



Predicting expert social science testimony in criminal prosecutions of historic child sexual abuse

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Purpose. Recently courts in several Common Law jurisdictions have been faced with the daunting task of adjudicating criminal complaints of child sexual assault that are alleged to have occurred in the distant past (historic child sexual abuse; HCSA). In the present data set, alleged offences ended between 2 and 48 years before the trial. These cases, which involve claims of repressed memory and continuous memory for the offence, raise many issues that hitherto had only rarely been faced by criminal courts and that are within the realm of issues studied by social scientists. In this paper we explore variables that predict the presence of a social science expert, called by the prosecution or the defence or an expert called by both sides.

Methods. A total of 2,064 actual criminal cases involving HCSA were coded on a variety of variables that were then used to predict the presence of an expert at trial and to predict the presence of an expert to evaluate the perpetrator for sentencing.

Results. Six variables predicted the presence of an expert at trial: offence description, frequency of abuse, complainant/accused relationship, complainant age, presence of repression, and complainant gender. Seven variables predicted the presence of an expert at sentencing: offence description, frequency of abuse, length of delay to trial, presence of threat, trial date, plea, and age difference between complainant and accused.

Conclusions. We use these archival data to generate hypotheses concerning the observed predictors of the use of expert testimony by courts in HCSA cases. The objective is to encourage more controlled studies of the particular case characteristics about which courts seek guidance from social scientists.

‘There has been a significant increase in the frequency of expert testimony over the past 25 years in Canada. As such, there has also been an increase in psychological expert testimony’ (Saunders, 2001, p. 109). The leading Canadian decision concerning the admissibility of expert evidence is *R. v. Mohan* (1994), in which Sopinka J. laid out four

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criteria: the evidence must be relevant, it must be necessary, the expert must be properly qualified, and there must be no rules of evidence that would exclude the testimony. The leading case in the United States is *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) in which the Supreme Court held that judges must 'examine the method or reasoning underlying the expert evidence and admit only evidence that is both relevant and reliable' (Dixon & Gill, 2002, p. 253). Expert evidence is also subject to the fundamental rule of evidence: that is, evidence will not be admitted if its prejudicial effect outweighs its probative value (Paciocco & Stuesser, 2002). Once admitted, experts are restricted in the content of their testimony: In Marquard (1993) the Supreme Court of Canada affirmed the prohibition against experts speaking to the ultimate issue in stating that an opinion on 'ultimate credibility' is inadmissible, however, an opinion about 'human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility' (p. 249) is admissible. Indeed, although there are limits to what experts can say in court, the range of possibilities has increased as courts hear more complex issues (Bala, 1999).

Much of the research on expert testimony has focused on its impact on mock juror decision-making (e.g. Cooper & Neuhaus, 2000; Cutler, Dexter, & Penrod, 1989; Cutler, Penrod, & Dexter, 1989) including the effect of expert testimony on mock trials involving child sexual abuse (CSA; e.g. Crowley, O'Callaghan, & Ball, 1994; Gabora, Spanos, & Joab, 1993) and repressed memories (e.g. Golding, Seago, Sanchez, & Hasemann, 1995; Griffith, Libkuman, & Poole, 1998; Stewart, Whiteside, & Golding, 2000). There is a paucity of studies of historic child sexual abuse (HCSA) complaints involving claims of continuous memory. Although there is very little research on experts in actual legal cases, there are a few notable exceptions. For instance, Groscup, Penrod, Studebaker, Huss, and O'Neil (2002) used a methodology very similar to the one employed here to evaluate and report a thorough analysis of 693 US appellate decisions on the effect of Daubert on the admissibility of expert testimony.

Mason (1991) examined the content of 122 US appellate decisions of criminal cases involving CSA in which an expert's testimony was the subject of the appeal. Social scientists who testified in CSA cases were most commonly social workers, followed by psychologists, counsellors and therapists, and psychiatrists. The most frequently discussed issue was behavioural characteristics of abused children (e.g. emotional consequences of abuse, delayed disclosure, child sexual abuse accommodation syndrome). Notably, this study was reported in 1991. Since then, the qualifications of experts and the content of their reports may have changed.

Gumpert, Lindblad, and Johannsson (1999) studied expert testimony in virtually all criminal prosecutions of CSA in Sweden in the years 1985, 1989, and 1992 ($N = 648$, 99% of all CSA prosecutions). The percentage of cases involving psychological experts who testified about the credibility/reliability of the child declined over these 3 years (23%, 24%, and 15%, respectively).¹ However, at each point in time, the likelihood of having an expert testify increased if the child complainant was younger than 7 years old or if the accused was a family member. Importantly, when expert evidence supported the child's credibility (88% of the expert opinions did so), convictions increased substantially. In 121 of 134 cases that included expert evidence, there was a single

¹ Gumpert (2001) reported evidence that this decline was a reciprocal consequence of courts not specifying their needs and experts failing to meet court needs. Only experts who testified about credibility/reliability were included in the analyses. It is possible that the content rather than the presence of psychological expert testimony has changed over the time of the study.

mental health professional and there were multiple experts reporting differing opinions in only seven cases (in four cases, multiple concurring experts were heard). Whether these results will generalize to expert testimony in cases of CSA that are alleged to have happened in the distant past in North America is not certain for at least two reasons. First, in Sweden, experts are often called by the court rather than by one or both parties (Gumpert, 2003). Notably, compared with being commissioned by one party to the proceeding, being court appointed may help to ensure that experts present unbiased testimony (Merckelbach, 2003) and it may have a positive effect on the perceived credibility of the experts (Cooper & Hall, 2000). Second, Gumpert *et al.* studied cases involving child complainants who reported having been sexually abused. The pattern and impact of expert testimony may be quite different when the complainant is an adult, testifying about childhood abuse, as in delayed prosecutions of CSA (HCSA).

In addition to providing opinion evidence at trial, mental health professionals are also-called upon to assist the court at sentencing. Although there is substantial literature regarding various risk assessment instruments and other evaluative tools, there is little research concerning the case variables that predict the presence of an expert to evaluate offenders for sentencing. In a study of American forensic psychologists and general clinicians, Tullman and Mullendore (2003) found that 87% of the forensic psychologists and 45% of general clinicians had, on at least one occasion, conducted evaluations of offenders for sentencing. Given the prevalence of this activity, it is important for experts to understand the characteristics of the cases about which they may be called. Certainly, HCSA cases will not be representative of all the cases about which evaluations for sentencing are requested. However, exploration of these cases provides a starting-point for understanding when an expert may be called and what issues s/he may face.

Much of the limited research on expert testimony in HCSA cases is based on a mock jury paradigm and involves claims of recovered memories. There is virtually no research on actual expert testimony in HCSA cases. This is a significant omission because, to presage the results, experts are called often to provide guidance to courts in HCSA cases.

Although we included only Canadian criminal cases of HCSA, we argue that our data are of international interest. Children often delay reporting CSA. In fact, it has recently been estimated that up to one third of CSA survivors do not disclose the abuse until adulthood (for an excellent review see London, Bruck, Ceci, & Shuman, 2005). Some portion of those survivors will seek a legal remedy and will not be blocked by a statute of limitations or by laws that, in the past, had the effect of making it improbable that a conviction could be obtained (Connolly & Read, 2003). In Canada, as in the United Kingdom, Australia, and New Zealand, there is no limitations period on indictable (roughly equivalent to felony) offences, except in very rare circumstances. In several American states (Wyoming, Kentucky, Virginia, West Virginia, Alaska, Maryland, North Carolina, South Carolina, Rhode Island, Alabama, and Maine), statutes of limitations, if they exist, do not apply to sexual offences against children (see Connolly & Read, 2005, for a more detailed discussion of this issue). Indeed, criminal prosecutions of HCSA have been the topic of discussion and policy debate in the United Kingdom (Home Affairs Committee, Fourth Report, October, 2002).

The purpose of the current study is to examine the admission, role, and content of expert evidence, whether given by experts for the prosecution or defence in criminal prosecutions of HCSA. Specifically, we explored: (a) predictors of the presence of an expert, and (b) predictors of the presence of an expert evaluation of the perpetrator for the purposes of sentencing.

Method

An HCSA complainant may proceed civilly and/or criminally, however, we restricted our cases to criminal complaints. Generally, when a case proceeds civilly the complainant must retain and pay counsel, whereas when a case proceeds criminally the Crown/State funds the prosecution. Also, generally, it only makes sense to proceed civilly if the accused is solvent. Punishment, rather than monetary compensation, is the purpose of criminal law – insolvency is not a constraint to proceeding. Therefore, we argue, criminal cases represent a wider range of complainants – those who could and those who could not afford to finance their own legal proceeding as well as cases against solvent and insolvent defendants.

QuicklawTM was used to locate criminal cases of delayed allegations of child sexual abuse reported in English. QuicklawTM is a full-text database that contains, at least from 1986 forward, all Supreme Court of Canada decisions; most decisions from provincial Courts of Appeal; written decisions from the provincial Superior Courts; and written decisions from Provincial Courts that were forwarded to QuicklawTM (forwarded at the discretion of the judge).

Search strategy

A keyword search using 'child' (including variations) and the names of the most common sexual offences was used.² Each case was reviewed to confirm that the complainant was 19 years old or younger when the alleged abuse began and that at least 2 years had elapsed from the end of the alleged offence and the trial date. Nineteen years old was the cut-off age because a person who has attained that age is considered an adult for most legal purposes. By using a fixed delay period, we will have overstated the actual delay from the end of the offence to the official complaint by the amount of time it took to get to trial. However, it was the most reliable data we could obtain: it was unusual for judges to report either the date of the official complaint or the charge date. Having said that, trial date is arguably the most relevant lag for some purposes – that is, the actual time between the event itself and the complainant's report of it in court.

There were two waves of data collection. In the first wave, cases released between 1986 and 1998 were collected: there were 874 cases involving 1626 complainants. Inter-coder reliability was obtained on cases involving 167 complainants. Two coders were involved for the purposes of obtaining inter-coder reliability and one person coded the cases. In the second wave of data collection, cases from the latter part of 1998 to early 2002 were gathered: the search located 228 cases involving 438 complainants and engaged two new coders. Inter-coder reliability was obtained on a subset of these cases involving 50 complainants. Once acceptable reliability was obtained, the cases were evenly distributed between the two coders.

Inter-coder reliability was computed as $(\text{agreements}/(\text{agreements} + \text{disagreements})) \times 100$ (i.e. percentage agreement). On all variables, a disagreement was recorded if one coder recorded information about the detail and the other coder recorded it differently

² Particular offences included in the search were: 'sexual offence(s)', or 'sexual assault', or 'sexual interference,' or 'sexual intercourse,' or 'gross indecency,' or 'indecent assault,' or 'incest,' or 'rape,' or 'bestiality,' or 'buggery.' The offence names, 'gross indecency', 'indecent assault' and 'rape' are no longer used in Canada: the behaviours that constituted the offences are now charged under a different offence. However, when a person is charged with an offence, the charged must comply with the law that was in force at the time of the alleged offence. Because our interest is historical child sexual abuse, it was necessary to search under names of sexual offences that no longer exist.

or as missing data. This latter source of disagreement explains the less than perfect agreement on variables that seem self-evident (e.g. gender of complainant). Intercoder reliability was not computed for derived variables; delay to trial was computed as trial date minus date the abuse ended, duration was computed as date the abuse ended minus date the abuse began, and age difference was computed as age of accused when the offence began minus age of the complainant when the abuse began). Intercoder reliability for waves 1 and 2 ranged from 83% to 100% for all variables.

Coding

All variables are listed in Tables 1 and 2³. Several of the variables do not require explanation (e.g. gender of the accused). For other variables (e.g. repression) a more detailed explanation of the variable is provided below.

Expert

Only experts who offered relevant social science evidence were recorded (e.g. psychologist, psychiatrist, social worker). If, for instance, a DNA expert testified, he/she was not recorded as an expert for the purposes of these data. The content of each expert's testimony was recorded as: memory (e.g. long-term recall/forgetting), delayed disclosure (e.g. possible reasons), medical issues (e.g. physical injury), or clinical issues (e.g. common behavioural characteristics of CSA victims, disorders/syndromes of the complainant or accused). See Appendix A for examples of judge's comments on the content of expert testimony. If an expert was reported to have given evidence about more than one of these issues, each was recorded. The professional designation of the expert was coded as being a psychologist, psychiatrist, some other mental health professional (i.e. social worker, guidance counsellor, therapist, occupational therapist, mental health therapist, alcohol therapist, psychotherapist), or a medical professional (i.e. physician). Coding of the content of expert's testimony and expert qualifications was done after all of the data had been collected and so only one report of intercoder reliability was computed. Intercoder reliability was sufficient after 10% of cases were coded; 88% for content and 89% for qualifications.

Trial date

If the case was a trial or sentencing decision, the trial date was recorded as the date the judgment was released. If the case was from a Court of Appeal (CA) or from the Supreme Court of Canada (SCC) and the trial date was not reported in the judgment, it was recorded as 2 years prior to the CA decision (e.g. a 1997 CA decision was coded as 1995) or 3 years prior to the SCC decision: these are rough estimates of the time it could take for an appeal decision to be released from a CA and from the SCC.

³ Factors associated with the trial were: trial date, plea, expert called by the defence, expert called by the crown, and expert called to assess the accused. Factors associated with the complainant were: gender, age when the alleged abuse began, and if complainant reported that she had repressed memory for the offence. Factors associated with the offence were: description of the offence, nature of threat, year the abuse began, and year the abuse ended. Factors associated with the accused were: age when the abuse began, age at trial, relationship between the complainant and the accused, and whether alcohol was likely to be involved.

Description of the offence

The offence was coded as Level 1, 2, or 3, from lowest to highest intrusiveness. Appendix B provides a list of the particular acts that constituted each type of abuse. If more than one type of abuse was alleged, the most intrusive was recorded. This criterion was selected to provide some discrimination between levels of abuse while acknowledging that different victims experience sexual abuse differently. Thus, the scoring system involved exposure and sexual touching on one end of the continuum, penile penetration on the other end, and everything else in between. Because intrusiveness is related to seriousness and to sentence length, we were able to test this coding scheme by comparing sentence length for convictions in each of these three levels. The average length of jail terms (*SDs* in parentheses) for convictions to offences described as Levels 1, 2, and 3, were 16.11 (29.89), 24.17 (24.31) and 42.57 (30.98), $F(2, 969) = 70.46, p < .001$. Tukey's *post hoc* tests revealed that each sentence length was different from the others.

Frequency

If frequency was specified, the number (e.g. 4 times) or an average of a range of numbers (e.g. '8-10 times' was coded as 9) was recorded. Sometimes, frequency was described rather than specified. The categories used to code descriptions, as well as the particular descriptors contained in each category, are presented in Appendix B. For the purposes of these analyses, frequency of alleged abuse was recoded as fewer than four times and four or more times. All complainants who described frequency were assigned to the 'four or more instances' category. This was done to reflect the theoretical view that memory for instances of repeated events are difficult to access and the empirical finding that presentation of four instances of an event is sufficient to observe this phenomenon (Connolly & Lindsay, 2001; Connolly & Price, in press; Powell & Roberts, 2002; Price & Connolly, 2004).

Threat

It was reported in some decisions that the child had been threatened, either to refrain from reporting the offence or to submit to the abuse. The nature of the threat was classified as either a threat to the child's psychological/emotional well-being, to the child's physical safety, or a threat without further explanation. Appendix B presents a list of the specifics of the threats that were included in each classification.

Repression

Repression was coded as present if it was evident from the text the complainant believed there was a time when they would not have been able to recall the alleged abuse or that the complainant believed that they had 'blocked out' critical details that they should have known (e.g. the identity of a known perpetrator, for instance a close uncle). All other cases were coded as repression absent. For instance, in the following two cases repression was coded as present: (1) 'At age 23, M.L. stated to her therapist that she had always had memories of abuse but she could not put a face to her abuser. Then in 1993. . . the pieces of the puzzle began to come together for her. Memories started to become clearer' [*R. v. L. (J.)*, 1997, at para. 28]; (2) 'The crimes were not immediately disclosed by the complainant. She apparently consciously blocked out all memory of the event but suddenly recalled it while under the influence of drugs'

[*R. v. H. (R. M.)*, 1990, at para. 3]. Conversely, notwithstanding some forgetting of details, continuous memory was coded in the following two cases: (1) 'Although no specific temporal references were provided, it was the evidence of L. B. (1) that there were other instances of the same or similar conduct on the part of the accused' [*R. v. G. (B. L.)*, 1996, at para. 17]; (2) 'The sexual abuse consisted of numerous acts of sexual intercourse. The Complainants were unable to recall the incidents in any detail.' [*R. v. L.(M.)*, 1998, at para.10].

Relationship between the accused and the complainant

The association was coded as parent, other relative, family connection, or community connection. The particular kinds of relationships that comprise each of these classifications are described in Appendix B.

Results

Analyses were conducted on subsets of data that were most appropriate to the particular question. Trials only ($N = 386$) were used to study expert testimony at trial. We excluded appeal decisions ($N = 699$) because most appeals concerned issues unrelated to expert testimony (e.g. 55.74% were appeals to sentence), and as such, the text of the appeal decision would be unlikely to have reported the presence of an expert, even if one was present. A similar argument supports our decision to exclude sentencing hearings ($N = 707$). We also excluded pre-trial hearings ($N = 272$), because an expert, if one would be called at trial, may not have been hired at the time of the pretrial hearing. Predictor variables were selected based on the limited research on the role and impact of experts in CSA cases as well as on our assessment of variables that are psychologically and legally relevant. The variables used to predict expert presence at trial are listed in Table 1. The analyses of experts involved in the evaluation of the perpetrator, were done on sentencing decisions only ($N = 707$) and all predictor variables are listed in Table 2.

We had no theoretical reason to group particular variables together and there were several reasons to test bivariate relationships. First, multivariate models were highly dependent on the particular variables we decided to include in the model, a model that was without theoretical or empirical foundation. Second, this is exploratory research and as such we were interested in bivariate relationships. Third, this is archival data and so missing values are common. Because an entire case is lost if any of the variables in the model has a single missing value, a multivariate model approach would lead to substantial loss of cases and power.

Presence of an expert at trial

At least one expert was reported to have been present in 20.5% ($N = 79$) of the complaints. An expert was present for the defence in 21 complaints, for the crown, in 35 complaints, and both the crown and the defence called an expert in 23 cases. Of the 79 complaints that involved expert testimony we were able to identify qualifications for 87 experts. In descending order, the percentage of professions represented as experts at trial were: 42.3% ($N = 41$) were psychologists, 28.9% ($N = 18$) were medical professionals, 17.5% ($N = 17$) were psychiatrists, and 11.3% ($N = 11$) were other mental health professionals (e.g. social workers, counsellors). We were able to code the

Table 1. Regression coefficients predicting expert presence at trial

Variable name	β	SE	Wald	p value	Odds ratio	%Experts present
Offence description			12.401	.002		
Expose/Fondle	-1.075	.316	11.546	.001	.341	13.9
Non-penile penetration	-0.714	.313	5.200	.023	.490	18.8
Penile penetration						32.1
Frequency of abuse						
1-3 times	-0.579	.280	4.270	.039	.561	17.3
4 or more times						27.1
Relationship			17.378	.001		
Parent	0.607	.336	3.256	.071	1.834	34.1
Other relative	-0.707	.422	2.810	.094	.493	12.2
Family connection	-0.826	.435	3.614	.057	.438	11.0
Community connection						22.0
Complainant age (continuous)	0.075	.033	5.234	.022	1.078	
Complainant age (quartile)			5.810	.121		
1 to 6 years	-0.578	.368	2.469	.116	.561	16.1
7 to 9 years	-0.966	.426	5.144	.023	.380	11.5
10 to 12 years	-0.380	.372	1.047	.306	.684	19.0
13 to 19 years						25.5
Duration of abuse (continuous)	-0.001	.004	.118	.731	.999	
Duration of abuse (quartile)			1.933	.586		
1 day to 12 months	0.080	.357	.051	.822	1.084	21.9
13 to 24 months	-0.214	.474	.204	.651	.807	17.3
25 to 60 months	-0.389	.425	.838	.360	.678	14.9
61 to 216 months						20.6
Repression						
No	-1.313	.303	18.818	.000	.269	16.5
Yes						42.4
Complainant gender						
Female	1.547	.415	13.908	.000	4.697	25.7
Male						6.9
Delay to trial (continuous)	0.010	.014	.478	.490	1.010	
Delay to trial (quartile)			1.700	.637		
2 to 7 years	-0.240	.332	.521	.471	.787	20.6
8 to 13 years	-0.466	.382	1.489	.222	.627	17.1
14 to 19 years	-0.320	.361	.785	.376	.726	19.3
20 to 43 years						24.8
Trial date (continuous)	-0.003	.035	.008	.928	.997	
Trial date (quartile)			1.293	.731		
1986 to 1992	-0.162	.418	.150	.699	.851	17.3
1993 to 1995	0.049	.308	.025	.873	1.050	20.5
1996 to 1998	0.325	.352	.850	.356	1.384	25.4
1999 to 2002						19.7

Note. Categorical variables were coded as follows: expose/fondle = 1, non-penile penetration = 2, penile penetration = 3; female = 1, male = 2; repress yes = 1, repress no = 2; parent = 1, relative = 2, family connection = 3, community connection = 4; frequency 1-3 times = 1, more than 3 times = 2.

Table 2. Regression coefficients predicting expert evaluation of the accused for sentencing

Variable name	β	SE	Wald	p value	Odds ratio	% Evaluating expert
Offence description			5.173	.075		
Expose/Fondle	0.321	.205	2.442	.118	1.378	52.3
Non-penile penetration	0.407	.183	4.931	.026	1.502	54.4
Penile penetration						44.3
Duration of abuse (continuous)	0.001	.002	.337	.561	1.001	
Duration of abuse (quartile)			.420	.936		
1 day to 12 months	-0.091	.207	.192	.661	.913	49.4
13 to 24 months	0.045	.252	.032	.859	1.046	52.8
25 to 60 months	-0.015	.228	.004	.948	.985	51.3
61 to 216 months						51.7
Repression						
No	0.414	.650	.406	.524	1.513	50.2
Yes						40.0
Relationship			.773	.856		
Parent	0.007	.215	.001	.975	1.007	52.8
Relative	-0.151	.223	.460	.498	.860	48.8
Family connection	-0.104	.238	.190	.663	.901	50.0
Community connection						52.6
Delay to trial (continuous)	-0.023	.009	5.911	.015	.977	
Delay to trial (quartile)			13.194	.004		
2 to 7 years	0.572	.217	6.952	.008	1.773	63.1
8 to 13 years	0.157	.225	.490	.484	1.170	53.1
14 to 19 years	-0.188	.216	.759	.384	.828	44.4
20 to 43 years						49.1
Frequency						
1-3 times	-0.668	.170	15.415	.000	.513	43.8
4 or more times						60.3
Accused age at trial (continuous)	-0.009	.006	1.839	.175	.991	
Accused age at trial (quartile)			1.926	.588		
18 to 42 years	0.192	.243	.625	.429	1.212	52.2
43 to 51 years	0.301	.246	1.502	.220	1.352	54.9
52 to 61 years	0.285	.241	1.403	.236	1.330	54.5
62 to 83 years						47.4
Age difference compl. and acc. (continuous)	0.004	.008	.217	.641	1.004	
Age difference compl. and acc. (quartile)			6.614	.085		
1 to 14 years	0.247	.269	.842	.359	1.280	48.5
15 to 22 years	0.211	.266	.628	.428	1.235	47.6
23 to 30 years	0.628	.250	6.309	.012	1.874	58.0
31 to 70 years						42.4
Threat						
Yes	-0.375	.182	4.238	.040	.687	48.8
No						58.2
Plea						
Not guilty	-0.636	.154	17.048	.000	.530	42.1
Guilty						57.9
Trial date (continuous)	-0.102	.021	24.416	.000	.903	
Trial date (quartile)			35.352	.000		

Table 2. (Continued)

Variable name	β	SE	Wald	p value	Odds ratio	% Evaluating expert
1986 to 1992	0.941	.211	19.902	.000	2.563	55.4
1993 to 1995	1.188	.213	31.038	.000	3.279	61.4
1996 to 1998	0.854	.228	14.086	.000	2.350	53.3
1999 to 2002						32.7

Note. Categorical variables were coded as follows: expose/fondle = 1, non-penile penetration = 2, penile penetration = 3; repress yes = 1, repress no = 2; parent = 1, relative = 2, family connection = 3, community connection = 4; frequency 1 to 3 times = 1, more than 3 times = 2; threat yes = 1, threat no = 2; not guilty = 1, guilty = 2.

content of 91 trial experts' testimonies: of those, trial experts were most likely to testify about memory issues (39.6%, $N = 36$), followed by clinical issues (36.26%, $N = 33$), and delayed disclosure issues (24.18%, $N = 22$).

The results of the logistic regression analyses (β , SE , $Wald$, the p value, and odds ratio) predicting the presence of a trial expert are presented in Table 1. In addition, Table 1 reports the percentage of expert witnesses present at each level of the independent variables. Three variables that may be indicative of offence seriousness predicted the presence of a trial expert. First, experts were substantially less likely to be present when the offence involved exposure/fondling or non-penile penetration compared with complaints involving penile penetration, $\chi^2(1) = 12.47$, $p < .05$, Nagelkerke $R^2 = .05$. Second, experts were approximately half as likely to be present when the allegation involved three or fewer instances of abuse compared with four or more instances of abuse, $\chi^2(1) = 18.34$, $p < .05$, Nagelkerke $R^2 = .08$. Third, compared with complaints against community members, experts were marginally more likely to be present when the accused was a parent figure and marginally less likely to be present when the accused was another relative or had some other family connection to the child, $\chi^2(1) = 4.24$, $p < .05$, Nagelkerke $R^2 = .02$. Courts have consistently held that as egregious as CSA is, it is aggravated when the perpetrator is in a position of trust with respect to the child. This position of trust is strongest when the perpetrator is in a parental role, but is also present when the child is temporarily placed in the care of a community member, for instance a teacher, spiritual leader, sports coach, or mental health provider.

Offence seriousness was not always predictive of the presence of a trial expert. For instance, although it may be argued that abuse against a younger child is more egregious than abuse against an older child, the opposite age pattern predicted the presence of an expert. When age of the child when the abuse began was analysed as a continuous variable it was reliable: the average age of the complainant when the abuse began was older in cases involving an expert witness ($M = 10.86$ years, $SD = 5.06$) than in cases that did not involve an expert witness ($M = 9.49$ years, $SD = 4.02$), $\chi^2(1) = 5.28$, $p < .05$, Nagelkerke $R^2 = .03$. As can be seen in the analysis of quartiles, 25% of the trials involving complainants who were between 13 and 19 years old when the abuse began involved an expert witness, whereas just over 10% of trials involving complainants who were between 7 and 9 years old when the abuse began involved expert testimony.

It is not surprising, given the abundance of research on repression (e.g. Lindsay & Read, 1995) and the difficulties associated with adjudicating such cases, that experts

were substantially less likely to be present in cases that did not involve claims of repressed/recovered memories than in cases that did involve such a claim ($\chi^2(1) = 17.78, p < .05$, Nagelkerke $R^2 = .07$). Indeed, experts were about one third as likely to be present in cases that did not involve a claim of repression. Experts were four times more likely to be present in proceedings with female than male complainants, $\chi^2(1) = 19.17, p < .05$, Nagelkerke $R^2 = .08$

Presence of an expert at sentencing

Included in these analyses were 707 sentencing hearings. Pre-sentence reports were available to the sentencing judge in 50.1% ($N = 354$) of sentencing hearings. We were able to identify the qualifications of 45 experts: 37.8% ($N = 17$) were psychologists, 33.3% ($N = 15$) were medical professionals, 26.7% ($N = 12$) were psychiatrists, and 2.2% ($N = 1$) were other mental health professionals. Often, judges simply state that a pre-sentence evaluation was completed, without describing the author or contents of the report: A substantial proportion of these reports may have been authored by probation officers. Of the experts whose testimony was described ($N = 31$), the content was always clinical issues.

Logistic regression was used to explore variables that predict the presence of an expert at sentencing. Four variables that indicated a less serious or moderately serious offence predicted the presence of an expert. First, experts were more likely to be called when the offence was moderately intrusive, non-penile penetration, compared with the most intrusive, penile penetration, $\chi^2(2) = 5.20, p < .05$, Nagelkerke $R^2 = .01$. Second, experts were less likely to be present when the judge reported that a threat was present compared with complaints where the judge did not report the presence of a threat, $\chi^2(1) = 4.24, p < .05$, Nagelkerke $R^2 = .01$. Third, to the extent that a longer delay suggests a greater impact of the offence on the complainant, the average delay to trial in cases involving an expert was shorter ($M = 13.38$ years, $SD = 8.52$) than the average delay in cases that did not include an expert at trial ($M = 14.93$ years, $SD = 7.90$), $\chi^2(1) = 5.97, p < .05$, Nagelkerke $R^2 = .01$. Indeed, as seen in the analysis of the quartile split of delay, experts were significantly more likely to be called when the delay was between 2 and 7 years compared with complaints that involved a delay of 20–43 years. Fourth, although age difference between the complainant and accused did not predict the presence of an expert when it was analysed as a continuous variable, when quartiles were analysed, it was marginally reliable. As reported in Table 2, complaints involving an age difference of between 23 and 30 years were reliably more likely to involve an expert to evaluate the accused than complaints in which the age difference was between 31 and 70 years. On the other hand, to the extent that increased frequency of abuse (i.e. four or more occurrences) reflects offence seriousness, complaints involving a less serious offence were less likely to involve an expert at sentencing than complaints involving a more serious offence, $\chi^2(1) = 15.62, p < .05$, Nagelkerke $R^2 = .04$.

Not surprisingly, trial variables also predicted the presence of an expert to evaluate the perpetrator: an expert at sentencing was less likely to be present in cases involving a not guilty plea than a guilty plea, $\chi^2(1) = 17.27, p < .05$, Nagelkerke $R^2 = .03$. Trial date predicted the presence of an expert, $\chi^2(1) = 37.21, p < .05$, Nagelkerke $R^2 = .07$. The median year of cases involving an expert was 1996 while the median year of cases that did not involve an expert was 1995. When one looks at the analysis of the quartile

split, a sharp decline in experts present to evaluate the accused in the last quartile is evident from 1999 to 2002.

Discussion

The present study examined the presence of expert witnesses in HCSA cases. With logistic regression models, the following issues were addressed: case characteristics related to the presence of an expert, the content of an expert's testimony, and the presence of an expert evaluating the accused for sentencing.

Connolly and Read (2003; see also Loftus, 2003; Porter, Campbell, & Birt, 2003) argued that, in the absence of new legal barriers to HCSA prosecutions, courts will continue to adjudicate large numbers of such cases. These cases raise many complicated cognitive and clinical issues, and, as is clear from these data, experts are being called to provide opinion evidence. In this study, we report case variables that are more and less likely to attract expert testimony. Because our data are correlational, we can only speculate as to the reasons for the relationships. Hopefully, these data will provide a foundation upon which hypotheses may be developed and tested in a more controlled context.

Experts at trial

Overall, experts were present in 21% of trial decisions, a finding that is comparable to Gumpert *et al.* (1999), who found that expert prevalence ranged from 15% to 32%. To the extent that it is possible to classify CSA offences along a continuum of seriousness, some of the factors that rendered an offence more egregious, complaints involving more intrusiveness offences, more frequent abuse, and perpetrators who had a custodial role *vis a vis* the child victim (either as a parent or a parent substitute, such as a teacher, sports coach, religious leader, etc.), were more likely to hear an expert at trial. This latter finding is partially consistent with data reported by Gumpert *et al.* in their analysis of CSA cases adjudicated in Sweden. Experts were most likely to be present in cases involving intra-familial abuse. Because we also found a relatively high percentage of experts in complaints involving a community member, we speculate that the common feature that attracts opinion evidence in both cases is when abuse involved a significant breach of trust.

Complainant's age when the abuse began was predictive of the presence of an expert, but in a direction we did not anticipate. That is, complaints involving complainants who were between 7 and 9 years old when the abuse began were less likely to attract expert evidence than complaints involving complainants who were between 13 and 19 years old when the abuse began. This appears different from the data reported by Gumpert *et al.* (1999), who reported that the percentage of experts increased across time if the complainant was younger than 7 years old when the abuse occurred. This discrepancy may reflect the different kinds of cases: CSA cases were analysed by Gumpert *et al.* and, of course, HCSA cases were examined in this report. Another explanation involves the two-factor model of credibility (e.g. Goodman, Bottoms, Herscovici, & Shaver, 1989; Ross, Jurden, Lindsay, & Keeney, 2003). Compared with older children, younger children are seen as more honest but less able to perceive, recollect, and communicate details of a past event (i.e. accuracy). In some legal cases, for instance in CSA cases, honesty is relatively more salient than accuracy, whereas in

other legal cases, for instance motor vehicle accidents, accuracy is relatively more salient than honesty. Because younger children are seen as more honest than older children, they can be seen as more credible in CSA cases. It could be that an expert is more likely to be present in cases involving older children because the older child is in need of assistance to bolster his/her perceived credibility. The problem with this explanation is that honesty is a present state. It seems unlikely to us that the perceived honesty of adults would vary as a function of their age at the time of the alleged offence. However, it is possible that triers of fact will make these erroneous attributions.

The purpose of expert testimony at trial is to help the trier of fact interpret evidence that otherwise might be misinterpreted. Given the intense controversy concerning repressed and recovered memories (e.g. Alpert, Brown, & Courtois, 1998; Lindsay & Read, 1995; Ornstein, Ceci, & Loftus, 1998), it is not surprising that experts were far less likely to be present in cases that did not involve a claim of repression compared with complaints that did involve such a claim.

It is not clear why gender of the complainant predicted the presence of an expert at trial. Perhaps gender *per se* is not predictive of the presence of an expert, but it is correlated with a third variable, for instance relationship or repression. Generally, boys are more likely to be abused by persons outside of the home and girls are more likely to be abused by persons within the home (as discussed in Goodman-Brown, Edelstein, Goodman, Jones, & Gordon, 2003): In the present data, there was a strong correlation between complainant gender and complainant/accused relationship ($r = .321$, $p < .001$). The data are quite striking: the percentage of female complainants in each of the relationship categories, parent, other family member, family connection, and community connection was 87.6, 80.0, 87.8, and 45.1, respectively. Although complaints involving accused persons with either a community connection (more likely for male complainants) or a parental relationship (more likely for female complainants) to the child were more likely to include a trial expert than complaints against accused persons in the other two categories, it remained that the percentage of experts involved in complaints against a family member were substantially higher (34.1%) than the percentage of experts involved in complaints against an accused who had a community connection to the complainant (22.0%). Thus, it is possible that the predictive power of complainants' gender is a function of the correlation with relationship between the complainant and accused. To test this possibility, we put complainant gender and relationship into the same model. Both predicted the presence of an expert (gender, Wald = 12.82, $p < .001$; relationship, Wald = 19.91, $p < .001$). Thus, the predictive value of complainant gender cannot be explained entirely by its correlation with relationship.

Gender of the complainant and reports of repression are also correlated, $r = -.18$, $p < .001$. Claims of repression were more likely to have been made by females (19.3% of female complainants) than males (2.5% of male complainants). However, the ability of complainant gender to predict the presence of an expert at trial cannot be explained by its correlation with repression. When put in a single model, both complainant gender and repression predicted the presence of an expert (gender, Wald = 10.75, $p < .001$; repress, Wald = 12.76, $p < .001$).

Length of delay to trial was not predictive of the presence of a trial expert. At first glance, this seems inconsistent with the finding that 24.2% of the experts in our sample discussed delayed disclosure. Moreover, given the perceived detrimental effect of a long delay on autobiographical memory and the consistent finding of a negative correlation between length of delay and perceived credibility (see Read & Connolly, 2004, for a

review of the literature), this finding was surprising. Notably, our measure of delay was not a measure of immediate versus delayed disclosure of CSA. Rather, it was a measure of length of delay. Thus, whether presence or absence of delay attracts expert testimony cannot be addressed with these data. Our data do, however, find that among delayed cases, the absolute length of delay did not predict the presence of an expert at trial.

Contrary to Gumpert *et al.* (1999), we found no evidence that the percentage of complaints involving an expert witness at trial has declined across time. This may well be a function of the nature of the case as well as a natural process of education and dissemination of research. There has been far more research on issues related to the child witness than there has been research related to complainants who delayed prosecution for many years. Research regarding the former issue may have educated courts to the point where they feel less compelled to call on expert witnesses to assist with such cases (see *R. v. D. D.*, 2000 for a similar argument from the Supreme Court of Canada concerning reasons for delayed disclosure of CSA). Far less research has been published on issues related to HCSA cases. Thus, difficult psychological issues may continue to require the assistance of expert witnesses.

Expert evaluating the accused for sentencing

In Canada, with very few exceptions – first-degree murder being one such exception – offences carry a maximum sentence but not a minimum sentence. Moreover, the range of possible sentences is substantial. For instance, the offence of sexual assault carries a maximum sentence of 10 years. Because there is no minimum sentence, a person convicted of such an offence could be sentenced to a period of probation or to 10 years in jail or anywhere in between these two extremes. Clearly, deciding where in this substantial range of possible sentences a particular offender should be sentenced can be a difficult task that involves a great deal of judicial discretion.

Under what circumstances would a judge look for guidance from non-legal professionals? It seems reasonable to assume that a sentencing judge would seek assistance in cases that are ambiguous in terms of the offence and/or offender. In other words, cases in which the efficacy of rehabilitation and the likelihood of recidivism are least clear. The most and least extreme cases are less likely to meet this criterion. It may be the penumbral cases that cause the most ambiguity and are therefore most likely to attract an expert to evaluate the accused. Our data are consistent with this possibility: Experts were more likely to be called to evaluate the accused for the purposes of sentencing in cases involving a moderate level of intrusiveness compared with the highest level of intrusiveness, when no threat was reported to have been involved, or when the age difference between the perpetrator and the complainant was more moderate (i.e. 23–30 years) compared with more extreme (i.e. 31–70 years). We also found that experts at sentencing were more likely to be present when there were four or more instances of the abuse compared with fewer than four, perhaps reflecting a more complicated question of offender rehabilitation.

Experts were called to evaluate the perpetrator more often in complaints involving the shortest delay (2–7 years) compared with the longest delay (20–43 years). This may reflect a judicial attitude that evaluations concerned with rehabilitation and recidivism are more likely to be prognostic if they are conducted relatively soon after the offence rather than decades later. As mentioned earlier, this explanation is speculative – because these data are correlational, we cannot use them to support this possibility. And, perhaps because courts have only recently begun to prosecute large numbers of persons

accused of crimes from the distant past, we are unaware of any empirical research that has studied this question.

Evaluation experts were also more likely to have been present in cases involving perpetrators who plead guilty compared with cases involving perpetrators who plead not guilty. Again, due to the nature of these data, our explanation is speculative: Perhaps judges find sentencing reports more compelling if, during the evaluation, the perpetrator is cooperative, rather than uncooperative. This is more likely to be true among perpetrators who plead guilty than among those who plead not guilty. Also, as suggested by an anonymous reviewer, when an accused goes to trial, all defence resources may be exhausted in defending the accused, leaving few or no resources left for the sentencing hearing.

There are several limitations associated with these data. First, these data represent complaints to the police where the prosecution exercised its discretion to proceed to criminal court. Absent from the data are delayed complaints of CSA that either did not involve a complaint to the police, or that did involve a formal complaint but the prosecution decided not to proceed to trial. We are unaware of any estimates of the percent of HCSA disclosers who pursue a legal remedy. However, if it is similar to the percentage of CSA disclosers who pursue a legal remedy the percentage is small: the range is 10% (Arata, 1998) to 12% (Smith *et al.*, 2000) to 13% (Hanson, Resnick, Saunders, Kilpatrick, & Best, 1999) up to 18% (Ussher & Dewberry, 1995). Second, in Canada, most HCSA cases proceed in Provincial Court and, because the database we used only includes Provincial Court cases that were forwarded to Quicklaw, it is likely that many such cases are not included in these data. Third, our data was coded from reported decisions: the judge who issues the decision will include information that he or she considers to be relevant. It is probable, therefore, that information that is relevant to this study will have been deemed not relevant by the judge, omitted from his or her report, and coded by us as not present. Fourth, these cases were drawn from a database of Canadian judgments, and thus, expert admissibility standards and general sentencing practices in other countries may be different. As incomplete as these data are, they represent the only large-scale study of expert testimony in actual cases of HCSA.

Social science experts are being called to assist courts to understand some of the complex issues that arise in cases involving HCSA. In this paper, we reported on variables that predict the presence of an expert at trial and at sentencing. Those predictors may reveal some of the issues about which courts seek assistance and assist psychologists to prepare to be expert witnesses in cases involving HCSA.

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Appendix A

Examples of experts' statements

Memory	<p>'...it was her [the expert's] opinion that repression of traumatic memory does occur in some individuals and...traumatized individuals do experience repression of memory' (R. v. D.(G.D.), 1995, para 49).</p> <p>'...a patient can end up with a memory suggested to her by therapists, with biases. She [the expert] spoke about the influence of certain books which the patients may read' (R. v. D.(G.D.), 1995, para 71).</p> <p>'...she [the expert] has many concerns about the memories and the manner in which they were retrieved' (R. v. D.(G.D.), 1995, para 78).</p> <p>'He [the expert] acknowledged that there was a sharp disagreement in the area by respected members of the psychiatric profession concerning recovered memory/false memory syndrome... ' (R. v. W. (A.), 1998, para 12).</p>
Delayed disclosure	<p>'It is not uncommon, I accept, for victims – young victims of sexual abuse to delay disclosing the assaults until some future time, nor is it uncommon for victims of sexual abuse to disclose this abuse incrementally' (R v. A. (R.), 1995, para 2).</p> <p>'He [the expert] indicated that for a variety of reasons...children will often delay making disclosures or will not disclose at all. He indicated that frequently a child's first disclosure is incomplete' (R. v. Brydon, 1997, at para 97).</p> <p>'...[the expert] explained how the psychological effects of the abuse itself may result in long delays in disclosure' (R. v. K.(M.), 1992, at para 13).</p> <p>'Barriers to disclosure would be if the perpetrator were close to the family, or in fact a family member, the latter being worse' (R. v. W.(A.), 1998, at para 14).</p>
Medical Issues	<p>'...[the expert described the] examination...of the complainant's genitalia and anus found nothing remarkable' (R. v. D'Antonio, 1993, at para 17).</p> <p>'...[the expert] found her hymen to have a three millimetre scar at a position indicating, she said, that there had been a tear caused by a single act of male intercourse' (R. v. Piccinato, 1992, at para 32).</p>
Clinical issues	<p>'...there exists a clinical picture which appears congruent...with a history of childhood abuse that she is alleging occurred' R. v. D.(G.D.), 1995, at para 56).</p> <p>'...[the expert] stated his opinion that while it is possible for people to change, it is rare for a paedophile to stop his practices later in life' (R. v. H. (E. F.), 1994, at para 193).</p> <p>'...he [the expert] made what he termed a differential diagnosis, i.e. psychosis, hypochondria, personality disorder' R. v. H. (I. L.), 1993, at para 72).</p> <p>'...she [the expert] told about child sexual abuse accommodation syndrome. That a child may not report abuse when it occurs and if a child does confide and gets no support after revealing the abuse that the child will then withdraw and keep it secret' R. v. S.(E.N.), 1993, at para 13).</p> <p>'...[the expert] testified that a paedophile tends to have the relevant sexual predilection in the sense of an intense and recurrent sexual preference, by the age of the late twenties' R. v. L.(B.), 1998, at para 42.</p>

Appendix B

Definition of categorical variables

Variable	Coding
The offence	<p><i>Level 1</i> expose, fondle;</p> <p><i>Level 2</i> masturbate, simulate intercourse, oral sex, digital penetration, attempt penile penetration</p> <p><i>Level 3</i> vaginal or anal penetration</p>
Description of frequency	<p><i>A few</i> multiple, several, various, occasions, periodic, few, more than one, 'offences'</p> <p><i>A pattern</i> number of times per day/week/month/year, a pattern, regularly, every opportunity, a series, 'would,' different times, diverse dates;</p> <p><i>A lot</i> hundreds, often, a lot, frequently, again and again, over and over, continuous, long-term, many, quite a few, substantial number, numerous, a number of times, an unspecified number, 21 or more instances were reported</p>
Threat	<p><i>Psychological well-being</i> no one will help/believe/love you, people will think you are bad, people will be mad at you, it will hurt others, I'll leave you, you'll be sent away, you'll get into trouble, I'll tell lies about you, I'll take away privileges.</p> <p><i>Physical well-being</i> I'll hurt you or members of your family, I'll kill you or members of your family, something bad will happen, you'll be sorry</p>
Relationship between complainant and accused	<p><i>Parent</i> mother or father (biological, common-law, step, or foster)</p> <p><i>Other relative</i> brother, sister, cousin, uncle, grandfather (biological, common-law, step, or foster)</p> <p><i>Family Connection</i> boarder, mother's boyfriend, family friend, neighbour, parent of childhood friend, employer, babysitter</p> <p><i>Community Connection</i> religious leader, mental health facilitator (e.g. psychiatrist, big brother) medical professional, educator</p>

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