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What Regulators Can Learn from the Criminal Courts about Sexual Abuse Cases

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It is no secret that there has been a societal reckoning about sexual abuse in the last few years. From the #MeToo movement to the amendments to the *Regulated Health Professions Act*,[1] society and our government are beginning to take sexual misconduct more seriously. However, sexual abuse cases often prove to be the most challenging matters for discipline committees. There are typically no eyewitnesses, meaning that these cases often boil down to a pure credibility contest between the patient/client and the member. The added public scrutiny that sexual abuse cases are now receiving makes it more important than ever that discipline committees have the tools and education they need to decide them fairly.

In this respect, recent developments in the world of the criminal courts contain several lessons – and cautionary tales – that regulators may find helpful.

Reasoning Must not be Based on Generalizations

The Supreme Court of Canada recently underscored the importance of assessing the witness as an individual, as opposed to relying on stereotypes or generalizations. In *R. v. Slatter*,[2] the accused was alleged to have sexually assaulted a woman with an intellectual disability over a four-year period. At trial, the defence presented expert evidence indicating that individuals with intellectual disabilities were more suggestible than the average person. The trial judge believed the complainant and convicted the accused, but a majority of the Court of Appeal overturned the conviction, holding that the trial judge failed to adequately grapple with the complainant's reliability.

In a short, three-paragraph decision, the Supreme Court of Canada restored the conviction. It cautioned against relying on expert evidence that speaks to general characteristics of a population, rather than focusing on the witness's demonstrated ability to perceive, recall, and recount events. As noted by the dissenting judge at the Court of Appeal (who would have upheld the conviction), there were several instances during the trial when the complainant demonstrated that she was not in fact suggestible. Moreover, there was no evidence of any suggestive statements that could have influenced the complainant's report to police. In restoring the conviction, the Supreme Court noted that "over-reliance on generalities can perpetuate harmful myths and stereotypes about individuals with disabilities, which is inimical to the truth-seeking process, and creates additional barriers for those seeking access to justice."[3]

In the world of professional regulation, it is not uncommon for professionals who sexually abuse clients/patients to select individuals who are particularly vulnerable (for example, because of their young age, intellectual disability, or mental illness). In many of these cases, expert witnesses will be called by either the College or the defence. *Slatter* provides a helpful reminder that expert evidence that is not grounded in the facts of the case does not merit a great deal of weight. Panels must ensure they focus their analysis on the witnesses they are actually hearing, and not resort to generalities about a particular characteristic or condition when evaluating a witness's credibility.

Words have Power and Should be Chosen with Care

In *R. v. Friesen*,[4] the Supreme Court spoke at length about the particular harm caused by sexual offences against children. The unanimous judgment is particularly relevant to regulators whose members frequently deal with minors, in that it contains several powerful statements underscoring the serious and long-lasting harms that result from such offences.

Even beyond cases dealing with children, the Court's decision points out the profound effect that words can have in validating the harm that survivors of sexual offences experience and in shaping the way society views these acts. For example, the Court criticized the use of words like "fondling" and "caressing" to describe sexual touching, because they "implicitly characterize the offender's conduct as erotic or affectionate, instead of as an inherently violent assault."[5] The Court cautioned that such language tends to normalize the conduct instead of condemning it.

The Court also sent a clear message that sexual touching can be just as harmful as intercourse, penetration, or oral sex:

[C]ourts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale… This is an error — there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. … [P]hysical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration… Similarly, it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration. For instance, depending on the circumstances of the case, touching that is both extensive and intrusive can be equally or even more physically intrusive than an act of fellatio, cunnilingus, or penetration.[6]

The Court did not limit this comment to cases involving children. Rather, it cited a case involving an adult victim as an example of this problematic reasoning.[7] This would seem to suggest that regardless of the age of the complainant, courts (and discipline committees) should not view touching as any less serious than penetration or oral sex.

Of course, under the recent amendments to the *Regulated Health Professions Act*, most forms of sexual touching are subject to the same mandatory revocation provisions as "frank sexual acts." Nonetheless, there can still be a tendency to view sexual touching as less serious and to write reasons that convey such a view. *Friesen* indicates that discipline panels should disabuse themselves of the notion that sexual touching is less serious – and their reasons should be written with this principle in mind.

Adjudicators Must Have Sufficient Education on Issues Related to Sexual Abuse

As the Supreme Court of Canada pointed out in *Friesen*, words have power. The way in which discipline committees question witnesses and express their reasoning in sexual abuse cases has the potential to make or break a regulator's public reputation. The media attention surrounding the remarks made by Justice Robin Camp is a prime example of the damage to the public trust that can be done if adjudicators are not well-versed in the law and the social context related to sexual abuse.

Justice Camp was a judge in the Alberta Provincial Court. When presiding over a criminal sexual assault trial, he made a series of wildly inappropriate comments that ignited a media firestorm. To give just a few examples, Justice Camp:

- Criticized the complainant for not objecting or resisting when the accused entered the room and locked the door (shortly before he allegedly assaulted her);[8]
- Asked the complainant why she "couldn't just keep [her] knees together", "skew her pelvis", or "sink [her] bottom into the bathroom sink" to avoid being sexually assaulted;[9]
- Criticized the complainant for not screaming while the alleged assault occurred;[10]

- Stated that “sex and pain sometimes go together”, which he characterized as “not necessarily a bad thing”;[11] and
- Said to the accused, after acquitting him, that he and his friends should be “far more gentle with women” because “to protect themselves, they have to be very careful.”[12]

The acquittal was subsequently overturned by the Alberta Court of Appeal, which stated that Justice Camp’s reasoning was grounded in “sexual stereotypes and stereotypical myths, which have long since been discredited.”[13] This rebuke from the Court of Appeal was only the beginning of the saga: several complaints were filed with the Canadian Judicial Council, which ultimately held a hearing into Justice Camp’s conduct. During that hearing, Justice Camp admitted that he had received no training on the law of sexual assault or the conduct of sexual assault trials. Although the Committee conducting the hearing noted that Justice Camp had made efforts to educate himself on these issues after the complaints against him were filed, these steps could not undo the harm that had been caused to the public trust. As the Committee explained:

[W]here judicial misconduct is rooted in a profound failure to act with impartiality and to respect equality before the law, in a context laden with significant and widespread concern about the presence of bias and prejudice, the harm to public confidence is amplified. In these circumstances, the impact of an after-the-fact commitment to education and reform as an adequate remedial measure is significantly diminished.[14]

Ultimately, the Canadian Judicial Council recommended that Justice Camp be removed from the bench because his conduct “seriously undermined public confidence in the judiciary.”[15] Shortly thereafter,[16] the federal government introduced legislation that would amend the *Judges Act* to require all candidates seeking an appointment to a provincial superior court to agree to participate in training on issues related to sexual assault law and social context, should they be appointed.[17] The stated goal is to enhance public confidence in the criminal justice system and to ensure that judges hearing sexual assault trials have the necessary training to fairly decide the matter without being influenced by myths and stereotypes.[18]

One can imagine the loss of credibility and public trust a regulator might suffer if one of its discipline panels made comments even a fraction as troubling as some of Justice Camp’s remarks. However, even though general training for discipline committees is common – including training on how “sexual abuse” differs from criminal sexual assault – it is far less common for discipline panels to receive in-depth training on rape myths and the relevant social context. Without such training, there is a risk of inappropriate stereotypical reasoning. For example, the argument is often made that a patient’s allegations of sexual abuse should not be believed if they continued to seek treatment from the professional who allegedly abused them. Many of us know that this conclusion relies on faulty assumptions about how survivors of sexual abuse “should” behave – assumptions that have long since been disproven – but is essential that all members of discipline committees appreciate this as well.

Particularly for regulators who see a comparatively high number of sexual abuse complaints, it may be worth considering whether broader education in this area would be beneficial for members of their discipline committees. The case of Justice Camp demonstrates that once a harmful comment has been made, it is virtually impossible to regain the public trust that has been lost. As the saying goes, an ounce of prevention is worth a pound of cure.

[1] *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18.

[2] *R. v. Slatter*, 2020 SCC 36.

[3] *Slatter*, at para. 2.

[4] *R. v. Friesen*, 2020 SCC 9.

[5] *Friesen*, at para. 147.

[6] *Friesen*, at para. 146 [citations omitted].

[7] *R. v. Visscher*, 2012 BCCA 290, cited at para. 146 of *Friesen*.

[8] *In the Matter of an Inquiry Pursuant to s. 63(1) of the* Judges Act *Regarding the Honourable Justice Robin Camp: Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council*, dated November 29, 2016, at paras. 114-118, available online at <https://cjc-ccm.ca/cmslib/general/Camp_Docs/2016-11-29%20CJC%20Camp%20Inquiry%20Committee%20Report.pdf> ["***Committee Report***"].

[9] *Committee Report*, at para. 135.

[10] *Committee Report*, at para. 113.

[11] *Committee Report*, at para. 185.

[12] *Committee Report*, at para. 207.

[13] *R. v. Wagar*, 2015 ABCA 327, at para. 4.

[14] *Committee Report*, at para. 9.

[15] *Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report of the Canadian Judicial Council to the Minister of Justice*, dated March 8, 2017, available online at <https://cjc-ccm.ca/sites/default/files/documents/2019/2017-03-08%20Report%20to%20Minister.pdf>.

[16] The bill was initially introduced as a private member's bill, Bill C-337, in 2017. Although it passed unanimously in the House of Commons, it had not yet been passed by the Senate by the time the 42nd Parliament was dissolved. A similar bill was then introduced by the new government as Bill C-5 in February 2020. The Bill had not yet passed when Parliament prorogued for the summer. It was reintroduced in identical form as Bill C-3 in September 2020.

[17] Bill C-3, *An Act to amend the Judges Act and the Criminal Code* (2nd Sess, 43rd Parl, 2020) (passed third reading in House of Commons 23 Nov 2020; is at the Senate Committee stage as of this writing).

[18] Department of Justice, *Government of Canada reintroduces bill on continuing education for judges, enhancing sexual assault survivors' confidence in the criminal justice system* (Sept 25, 2020), online: <https://www.canada.ca/en/department-justice/news/2020/09/government-of-canada-reintroduces-bill-aimed-at-enhancing-public-and-sexual-assault-survivors-confidence-in-the-criminal-justice-system.html>.

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