception (see below); and statements in the present tense as to the child's physical, mental or emotional state.

statement with the event was required[14], the rationale being that the declarant would have had no time to fabricate due to the immediate shock of the event. This has been replaced by the test of spontaneity[15]. The Supreme Court in *R.* v. *Khan*[16] defined the test for spontaneity as either contemporaneity, or the existence of pressure or emotional intensity. In this case, a four and a half year old child was examined by a doctor with no one else present. Fifteen minutes after leaving the doctor's office, the child's mother asked the child to explain a stain on her sweater, and in response the child described an act of masturbation by the doctor. The Court held that the statement did not satisfy the requirements of reliability for the admission of spontaneous declarations as[17]:

> [t]he statement was not contemporaneous, being made fifteen minutes after leaving the doctor's office and probably one half-hour after the offence was committed. Nor was it made under pressure or emotional intensity which would give the guarantee of reliability upon which the spontaneous declaration rule has traditionally rested.

This reflects the limitations of this exception. Very young children may not have sufficient knowledge to understand the implications of a sexually abusive act[18]. Even when they do respond with shock, they may delay reporting or not report at all until

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[14] *Bedingfield* (1879), 14 Cox C.C. 341 provides an extreme example of this, in which case the statement of a woman, who emerged from a room where her husband was, with her throat cut, saying "See what Harry has done", was inadmissible.

[15] *R.* v. *Clark* (1983), 35 C.R. (3d) 357 (Ont. C.A.). This exception has been further extended in the U.S., where some decisions have held that even "rekindled excitement" can satisfy its requirements; see J.E.B. Myers, "Hearsay Statements by the Child Abuse Victim" (1986) 38 Baylor L. Rev. 755 at 863-8.

[16] [1990] 2 S.C.R. 531 at 540.

[17] *Per* McLachlin, J., (*ibid.*).

[18] See J. Yun, "A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases" (1983) 83 Col. L. Rev. 1745 at 1756-7.

questioned, which precludes spontaneity[19].

However, in *Khan* the Court held that the modern approach towards hearsay is a flexible one[20], as illustrated by *Ares* v. *Venner*[21]. McLachlin, J., held that in order for hearsay to be admitted, the tests of necessity and reliability must be satisfied[22]. She stated that this flexible hearsay approach was particularly appropriate for the admission of out-of-court statements of children. The Court held that the child's statements met both tests, as other evidence of the event was inadmissible. The Court also held that a finding of necessity could be based on psychological assessments that testifying would cause harm or trauma to the child[23].

The court outlined a non-exhaustive list of factors to be considered on the issue of reliability, including timing, demeanour, the personality, understanding and intelligence of the child, and the question of motive to fabricate[24]. In this case the evidence was said

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[19] As noted by A. Frissell and J.M. Vukelic, "Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of a Child's Out-of-Court Statements in the Prosecution of Child Sexual Abuse Cases in North Dakota" (1990) 66 N. Dakota L. Rev. 599 at 620.

[20] *Per* McLachlin, J., *supra* note 16 at 540.

[21] [1970] S.C.R. 608. In *Ares* the Supreme Court, adopting the dissenting judgment of Lord Pearce in *Myers* v. *D.P.P.*, [1965] A.C. 1001, held that the categories of hearsay exceptions are not closed and may be added to by judicial decisions.

[22] As a basis for these two tests she cited the dissenting judgement of Lord Pearce in *Myers*, (*ibid.* at 1040-41) who was prepared to admit hearsay evidence where (a) it is difficult to obtain other evidence, (b) it is not made in the interest of the declarant, (c) it is made prior to the dispute or litigation, and where (d) the declarant had peculiar means of knowledge.

[23] *Supra* note 16 at 546.

[24] *Ibid.* at 547.

to be reliable, as[25]:

> T. [the child] was disinterested, in the sense that her declaration was not made in favour of her interest. She made the declaration before any suggestion of litigation. And beyond doubt she possessed peculiar means of knowledge of the event of which she told her mother. Moreover, the evidence of a child of tender years on such matters may bear its own special stamp of reliability.

In support of this, McLachlin, J. cited Robins, J.A., in the Ontario Court of Appeal[26]:

> Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.

The Court pointed to several factors which supported this liberalization of the hearsay rule. The requirements for admission of such statements have been relaxed by courts in the United States[27], and by the Canadian courts in child protection proceedings. It is

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[25] *Ibid.* at 542.

[26] (1988), 42 C.C.C. (3d) 197 at 210.

[27] The U.S. *Federal Rules of Evidence* s.803-4 (1975) list the various exceptions to the hearsay rule, and include a "residual" hearsay exception, under which other hearsay statements are admissible if they possess "comparable circumstantial guarantees of trustworthiness". The Supreme Court in *Ohio* v. *Roberts* (448 U.S. 56 at 66 (1979)) stated that in absence of a "well rooted" hearsay exception, particularized guarantees of trustworthiness are required in order to admit hearsay evidence, so as not to infringe the right of confrontation. This analysis was applied in *Idaho* v. *Wright*, 110 S.Ct. 2139 (1990), in which case it was held that the statements of a two and a half year old child, in response to the questions of a paediatrician who was conducting a medical examination which revealed signs of sexual abuse, did not fall within a "well rooted" hearsay exception. As a result, the onus fell upon the state to demonstrate particularized guarantees of trustworthiness. Factors which could indicate trustworthiness included, in the view of the court, spontaneity, and constant repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, lack of motive to fabricate. Factors which undermined spontaneity were said to be evidence of prior interrogation, prompting, or coaching by adults.

A. Frissell and J.M. Vukelic (*supra* note 19 at 621) observe that 23 states have adopted, by statute or rule, specific hearsay exceptions to cover statements by children in sexual abuse cases.

clear in *Khan* that admissibility of hearsay is not dependent on the availability of cross-examination, or competency of the child. However, McLachlin, J., in *Khan* concluded that the two tests do[28]:

> not make out-of-court statements by children generally admissible; in particular the requirement of necessity will probably mean that in most cases children will still be called to give *viva voce* evidence.

(b) hearsay in civil proceedings

The Court in *Khan* referred to the case of *Official Solicitor* v. *K.* as authority for the proposition that hearsay is admissible in child protection proceedings[29]. More solid authority is provided by Canadian decisions. A handful of cases in British Columbia approve of the admission of hearsay on the grounds that child protection proceedings operate according to a non-adversarial model[30]. Other cases, such as *F.* v. *F.*[31] justify the reception of hearsay evidence in civil proceedings not on the basis of the type of proceeding, but rather on the grounds of necessity and reliability.

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[28] *Supra* note 16 at 548.

[29] [1965] A.C. 201 (H.L.). The problem with this is that Lord Devlin's comments on hearsay (which were *obiter*), were directed to the High Court's wardship jurisdiction, which is quite different to Canadian child protection proceedings, as is noted by Thompson, (*supra* note 9 at 56). Also the decision of the majority in that case was to the effect that a parent is not entitled as a matter of right to a confidential report; this has been rejected in later cases, see *J.* v. *J.* (1980), 16 R.F.L. (2d) 239 (Man. C.A.); and *Young* v. *Young* (1985), 48 R.F.L. (2d) 391 (Alta. Q.B.).

[30] For example see *H.(D.R.)* v. *Superintendent of Child Services* (1984), 41 R.F.L. (2d) 336 at 340-41 (B.C.C.A.). This decision however restricts the hearsay exception to protection proceedings, as opposed to private custody and access proceedings.

[31] [1988] B.C.J. No. 278 (B.C.C.A.) (Q.L.); see also *M.W.* v. *Director of Child Welfare for P.E.I.* (1986), 3 R.F.L. (3d) 181 (P.E.I.C.A.); and *Foote* v. *Foote*, [1988] W.D.F.L. 799 (B.C.C.A.).

A few provinces have enacted statutory hearsay exceptions[32]. Section 74(4)(b) of Alberta's *Child Welfare Act* allows the court to accept hearsay evidence "if it considers it proper to do so and it is satisfied that no better form of evidence is readily available." Russell, J., in *Re: N.(L.), T.(L.) and J.(L.)* held that this section is not restricted to preexisting hearsay exceptions[33]. According to her interpretation of the section, only necessity is the test for admissibility, with circumstantial guarantees of trustworthiness going to weight[34].

The liberalizing of the hearsay exceptions do indicate more recognition of the dynamics of child sexual abuse and the necessity of admitting the child's out-of-court statements. However, the admission of these statements is justified by reference to factors of trustworthiness, which are seen as providing an equivalent guarantee of reliability as that provided by cross-examination.

Furthermore, the factors of reliability are not always responsive to the dynamics of child

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[32] See the Alberta *Child Welfare Act*, S.A. 1984, c.C-8.1; Quebec's *Youth Protection Act*, R.S.Q., c.P-34.1, ss.85.5, 85.6, as en. S.Q. 1989, c.53, s.8; Ontario's *Child and Family Services Act*, R.S.O. 1990, c.C-11, s.46(1); and Nova Scotia's *Children and Family Services Act*, S.N.S. 1990, c.5, s.96(3)(b).

[33] (1986), 72 A.R. 241 at 255 (Prov. Ct., Fam. Div.).

[34] Guarantees of trustworthiness include the child's age, and likelihood of deception; the child's ability to communicate; the credibility and trustworthiness of the witness alleging the hearsay statements and the potential for bias in that witness; the circumstances in which the alleged statements were made and the potential for coaching, duress or influence; and the availability and strength of corroborating evidence. Thompson objects to the "anomalous situation where corroboration is only required when the child does testify [under the provincial evidence acts], thus creating a substantial incentive to introduce the child's evidence by the *hearsay* route even if the child could testify", (*supra* note 9 at 71). This can be used as an argument to eliminate the requirement of corroboration of the child's testimony in the interests of consistency and principle, rather than requiring corroboration for the child's out-of-court declarations.

sexual abuse, and reflect judicial distrust of children. For example, Weiler, J.A., in *R. v. G.N.D.* considered that, in determining whether to admit the repetitive hearsay statements of the child, the following factors were to be considered in assessing reliability[35]:

> [t]he age of the child, and, as a result, the child's ability to understand and interpret events accurately, *the lapse of time between the alleged incident and the making of the statement*, whether the statement was spontaneous or emerged naturally, elicited by leading questions from well-meaning professionals or [was] the result of prompting by parents.

This fails to recognize that frequently children delay disclosure of sexual abuse, due to fear of the perpetrator or shame. These factors of trustworthiness also include the availability and strength of corroborating evidence, a practical requirement which poses an impediment to legal recognition of child sexual abuse[36]. Furthermore, in admitting hearsay evidence, adversarial principles are still "the norm", and any "deviations" from these are conservative.

III THE REFORMS

(1) Pressures for Reform

The concern about the prevalence of child sexual abuse documented in the *Badgley Report*[37] led to pressure for reform of, among other things, the rules of evidence, which were perceived as posing an impediment to convictions in child sexual abuse cases. An

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[35] [1993] O.J. No. 722 (C.A.) (QL), (emphasis added).

[36] See the discussion in chapter 7.

[37] *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa: Minister of Supply & Services, August 1984).

interplay of legal and other professional viewpoints in the literature over the last decade reflect a change in attitude towards the testimony of children. The view was increasingly expressed that the rules of evidence "revictimized" the child, not only as a result of discriminatory rules which treated children's testimony as inherently unreliable, but also because of the stress caused to the child by requiring her to confront the accused and endure the adversarial procedure of cross-examination[38]. There has also been increasing recognition of the testimonial abilities of child witnessess, and this is reflected in the enactment of Bill C-15, which came into force on January 1, 1988[39].

(2) Use of Screens and Closed-Circuit Television

Bill C-15 introduced s.486 which permits a complainant in a case of child sexual abuse to testify from behind a screen or from another room via closed circuit television, provided the Court was first satisfied that this "is necessary to obtain a full and candid account of the acts complained of"[40].

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[38] See for example N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System" (1990) 15 Qu. L.J. 3 at 3.

[39] *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c.24 (now R.S.C. 1985 (3d Supp.), c.19).

[40] Section 486 (as provided by section 14 of *An Act to amend the Criminal Code and the Canada Evidence Act*, (*ibid.*) provides:

> (2.1) Notwithstanding section 650, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273 and the complainant is, at the time of the trial or preliminary inquiry, under the age of eighteen years, the presiding judge or justice, as the case may be, may order that the complainant testify outside the court room or behind a screen or other device that would allow the complainant not to see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant.
> (2.2) A complainant shall not testify outside the court room pursuant to subsection (2.1) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the complainant by means of closed-circuit television or otherwise and the accused is permitted

There has been an increasing amount of anecdotal evidence (in the form of judges', lawyers', victims', or media accounts), to the effect that child witnesses sometimes are unable to testify due to the stress they experience in the courtroom[41]. Spencer and Flin comprehensively outline the many potential sources of stress in the pre-trial period, including repeated interviews, lack of legal knowledge, waiting for the trial, and further delay due to the rescheduling of cases[42]. Further sources of stress arise in court, including time spent in the waiting-room, lack of knowledge of the proceedings, and the formality of the layout of the courtroom[43]. Goodman's study[44] of child witnesses in which many of the children were observed to be distressed by the court experience supports their view that child witnesses should be kept out of the courtroom wherever

to communicate with counsel while watching the testimony.

[41] It should also be noted that other witnesses may also experience stress in giving testimony, for example the mentally handicapped, and adult rape victims; see Z. Adler, *Rape on Trial* (London: Routledge and Kegan Paul, 1987), and J. Temkin, *Rape and the Legal Process* (London: Sweet and Maxwell, 1987).

[42] *The Evidence of Children: The Law and the Psychology* (London: Blackstone Press, 1990) at 287-290. Delay prevents the child from dealing with the abuse in therapy, and then moving on with his or her life.

[43] *Ibid.* at 290-297. They note that from the viewpoint of the child, the isolation of the child in the witness box may suggest that he or she, and not the accused, is on trial. Other potential causes of stress are confrontation of the accused, and examination and cross-examination of the child witness, which are regarded as essential features of the justice system. After the proceedings are over they note that the child may continue to experience stress, particularly if a conviction has not been obtained. They also document the mediating factors which may operate to determine how stressful the experience is for a child witness in any particular case, including the child's personality, the type of offence involved, the relationship of the child to the defendant, the degree of support for the child, and the outcome of the trial, (*ibid.* at 298).

[44] G. Goodman *et al.* found that of 40 American children observed giving evidence during preliminary hearings, 20 showed signs of distress, and 11 child witnesses out of 17 giving evidence in actual trials were distressed; see "Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims" (1989) [unpublished].

possible[45].

In contrast, some commentators express the view that as yet there is no empirical evidence to support the view that children as a class consistently experience stress in giving testimony[46]. Others are of the view that in fact it is a cathartic and empowering experience for the child to give evidence[47].

However, it would appear that there are factors specific to child sexual abuse cases which potentially cause stress, and s.486 of the *Code* is one attempt to prevent this[48].

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[45] See also the study of J.F. Tedesco *et al.*, who concluded from the results of questionnaires completed by 48 child witnesses in sexual abuse criminal cases, that testifying in court, as well as undergoing repeated interviews, was associated with negative ratings; see "Children's Reactions to Sex Abuse Investigation and Litigation" (1987) 11 Child Abuse and Neglect 267. Studies have also been done which canvass the views of professionals as to whether or not child witnesses are harmed by the courtroom experience, but studies which directly assess this question from the viewpoint of child witnesses are more reliable.

[46] See for example the view of D.A. Rollie Thompson, *supra* note 9 at 78.

[47] For example L. Berliner & M.K. Barbieri suggest that "the experience of testifying in court can have a therapeutic effect for the child victim... some children report feeling empowered by their participation in the process"; see "The Testimony of the Child Victims of Sexual Assault" (1984) 40 J. of Soc. Issues 125 at 135. N. King *et al.* evaluated 100 children who had been abused by family members (five-month follow-up data were obtained on 76 children); see "Going to Court: The Experience of Child Victims of Intrafamilial Sexual Abuse" (1988) 13 J. of Health, Politics, Policy and Law 705. They concluded that (*ibid.* at 725):

> ... the children who testified in juvenile court were twenty times more likely to experience a significant decrease in their anxiety scores ... than were their peers without juvenile court experience... On the other hand, children who were pending criminal trial were twelve times less likely to have resolved earlier symptoms of depression to a clinically significant degree after five months than the groups of children whose cases were adjudicated quickly or whose cases were never prosecuted.

[48] Other proposals to prevent stress include various modifications of the courtroom. A. Frissell & J.M. Vukelic are among those who advocate a child sized witness chair, as well as the availability of a support person; see "Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of a child's out-of-Court Statements in the Prosecution of Child Sexual Abuse Cases in North Dakota" (1990) 66 N. Dakota L. Rev. 599 at 669; see also D. Libai's proposal for a "child-courtroom", in "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System" (1968-9) 15 Wayne L. Rev. 977.

(3) Section 486: Potential Conflict with the Right of Confrontation

(a) the american authorities

The question arises whether this provision violates the right of confrontation. It is instructive to refer to the American caselaw dealing with similar provisions[49]. A screen which allowed the defendant to dimly see the child, but not vice versa was held to violate the right of confrontation embodied in the Sixth Amendment to the U.S. Constitution in *Coy* v. *Iowa*[50]. The majority of the Supreme Court held that the accused had a right of face-to-face, or two-way, confrontation, which was justified on the traditional ground that this would make it less easy for the witness to lie. However, the judgments indicate that this right could give way where case-specific findings of necessity were made requiring protective measures for the child witness. They failed to comment, however, on the evidential basis which would satisfy such a finding. In *Maryland* v. *Craig*[51] more guidance was given on this issue. In this case the Supreme Court upheld the provision of the Maryland Code[52], which permits the cross-examination of the child witness in a separate room with both the prosecutor and defence counsel present. This is broadcast to the

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Another proposal, as canvassed by Robb & Kordyban, (*supra* note 2 at 348), is the use of a surrogate witness system. The system operated in Israel is an example of this, whereby "youth interrogators" interview the child and present the child's evidence in court, in lieu of the child testifying, (for a description of this see E. Harnon, "Examination of Children in Sexual Offences - the Israeli Law and Practice" [1988] Crim. L.R. 263).

[49] 34 states have statutes allowing out-of-court videotape depositions of the child, and 23 have closed-circuit television for "live" presentation at the trial; see B.E. Bohlman, "The High Cost of Constitutional Rights in Child Abuse Cases: Is the Price Worth Paying?" (1990) 66 N. Dakota L. Rev. 579 at 583.

[50] *Supra* note 3.

[51] 110 S. Ct. 3157 (1990).

[52] *Courts and Judicial Proceedings Code*, Maryland Code Ann. s. 9-102 (1988).

courtroom, from where the defendant remains in electronic communication with counsel. The Supreme Court held that face-to-face confrontation is preferrable, but is not absolutely required as long as an important public policy is furthered, (in this case the protection of child witnesses who are victims of sexual abuse from further trauma[53]), and case specific findings are made requiring protection for the child witness[54]. The Court was of the view that other safeguards to ensure reliability were in place, including the determination of competency of the witness, the administration of the oath, opportunity for the fact finder to observe the demeanour of the witness, and allowing the defendant to cross-examine the witness. In other words the majority held that the procedure adhered to adversarial principles. Underlying this reasoning is an entrenched faith in the ability of these adversarial procedures to produce reliable evidence. As to the nature of the case specific findings, it was held that the child must be traumatized by the presence of the defendant, and not merely by the court process, which must be more than simple nervousness, excitement, or reluctance to testify[55]. The Court further held that the trial court could make the findings based on expert and other testimony before the child testifies, rather than requiring the child to testify first in the physical presence of

[53] *Supra* note 51 at 3167.

[54] The statute requires the trial judge to first "determine that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."

[55] The Court held that the "unable to reasonably communicate" standard met constitutional standards. This should be contrasted with the dissenting opinion of Justice Scalia (part of the majority in *Coy*, who was joined in *Maryland* v. *Craig* by Justices Brennan, Marshall, and Stephens). He was of the view that as the prosecution had control of (at least the initial) decision of whether or not the child should testify, it was the State's own fault if the child suffered trauma, and that the State's interest in securing fewer convictions of innocent defendants could not be forfeited in favour of the procedure.

the defendant[56]. Bohlman notes that this decision applies only to the protective measure in question, and predicts more constitutional challenges in the future with respect to other procedures[57].

(b) the constitutional challenge to section 486

(i) section 7 analysis

In *R.* v. *Levogiannis*[58], (in which case the trial judge made an order permitting the twelve year old complainant to testify from behind a screen), section 486(2.1) was challenged as inconsistent with sections 7 and 11 of the *Charter*[59]. The first question for the Court was whether it is a basic tenet of our legal system protected by s.7 of the *Charter*, that an accused be permitted an unobstructed view of a witness who testifies against him. The Ontario Court of Appeal held that although normally the accused has the right to be in the sight of witnesses who testify against him, this is not an absolute right[60]. They relied on MacDonald, J.A., in *R.* v. *R.(M.E.)* who stated that the right

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[56] C.A. Whitlock notes that this may invite a battle of expert testimony to the effect that the child is or is not able to testify; see "Admissibility of Videotaped Testimony: What is the Standard After *Maryland* v. *Craig* and how will the Practicing Defense Attorney be Affected?" (1990-1) 42 Mercer L. Rev. 883 at 900. He also raises the unresolved question of how the courts will evaluate whether or not the potential trauma to the witness is caused by confrontation with the defendant as opposed to trauma generated by other courtroom procedures, (*ibid.* at 901).

[57] *Supra* note 49 at 595.

[58] (1991), 1 O.R. (3d) 351 (C.A.).

[59] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].

[60] In support of this they referred to *R.* v. *Smellie* (1919), 14 Cr. App. R. 128 (C.C.A.), in which case the accused, who was convicted of assaulting and ill-treating his 11 year old daughter, was directed by the judge to sit upon the stairs leading out of the prisoner's dock, out of sight of his daughter while she gave evidence. Lord Coleridge J. for the court affirmed this procedure in an extremely short judgment, (*ibid.*

to confrontation[61]:

> is simply the right of an accused person to be present in court, to hear the case against him and to make an answer and defence to it.

They stated that all of the elements of confrontation, "physical presence, oath, cross-examination, and observation of demeanour by the trier of fact[62]" were present where a screen was used under section 486(2.1). It was recognized that[63]:

> ... in some cases... eye to eye contact may frustrate the obtaining of as true an account from the witness as is possible.

This is particularly liable to be the case where a child testifies to sexual abuse. The stress of testifying in front of the accused may cause the child witness to retract, to refuse to testify or to testify less completely than she would in the absence of face-to-face confrontation. As Jacqueline Castel notes, face to face contact with the accused may recreate the fear and helplessness experienced by the child in her relationship with the accused[64]. Furthermore, it is not necessarily the case that it is possible to tell from a

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at 130):

> If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the needs of justice by removing the former from the presence of the latter.

[61] (1989), 49 C.C.C. (3d) 475 at 484 (N.S.S.C.).

[62] *Supra* note 58 at 367, quoting Justice O'Connor in *Maryland* v. *Craig*.

[63] *Ibid.*

[64] "The Use of Screens and Closed-Circuit Television in the Prosecution of Child Sexual Abuse Cases: Necessary Protection for Children or a Violation of the Rights of the Accused?" (1992) 10 Can J. of Fam. L. 283 at 297.

person's demeanour whether or not they are lying[65].

(ii) section 11 analysis

One of the main objections to the use of the screen is that it may reverse the presumption of innocence guaranteed under s.11(d) of the *Charter* in that it suggests that the accused has already in some way hurt the child, as was argued in *Levogiannis*[66]. The Ontario Court of Appeal were of the opinion that this was a risk, and to answer it held that it should be the usual practice for the trial judge to instruct the jury that the use of the screen has nothing to do with the innocence or guilt of the accused[67].

(iii) section 1 analysis

The Ontario Court of Appeal held that if section 486(2.1) violated section 7 and 11(d) of the *Charter*, it was justified under section 1[68]. According to the Court's section 1 analysis, the purpose of the legislation is narrower than that upheld as constitutional in

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[65] As Spencer and Flin note, signs associated with lying (for example, hesitancy and blushing), may be signs, not of lying, but of stress which is the result of having to tell an unpleasant truth, (*supra* note 42 at 232). They cite P. Ekman's book in support of this; *Telling Lies: Clues to Deception in the Marketplace, Marriage and Politics* (New York: W.W. Norton, 1986).

[66] See also Whitlock, *supra* note 56 at 902.

[67] *Supra* note 58 at 372. It has been suggested that, in order to overcome this, it should appear that such a procedure is a normal one in every case; see M. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Sexual Abuse Prosecutions" (1985) 40 U. of Miami L. Rev. 19 at 93-4. However, as Robb & Kordyban observe (*supra* note 2 at 351-2), the determination at the *voir dire* by the judge to the effect that the separation of the child and defendant is necessary in order to obtain a "full and candid account" prevents the procedure from taking on an appearance of normality.

[68] Applying the test in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 138-40. The objective of the legislation was held to be of sufficient importance to override a constitutional right, and the means chosen to attain that objective were held to be proportional to the ends.

the United States, the latter which was described as directed more towards the well-being of the child. In contrast, the purpose of the Canadian legislation was said to be the enhancement of the reliability of the testimony of the child witness and "the administration of justice"[69]. It was held that the accused's right is impaired as little as possible by s.486(2.1), as the child victim's testimony is still given under oath, subjected to unrestricted cross-examination, and the judge and jury would be able to observe the child's demeanour during testimony.

(c) application and scope of section 486

The section is limited insofar as it applies only to the enumerated offences, and only to complainants who are under eighteen years[70]. It also fails to cover the case where one child may be testifying about acts committed against another child. The judge must make a case-specific finding that the use of screens or closed-circuit television is necessary in order to obtain a full and candid account of the acts complained of. The provision vests in the judge a discretion as to whether or not to make such an order[71]. Generally such a finding will be made after the evidence of parents, social workers or others is heard at a *voir dire*.

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[69] *Supra* note 58 at 373-5.

[70] As previously noted, other witnesses also experience stress when testifying in court, (*supra* note 41).

[71] By virtue of the words "may order" as opposed to "shall order", as was held in *R.* v. *Levogiannis*, *supra* note at 373. The Court in that case stated that the provision "rests substantial responsibility in the trial judge... with little scope for review" (*ibid.* at 379).

Judicial rulings on the meaning of "necessary" have varied. The Court in *R.* v. *Levogiannis* allowed for the use of a screening device in response to the testimony of a psychologist that the complainant's fears of testifying had intensified since disclosure, and since the preliminary inquiry[72]. A more restrictive interpretation was given in *R.* v. *M.(P.)*[73]. In this case the Court held that the evidence that the complainant did not want to see the accused because she did not like him was insufficient to support a finding of necessity that a screen be used. It had to be also shown that she could not testify fully and candidly if she did see him. The court held that the evidence adduced to the effect that the complainant was uncomfortable testifying in front of other people was directed at the need to exclude people from the courtroom, (which is covered by section 486(1) of the *Code*), and was not relevant to the issue under section 486(2.1). Jacqueline Castel objects to this decision on the grounds that it suggests that the child must communicate her inability to speak candidly in terms closely resembling the wording of the provision, which ignores the fact that this may be beyond children's linguistic abilities[74].

A more fundamental problem with this section is that this procedure does not protect the

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[72] See also *R.* v. *Ross* (1989), 90 N.S.R. (2d) 439 (C.A.), in which case the Nova Scotia Court of Appeal upheld the ruling of the trial judge allowing the complainant to testify from outside the courtroom under s.442 of the *Code*. It was held that, (*ibid.* at 446):

> [h]ere the girl was a ten year old granddaughter of the accused. She was said to be shy by nature. The charge against Mr. Ross spanned a time period of five years. The girl would be testifying to intimate matters that occurred in part when she was no more than five years of age.

[73] (1991), 1 O.R. (3d) 341 (C.A.).

[74] As she observes, (*supra* note 64 at 291):

> [i]t should be enough to demonstrate that the child is uncomfortable or apprehensive about testifying in front of the accused.

child from the stress of cross-examination techniques. The defence lawyer often fails to tailor cross-examination to the child's smaller vocabulary and need for simple sentence constructions[75]. Declarative sentences (for example, "So you changed your testimony?") allows the defence to introduce information in the guise of a question. Forced-choice questions are also a problem for the complainant, who is not able to put her answer in context, (for example: "Did you attempt to run, yes or no?")[76]. The defence strategy is frequently to suggest that the complainant is fantasizing or lying which can be devastating to the child's self-esteem[77].

Furthermore, as Spencer and Flin note[78], lawyers are permitted to use leading questions in cross-examination, despite psychological evidence which indicates that the use of leading questions may distort evidence because the witness incorporates the suggested information into his or her account. This results in a double standard, as lawyers themselves impeach evidence given by experts in child sexual abuse cases on the grounds that the experts used leading questions in interviewing the child. Studies have shown that children may be influenced by leading questions in certain circumstances, which are

[75] As noted by Castel, *ibid.* at 294.

[76] This is criticized by L.L. Burgess & A.W. Holmström, *The Victim of Rape: Institutional Reactions* (New York: John Wiley & Sons, 1978) at 206.

[77] As noted by Spencer & Flin, *supra* note 42 at 226.

[78] *Ibid.* at 223-28.

summarized by Spencer and Flin as follows[79]:

> (a) when being asked about descriptions of people or things, rather than events; (b) when they are pressed to provide additional details; (c) when they do not have a good memory of the information in question; (d) after a long delay; (e) when the interview is stressful, and (f) when the interviewer lacks appropriate skills.

A child's susceptibility to leading questions may be exacerbated by the stress of cross-examination and because cross-examination takes place long after the event[80].

Furthermore, children are more suggestible when the information concerns peripheral rather than central information[81], and the defence may exploit this by asking the child difficult questions on peripheral information which have minimal relevance to the central question of whether child sexual abuse occurred. This was recognized by Wilson, J., in *R.* v. *B.(G.)* when referring to the trial judge's treatment of the evidence of the complainant[82]:

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[79] *Ibid.* at 254, summarising H.R. Dent's findings in "Interviewing", in J. Doris, ed., *Suggestibility of Children's Recollections* (Washington: American Psychological Association, 1990) 138. See also E.F. Loftus & G.M. Davies, "Distortions in the Memory of Children" (1984) 40 J. Soc. Issues 51. It should be noted however that adults are also suggestible; see M.S. Zaragoza, "Memory, Suggestibility, and Eyewitness Testimony in Children and Adults" in S.J. Ceci, M.P. Toglia & D.S. Ross, eds., *Children's Eyewitness Testimony* (New York: Springer-Verlag, 1987) 53 at 73. Furthermore, children are not as suggestible as was indicated by early psychological research particularly when they are familar with the subject matter about which they are being questioned, as observed by E.F. Loftus & G.M. Davies, *ibid.* at 55.

[80] As noted by Spencer & Flin, *ibid.* at 220.

[81] See G. Goodman and R. Reed, "Age Differences in Eyewitness Testimony" (1986) 10 Law and Human Behaviour 317. However, as King and Yuille note, what is central as opposed to peripheral must be defined from the child's, and not the adult's point of view; see M.A. King & J.C. Yuille, "Suggestibility and the Child Witness" in *Children's Eyewitness Memory*, (*supra* note 79) 24 at 30.

[82] [1990] 2 S.C.R. 30 at 54-55; see also McLachlin, J., in *R.* v. *W.(R.)*, [1992] 2 S.C.R. 122 at 133, who stated that:

> [e]very person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, under-

> ... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of the child witness and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration and I believe this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

The question should be, as Gail Goodman has argued, not simply whether children are suggestible, but whether they are suggestible when questioned about personally significant actions such as sexual abuse[83].

It has also been suggested that children may appear to be more susceptible to suggestion where the questioner is more powerful than the child by virtue of position or age, and the child may attempt to please the interviewer by agreeing with the suggested

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> standing and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[83] See G. Goodman *et al.*, "Child Sexual and Physical Abuse", in *Children's Eyewitness Memory*, (*supra* note 79) 1 at 6; G. Goodman & A. Clarke-Stewart, "Suggestibility in Children's Testimony: Implications for Child Sexual Abuse Investigations", in J. Doris, ed., *The Suggestibility of Children's Recollections* (Washington: American Psychological Association, 1990) 92 at 103.

the child may attempt to please the interviewer by agreeing with the suggested information[84].

The suggestibility of children is held against them, rather than against the methods of interviewing or cross-examination which distort their accounts[85], or against the society in which children are socialized to accede their views to the superior views of adults.

(3) Videotaped Evidence

(a) the uses of videotaped evidence

Videotapes may be used for a number of purposes, as is illustrated by legislative schemes providing for their use in America[86]. They were initially used to reduce the number of

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[84] See King & Yuille, *supra* note 81. In this article the authors note that 'on several occasions we received unprompted admissions from children that they had "gone along" with a misleading suggestion', despite evidence that the child had correctly recalled the information, (*ibid.* at 28). Here the apparent suggestibility of the child is the result of a power imbalance which must be distinguished from "cognitive effects which involve a memory distortion"; see Spencer & Flin, *supra* note 42 at 255.

[85] Studies indicate preferable forms of questioning of children in order to elicit more accurate accounts, for example the use of open-ended questions. However, this is contrary to the methods preferred by lawyers who avoid open-ended questions in favour of narrow questions, to prevent the witness making wide, damaging statements; see Spencer & Flin, *ibid.* at 227. Another aspect of this debate focuses on the use of anatomically detailed dolls, which are used by some interviewers as a way to help younger children to communicate whether or not they have been abused in a non-verbal fashion. The question is how play with the dolls is to be interpreted. Some professionals argue that the dolls are inherently suggestive, and might prompt non-abused children to play with them in a sexual manner; (for two differing opinions see A. Yates, and L. Terr, "Anatomically Correct Dolls - Should they be Used as the Basis for Expert Testimony?" (1988) 27 Journal of the American Academy of Child and Adolescent Psychiatry 254-57, 387-8).

[86] At least 29 states have enacted statutes permitting videotaping of children's evidence; see C.A. Gauldin, "*McGuire* v. *State*: Arkansas Child Abuse Videotape Deposition Laws - Room for Improvement" (1988) 41 Ark. L. Rev. 155 at 156. Some schemes require the tape in lieu of the child, others permit the child to be reexamined at trial, while others allow taping of the preliminary trial.

interviews, which are stressful for the child[87]. The use of videotapes has been recommended to increase the number of guilty pleas by showing the videotape to the accused before trial, as this may not only force the accused to take responsibility for his acts, but may also demonstrate that the child will be a convincing witness[88]. The use of videotapes may also prevent recanting by complainants[89]. Another advantage is that videotaped evidence may give the trier of fact a fuller and more accurate description of the events, as children's memory is thought to fade with time[90], as well as capturing the demeanour of the child at the time of the disclosure[91]. They may also be an aid to expert testimony.

It has been noted in the literature that use of videotapes may operate to the advantage

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[87] See A. McGillivray, "*R.* v. *Laramee*: Forgetting Children, Forgetting Truth" (1991) 6 Crim. Reps. 325 at 330. Repeated interviews have also been implicated in the distortion of children's evidence through suggestive questioning. It has also been observed that as a result of the child continually repeating his or her story, it often becomes mechanical by the time she gets to court, laying the complainant open to the charge of having been coached; see D.L. Corwin *et al.*, "Child Sexual Abuse and Custody Disputes" (1987) Journal of Interpersonal Violence 91 at 100. This concern is partly a concern about catering to assumptions about what is expected from a child witness - that they be spontaneously upset when giving testimony of their abuse.

[88] See N. Bala, *supra* note 38 at 9; T. Howard, "Child Sexual Abuse Prosecutions: Protecting the Child Victim and Preserving the Rights of the Accused" (1990) 66 N. Dakota L. Rev. 687 at 701.

[89] As recommended by T. Howard, *ibid.* at 701-2. See also P.E. Hill & S.M. Hill, "Videotaping Children's Testimony: An Empirical View" (1986-7) 85 Michigan L. Rev. 809 at 824.

[90] Although as yet there are few definitive conclusions, the research to date supports this; see G.S. Goodman *et al.*, (*supra* note 83 at 10). See also G. Goodman *et al.*, "Children's Concerns and Memory: Issues of Ecological Validity in the Study of Children's Eyewitness Testimony" in R. Fivush & L.J.A. Hudson, eds., *Knowing and Remembering in Young Children* (New York: Cambridge University Press, 1990) at 249-284.

[91] See P.E. Hill & S.M. Hill, *supra* note 89 at 831. Kee MacFarlane states that videotapes at the time of disclosure can capture "visual reactions that might otherwise never find their way into words"; see "Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases" (1985) 40 U. Miami L. Rev. 135 at 136.

of the accused, and in some cases to the detriment of the child witness. A further cause of probable stress for the child witness is the possible use of the videotape by the defence to illustrate inconsistencies between the videotape and the child's in-court account to discredit the child by the suggestion of fabrication. Furthermore, the defence can use the videotape as evidence for suggestions that leading questions were used, or that the child was coached, in order to impeach the techniques of the social worker or therapist. For these reasons the use of videotapes have been termed a "double edged sword"[92].

(b) application and scope of section 715.1

The new section 715.1 of the *Code* provides that a court may admit[93]:

> In any proceeding relating to an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273, in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of ... if the complainant, while testifying, adopts the contents of the videotape.

The section gives little in the way of guidelines as to the standard of admissibility. In *R.* v. *Meddoui*[94] Kerans, J.A., drew an analogy between the section and the past recollection recorded exception to the hearsay rule[95]. He held that the complainant must

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[92] N. Bala, *supra* note 38 at 10.

[93] Introduced by section 16 of *An Act to amend the Criminal Code and the Canada Evidence Act*, (*supra* note 39).

[94] (1991), 77 Alta. L.R. (2d) 97 (C.A.).

[95] This rule requires that, in order to admit the prior statement: (a) the statement is necessary as the witness has totally forgotten the incident in question; (b) the record is made when memory was fresh, which provides some guarantee of trustworthiness; and (c) the witness must affirm that at the time of giving the statement she was telling the truth; see *R.* v. *Rouse & McInroy* (1979), 42 C.C.C. (2d) 481 (S.C.C).

"adopt" the statement[96]:

> in the less strong sense that, whether or not she recalls the events discussed, she does believe them to be true because she recalls giving the statement and her attempt then to be honest and truthful.

Under section 715.1 the complainant does not have to have a clear memory loss as to the event[97] in order for the statement to be admissible. Where the complainant adopts the statement in this sense, the videotape becomes part of her testimony in proof of a fact in issue[98]. In other words, the section creates an expanded hearsay exception[99]. This in the view of the court would facilitate testimony by a witness whose memory might be

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[96] *Supra* note 94 at 110. Kerans, J.A., examined other definitions of the word "adopt": (a) The witness might adopt the statement in the stronger sense that he or she recalls both the statement and the events discussed, and confirms the truth of what the statements say about the events. This meaning was rejected, as it was held that this would offend the rule against prior consistent statements, (*supra* note at 110). (b) The witness might adopt the statement in the weak sense that, while she has no present recall, she does believe them to be true because she at least recalls giving the statement and her attempt then to be honest and truthful. As this would result in the new provision merely restating the already existing past recollection recorded exception it was rejected. It was noted that a videotape may be admitted if it satisfies the requirements of past recollection recorded, regardless of the statutory provision, (*ibid.* at 109).
(c) The witness might adopt in the weakest sense of admitting the statement was made but will not admit that it is truthful. This was rejected, (*ibid.* at 111-2), as it was thought to be too dangerous to admit a videotaped statement which the child has later retracted, despite the fact that this is a common problem with abused children; see Summitt, "The Child Sexual Abuse Accommodation Syndrome" (1983) Child Abuse and Neglect 177 at 188. However, Kerans, J.A., stated that the legislation did not provide adequate safeguards as to the reliability of the evidence in these circumstances, (for example, that the tape contains no improper questioning, and that the interviewer be available at trial).

[97] As is required under the past recollection recorded exception.

[98] The court rejected the defence's argument that the videotape was merely proof of the fact of utterance, in recognition that the decision of the Supreme Court in *R.* v. *Kendall*, which treated the evidence of children as unreliable, "was doubtful science" (*supra* note 94 at 111).

[99] See Robb and Kordyban, (*supra* note 2 at 341). It should also be noted that a videotape can be admitted under other hearsay exceptions; including past recollection recorded, or under the tests of reliability and necessity.

good, but whose ability to communicate was limited, as in the case of a child[100].

The decision of the Manitoba Court of Appeal in *R.* v. *Laramee*[101] to the effect that section 715.1 contravenes sections 7 and 11(d) of the *Charter* has been overruled by the Supreme Court. The reasons for the decision of the Supreme Court have not, however, yet been released.

The drafting of the section poses certain problems. The provision is too narrow in its exclusion of other witnesses who also may experience difficulty testifying at trial, for example mentally handicapped adult witnesses, and adult complainants in sexual abuse trials[102].

The provision does not necessarily reduce the stress experienced by the child witness, as it preserves the rights of the accused to cross-examine the complainant at trial[103]. As

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[100] In the words of Kerans, J.A., (*supra* note 94 at 108):

> where the child might remain almost mute in the traditional method of inquiry ... he might divulge much more in casual and spontaneous activity ... at the taped interrogation.

This case must be taken to have implicitly overruled *R.* v. *Thompson*, in which case MacKenzie, J., held that section 715.1 was contrary to section 7 and 11(d) of the *Charter*; (1989), 68 C.R. (3d) 328 (Alta. Q.B.).

[101] (1991) 6 C.R. (4th) 277 (Man. C.A.).

[102] It should be noted that under s.715.1 videotapes are admissible as long as the offence occurred when the complainant was under 18, even if at the date of trial the witness is now an adult, as Bill C-15 abolished statutory limitation periods on child sexual offenses.

[103] See the discussion on cross-examination above. The stress of confronting the accused is eliminated in schemes such as those of Texas and Kentucky, under which the defendant can observe and hear the interrogation, but the witness is shielded from the child's view, (Ky. Rev. Stat. Ann. 421.350(4); Tex. Code Crim. Proc. Ann. art. 38.071(4)); as noted by P.E. Hill & S.M. Hill, (*supra* note 89 at 820). It should be noted that even under these schemes, a child witness may suffer stress due to cross-examination.

a result, it will not necessarily reduce the time the child will spend giving testimony.

Furthermore, section 715.1 requires that the videotape be "made within a reasonable time after the alleged offence". This precludes a videotape being admitted in the case of a child who, as is often the case, does not disclose until a long time after the occurrence of the abuse, or who only discloses very gradually. The wording of the section is ambiguous, as Robb and Kordyban note, because when disclosure occurs at the end of several interviews it is unclear as to whether all the interviews must be videotaped[104]. The section fails to specifically recognize that disclosure of child sexual abuse is often a gradual process.

Kerans, J.A., in *R.* v. *Meddoui* rejected the proposition that a videotape would be admissible under s.715.1 where the witness adopts the statement in the "weakest sense" of admitting the statement was made but will not admit that it is truthful. This ignores that fact that sexually abused children frequently recant their accounts of sexual abuse due to, (among other things), shame, fear of the perpetrator and lack of family support.

However, although the position at common law was that prior inconsistent statements were not admissible to prove the truth of the matter, but only to impeach the credibility of the witness, this may be changed by virtue of the decision of the Supreme Court in

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[104] *Supra* note 2 at 343-4.

R. v. *B.(K.G.)*[105]. The Supreme Court in its interpretation of s.9 of the *Canada Evidence Act*[106] held that the rule against the substantive use of prior statements should be replaced by a more "principled approach"[107]. It was held that if the trial judge is satisfied that there are sufficient indicia of reliability and necessity, prior inconsistent statements can be admitted to prove the truth of the matter. Indicia of reliability were said to be present, (among other things), where the witness' prior statement is videotaped, and where the opposing party has a full opportunity to cross-examine the witness at trial respecting the statement[108].

Potentially the application of these principles can be used to admit children's videotaped accounts of sexual abuse even when they have later recanted. However, the admission of prior inconsistent statements lies within the discretion of the trial judge, who determines credibility. Furthermore, there continues to be reliance on cross-examination as a way for testing the truth of prior inconsistent statements, which may distort the evidence of a sexually abused child.

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[105] (25 February 1993), (S.C.) [unreported].

[106] R.S.C. 1985, c.C-5.

[107] *Supra* note 105 at 43.

[108] *Ibid.* at 59.

(4) Civil Proceedings

B.C. in 1988[109] and Saskatchewan in 1989[110] adopted the C-15 provision for use of screens or closed-circuit television for testimony. Saskatchewan also adopted the C-15 videotape provision. However, as Thompson notes[111], there may be little need to use these provisions in civil proceedings as the new hearsay exception removes the need for the child to testify. Where the child does testify, the court has the more effective option of excluding the parents during the child's testimony[112]. Furthermore, a videotape of a child's testimony is readily admissible under the hearsay exception.

IV CONCLUSION

To the extent that the reforms facilitate the admission of children's testimony they are to be welcomed. However, the adversarial system remains the "norm" against which the reforms must be justified. Legal methods of determining the "truth", such as cross-examination and the modified right of confrontation, are taken to be self-evidently reliable. This delegitimates other methods of obtaining a child's account of events.

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[109] "[I]n a proceeding in which it is alleged that a person [under 19] has been physically or sexually abused"; *Miscellaneous Statutes Amendment Act (No.2), 1988*, S.B.C. 1988, c.46, s.29, enacting *Evidence Act*, R.S.B.C. 1979, c.116, s.82.

[110] *The Saskatchewan Evidence Amendment Act, 1989*, S.S. 1989-90, c. 57, s.4, re-enacting *The Saskatchewan Evidence Act*, R.S.S. 1978, c.S-16, s.42; enacting ss.42.1-42.3.

[111] "Children Should be Heard, but Not Seen: Children's Evidence in Protection Proceedings" (1991-92) 8 Can. Fam. L.Q. 1 at 24-5.

[112] It should be noted that counsel for the child's parents remains in the courtroom during the child's testimony. Counsel then consults with the parents outside the courtroom, and the lawyer then returns to the courtroom to cross-examine the child; see Thompson, *ibid.* at 26. A few provincial statutes explicitly allow for the exclusion of the parents during the child's testimony; see for example Alberta's *Child Welfare Act*, S.A. 1984, c.C-8.1, s.22.

CHAPTER 10

CONCLUSION

> There is nothing easier to silence than the true voice of [a] child, especially in a courtroom[1].

I INTRODUCTION

In this chapter I will assess the extent to which the feminist themes, identified in chapter 1, are borne out by the rules of evidence. Specifically I will examine the existence of rape myths in the rules of evidence, and the extent to which these facilitate denial of widespread child sexual abuse, and buttress male power over women and children. I will also examine the extent to which the rules of evidence construct a "typical" child sexual abuse complainant and require complainants to fit this mold in order to receive legal protection. To what extent does the law recognize children's accounts of child sexual abuse and enable them to be heard in their own words?

II THE LEGAL ACCOUNT OF CHILD SEXUAL ABUSE

Historically the rules of evidence, particularly the exercise of judicial discretion in this area, have had a discriminatory impact on child complainants in child sexual abuse cases. The reforms of the rules of evidence to a large extent have removed the traditional barriers impeding judicial acceptance of children's accounts of child sexual abuse. The reforms are more responsive to the dynamics of child sexual abuse, and represent a move

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[1] A. Miller, *Banished Knowledge: Facing Childhood Injuries* (New York, London: Anchor Books, 1991) at 94.

to better protect sexually abused children.

However, despite the reforms it is clear that sexist conceptions about complainants of child sexual abuse continue to enter legal proceedings through the back-door of judicial reasoning. I will explore the existence of these "rape myths" in the following section.

(1) Rape Myths embodied in the Rules of Evidence

(a) chaste vs. unchaste complainants

The law traditionally divided females into two types: chaste and unchaste. Only the former were protected by the law, as is indicated by the development of the substantive offences prohibiting child sexual abuse. The new offences, such as sexual interference, invitation to sexual touching, and sexual exploitation are more comprehensive, and acknowledge the inequality in social power between a child and an adult. However, there is a danger that the judges will continue to interpret the new provisions by drawing on prejudicial beliefs about unchaste complainants, particularly in applying the defence of consent, and the defence of due diligence with respect to the complainant's age where the complainant is under 14.

The emotional and psychological harm caused by child sexual abuse often manifests itself in the complainant's promiscuous acting-out behaviour, running away from home, drug use and difficulties in maintaining relationships[2]. Frequently, however, the courts have

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[2] See chapter 5.

not recognized this as indicia of sexual abuse: rather these factors have undermined the credibility of complainants in the eyes of the judiciary. This is evident in the court's application of the reasonable doubt rule, whereby the existence of the "third alternative" is fueled by rape myths. The courts support their disbelief in complainants' accounts of child sexual abuse by referring to evidence that the complainant ran away from home, or is an unemployed dropout, and by searching for evidence that the complainant lied out of spite, self-exculpation or vindictiveness[3]. These notions derive from the stereotype of the sexually voracious female who then blames the man for her own seductive behaviour. The underlying assumptions in these constructions of complainants facilitate denial of the extent of child sexual abuse.

More recently however, the courts have accepted expert evidence that these features, such as promiscuity and drug use, are consistent with child sexual abuse. This reflects greater judicial acknowledgement of the dynamics of child sexual abuse. However, the lawyer for the alleged abuser will seek to exploit the conflicting positions within the medical and psychoanalytic professions as to the existence and diagnosis of child sexual abuse.

Historically the exercise of judicial discretion with respect to the admissibility of the complainant's past sexual history has put the complainant, rather than the accused, on

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[3] *Ibid.*

trial. The decision of McLachlin, J., in *R.* v. *Seaboyer and Gayme*[4] indicates that the notion that complainants in sexual abuse cases possess a vindictive and sexually voracious sexuality continues to feature in judicial reasoning. *An Act to amend the Criminal Code* provides that a complainant's past sexual history is no longer admissible to support an inference that the complainant is more likely to have consented to the sexual activity which is the subject matter of the charge, or is less worthy of belief[5]. The new legislative scheme, however, continues to vest discretion as to the admissibility of evidence of the complainant's past sexual history in the hands of the judiciary. The reforms do not address the problem of extra-legal considerations, which may enter the process as a result of judicial and jury prejudice.

(b) the false allegation

The Freudian belief that children's accounts of sexual abuse are the product of their fantasies worked to the disadvantage of both chaste and unchaste complainants alike. This theory had a profound effect on the rules of evidence, particularly in the assessment of the child complainant's credibility.

The fear of the false allegation is now particularly evident in child custody cases. Judges tend to presume that mothers incite their children to make allegations against fathers in order to gain custody. Another prejudicial belief which is present in the caselaw is the

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[4] [1991] 2 S.C.R. 577.

[5] S.C. 1992, c.38, s.276.

notion that feminist therapists "brainwash" children. These prejudices are reflected in the high burden of proof which must be met in custody cases before the courts will accept that child sexual abuse has occurred.

Fear of the false allegation similarly underpinned the development of the corroboration requirements in child sexual abuse cases. Despite the repeal of the formal requirements of corroboration, it is clear that there is a continuing practical requirement of corroboration as a result of the high burden of proof in both civil and criminal proceedings. The exercise of judicial discretion to warn of the dangers of accepting the uncorroborated word of the child in individual cases reflects fear of the vindictive, lying child.

(c) legal recognition of the dynamics of child sexual abuse

Disclosure of sexual abuse by a child is a process which evolves over a period of time. Traditionally this was not recognized by the rules of evidence, most notably the doctrine of recent complaint, which required the Crown to show that the complaint was made a reasonable time after the occurrence of the incident. In the absence of this evidence the court was bound to presume that the complainant was fabricating this charge. The doctrine of recent complaint has now been abrogated, but it is still open to the defence to allege recent fabrication, and judges continue to presume that the complainant fabricated the complaint in the absence of evidence of recent complaint. Furthermore, in custody cases the courts have interpreted delayed disclosure as evidence that the therapist compelled the child under pressure to make an allegation.

The rules of evidence also have traditionally failed to recognize that recantation is a common feature of child sexual abuse cases. Where the child recanted it was not possible to pursue a charge against the abuser, as evidence of prior inconsistent statements were not admissible at common law to prove the truth of the matter, but only to impeach the credibility of the witness. In line with this, a videotape is not admissible under the new s.715.1 of the *Code* where the witness adopts the videotaped statement in the "weakest sense" of admitting the statement was made, but will not admit that it is truthful, as was held by Kerans, J., in *R.* v. *Meddoui*[6]. Whether or not this will be changed as a result of the decision of the Supreme Court in *R.* v. *B.(K.G.)*[7] remains to be seen.

III THE ROLE OF LAW

(1) Constructive or Reflective?

It is evident from my examination of the rules of evidence that the law plays both a constructive and reflective role in constructing our understanding of child sexual abuse complainants. The law is reflective of medical and psychoanalytic constructions of women and children, most notably the Freudian view that children fantasize about having sex with one parent, (the Oedipus complex). At the same time the rules of evidence perpetuate prejudicial conceptions of the dynamics of child sexual abuse. One example

[6] (1991), 77 Alta. L.R. (2d) 97 (C.A.).

[7] (25 February 1993), (S.C.) [unreported].

of this is the judicial assumption in custody cases that feminist therapists are determined to find the existence of child sexual abuse at any cost, or that mothers incite children to make false allegations against fathers.

(2) The Binary System of Law

The adversarial system is premised on a number of binary opposites: the dichotomies of innocence/guilt, consent/non-consent in sexual assault trials, and the competing rights of the accused versus those of the child complainant. Another binary opposite is formed by the juxtaposition of legal methods of discovering the "truth", versus alternative methods such as the process of disclosure of child sexual abuse with the support of a feminist therapist. The postmodern feminist analysis suggests that one side of the dichotomy is aligned with male interests (the rights of the accused in sexual assault trials, and legal methods of discovering "the truth" where there are conflicting accounts). The interests represented by the less powerful side of the dichotomy (the interests of the child, and the methods of feminist therapists) are disqualified by the rules of evidence, or given little recognition.

To the extent that the reforms facilitate the admission of children's testimony they are to be welcomed. However, they serve merely to reform the established system, and do not answer the fundamental questions posed by feminist and postmodernist theory of how to explode the subject/object dichotomy. The dichotomies of the adversarial system are preserved, and are the measure against which the constitutionality of the reforms are assessed. The adversarial system continues to be "the norm", at the expense of other approaches to the discovery of knowledge such as feminist therapy. Judicial criticisms are frequently levelled at alternative approaches, such as feminist therapy techniques, which fail to qualify as a "science". These accordingly are relegated to the realm of "lesser knowledges[8]".

(3) Conflicting Legal Aims

An examination of the rules of evidence reveals that women and children have been constructed as sexually passive, and in need of male protection. Examples of this are judicial *dicta* which construct children as innocent and asexual[9]. However, the complainant of child sexual abuse is also portrayed at the same time as vindictive and sexually aggressive[10]. This is evidence of the "fundamental paradox" identified by Susan Edwards[11]. It also indicates the dilemma facing law-makers which is discussed by Christine Boyle[12]. She notes that the law-maker identifies with one of two roles in child sexual abuse cases: as either the husband, father or brother of the female assaulted, or as the accused. In his identification with the role of husband, father or brother of the

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[8] See Carol Smart, *Feminism & the Power of Law* (London, New York: Routledge) at 9.

[9] See for example Robins, J.A., in *R.* v. *Khan* (1988), 42 C.C.C. (3d) 197 at 210 (Ont. C.A.).

[10] An extreme example of this is the case of *R.* v. *D.L.* in which case Van der Hoop, Cty. Ct. J., sentenced a 33-year-old babysitter to a suspended sentence for a conviction of touching for a sexual purpose. The judge described the three-year-old complainant as "sexually aggressive". On appeal, the British Columbia Court of Appeal affirmed this sentence, although it was noted that the judge's description of the complainant was "an unfortunate one"; (1990), 75 C.R. (3d) 16 (B.C.C.A.).

[11] *Female Sexuality and the Law* (Oxford: M. Robertson, 1981) at 54.

[12] *Sexual Assault* (Toronto: Carswell, 1984) at 5.

victim, the concern is with the devaluation in property value of a wife or child. In his identification with the accused, the law-maker is most concerned about the plight of the falsely accused man. Men are not facing a conflict between their own interests and those of women and children. Rather, they face a conflict between their own interests as husbands or fathers, versus the male identification with the accused based on their fear of the false accusation.

(4) The Child's Voice

A continuing concern in my examination of the rules of evidence governing child sexual abuse cases is the fact that frequently the child is the sole witness, and as a result it is extremely important that the child be able to testify as to what occurred. My question is the extent to which the child's account of child sexual abuse has been accepted on its own merits.

Spencer and Flin note the principal objections that have traditionally been made to the admission of children's evidence: that children's memories are unreliable, that they are egocentric, and highly suggestible; that they have difficulty distinguishing fact from fantasy, and are prone to making false allegations, particularly of sexual assault, and finally that children do not understand the duty to tell the truth in court[13]. These assumptions are a result of the construction of the child witness as objects and as a focus of study. Furthermore, evidence law has tended to construct children as a category, as

[13] *The Evidence of Children: The Law and the Psychology* (London: Blackstone Press, 1990) at 238.

for example in the imposition of an inquiry into children's competence to testify which is conducted on a mandatory basis. The rules of evidence failed to take into account differences between children, such as developmental, cultural, linguistic, gender and economic differences. More recent judgments have, however, begun to recognize the need to assess children's evidence on an individual basis[14].

The child's voice has frequently been completely eliminated in civil proceedings where judges exercise their judicial discretion to prevent the child from testifying[15]. Furthermore, the competency tests historically created a serious impediment to the prosecution of child sexual abuse cases by frequently eliminating the child's testimony. The new section 16 of the Canada Evidence Act continues to require that a child under 14 jump through the hoop of a competency examination before her testimony will be accepted by the courts. It would be preferable if the presumption were reversed to allow children's evidence to be admitted as a matter of course. A further concern is that the requirement of section 16 that the child "is able to communicate the evidence" perpetuates the inability of the legal system to address the problem of sexual abuse of the pre-verbal child.

Furthermore, legal methods of establishing the "truth" where there are conflicting accounts frequently impair the child's account of sexual abuse. Face-to-face confrontation

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[14] See especially *R.* v. *B.(G.)* [1990] 2 S.C.R. 30 at 54-55; and *R.* v. *W.(R.)*, [1992] 2 S.C.R. 122 at 133.

[15] See for example *Wakaluk* v. *Wakaluk* (1976), 25 R.F.L. 292 (Sask. C.A.).

disadvantages the sexually abused child, as the stress of testifying in front of the accused may cause the child witness to retract, to refuse to testify or to testify less completely than she otherwise would. The new s.715.1 of the *Code* allowing for the admission of a child's previously videotaped statement of sexual abuse requires the complainant to adopt the statement *while testifying*, and does not protect her from confronting the accused. The liberalization of exceptions to the hearsay rule to some extent now saves the child from the burden of confrontation. The new s.486 of the *Code*, which allows for the use of screens or closed-circuit television, also to some extent alleviates the stress of testifying. However, when the child testifies, she must undergo the rigours of cross-examination. Despite the assertion by Wigmore that cross-examination is "the greatest legal engine ever invented for the discovery of truth[16]", it is clear that cross-examination in fact may distort the evidence of a sexually abused child. Frequently cross-examination is not tailored to a child's linguistic abilities, and the defence lawyer's strategy of suggesting the child is lying or fantasizing undermines the complainant's account.

To some extent the use of expert evidence helps to accommodate the testimony of victims of child sexual abuse and represents an attempt to explain some of the apparent ambiguities, but essentially this highlights the problem that children cannot speak for themselves, and eliminates other approaches as possible methods of discovery. The reforms do not go very far in dismantling traditional legal methods as the norm; nor do

[16] J.H. Charbourn, ed., *Wigmore on Evidence*, vol. 5, rev. ed. (Boston: Little, Brown, 1976) at 32.

they require men as the definers of this norm to adopt a different consciousness - one which does not turn another into "the other" and which silences alternative accounts.

IV CONCLUSION

It is the responsibility of those in power, judges and legislators, to educate themselves and examine their own socialization in order to ensure that the rape myths identified by feminists do not underly their application of the rules of evidence. There needs to be a better representation of viewpoints on the bench (for example by appointing more women), in order to enhance legal understanding of viewpoints which are different from the present (white, middle-class, male) judicial norm.

Even with the removal of specific barriers to the reception of children's evidence, the problem remains of formulating justice claims and needs of children into a system created in adult and male terms, and of fitting the voice of a child into the traditional mold of adversarial principles. Alternatives to the adversarial system must be explored. In particular, alternatives to cross-examination and confrontation must be examined. An example of such an alternative is Statement Validity Analysis, whereby interviewers are trained to interview children in a manner especially tailored to children, and to look for indicators of reliability[17]. Another alternative is the use of a surrogate witness system,

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[17] For a description of this see J. Yuille, "The Systemic Assessment of Children's Testimony" (1988) 29 Canadian Psychology 247 at 251.

similar to the one established in Israel[18]. Furthermore, it is important that the development of alternatives to the adversarial system recognize the dynamics of child sexual abuse, such as delayed disclosure and recantation.

The reforms do not address the issue of introducing wider contextual considerations into legal proceedings, as suggested by some feminists. The postmodern feminist challenge is to "make our categories explicitly tentative, relational and unstable[19]". The judgment of Justice L'Heureux-Dube in *Seaboyer* is an unusual example of judicial reasoning which takes into account wider contextual considerations. In order to enable the voices of children to be heard, feminist litigation strategies of contextualizing women's experience should be adopted in the context of child sexual abuse cases. The admission of evidence must enable the court to be aware of the child's world, whether through the admission of expert evidence, or through a representative appointed to speak on behalf of the child. Presently judicial recognition of child sexual abuse requires child complainants to support their accounts of child sexual abuse with firm evidence. This is reflected, for example, in the continuing practical requirement of corroboration which may be met by medical, expert or similar fact evidence. In the present climate where there are indications that a backlash against recognition of child sexual abuse has set in, it will continue to be necessary to support children's accounts of sexual abuse as

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[18] According to this system "youth interrogators" interview the child and present the child's evidence in court, in lieu of the child testifying; see E. Harnon, "Examination of Children in Sexual Offences - the Israeli Law and Practice" [1988] Crim. L.R. 263.

[19] A.P. Harris, "Race and Essentialism in Feminist Legal Theory" in K.T. Bartlett & R. Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991) 235 at 239.

concretely as possible.

It is important that feminist therapists do not give up their efforts to enable children to be heard, despite legal criticism of their efforts. Feminists must continue to learn about child sexual abuse, and to look for ways to obtain legal recognition of the social context in which child sexual abuse takes place.

Children are entitled to their own authentic subjectivity, in contrast to their present position as objects of male desire with no voice of their own, or with only a voice set on adult terms. This is the challenge of a feminist approach[20]:

> It should be the duty of the judges to find a way out of the monster labrynth each case of sexual abuse brings to light. Instead, they act just as they learned to do as children. They serve the interests of the adults - of the often unscrupulous attorneys and of the perpetrators ... If they listen to the children with attentive ears and look at their faces with alert eyes, what kind of memories would surface within them? They prefer to shield themselves from those memories by resorting to courtroom routine and by delivering up already grossly mistreated children to new, cruel mistreatment, sacrificing them to the ignorance of the adults. This they do without batting an eye and without the slightest twinge of conscience because they themselves once, as children, were sacrificed to the same ignorance and have never been allowed to perceive this.

[20] A. Miller, *supra* note 1 at 94-95.

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