The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia

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The author compares two early twentieth century criminal cases, one Australian and one Canadian, involving carnal knowledge of a child. The cases illustrate the parallel development of the doctrine of corroboration in sexual assault cases in the two countries – a doctrine which was based on the belief that the testimony of women and girls in such cases was inherently suspect. By requiring that corroborating evidence be independent of the complainant's testimony, and by interpreting that requirement in an extremely rigid way to exclude particular items of evidence that strongly supported the complaints, the courts in both cases imposed unjustified obstacles to the conviction of men accused of sexual offences. This misuse of the doctrine of corroboration contradicted the ideals of evenhanded justice and gender equality in both Canada and Australia.

Introduction

Canadian and Australian scholars have increasingly begun to search each other's historical legal records for evidence of similarity and difference. The two countries have much in common. They were birthed as colonies by the same mother country and share roots in the British commonwealth tradition.

Both countries were bestowed with virtually identical common law and legislative heritages. Both share a history of patriarchy, of political, social and economic imbalances between men and women that resonate in law. The comparative analysis of women's legal history in Canada and Australia is a potentially rich field, which will contribute to the task of articulating what is unique or particular about the historical foundation of the two nations.

This paper examines the similarity and distinctiveness of Canadian and Australian legal traditions through the lens of sexual assault law in the early twentieth century. Both countries inherited a criminal law that was premised upon British common law traditions of judicial precedent. The constitutional framework in Canada located the criminal law power within the federal sphere, while the Australian nation placed it under the jurisdiction of the individual states. Canada departed from the British example by codifying its criminal law in 1892.[1] Some Australian states, such as Victoria, remained true to the common law tradition, but others, such as Western Australia in 1902, codified their criminal law.[2] All of the codifications were substantially influenced by the work of the British jurist Sir James Fitzjames Stephen, whose draft code failed to secure enactment in Britain, but obtained currency within the larger commonwealth.[3] Most importantly, Canadian and Australian judges remained highly deferential to British judicial pronouncements in the field of criminal law, citing British appellate rulings regularly, often in

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1. *Criminal Code 1892*, S.C. 1892, c. 29 [hereinafter *Criminal Code 1892*].

2. *Criminal Code 1902* (W.A.), 1 & 2 Ed. VII, No. 11 [hereinafter *Criminal Code 1902* (W.A.)].

3. D.H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: Osgoode Society, 1989).

preference to local appellate decisions, and occasionally in spite of their own country's statutory departures from the British law concerned.

The focus of this article will be two early twentieth century trials, *R.* v. *Sullivan*, decided in Perth, Western Australia in 1913[4], and *Hubin* v. *The King*, decided in Winnipeg, Manitoba in 1927.[5] These cases offer useful illustrations of the judicial reasoning spawned by sexual assault proceedings in the two countries during this period. The issues concerned, the types of evidence adduced and the legal arguments raised in these two cases typify the sexual assault trials that focused on the doctrine of corroboration in the early twentieth century.[6] Both cases involved thirteen-year old complainants, and accused men charged with the offence of "carnal knowledge" perpetrated upon women under the age of consent. Both decisions focused on the legal framework for assessing female credibility; both dwelled, in depth, on the doctrine of corroboration; and both resulted in convictions at trial which were quashed on appeal. Both cases also present a wealth of factual detail. *Sullivan* is richly documented in the surviving archival records and the contemporary press, allowing

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4. (1913), 15 W.A.R. 23 [hereinafter *Sullivan*]. For depositions, see State Archives of Western Australia "Depositions in *R.* v. *Louis Sullivan*", *Criminal Indictment Files*, Cons. 3473, Item 427, Case 4475 (Perth, 1913) [hereinafter *Sullivan* depositions]. I have written in some detail regarding this case in C. Backhouse, "Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History" (2000) 29 U.W.A. L. Rev. 79 [hereinafter "Skewering the Credibility of Women"].

5. (1927), 36 Man. R. 373 (C.A.) [hereinafter *Hubin* (C.A.)], rev'd [1927] S.C.R. 442 [hereinafter *Hubin* (S.C.C.)]. For court transcripts, see Archives of Manitoba, Manitoba Court of Appeal No. 3/27 (1927) [hereinafter *Hubin* archives (C.A.)]; Supreme Court of Canada Archives, RG 125, Part 2, Box 483-1192 (1922-1962), Vol. 556, File 5369, Series A [hereinafter *Hubin* archives (S.C.C.)].

6. The *Sullivan* and *Hubin* cases were selected after reviewing all of the reported sexual assault cases from Canada between 1900 and 1950, a sample of unreported Canadian cases during this period from the archival records of Nova Scotia, Ontario and Saskatchewan, and all of the reported sexual assault cases from Western Australia and Victoria, Australia published between 1900 and 1950.

examination well beyond the contours of the reported judgment.[7] Although *Hubin* is less well-documented in the press, the judicial records contain scrupulously detailed accounts of the types of evidence introduced - and rejected - as corroboration.[8] The timing of the two cases is also fortuitous. The case of *R.* v. *Baskerville*, decided by the English Court of Appeal in 1916, articulated a set of corroboration criteria that came to hold sway across the British Commonwealth for the next half a century.[9] *Sullivan* presents a unique opportunity to scrutinize early Australian law prior to the trend-setting English decision, at a point in time when the rules of corroboration were quite fluid and unsettled. *Hubin* provides a glimpse into the immediate post-*Baskerville* era, at a time when Commonwealth courts were making their own precedential rulings about how the doctrine of corroboration should be articulated in the wake of *Baskerville*.

The cases are also well suited to comparison because the statutory foundations of the crime of "carnal knowledge" were identical in Canada and Australia. The British Parliament passed an imperial statute in 1861 making it a crime to have sexual intercourse with a girl younger than twelve. This age limit was

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7. *Sullivan* depositions, *supra* note 4; "A Serious Charge" *Perth Daily News* (16 December 1912); "A Serious Charge" *Perth West Australian* (13 December 1912).

8. The Provincial Archives of Manitoba holds the appeal files for *Hubin* (C.A.), *supra* note 5, but not the lower court files. The Supreme Court of Canada Archives contains portions of the trial transcript, as well as the written arguments of appellate counsel. See *Hubin* (C.A.) archives, *supra* note 5. I am indebted to Brian Hubner of the Provincial Archives of Manitoba for his efforts to locate the surviving records. The press coverage is sparse on detail: "Four Years For Serious Crime" *Winnipeg Tribune* (8 December 1926) 6; "City and District" *Winnipeg Free Press* (8 December 1926) 6; "Supreme Court Reserves Judgment in Hubin Case" *Winnipeg Free Press* (4 May 1927) 2; "Supreme Court Gives Manitoban New Trial" *Winnipeg Free Press* (31 May 1927) 17; "Circumstantial Evidence Must Be Corroborated" *Winnipeg Tribune* (31 May 1927) 13.

9. [1916] 2 K.B. 658 (C.A.) [hereinafter *Baskerville*]. On the dominance of the *Baskerville* analysis, see A.B. Clarke, "Corroboration in Sexual Cases" [1980] Crim. L. R. 362; A.E. Branca, "Corroboration" in R.E. Salhany & R.J. Carter, eds., *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) 133 at 133-134 [hereinafter "Corroboration"].

raised sixteen in 1885.[10] Although many of the young women whose cases were heard under this provision were forcibly and coercively assaulted, it was not strictly necessary to prove that the victim had been raped by means of force, fear or fraud, as was required for adult females. Sexual relations with underage women could generate conviction simply upon proof that the accused had had a sexual connection with the female concerned, with or without her consent. Both Canada and Western Australia inherited the 1861 statute, but both went on to enact their own legislation thereafter. Canada retained the age limit of twelve in its 1869 statute, raising it to fourteen in 1890 and sixteen in 1920.[11]

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10. *Offences Against the Person Act 1861* (U.K.), 24 & 25 Vict. , c. 100, ss. 50-51; *Criminal Law Amendment Act 1885* (U.K.), 48 & 49 Vict., c. 69, s. 5. On the legislative history of these provisions, see C. Backhouse, "Nineteenth-Century Canadian Rape Law, 1800-92" in D. H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: Osgoode Society, 1983) 206 at 206-211 [hereinafter "Nineteenth Century Canadian Rape Law"].

11. *An Act Respecting Offences Against the Person*, S.C. 1869, c. 20, ss. 51-53; *An Act to Amend the Criminal Law*, S.C. 1890, c. 37, ss. 3, 7, 12. For a discussion of the discrepancy in penalties between Canadian and British legislation, see "Nineteenth-Century Canadian Rape Law", *ibid.* The *Criminal Code 1892*, *supra* note 1, s. 269 provided:

> Every one is guilty of an indictable offence and is liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife, whether he believes her to be of or above that age or not.

See also *Criminal Code*, R.S.C. 1906, c. 146, s. 301 [hereinafter *Criminal Code 1906*]. The *Criminal Code Amendment Act*, S.C. 1920, c. 43, s. 8 [hereinafter *Criminal Code Amendment Act 1920*] added s. 301(2):

> Every one is guilty of an indictable offence and liable to imprisonment for five years who carnally knows any girl of previous chaste character under the age of sixteen and above the age of fourteen, not being his wife, whether he believes her to be above the age of sixteen or not. No person accused of any offence under this subsection shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

Section 17 of the 1920 statute added s. 301(3):

> On the trial of any offence against subsection two of this section, the trial judge may instruct the jury that if in their view the evidence does not show

Western Australia put the age limit for carnal knowledge at fourteen in 1892, and increased it to sixteen in 1900.[12]

One of the criminal law ideas that seems to have taken firm root in both countries was the belief that women and children were inherently untrustworthy when they testified about sexual assault. There has never been any empirical basis for such presumption, which appears to have sprouted from pervasive and long-standing misogynistic attitudes.[13] Judges and text writers in Canada and Australia routinely cited eighteenth century English jurist Sir Matthew Hale for the adage that rape "was an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent".[14] In

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that the accused is wholly or chiefly to blame for the commission of the said offence, they may find a verdict of acquittal.

See also *Criminal Code*, R.S.C. 1927, c. 36, s. 301 [hereinafter *Criminal Code 1927*].

12. See *Criminal Law Consolidation Ordinance 1865* (W.A.); *Criminal Law Amendment Act 1892* (W.A.); *Criminal Law Amendment Act 1900* (W.A.); *Criminal Code 1902* (W.A.), s. 188(1). Section 188(1) provided that:

> any person who has or attempts to have unlawful carnal knowledge of a girl under the age of sixteen years . . . is guilty of a misdemeanor, and is liable to imprisonment with hard labour for two years, with or without whipping.

There was no requirement for proof of "previous chaste character", as in the Canadian counterpart legislation. However, it was a defence to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of sixteen years. (This defence did not apply to charges of unlawful carnal knowledge of a girl under the age of thirteen years: ss. 185, 205.) See also *Criminal Code Amendment Act 1911* (W.A.), ss. 2-4.

13. For some discussion of the absence of any empirical foundation to substantiate the claims that women often lie about rape, see J. Scutt, "Sexism and Psychology: An Analysis of the 'Scientific Basis' of the Corroboration Rule in Rape" (1979) Hecate 35.

14. M. Hale, *Historica Placitorum Coronae*, vol. 1 (London: Nott and Gosling, 1734) at 635-636. On the frequency with which these statements were quoted, see S.F. Harris, *Principles of the Criminal Law*, 7th ed. (London: Stevens and Haynes, 1896) at 164. For some discussion of Hale's reputation as a misogynist and his notorious role in convicting women accused of witchcraft, see G. Geiss, "Lord Hale, Witches and Rape" (1978) 5 Brit. J.L. & Soc. 26; and J. Scutt, "Law Reform and Child Abuse in Australia" in P. Hetherington, ed., *Childhood and Society in*

deference to Lord Hale, special evidentiary rules were constructed for sexual assault trials, with judges urged to caution juries that it was dangerous to convict upon the uncorroborated testimony of female rape complainants.[15] Canadian and Australian legislators expanded upon the common law rules, fortifying many of their criminal law statutes with additional requirements for corroboration in cases of sexual assault. For some offences the statutes went well beyond the common law *preference* for corroboration, making it *mandatory*, and stipulating that no one could ever be convicted "upon the uncorroborated testimony of one witness". The offence of "carnal knowledge" with which the accused men were charged in the *Sullivan* and *Hubin* cases was such an offence in Canada[16] and Australia.[17] A review of the legislative debates that accompanied the introduction of mandatory corroboration provisions indicates that the all-male legislators were worried about false complaints and the potential for extortion and blackmail. Politicians in both countries spoke of "seducers", "tempters" and "brazen females" of "vicious habits", who were wont to exhibit "hysterical", "wanton" and "wicked" practices, as well as "designing girls" and "libidinous women" who might "entrap" the "vigorous, active" and "foolish" young men of the country. The efforts of female reform groups to remind the politicians that "false charges of this kind" were of "very rare occurrence" failed abjectly.[18]

Western Australia (Perth: University of Western Australia Press, 1988) 125 at 125-126, 134.

15. See *e.g. Halsbury's Laws of England*, vol. 9 (London: Butterworths, 1909) at 388; E.H. East, *Pleas of the Crown*, vol.1 (Abingdon, Oxon: Professional Books, 1987) at 445.

16. *An Act to Amend the Criminal Code*, S.C. 1925, c. 38, s. 26; *Criminal Code 1927*, *supra* note 11, ss. 301(2), 1002.

17. The *Criminal Code 1902* (W.A.), *supra* note 2, s. 188(1) provided that "a person cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness." Section 1 provided that the term "uncorroborated testimony" meant "testimony which is not corroborated in some material particular by other evidence implicating the accused person."

18. For reference to the debates, see "Nineteenth Century Canadian Rape Law", *supra* note 10; C. Backhouse, *Petticoats and Prejudice: Women and Law in*

I. Ila Collins and Sophie Oleksiuk: Two Highly Credible Witnesses

Ila Collins was a mere slip of a girl just thirteen years old when she took the witness stand in Police Magistrates' Court in Perth, Western Australia on a sweltering hot day in December, 1912. Observers described her as timid, embarrassed and reticent to speak about the intimate sexual details of her experience. However, after being duly sworn, Ila Collins told the court how Louis Sullivan, a fifty-year-old innkeeper who cohabited with her mother, had sexually assaulted her repeatedly for the past eleven months. She testified that Sullivan had accosted her while they were out riding horses in the bush and when she was down at the paddock feeding the pigs. She spoke in a wavering, barely audible voice of her terror, of her efforts to resist, of Sullivan's persistent threats. She described her tears when he forced her to the ground, "hurt" her inside her "private parts" and left her "wet" and in great pain. She recalled how Sullivan had taunted her, saying, "If it hurts you, it will only hurt you once in your life."

Neighbours and acquaintances all characterized young Ila Collins as "very innocent", "a good, quiet, retiring girl", "babyish" and "reserved". She apparently struck everyone who knew her as proper, shy and subdued. Her demeanour in court was highly compelling, and the magistrate committed Sullivan for trial on the strength of her statements. Ila Collins stood up equally well at trial before the Supreme Court in Perth three months later. Although she was cross-examined at length by defence counsel, she seems to have impressed those in the

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Nineteenth-Century Canada (Toronto: Osgoode Society, 1991) at 69-80; "Skewering the Credibility of Women", *supra* note 4 at 87.

courtroom as unshakeable and "entirely believable". She convinced the jury beyond a reasonable doubt.[19]

Half-way around the globe, Sophie Oleksiuk seems to have been equally compelling when she appeared before the County Court Judge's Criminal Court in Winnipeg, Manitoba on a blustery, frigid morning in December, 1926. A few days shy of her thirteenth birthday, Sophie Oleksiuk explained that she had been walking along a country road around nine o'clock in the morning in order to mail a letter at the nearest post office in Lockport, several miles southeast of her rural home. Leo Paul Hubin, a St. Boniface man of undetermined age, had driven up alongside her in a McLaughlin coupe and offered her a lift. She did not know him, but she accepted the ride. She told the court how Hubin turned north on a cross-road, and drove her four miles out of her way despite her remonstrations. She explained that she tried to escape from the vehicle, but that Hubin followed her out of the car, grabbed her by the coat and raped her on the side of the road. She also spoke of her resistance and her tears and described how Hubin had ripped her bloomers when he tore them from her body. She testified that she refused to get back into the car with her attacker, and that he drove off and left her there, frightened, hurt and weeping.

The general assessment of Sophie Oleksiuk's testimony was also highly positive. The witnesses emphasized her youthful vulnerability, with the medical expert testifying that she was "still a child physically". She was described as "unhesitating", and her evidence was characterized as "true" and "convincing", ultimately constituting "a very strong case." Since this was not a jury trial, the trial judge was the ultimate trier of fact. He pronounced Sophie Oleksiuk's story to be "absolutely truthful" and emphasized that he "accepted" her word "absolutely". The judges of the Manitoba Court of Appeal who subsequently reviewed the

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19. See "Skewering the Credibility of Women", *ibid.* at 79-107 for more details regarding this testimony and its characterization by witnesses, court officials and the press.

case and upheld the verdict of guilty labeled her narrative "a convincing and well-connected one".[20]

In both instances, then, the primary Crown witness was deemed to be steadfast and highly convincing. The young girls' testimonial credibility was elevated even further by comparison with the manipulative and vacillating stories proffered by the accused men. Louis Sullivan initially denied having had any sexual contact with Ila Collins, but then confessed to her mother that he was surprised at the charge because he had never "got properly into" the girl. In the end, he was reduced to complaining to a neighbouring publican that he "was not the only one" to have had sexual relations with the girl. An arrogant and bombastic man who angered the appellate judges by complaining that they were not making sufficiently detailed notes of his legal argument, Sullivan was also known to have advised one of his employees that "a little bit of vaseline" would prevent genital tearing during intercourse with young girls.[21]

For his part, Leo Paul Hubin provided strikingly inconsistent statements to the police. Initially, he claimed that on the day of the rape he was playing pool in the Seymour Hotel in Winnipeg and was having his car fixed at a local garage, all of which he brashly asserted could be confirmed by multiple witnesses. Thinking better of the matter, Hubin later retracted this statement and advised that he had played pool only briefly, then spent the balance of the day with his mother and sister in St. Boniface. Hubin's evidence was judicially characterized as "weak and quibbling", even "a tissue of lies".[22]

If the criminal trial had been constructed in accordance with the ordinary principles of evidence, it would have been a simple matter for the Crown attorneys in both cases to meet their onus of proof. It was an irrefutable rule of English law that in most criminal trials, the testimony of a single witness was sufficient to

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20. *Hubin* (C.A.), *supra* note 5 at 374-375, 377-379; *Hubin* Archives (S.C.C.), *supra* note 5.

21. See "Skewering the Credibility of Women", *supra* note 5 at 89-91, 101.

22. *Hubin* (C.A.), *supra* note 5 at 375-376, 383, 385.

prove a legal case, provided that the trier of fact believed that witness beyond a reasonable doubt. The doctrine of corroboration was a marked departure from the general practice, an evidentiary hurdle that made it substantially more difficult to secure convictions despite the overwhelming ring of truth that seems to have suffused Ila Collins's and Sophie Oleksiuk's testimony.[23]

II. The "Back-Up Evidence"

Precisely what did the term "corroboration" mean? What sorts of additional proof did the prosecution have to put forward to obtain convictions in cases involving carnal knowledge of young girls? English dictionaries published at the turn of the century offered a list of equivalent phrases: "strengthening, fortifying, invigorating", "confirm[ing] (of a statement, etc.) by additional evidence", "strengthen[ing] (a statement, etc.) by concurrent or agreeing statements or evidence", "mak[ing] more sure or certain".[24] The legal definition did not fully match the contemporary dictionary sense of the word. However, if the

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23. The requirement for corroboration under English law was attached primarily to allegations involving sexual violence, exploitation or immorality made by women and children. It encompassed criminal proceedings for a variety of sexual offences and civil proceedings for affiliation, breach of promise to marry and divorce. The unsworn testimony of children "of tender years" also attracted the need for corroboration, as did the evidence of accomplices, and criminal prosecutions for perjury, treason, blasphemy and personation. Highlighting the peculiarities of such rules, E. Jowitt & C. Walsh, eds., *The Dictionary of English Law* (London: Sweet and Maxwell, 1959) *s.v.* "corroboration", stated:

> The general rule of English law, unlike that of other systems, is that the evidence of a single witness is sufficient to prove any case, civil or criminal. In certain cases, however, the court will not act on the evidence of a single witness unless that evidence is corroborated. This, in some cases, is a matter of practice, but in a few cases the court is precluded by statute from acting on the evidence of a single witness unless there is corroboration.

24. *A New English Dictionary*, vol. 2 (Oxford: Oxford University Press, 1893), *s.v.* "corroboration".

common understanding of the word had been taken to govern the situation, it would seem that a great many things could have been accepted as "corroborative" in sexual assault trials.

In the *Sullivan* case, there was a surfeit of "strengthening" and "confirming" testimony. A physician testified that he had examined Ila Collins and found "a considerable dilatation of the whole vaginal tract," leading him to conclude that she had had "repeated sexual connection" dating back several months. Various neighbours testified to having seen Louis Sullivan and Ila Collins out riding together in the bush and in the direction of the paddock, often late into the night. A police officer went out to investigate the paddock and found the table and bundle of empty chaff bags upon which Ila Collins had reported that she was raped. The proprietor of a nearby saloon, who had formerly trained as a nurse, testified that Louis Sullivan had come over to ask her whether a medical man could "tell positively that a girl had been interfered with". This was the same conversation during which Sullivan complained that he was "not the only one".

Ila Collins's mother also testified that her daughter had reported to her the details of the sexual attack well before any formal charges were laid with the police. The mother told the court that when she confronted her cohabitee and accused him of sexually abusing her daughter, Sullivan had insisted that he "never got properly into her". Understood within the context of the conversation, most hearers would have taken this as an unwitting admission that Sullivan had indeed "got into" the young girl after a fashion. The Australian statute did not require the Crown to prove full sexual intercourse. The crime of "carnal knowledge of girls under sixteen" was defined as "having" or "attempting [to have] unlawful carnal knowledge of a girl under the age of sixteen". The crime specifically encompassed the "attempt" as well as the completed offence.

The "fortifying" evidence in the *Hubin* case was equally substantial. The medical practitioner who examined Sophie Oleksiuk reported that he found "the hymen ruptured and the vagina slightly injured" with abrasive swelling on the left side, that this condition was "of recent origin" and that it could have

been "caused by sexual intercourse". Sophie's oldest sister, fifteen-year-old Mary, confirmed that Sophie had returned to her home on the day of the rape in tears. Mary testified that her sister told her immediately what had happened. Mary had had the presence of mind to save the torn bloomers that Sophie showed her, and these were filed as a material exhibit in court.

Sophie Oleksiuk was a very observant young girl, and she was able to describe an unusual cushion that was lying on the driver's seat in Hubin's car - a "little round one", one side of which was "black plush" and the other "a kind of sand colour". The car was tracked because Sophie Oleksiuk had been carrying a pencil in her pocket on the morning of the rape, and she had accurately written down the licence number of the car on the envelope she was bringing to the post office. The police traced the car to an automobile salesman who identified the McLaughlin coupe as one he had earlier sold to Hubin. Sophie was able to identify the car while it was sitting at a garage, by its appearance, licence number and the cushion that remained on the driver's seat, identical to the one that she had described. The police brought Hubin down to the police station and placed him in a line-up with four other men. Without hesitation, Sophie pointed him out as the man who had raped her. Hubin also admitted that he was the owner of the car and that he was driving it on the day the offence was committed. Although the police cautioned Hubin that any statement he might make would be taken down and could be used against him at trial, he offered two substantially inconsistent statements as to his whereabouts on the day in question.

III. Whittling Down the Scope of Legal Corroboration: The Australian Example

When eighteenth century judges first dreamed up the need for corroboration, they did not provide a detailed or systematic code to regulate what sorts of evidence should be called. Theoretically, any additional evidence beyond the complainant's testimony

could have sufficed. When Western Australian legislators first enacted their *Criminal Code*, they took a major step back from this potentially wide interpretation. The *Criminal Code 1902* (W.A.) set out a statutory definition that described "uncorroborated testimony" as "testimony which is not corroborated in some material particular by other evidence implicating the accused person".[25] This narrowed the scope of the doctrine to encompass only certain kinds of evidence - that which

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25. This definition was first introduced in the *Criminal Code 1902* (W.A.), *supra* note 2, s. 1. There was no general statutory requirement for corroboration for carnal knowledge in England at the time. The only extant provisions were found in the *Criminal Law Amendment Act, 1885* (U.K.), 48 & 49 Vict., c. 69. Section 2 made it a crime to procure or attempt to procure any girl or woman under twenty-one years, not being a common prostitute or of known immoral character, to have unlawful carnal connexion, or to leave the United Kingdom to become an inmate of a brothel. The section continued: "provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused." Section 3, which made it a crime to procure such a woman to have unlawful carnal connexion by threats, intimidation, false pretences or the administration of drugs, contained a similar corroboration provision. Section 4, which made it a crime to have unlawful carnal knowledge of a girl under the age of thirteen years, or to attempt to do so, did not contain the same provision. However, the section described how evidence of children "of tender years" might be taken pursuant to this charge without being sworn, if the witness was "possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth." Where this type of unsworn evidence was received, the section required a different sort of corroboration: "Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section shall be corroborated by some other material evidence in support thereof implicating the accused". The phrasing of the corroboration requirement subsequently enacted in Western Australia appears to have been an amalgam of the two English sections. The only other statutory corroboration requirements in England were found in *An Act for the Prevention of Cruelty to, and Better Protection of, Children, 1889* (U.K.), 52 & 53 Vict., c. 44, s. 8, which provided that evidence of children not given upon oath could not result in a conviction of an adult for ill-treatment or neglect of children, unless that evidence was "corroborated by some other material evidence in support thereof implicating the accused." See also *Prevention of Cruelty to Children Act*, 1894 (U.K.), 57 & 58 Vict., c. 41, s. 15; *Prevention of Cruelty to Children Act, 1904* (U.K.), 4 Edw. VII, c. 15, s. 15.

related to a "material particular" rather than to less critical elements of the case - and that which implicated the accused, rather than simply increased the credibility of the complainant's testimony. This went well beyond the simple concept of "strengthening" or "confirming" evidence.

In the hands of the lawyers and judges in Australia, the statutory definition would be pulled apart, probed and pinched still further, until the legal doctrine came to resemble but a fraction of the original, broad concept. The *Sullivan* case provides an ideal vehicle for examining this winnowing process, as judges dismissed certain types of evidence and narrowed the scope of corroboration to a thin band of qualifying data. The Supreme Court of Western Australia rejected all of the evidence led by the Crown, finding none of it sufficient to meet the legal burden of corroboration, and quashed the conviction of the jury that had believed Ila Collins.

The medical evidence was the easiest to dismiss. The doctor's findings might have proved that the young girl had been sexually assaulted, but the report did not solely "implicate the accused". This was because the testifying physician was unable to state whose penis had caused the "considerable vaginal dilation" he had observed. The new statutory definition had rendered meaningless a swath of otherwise confirmatory testimony. What in theory was a clear and affirming piece of evidence, a medical finding that the complainant had been sexually violated, was now largely useless.[26] This rule would destroy the corroborative value of most medical evidence in sexual assault trials, at least until the introduction of DNA testing three-quarters of a century later.

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26. Prior to the introduction of the statutory definition, Australian law had been quite unsettled regarding the corroborative potential of medical evidence in sexual assault trials. See *e.g. R.* v. *Abbott* (1898), 9 Q.L.J. 92; *R.* v. *Roys* (1898), 9 Q.L.J. 47; and the unreported trial of Thomas Palmer in the Geelong Court of Assize in 1885 on the charge of raping his daughter, described in J. Bavin-Mizzi, "Writing About Incest in Victoria 1880-1890" in P. Hetherington, ed., *Incest and the Community: Australian Perspectives* (Perth: University of Western Australia Centre for Western Australian History, 1991) at 58-65.

The utility of the statements of the multiple witnesses who had seen Ila Collins out riding with Louis Sullivan late at night and in the vicinity of the paddock was also rejected. This is somewhat harder to understand, since the evidence placed Louis Sullivan at the scene of the crime, and unlike the doctor's testimony, presumably "implicated the accused". However, Australian courts had rejected evidence of "mere opportunity" as insufficiently corroborative without some further "inference of impropriety".[27] Presumably mere horseback riding in the vicinity of the assaults

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27. *R.* v. *Walsh* (1905), 7 W.A.R. 263 [hereinafter *Walsh*], State Archives of W.A., "Depositions in *R.* v. *John Walsh*" *Criminal Indictment Files*, Cons. 3473, Items 3692 and 3701 (Perth, 1905) [hereinafter "Depositions in *R.* v. *John Walsh*"] involved a charge of carnal knowledge of a nine-year-old girl. The girl's parents had sent her to the accused's residence with messages on three occasions, and each time she had come home complaining of injury. The sexual assault was medically ascertained some weeks later. The Supreme Court ruled that the fact that the girl had been at the accused's house, or in his company, was insufficient corroboration without further incriminating particulars. It was up to the Crown to prove something more to obtain an inference of impropriety - that they had been seen in an "indelicate position", that he was enticing her into his house, or shutting the door or pulling down the blinds. *R.* v. *McGee* (1894), 6 Q.L.J. 151 also ruled that the fact that the accused man and the child were alone together in the house in which the offence was alleged to have been committed did not constitute corroboration. See also *R.* v. *O'Brien*, [1912] V.L.R. 133 at 139 holding that evidence that the accused had an opportunity to commit the act charged, the commission of which was clearly proved, was not sufficient. A Canadian case that seems to have taken a more relaxed approach is *R.* v. *Pailleur* (1909), 20 O.L.R. 207 (C.A.) involving the charge of attempting to commit incest upon a daughter aged seven. A witness testified to seeing the accused go upstairs and call his daughter to come up to him, that the girl was reluctant but went and that she came back later with her clothing in "disorder" and showing "signs of agitation". The court found such evidence corroborative, noting that the law did not require that every part of the evidence should be corroborated, but only that it must be corroborated by some other material evidence. See also *R.* v. *Bowes* (1909), 20 O.L.R. 111 (C.A.); *R.* v. *Steele* (1923), 33 B.C.R. 197 (C.A.), aff'd [1924] S.C.R. 1; *R.* v. *Kramer* (1924), 20 Alta. L.R. 244 (C.A.); *R.* v. *Bristol* (1926), 58 N.S.R. 533 (C.A.). But see *R.* v. *McGivney* (1914), 19 B.C.R. 22 (C.A.); *R.* v. *Drew*, [1933] 1 W.W.R. 225 (Sask. C.A.); and *R.* v. *Newes*, [1934] 3 D.L.R. 237 (Alta. C.A.), where Canadian courts dismissed the corroborative potential of evidence suggesting that the accused had the opportunity to commit the offence.

was taken to be lacking such an inference. A similar fate befell the police evidence. The scene of the crime looked just as Ila Collins had described it, but her ability to describe the physical surroundings that attended the location in which the assault occurred did not "implicate the accused" either.

The complaint that Ila Collins made to her mother was potentially more useful, at least at this point in Australian jurisprudential development. Australian law was still unclear as to whether the complainant could corroborate her own story by divulging the sexual assault to a third party. None of the reported decisions prior to *Sullivan* had ruled categorically whether this type of evidence was sufficient. The main case on the point had provoked strong disagreement between two judges. *R.* v. *Gregg*, an 1892 decision of the Victoria Supreme Court, considered a charge of indecent assault on an eight-year-old girl. The court heard evidence that the child had returned to her mother "in a state of distress" and described the assault, the place where it was committed, the appearance of the place and the appearance and garb of her assailant.[28] Chief Justice Higinbotham concluded that the conversation was "forcible evidence" of corroboration, stating:

> Corroboration may be easily supplied in most cases by our law, though not by the English law. Our law admits that a statement by a child to its mother, made after the commission of such an offence, is admissible, not as part of the *res gestae*, but as evidence confirming and corroborating the testimony which the child gives in the box; and in a very large number of cases I am not aware of any kind of corroboratory evidence more satisfactory than that of a female child suffering under a shock of this kind, and indicating by appearance, manner, words, and acts the distress caused by the assault.[29]

In the unusual circumstances of the case, however, the Chief Justice ruled that the evidence did not meet the qualifications of legal corroboration. In *Gregg*, the conversation between mother and child had occurred prior to the police investigation and prior

28. (1892), 18 V.L.R. 218 (Vic. Sup. Ct. F. C.) [hereinafter *Gregg*].
29. *Ibid.* at 222-223.

to the time when the child identified her assailant. Consequently, the Chief Justice held that the statement failed to "implicate the accused":

> [U]nder the present law such corroboration can only be given so as to implicate the accused person, if the child knows at the time of the assault the person who has assaulted her, or if some other testimony exists independent of that of the child by which the assailant can be identified.[30]

While concurring in the result of the case, Judge Hood was in strong disagreement with his Chief Justice over the value of complainants' statements to third parties. Rejecting this type of evidence as generally insufficient, Judge Hood noted:

> There was evidence to support the girl's story and to confirm her credibility and to show that she was telling what she believed to be the truth. But I think that the Legislature has in these cases required something more. There must be some other material evidence implicating the accused; that is, something proved altogether apart from the child's story tending to establish the guilt of the prisoner. It seems to me that the intention was that no man should be convicted upon the unsworn testimony of a child of tender years unless other facts were established which would raise a suspicion of the accused's guilt, even if the evidence of the girl had been absent.[31]

Judge Hood's interpretation was draconian in import. In essence, he was insisting that "corroboration" be restricted to evidence that originated entirely independently from the words and actions of the complainant. The statute itself did not mandate this. What was required was testimony that was corroborated "in

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30. *Ibid.* at 223.

31. *Ibid.* at 224. See also *R.* v. *Smith* (1901), 26 V.L.R. 683 (Vic. Sup. Ct. F. C.), a charge of indecent assault on a girl of five years, where the court heard evidence that the girl had described portions of the assault to her mother. Ruling that the conversation between the girl and her mother had not revealed sufficient "circumstances of indecency" the court disqualified it as corroborative. Although nothing in the court's judgment suggests that such evidence could never be corroborative, the holding did note that corroboration constituted "extrinsic sworn evidence" that would "implicate the accused". *Ibid.* at 686.

some material particular by other evidence implicating the accused person". Judge Hood had taken the phrase "other evidence" and equated it with evidence that was completely "extrinsic" or "independent" of the complainant.

In the *Sullivan* case, the legal authorities seem to have preferred Chief Justice Higinbotham's sense of the issues over Judge Hood's. There was no legal argument over whether Ila Collins's mother's testimony about her daughter's description of the sexual assaults could potentially qualify as corroboration. Both the Crown attorney and defence counsel seem to have believed that the recent complaint fit within the legal criteria for potential corroboration. The defence lawyer argued instead that Ila's mother could not corroborate her daughter's story because she was simply not a credible witness. He pointed out that this was a woman blatantly living in sin, a "mistress" to Louis Sullivan. As it turned out, Ila Collins's mother had also held herself out as a widow, claiming that Ila's father had died six months after the child's birth. Yet Ila's birth certificate was blank where the father's name should have appeared. The marital history created additional problems when it was revealed that Ila's mother had sworn to be a widow while making application for a hotel licence in 1906. Sullivan's defence lawyer accused the mother of perjury, birthing an illegitimate child, extra-marital cohabitation and alcoholism. The Supreme Court justices who heard the appeal were strongly influenced by this disparaging evidence and were quick to dispense with Ila's mother's testimony. Rattling off the reasons why no jury should ever have relied upon such a woman's evidence, Chief Justice Sir Stephen Henry Parker noted that Ila's mother had falsely sworn to be a widow in order to obtain a hotel licence, that she "had been living with the accused for years as his mistress" and that she was "a drunkard". What more could one possibly imagine to eviscerate the reputation and credibility of a woman? The judges did not dispute that the recent complaint Ila Collins had made to her mother fell within the legal parameters of the doctrine of corroboration. Instead, they dismissed the mother's testimony as lacking in credibility.

The conversation that Louis Sullivan had had with the saloon proprietor and former nurse, in which he had grilled her about the accuracy of medical assessments of female virginity and grumbled that he was "not the only one", was inexplicably never put forward as legal corroboration before the Supreme Court. These statements might have been construed as incriminating admissions, and it is difficult to know why the Crown chose not to include this evidence as potential corroboration. It is true that Australian courts had been very cautious about drawing implications from statements of the accused, giving them every benefit of the doubt before accepting such evidence as corroborative.[32] However, it is difficult to understand how Sullivan's statement was not a full admission of sexual intercourse. How frequently was similar evidence disqualified, without any records left to offer analysis or rationale? The other admission Sullivan had made, to Ila Collins's mother that he had "not properly got into" Ila, was put before the Supreme Court by the Crown. It was rejected on the same ground as the rest of Ila Collins's mother's evidence on the basis that she was an inherently untrustworthy witness.

In the end, the case faltered entirely over corroboration. Judge Robert Bruce Burnside was at pains to articulate the long-standing rationale behind the evidentiary barrier to conviction: "The policy of the law from time immemorial has been to require that in cases of offences against women and female children the evidence of the prosecutrix should receive some corroboration."[33]

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32. See *e.g. R.* v. *Rima* (1892), 14 A.L.T. 138 at 355 where the accused gave statements to the arresting officer in which he admitted having "tampered with the child". The court held that this was insufficient to justify the conclusion that he had committed an indecent assault. In *Walsh, supra* note 27 and "Depositions in *R.* v. *John Walsh*", *supra* note 27, the accused, who was charged with carnal knowledge of a girl under the age of thirteen, told the police that the complainant was a "young hussy". He also admitted she had been in his place when he was undressing. Upon arrest, he added: "It would not do me any good to say anything." The court held these statements were insufficient to implicate the accused.

33. *Sullivan, supra* note 4 at 29.

Paraphrasing the indomitable Sir Matthew Hale, he went on: "It was commonly put before juries in criminal cases that it was a charge very easily made and most difficult to disprove, and the wisdom of the legislators has in the statute under review enunciated that policy, namely, that the prisoner cannot be convicted merely upon the testimony of one witness."[34]

Chief Justice Parker was equally at pains to emphasize the importance of corroboration, taking care to support the statutory underpinning of the doctrine:

> Her [Ila Collins's] story may be quite true, and in all probability the jury, having seen her in the box and observed the mode in which she answered the questions and her demeanour when cross-examined, may have rightly come to the conclusion that they entirely believed her story, but it is necessary that there should be corroboration as defined by the statute. . . . Now I venture to think that the jury did believe the girl - it may be that they rightly believed her - and that they entirely overlooked the question that they must find corroboration in the manner defined in the Code, before they could convict the accused.[35]

This was a non-apologetic insistence that the legal rules requiring corroboration ought properly to override the conviction of guilty men. The appellate court went further to applaud the "wisdom of the policy of the Legislature in requiring corroboration" in trials such as these. "It is not sufficient that she should be believed", the court ruled, "although the jury may have believed her". The jurors had satisfied themselves "of the truth of the girl's story" and "determined to convict" the accused.[36] But in their haste to see justice done, they had ignored the requirement for corroboration. Even where the complainant was "entirely believable", even when a jury "rightly" decided that she was telling the truth, even where the complainant gave evidence in a completely honest and compelling manner throughout her

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34. *Ibid.* at 29. For press coverage of the appellate ruling, see "A Criminal Appeal" *Perth West Australian* (27 June 1913); "Court of Criminal Appeal" *Perth Daily News* (26 June 1913).

35. *Sullivan, supra* note 4 at 22-25.

36. *Ibid.* at 25-26, 30.

testimony-in-chief and cross-examination, the verdict must go to the accused unless legal "corroboration" was available. And what sort of evidence would qualify as "corroboration" was to be rigorously and tightly controlled. In the tug-of-war between the need to protect young girls from sexual abuse and the need to protect men from untrustworthy females, it was incontestably Australian men who came out on top.

Three years later, the *Baskerville* decision of the English Court of Appeal would restrict the scope of corroboration still further. The court equated the definition of corroboration at common law and under statute, holding that in both situations, corroboration would now require "independent testimony which affects the accused by connecting or tending to connect him with the crime."[37] In the hands of the Australian judiciary, the *Baskerville* decision would also come to stand for the rule that corroboration must always emanate from a source other than the complainant. This would ultimately place off limits the details of any complaints made by sexual assault victims to third parties.[38]

IV. Strangling the Doctrine of Corroboration: The Canadian Example

The first legislative requirement for corroboration in carnal knowledge cases surfaced in a Canadian statute in 1890. At the start, Canadian legislators did not mandate corroboration as a prerequisite for conviction in all carnal knowledge offences, but only when the female complainant had been too young to swear her evidence under oath.[39] With the passage of the first Canadian

37. *Baskerville, supra* note 9 at 665.

38. J.A. Gobbo, *Cross on Evidence*, Australian ed. (Sydney: Butterworths, 1970) at 221.

39. *An Act to further amend the Criminal Law*, S.C. 1890, c. 37, s. 13 provided only that when a child of "tender years" was tendered as a witness, who did not understand the nature of an oath, such evidence might be received "if, in the opinion of the court or justices ... such girl ... is possessed of sufficient

Criminal Code in 1892, Parliament saw fit to make corroboration a prerequisite for a variety of sexual offences, although "carnal knowledge" was not initially included.[40] In 1920, when the age of consent was raised to sixteen for girls of "previous chaste character", corroboration finally became mandatory.[41] Carnal

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intelligence to justify the reception of the evidence and understands the duty of speaking the truth". In such cases only, s. 13(2) provided: "But no person shall be liable to be convicted of the offence unless the testimony adduced by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused".

40. *Criminal Code 1892*, *supra* note 1, s. 684 made corroboration mandatory for all charges under ss. 181-190, which included "[s]eduction of girls under sixteen", "[s]eduction under promise of marriage", "[s]eduction of a ward, servant", "[s]eduction of female passengers on vessels", "[u]nlawfully defiling women", "[p]arent or guardian procuring defilement of girl", "[h]ouseholders permitting defilement of girls on premises", "[c]onspiracy to defile", "[c]arnally knowing idiots" and "[p]rostitution of Indian woman", as well as the offences of treason, perjury, procuring feigned marriage and forgery. It did not cover "[c]arnal knowledge of a girl under the age of fourteen" or "[a]ttempt to commit carnal knowledge of a girl under fourteen." The wording of the corroboration rule stated: "No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused." Slightly different wording was retained in s. 685(2), with respect to evidence of children of "tender years" received without an oath: "But no person shall be liable to be convicted of an offence [of carnal knowledge of a girl under fourteen or indecent assault] unless the testimony . . . given on behalf of the prosecution is corroborated by some other material evidence thereof implicating the accused." See also the *Criminal Code 1906*, *supra* note 11, s. 1002, 1003(2).

41. *Criminal Code Amendment* Act, *supra* note 11, s. 8 amended s. 300 of the *Code* by adding s. 300(2):

> Every one is guilty of an indictable offence and liable to imprisonment for five years who carnally knows any girl of previous chaste character under the age of sixteen and above the age of fourteen, not being his wife, and whether he believes her to be above the age of sixteen years or not. No person accused of any offence under this subsection shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

knowledge of girls under fourteen escaped such compulsory treatment until 1925.[42]

Two statutory definitions of corroboration were provided. The general definition, applicable after 1925 to all carnal knowledge trials, provided that no person could be convicted "upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused".[43] The slightly different version, which applied to the unsworn evidence of children of "tender years" in charges of carnal knowledge, prevented conviction unless the testimony "given on behalf of the prosecution" was "corroborated by some other material evidence thereof implicating the accused".[44] Sophie Oleksiuk had been duly sworn when she gave her testimony, so the former definition was applicable to her case.

The statutory definitions enacted in Canada suffered from the same restrictive formulation that beset Australian criminal law. This unnecessarily narrow formula destroyed the value of the medical examination that had been conducted on Sophie Oleksiuk. The doctor's testimony about her "ruptured hymen" and "swollen" vagina failed to "implicate the accused" in much the same way that Ila Collins's "vaginal dilation" had failed to

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42. *An Act to Amend the Criminal Code*, S.C. 1925, s. 26 [hereinafter *An Act to Amend the Criminal Code 1925*] expanded the list of offences requiring corroboration to include "seduction of girls between sixteen and eighteen", "seduction of step-child or foster child", "seduction of female employee", "procuring", "carnal knowledge of girls under fourteen", "carnal knowledge of girls of previous chaste character between fourteen and sixteen", "attempted carnal knowledge of girls under fourteen", the abortion offences, "communicating venereal disease" and "bigamy." See also the *Criminal Code 1927*, *supra* note 11, ss. 1002, 1003(2). The 1927 revision reprinted the corroboration provisions directly within s. 301(2), carnal knowledge of a girl between fourteen and sixteen and s. 307, communicating venereal disease, an unusual duplication.

43. *Criminal Code 1892*, *supra* note 1, s. 684, as amended by *An Act to amend the Criminal Code 1925*, *ibid.*

44. *Criminal Code 1892*, *ibid.*, s. 685(2); *Criminal Code 1906*, *supra* note 11, s. 1003(2); and *Criminal Code 1927*, *supra* note 11, s. 1003(2).

corroborate her evidence in the earlier trial.[45] A similar fate befell Sophie Oleksiuk's torn bloomers. An item of concrete evidence that undeniably attested to the violence of the sexual assault was rejected because the rent undergarment failed to disclose who had ripped it.

The matter of the complaint that Sophie Oleksiuk had made to her fifteen-year-old sister Mary was somewhat more complex. "Recent complaint" was the legal term frequently used to describe the complainant's first disclosure of the assault. Allowing a witness to testify that the complainant had divulged information about the sexual assault was a departure from the ordinary rules of hearsay evidence. The Ontario High Court had explained the anomaly in *Hopkinson* v. *Perdue* in 1904, as a survival of the practice that "prevailed in early times" of receiving evidence of previous statements of witnesses not under oath similar to their testimony in court for the purpose of "confirming" that testimony. Although such evidence had long since ceased to be admissible as a general rule, the "ancient practice" had survived as an "exception" in cases of rape, probably in line with legal expectations that women who were truly raped would raise a "hue and cry".[46] The relationship between this "confirming" testimony and the legal requirement for corroboration was not entirely clear. Early cases stipulated that "recent complaint" evidence should not be construed to be "independent or substantive evidence to prove the truth of the charge", but as "corroborative evidence" that could "confirm the injured party's testimony".[47] Although Canadian courts often used the terms

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45. For examples of Canadian cases dismissing the corroborative value of medical evidence, see *R.* v. *Turnick* (1920); 54 N.S.R. 69 (C.A.); *R.* v. *Drew* (1932); 60 C.C.C. 37 (Sask. C.A.); and *R.* v. *Terrell*, (1947) 3 D.L.R. 523 (B.C. C.A.). For a case to the contrary, where the judge ruled that the medical evidence of a ruptured hymen might constitute corroboration in a charge of carnal knowledge, see *R.* v. *Hyder* (1917) 29 C.C.C. 172 (Sask. C.A.). See also *R.* v. *Drew (No. 2)*, (1933) 4 D.L.R. 592 (Sask. C.A.).

46. (1904), 8 O.L.R. 228 (C.A.). See also *R.* v. *Schraba* (1921), 31 Man. R. 275 (C.A.).

47. *R.* v. *Riendeau* (1900), 9 Que. K.B. 147 [hereinafter *Riendeau*].

"corroborative" and "confirmatory" within the same judgment, many judges seemed loath to accept recent complaints as constituting full legal corroboration that a sexual assault had in fact occurred.[48]

The Canadian courts had also constructed a series of restrictions on the admissibility of "recent complaint" evidence. If the recent complaint was not made at the first reasonable opportunity, it could be excluded.[49] The timeliness factor was a potential problem in the *Hubin* case. During cross-examination, Sophie Oleksiuk admitted that she had seen a number of people after the alleged rape had occurred, before she confessed the details of the attack to her sister. As she was walking back along the highway, she passed by a woman named Mrs. Lipsick, two boys driving along on a threshing machine and two female school chums. Before returning home, she had stopped off at her grandmother's home for about fifteen minutes, where she spoke briefly with her grandmother, and her aunt and uncle who were out in the field harvesting potatoes. She had also gone into the store where she spoke with a female salesclerk and to the post office where she mailed a letter to Eaton's Department Store. Both Crown and

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48. For cases disavowing the use of recent complaint as corroboration of the facts in issue, see *R.* v. *Schraba*, *supra* note 47; *R.* v. *Gordon* (1924), 25 O.W.N. 572 (C.A.) [hereinafter *Gordon*]; *R.* v. *Everitt* (1925), 58 N.S.R. 291 (Sup. Ct.); *R.* v. *Mudge* (1929), 24 Sask. L.R. 257 (C.A.); *R.* v. *Stinson* (1934), 48 B.C.R. 92 (C.A.) [hereinafter *Stinson*]; *R.* v. *Tolhurst* (1939), 3 W.W.R. 559 (Sask. C.A.) [hereinafter *Tolhurst*]; *R.* v. *Reeves* (1942), 57 B.C.R. 90 (C.A.); *R.* v. *Reardon*, [1945] O.R. 85 (C.A.). *R.* v. *Calhoun* [1949] O.R. 180 (C.A.) upheld as correct a trial judge's charge to the jury that a recent complaint was not evidence of the actual happening of the event, but testimony that pointed to the complainant's consistency, and that it could also be considered corroborative of the absence of consent.

49. On the importance of promptness, see *Riendeau*, *supra* note 47; *R.* v. *Smith* (1905), 9 C.C.C. 21 (N.S. Co. Ct.); *R.* v. *Akerley* (1918), 46 N.B.R. 195 (C.A.); *Gordon*, *ibid.*; *R.* v. *Hall* (1927), 31 O.W.N. 451 (C.A.); *R.* v. *Marsh* (1940), 55 B.C.R. 484 (C.A.); and *R.* v. *Jones* (1945), 4 D.L.R. 515 (P.E.I. S.C.). For cases that showed more tolerance toward a delayed complaint, see *R.* v. *Barron* (1905), 9 C.C.C. 196 (N.S. Co. Ct.); *R.* v. *McGivney* (1914), 5 W.W.R. 1181 (B.C. C.A.) [hereinafter *McGivney*] in the majority decision; and *R.* v. *Hill* (1928), 61 O.L.R. 645 (C.A.), leave to appeal to S.C.C. refused [1928] S.C.R. 156.

defence counsel demanded to know why Sophie Oleksiuk had not blurted out the story of the rape immediately. The young girl replied that she had not told the children "because the kids they go and tell everybody and I didn't want them to know". As for her reluctance to complain to the older people, she explained that she was too "ashamed".

Another potential problem involved the circumstances under which the complaint had been extracted. Canadian courts refused to admit evidence of recent complaints if they were not made in a voluntary and spontaneous fashion.[50] Mary Oleksiuk had testified that about five minutes after Sophie returned home, she noticed that her younger sister was crying. Mary asked her what was the matter, and why it had taken her so long to go to the post office. That was the point at which Sophie first told anyone about the rape.

At the trial, County Court Judge Stacpoole did not allow these potential problems to deter him. He did not characterize the complaint as lacking in spontaneity or voluntariness, or dismiss it as given in response to a suggestive or leading question. He also ruled that Sophie Oleksiuk had "explained her reason for the delay quite satisfactorily". Judge Stacpoole permitted the Crown to introduce the evidence of Sophie's complaint to her sister, Mary. He did not specifically state whether he accepted the recent complaint as legally corroborative under the requirements of the *Criminal Code*, or whether he took it as simply confirmatory of credibility. Walter Harley Trueman, speaking for the majority of the Manitoba Court of Appeal, made mention of the story told to the elder sister in his decision confirming the conviction, although

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50. For cases stipulating the importance of voluntary and spontaneous disclosure, and rejecting complaints that were made in response to questions, see *R.* v. *Bishop* (1906), 11 C.C.C. 30 (N.S. S.C.); *R.* v. *Dunning* (1908), 1 Sask. L.R. 391 (Sup. Ct.); and *R.* v. *Stonehouse and Pasquale* (1928), 39 B.C.R. 279 (C.A.). For cases illustrating a less rigid view on these matters, see *R.* v. *Spuzzum* (1906), 12 B.C.R. 291 (S.C.); *R.* v. *Pailleur* (1909), 20 O.L.R. 111 (C.A.); *R.* v. *Bowes* (1910), 20 O.L.R. 111 (C.A.); *McGivney, ibid.* in the majority decision; *R.* v. *Shorten*, [1918] 3 W.W.R. 5 (Sask. C.A.) aff'd [1918] 57 S.C.R. 118; *Tolhurst, supra* note 48; and *R.* v. *Ashley* (1944), 17 M.P.R. 453 (P.E.I. S.C.).

he too failed to indicate whether he was treating the complaint as corroboration or something less. Dissenting Manitoba Court of Appeal Judge James Emile Pierre Prendergast also took note of the recent complaint, stating that "the fifteen-year-old sister corroborated her younger sister's evidence as to being informed by her of the occurrence, adding that she was crying at the time". But Judge Prendergast then explicitly refuted the classification of such evidence as corroboration in law. "Nothing she said," he wrote, "however much [it] may strengthen her version, can be corroboration". The difficulty, according to Judge Prendergast, was that the complaint originated with Sophie Oleksiuk. The fact that her sister, Mary, could testify to the details of Sophie's complaint did not make it sufficiently "independent". By the time the case reached the Supreme Court of Canada, all mention of the recent complaint was gone. There was no reference whatsoever to this "fortifying" piece of evidence.

Sophie Oleksiuk's identification of Leo Hubin and his car provoked a substantial degree of judicial disagreement until, in the final result, these items of potentially corroborating evidence were also jettisoned. Sophie had testified, apparently completely credibly, that she had never seen Leo Hubin before the morning of the attack. She was able to advise the police of the licence number of the car, and to give a full description of the car and its contents, including the plush black and sand coloured cushion on the driver's seat. When the police traced ownership of the car to Hubin, he admitted driving the car on the morning of September 20. He was brought down to the police station, where Sophie Oleksiuk confidently identified him from the police line-up.

At the lower trial level, Judge Stacpoole was prepared to accept the identification evidence as legally corroborative. He stated in his oral judgment:

> I accept [the girl's] story absolutely - I think her story is absolutely truthful. The evidence I regard as corroborative is contained in the statement of the accused whereby he admits the ownership of the car. The little girl claims that car was out there, and that was the car she was conveyed in to where the offence took place. The accused admits the ownership of the car, and that is a corroboration

on a material point implicating the accused. . . . [T]he girl swears that this was the car he drove her in, and identified the car, and I think that in itself is sufficient corroboration to support the girl's story . . . .[51]

The majority of the Manitoba Court of Appeal judges also took the identification evidence to be legally corroborative. Penning the lead opinion, Chief Justice William Egerton Perdue noted:

[I]t was shown that the girl immediately identified the accused at the police office as the guilty man. It was clearly established that he owned the motor car and was driving it on the day on which the offence was committed. He himself admitted these two facts. After the offence had been committed the girl took the number of the car and by this number the accused was traced and arrested. These facts fully corroborate the girl's identification of him as the man who committed the crime.[52]

Manitoba Court of Appeal Judges Prendergast and Fullerton thought differently. Judge Prendergast began with the seemingly obligatory reference to the long-departed Sir Matthew Hale, noting that the Canadian Parliament had not been "content with the protection given an accused by Lord Hale's dictum now become a Rule of Court".[53] Indeed, as Judge Prendergast emphasized, Parliament had "judged proper to go further and require corroboration in such cases as this one as a matter of law."[54] And as a matter of law, Judge Prendergast and Judge Fullerton both concluded that the identification evidence could not serve as statutory corroboration.

The difficulty was traceable, according to the dissenting judges, directly to the legal test. "The proper question", they stipulated, was whether there was "any material particular in the main witness' testimony that is corroborated by independent evidence implicating the accused". The formulation of the test differed a bit from the statutory language, although the dissenting judges

51. *Hubin* archives (S.C.C.), *supra* note 5 at 54-55.
52. *Hubin* (C.A.), *supra* note 5 at 375.
53. *Ibid.* at 378.
54. *Ibid.*

professed to be simply "[f]ollowing the wording" of the corroboration section of the *Code*.[55] In fact, section 1002 of the *Criminal Code* stated that "no person accused of an offence [including carnal knowledge] shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused".[56] The word "independent" was nowhere in sight. Section 1003 came somewhat closer. It set forth the corroboration rule that applied to prosecutions for carnal knowledge where the child was of such tender years as to be unable to give testimony under oath. Evidence admitted without the safeguard of an oath had traditionally been viewed as more suspect than properly sworn testimony. In cases such as these, the *Code* provided that no person could be convicted unless the evidence was "corroborated by *some other* material evidence in support thereof implicating the accused".[57] It is an arguable point whether the word "independent" is precisely equivalent to the phrase "some other". But neither the word "independent" nor the word "other" appeared in section 1002, the corroboration provision that governed Sophie Oleksiuk's sworn testimony.

Judge Prendergast failed to stipulate from where he took the concept of "independent evidence". He claimed to be simply interpreting section 1002 of the Canadian *Criminal Code*, but it is likely that he was drawing upon the 1916 English case of *Baskerville*. Judge Trueman, who wrote a concurring opinion in *Hubin*, did quote from the English Court of Criminal Appeal's ruling in *Baskerville* that "evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime".[58] Judge Trueman, however, did not focus any further upon the "independent" requirement. He was more than content to confirm the conviction of Leo Hubin upon the evidence tendered. And it

55. *Ibid.*
56. *Criminal Code 1927*, *supra* note 11.
57. *Ibid.*, s. 1003 [emphasis added].
58. *Hubin* (C.A.), *supra* note 5 at 383, citing *Baskerville*, *supra* note 9 at 667.

should have remained an open question whether *Baskerville* applied to the case at bar. The English decision related to the evidence of accomplices, which required corroboration at common law, and not as a result of a statutory formulation. There was no reason to apply the "independence" language from *Baskerville* to the statutory corroboration rules attached to the crime of carnal knowledge under the Canadian *Criminal Code*. The "independent" criterion set the evidentiary burden for rape victims one step beyond where the legislators had already gone. It practically necessitated third party evidence in crimes of sexual assault where the judges must have known that separate witnesses would rarely exist.[59]

Judge Prendergast's and Judge Fullerton's decisions to import the concept of "independent evidence" into the doctrine of corroboration turned out to be critical to their holding that Leo Hubin's conviction should be quashed. Under the new formulation, Sophie Oleksiuk's testimony that Hubin's car had been on the road near Lockport on the morning of September 20 was a "material particular" that needed to be corroborated by "independent evidence". But the evidence that qualified as "independent", in the sense that it did not emanate from Sophie, did not go to a "material particular". Neither the car vendor's testimony that Hubin owned the car, nor Hubin's admission of car ownership corroborated the "location" of the car at the particular moment in question. And the evidence that went to a "material particular" was not "independent". The note upon

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59. The steepness of the evidentiary barrier this interpretation would impose was considered and explicitly rejected in the earlier case of *R.* v. *Burr* (1906), 13 O.L.R. 485 (C.A.), a prosecution for the seduction of a girl under sixteen, which also required statutory corroboration under s. 1002. At 486-487 the court noted that the statute did not necessarily

> make it incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be to virtually render a conviction impossible in the majority of cases like the present. It is enough if there be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act . . . .

which Sophie Oleksiuk had jotted down Hubin's licence number was Sophie's evidence alone:

> It does not serve any purpose to observe that she gave the police at the station a paper on which she stated she had noted the plate number, nor that she repeated the same thing under oath at the trial. Nothing that she said and no document that proceeded from her, however much they may strengthen her version, can be corroboration.[60]

The same difficulty beset the identification of Hubin in the police line-up:

> If, as she says, she had never seen him before the 20th (and the accused, on his part, says that he saw her at the station for the first time) such identification undoubtedly adds further value to her testimony . . . [S]till the statement, as true and convincing as it may be in itself, remains wholly unsupported. That the identification was made in the presence of police officers, adds nothing to it. It is still her evidence and that only, just as it would be if the identification had been made at the trial for the first time.[61]

With a sense of certitude that almost lent itself to a lecturing tone, Judge Prendergast continued:

> It is the purpose and function of corroboration to communicate its own independent virtue to the primary evidence. To follow the reverse process of looking for something in the primary evidence to bolster up and energize the corroboration, is to travel in a circle, and corroboration then becomes meaningless. No degree, however high, of plausibility or certainty in the primary evidence, is a substitute for corroboration, which must stand by itself and be judged on its own independent value.[62]

Judge Trueman, who had obviously read the dissenting judges' opinions before writing his own, upbraided his colleagues for the irrational result that attended their narrow interpretation of the

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60. *Hubin* (C.A.), *supra* note 5 at 378-379.
61. *Ibid.*
62. *Ibid.*

doctrine of corroboration. His decision, issued as a concurring majority opinion, noted:

> No one on the evidence which I have above detailed can reasonably have any view other than that the prisoner is guilty. That some one had carnal knowledge of the complainant is corroboratively shown. The theory that the complainant seeks to connect the prisoner, a person she did not know and never saw before, with the commission of the act, in order to shield another person, is too barren to have a moment's consideration. She gave not only the number of the car – something it is true she could have got from any passing car driven by an unknown man, if there would have been the slightest sense or object in doing it – but she shows through her familiarity with the cushion in the back of the driver's seat that she had been in the car. This is a detail it is likely she would not have given if her story was an invention .. Its nature differs from cumulative or supporting statements resting solely upon the veracity of the complainant. It relates to facts she was powerless to invent.[63]

Judge Trueman ridiculed the theory that Sophie Oleksiuk could have concocted the identification of Hubin and his car, linking her testimony to Hubin's sworn statement that he had been driving his car that morning, nowhere in the vicinity of the alleged rape:

> If the prisoner's statement is true that during the whole of the forenoon of the 20th he was not at Lockport because he was elsewhere, then the number was a fictitious one invented for no earthly reason, and which on investigation by the police might be found not to belong to anyone or to belong to a person who weeks before had left the country. The conclusion, in my opinion, is unavoidable that the car was in Lockport on the 20th and that the complainant was in it. It is pointless to suggest that the complainant could have got the number when it passed her on some former occasion. . . . .If it was not in Lockport on that date, then the incredible supposition is made that before the act in question was committed, the complainant in anticipation that the act would be committed on the 20th, and to protect the person who was to commit it, obtained the number of the car at an earlier date for the purpose of fastening the crime on the prisoner, a person she did not know, and who, if her story was to hold together, she had to assume would be in Lockport on the 20th.[64]

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63. *Ibid.* at 384-385.
64. *Ibid.*

Given the division of opinion from the provincial appellate bench, the Supreme Court of Canada agreed to consider the prisoner's appeal. The Supreme Court judges unanimously sided with the dissenting appellate decision, finding that the identification evidence was tainted by its connection with Sophie Oleksiuk:

> While the verification of the details given by her no doubt adds to the credibility of the story she tells, everything in that connection, including the admitted facts of ownership and driving (not at or near the scene of the offence, but in and about Winnipeg) depends, for its evidentiary value, upon her statement that a certain license number was that carried by the car in which she was conveyed to the scene of the crime and her subsequent identification of a cushion found in the car bearing that number. That is not, in a proper sense, independent evidence tending to connect the accused with the crime. In themselves these facts and circumstances merely "relate to the identity of the accused without connecting him with the crime".[65]

Citing *Baskerville*, Chief Justice Francis Alexander Anglin decided to reject the identification evidence because it implicated the accused "solely by reason of the complainant's statement". Without the "additional factor" of her testimony, the identification evidence was "quite irrelevant". Summing up, Anglin C.J. concluded: "Nor can any multiplication of such facts amount to corroboration. They are all admissible only by reason of the girl's own story connecting them with the crime. They lack, therefore, the essential quality of independence".[66]

There was nothing that irrevocably dictated this final result. The *Criminal Code* did not stipulate that corroborating proof had to issue from a source separate from the complainant. There was no need for the judges to tighten the doctrine of corroboration still further than the legislators had formulated. To import the criteria of "independent" evidence constituted a rude and unnecessary dismissal of the veracity of sexual assault victims, to the point that not only were they rejected as trustworthy

65. *Hubin* (S.C.C.), *supra* note 5 at 445.
66. *Ibid.* at 444-445.

witnesses, but everything that even remotely stemmed from their evidence was summarily disregarded.

Even if it were correct to interpret the statutory wording as incorporating some element apart from the victim herself, there was no need to take the concept of "independent evidence" to such an extreme point as the judges ultimately did in the *Hubin* case. One might have located the "independent" criterion within the concrete existence of the identified motor vehicle and the peculiar cushion. Sophie Oleksiuk may have written the note with the licence number that identified the car and she may have identified the cushion, but the material objects belonged to a man she did not know, who independently admitted he was driving in that motor vehicle, which contained that cushion, at the time in question. Hubin's admission was what implicated him, quite apart from Sophie's testimony. Sophie Oleksiuk may also have been the individual who identified the accused as the man who raped her. But the man she identified turned out to be the owner of the car she had identified earlier. And the fact of his ownership was proven by the car dealer and Leo Hubin himself, both sources independent of Sophie Oleksiuk.

The final items of evidence that came under scrutiny as potential corroboration were the two inconsistent statements that Leo Hubin gave to the police upon his arrest. Hubin was duly cautioned in the police station that anything he might say could be taken down and used against him in court. Heedless of the risk, Hubin signed a written statement purporting to have been at least twenty miles distant from the country road on which Sophie Oleksiuk was raped on the morning of September 20. He swore that he had been driving his car in Winnipeg, conversing with pool hall mates at the Seymour Hotel and consulting with a garage mechanic at the City Dray Garage. Almost immediately after signing this statement, Leo Hubin asked to withdraw it and to make a second statement. This time he swore that he drove his car directly from the Seymour Hotel to his mother's home in St. Boniface, stayed there until 10:30 a.m., drove to his sister's home and brought her back to his mother's and then departed for his

own apartment in Winnipeg where his wife was waiting, arriving there about noon.

Both statements constituted denials on the part of the accused. The denials were internally inconsistent. It was arguably open to the court to draw an adverse inference regarding the credibility of the accused man, a finding that could offer some corroboration "implicating the accused". What was more, there was no quarrel that Leo Hubin's statements to the police were "independent" of the complainant. At trial, Judge Stacpoole made no mention of the inconsistent statements. He had already found the identification of Hubin and his car to be sufficient corroboration, and he went no further in his oral judgment. The majority of the judges at the Manitoba Court of Appeal canvassed the whole of the evidence and ruled the statements to be fully corroborative in law. Chief Justice Perdue was quick to characterize the statements as incriminating admissions, noting that they were clearly made "for the purpose of founding an alibi upon them". Perdue suspected that after Hubin made the first statement, he "feared that the persons he mentioned as in conversation with him that forenoon might not support his statements". He then shifted his statement "in the expectation that his mother and sister" would vouch for him. Judge Trueman was even more scathing:

> These statements carry nothing but conviction that they are a tissue of lies. Each completely contradicts and refutes the other. It is not necessary to examine or compare them in detail. . . . . That both statements are false I have no doubt. That one is assuredly false need alone be stated.[67]

Although Leo Hubin did not testify at the trial, Judge Trueman indicated that it was open to the trial judge to come to the conclusion that the accused was lying when he gave the inconsistent denials to the police. This, entirely on its own, could constitute legal corroboration.[68]

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67. *Hubin* (C.A.), *supra* note 5 at 375.

68. The majority opinion cited no authority for this rule, either Canadian or English. Cases that had used similar reasoning include *R.* v. *Daun* (1906), 12 O.L.R. 227 (C.A.) where the failure of the accused to deny responsibility for his

Judge Prendergast in his dissent came to a remarkably different conclusion. Like the Australian judges who exhibited distinct caution in reviewing statements of the accused, he was prepared to extend every feasible excuse to explain the apparent inconsistencies in Leo Hubin's police statements. First, he suggested that the discrepancies might be explained on the basis that Leo Hubin was trying to account for his whereabouts a full four days after the events in question. Hubin had been quite busy on September 20th ferrying around between home, pool hall, city garage, his mother's home, his sister's home and so on. Perhaps Hubin had simply "made a mistake" when he signed the first statement, and immediately decided to make a second statement. According to Judge Prendergast, there was nothing "suspicious" in the "bare fact of his stating that [the first statement] was not correct". Dissecting the two statements for discrepancies, Judge Prendergast deduced that the account of Hubin's movements early that morning was the same. The divergent information related to what had transpired after 10:00 a.m., all arguably irrelevant to a sexual assault that allegedly occurred shortly after 9:00 a.m. Hubin's efforts to establish an alibi with his mother and sister was legally inconsequential, because he did not need an alibi for the latter portion of the morning or the afternoon. Judge Prendergast was prepared to overlook the inconsistencies, noting that they did not "necessarily show such bad faith as would be ground for holding that they constitute corroboration".[69]

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fiancée's pregnancy was found to constitute corroboration for the charge of seduction under promise of marriage. *R.* v. *Romans* (1908), 4 E.L.R. 426 (N.S. S.C.) located corroboration for a charge of seduction under promise of marriage in the testimony of the woman's parents as to admissions made by the accused regarding his promise to marry their daughter. See also *R.* v. *Whistnant* [1912], 3 W.W.R. 486 (Alta. S.C.); *R.* v. *Wakelyn* (1913), 5 Alta. L.R. 251 (Sup. Ct.); *R.* v. *Magdall*, [1920] 2 W.W.R. 251 (Alta. C.A.) aff'd (1920), 61 S.C.R. 88; *Stinson*, *supra* note 48; *R.* v. *Richmond* (1945), 61 B.C.R. 420 (C.A); and *R.* v. *Stelmasczuk* (1948), 8 C.R. 430 (N.S. S.C.) on the implied admission of guilt as implicating the accused. But see *R.* v. *Goodfellow* (1928), 54 N.B.R. 170 (C.A.), which held that the mere failure of the accused to deny the charge and to take the stand in his own defence could not constitute corroboration.

69. *Hubin* (C.A.), *supra* note 5 at 379-380.

The Supreme Court of Canada was somewhat less charitable concerning Hubin's possibly faulty memory. Chief Justice Anglin indicated that Hubin's conduct "in voluntarily making the two inconsistent statements" was such that "the trial judge might infer from it some acknowledgment of guilt". This was a "finding of fact" that properly lay within the jurisdiction of the jury, or in cases tried without a jury, with the trial judge. The problem was that Judge Stacpoole had not specifically cited Hubin's inconsistent statements in his trial judgment. He had stopped prematurely once he determined that the identification of the car was corroborative. Anglin summed up:

> There is no finding by the trial judge as to the inference to be drawn from the conduct of the accused, already adverted to, nor any adjudication that affords the requisite corroboration. We cannot, without usurping the exclusive function of the tribunal of fact, make such an adjudication.[70]

Here was a legal interpretation that finally accepted as "corroborative" one of the multiple items of evidence put forward by the Crown prosecutor. Yet, in the final analysis, it too was spurned. The Supreme Court quashed the conviction and directed a trial *de novo*. There is no record of any second prosecution ever being instituted.[71] Leo Hubin, whom almost everyone connected with the case seems to have believed responsible for the sexual attack upon Sophie Oleksiuk, was judicially branded "not guilty." Even his defence counsel, J.M. Issacs, appears to have recognized his client's moral turpitude. In his written submissions to the Supreme Court of Canada, Isaacs noted: "Corroboration has been adopted by the Legislature as a matter of public policy and like all such enactments they must inevitably lead to injustices being done in individual cases. That is the price paid to secure public

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70. *Hubin* (S.C.C.), *supra* note 5 at 446, 449-450.

71. No record of a second trial against Leo Paul Hubin was found in a search of the following: Provincial Archives of Manitoba, Court of Queen's Bench and County Court Criminal Registers, Schedule A0107, Micro film #M1196 (from 1872-1949); and Court of Queen's Bench Criminal Pockets, ATG0007A, Micro film #M1245 (from 1872-1989).

protection."[72] Here was a succinct articulation of the heavy costs associated with the demand for corroboration. Isaacs, the majority of the Canadian judges and the legislators all seem to have been predisposed to believe that the "public protection" that required securing was the safe keeping of men who might potentially be falsely accused. The "public protection" of raped young girls went by the wayside, as something more intangible, more inconsequential, a mere "inevitable injustice".

Conclusion

The credibility of witnesses is fundamental to the process of legal adjudication. All legal systems recognize that some witnesses tell the truth, while others do not. However, the manner in which the trustworthiness of witnesses is assessed reveals a great deal about the judiciary, the legislators who shape the statutory framework of evaluation and the wider society within which such findings of credibility are constructed. Where legal systems differentiate between witnesses on the basis of gender, this suggests grave sexual imbalances and inequalities. Where the law stipulates presumptions of incredibility that are applied to female witnesses but not to males, this would seem to be reflective of patriarchal injustice.

The history of the legal doctrine of corroboration, as it was grafted onto the crime of "carnal knowledge" of young women, offers an exemplary opportunity to probe the evidentiary prescriptions constructed by legislators, lawyers and judges. The similarities between the corroboration rules promulgated in Australia and Canada were remarkable. Both countries took their lead from England in their decision to criminalize the offence of sexual intercourse with girls below the age of consent. Both countries borrowed from the common law traditions rooted in Sir Matthew Hale's unsubstantiated anxieties about the credibility of women and girls who reported coercive male sexuality.

72. *Hubin* archives (S.C.C.), *supra* note 5 at 91.

Legislators from both jurisdictions departed from English precedent in enacting statutory requirements that mandated corroboration for the crime of carnal knowledge of girls under the age of fourteen. The statutory formulations of the rules of corroboration set forth parameters that were substantially narrower than ordinary usage of the word might have suggested. In the hands of the judiciary, the boundaries of what qualified as legal corroboration constricted still further.

The early twentieth century cases of *Sullivan* and *Hubin* provide useful illustrations of the parallel development of the corroboration doctrine in Australia and Canada. Crown prosecutors in both cases supplemented the testimony of highly credible complainants with a host of additional evidentiary material. The evidence that convinced judge and jury at the trial level of the guilt of the accused men, beyond a reasonable doubt, was dismissed out of hand by appellate judges. The convictions were quashed because of mandatory statutory corroboration provisions that were interpreted extremely narrowly by judges who professed greater concern over the plight of men potentially falsely accused than they did over sexual crimes involving females.

Medical evidence that attested to the sexual assault of the young girls was rejected in both cases as failing to "implicate the accused". One witness's torn bloomers were ignored for the same reason. Recent complaints made by the two girls to family members were also thrown out. The rationale in one case was that the recipient of the recent complaint was "inherently incredible". In the other case, the appellate court failed to articulate its reasons. Evidence that one of the accused men had been seen in the vicinity of the crime location was dismissed as "mere opportunity" and insufficiently probative. The incriminating statements made by the two men also did not secure their convictions. In one case, the admissions made to the complainant's mother were dismissed because of extenuating circumstances related to the mother's reputation. Incriminating statements made to a neighbour were ignored, with no rationale offered. In the other case, the accused's contradictory alibis were thrown out because the lower court judge had forgotten to

stipulate that he found this evidence to be corroborative at trial. One witness's description of the paddock in which she had been violated was rejected as unable to "implicate the accused". The other witness, whose identification of the accused's car certainly met that test, had her evidence dismissed because it did not issue from an "independent" source.

Were there apparent distinctions between the corroboration law in Australia and Canada? To the extent that these leading cases[73] document diversity, the disparity is but slight. The phrasing of the statutory definition of "corroboration" was not identical in the Western Australian and Canadian criminal codes. Since judges in neither country seemed to pay much attention to the niceties of the statutory phrasing, whether the small discrepancies in wording might have resulted in different legal findings was never put to the test. The introduction of the concept of "independent" evidence, a judicial importation that was not apparent on the face of any of the legislative formulations, had not taken hold in Australia in 1913. The Australian courts would await the 1916 English *Baskerville* decision before beginning to insist that corroboration must emanate from an entirely separate source other than the complainant.[74] The unnecessarily restrictive "independent" rule was in full swing in Canada by 1927, when Canadian courts unreflectively transported the rule from an English court that was ruling on common law corroboration applied to an entirely different offence. The *Hubin* approach, a colonial acceptance of the English precedent without further consideration of the distinctions codified in Canadian statute, or a purposive interpretation flowing from such legislative language, foreshadowed what would ensue in Australia in the future.

Deeply suspicious of the testimony of women and girls, Australian and Canadian authorities were historically loath to receive their evidence at face value or to leave it subject to the

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73. On the importance of *Hubin*, *supra* note 5 to the development of Canadian jurisprudence in this area, see "Corroboration", *supra* note 9 at 136, where he notes: "Unquestionably, the leading case in Canada is *Hubin* v. *The King*."

74. Gobbo, *supra* note 38 at 221.

club to assail women and girls who dared to seek criminal sanction against men accused of sexual offences. Fashioning corroboration as the *sine qua non* for conviction was calculated to ensure that the testimony of guilty men would receive more credence on the scales of justice than the testimony of female victims of sexual assault. The promulgation of restrictive and stilted definitions of corroboration tilted the balance still further. The application of such doctrines in the hands of the judiciary whittled down the scope of qualifying evidence and served to skewer the credibility of young women complaining of sexual intercourse. The doctrine of corroboration made a mockery in both countries of the ideals of evenhanded justice and gender parity. For Ila Collins and Sophie Oleksiuk, raped half way across the world from each other, the end result of such discriminatory legal treatment was precisely the same. In this shameful record, there was virtual parity and no apparent divergence in the legal histories of the two sister colonies.