

Comparing Sexual Harassment Alternative Dispute Resolutions Mechanisms at Universities in Canada and the United States

Getting Policy Right

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Abstract. The United States and Canada have markedly different legislation dealing with sexual harassment policies on university campuses. In the States, there is a federal standard which publicly funded universities must meet, or they risk losing federal funding. Conversely, in Canada education is a provincial jurisdiction and the result is a patchwork of standards. This essay examines the American standard, Title IX, and then employs it to show theoretical problems with the sexual harassment policy in place at Memorial University. It further purports that the inefficacy of title IX is due to the courts interpretation of the act, and not its contents.

Introduction

Sexual harassment is an epidemic across North American universities. The United States has made concrete headway on this issue by implementing a federal standard. Publically funded American universities are expected to conduct investigations and hearings on sexual harassment complaints with a degree of uniformity. However, in Canada education is a provincial power which makes it difficult to establish uniform sexual harassment policies and procedures across the country. The result is a patchwork of standards, with some provinces implementing legislation, and others leaving it up to institutions to design their own procedures.

Memorial University of Newfoundland has designed its own procedures for dealing with sexual harassment complaints. The procedure is outlined in the Memorial University Student Code¹, and the Memorial University Sexual Harassment policy.² There are serious procedural issues with the practices employed by Memorial particularly concerning the standard of evidence, interim measures, and transparency.

Title IX of the Education Amendments of 1972³ along with the Cleary Act⁴ establish the federal standard in the United States. It enumerates the appropriate standard of evidence, interim measures, and transparency obligations for publically funded universities. These standards greatly enhance the effectiveness and legitimacy of the university dispute resolution system by balancing the rights of complainants and respondents through the use of the balance of probabilities standard of evidence, mandating numerous interim measures, and requiring that on campus crime statistics be made public. Investigators and advisors of sexual harassment claims must receive Title IX

¹ Memorial University Board of Regents. "Memorial's Student Code of Conduct" (2015) https://www.mun.ca/student/conduct/code_of_conduct.php

² President, through the Sexual Harassment Advisor. "University Policies: Sexual Harassment" (2010) <http://www.mun.ca/policy/site/policy.php?id=192>

³ The United States Department of Justice. "Title IX of the Education Amendments of 1972"

⁴ The Cleary Act. Pub.L. 101-542.

accreditation in order to ensure that there is a degree of uniformity across college campuses and prevent malpractice.

Despite the use of various policies to increase transparency, and balance the rights of accused persons with complainants, Title IX has been dogged by ineffectiveness. This is due to the failure of the legal system to enforce the standards outlined in Title IX, though activists have had legal victories as well. The past ineffectiveness of Title IX is not due to any problems with the content of the bill, and, these problems would not necessarily appear in the Canadian system.

Burden of Proof

In dispute resolution it is important to know which standard of evidence is required in order to prove guilt or innocence, or determine liability. In criminal proceedings guilt is proven beyond a reasonable doubt, hereafter BARD, which was discussed by the Supreme Court of Canada in the decision of *R v Lifchus*. Reasonable doubt cannot be imaginary or frivolous but rather must arise from the record, the belief that an accused is likely guilty, or probably guilty is not enough to satisfy the burden. The standard is just short of absolute certainty, and requires surety that the accused committed the offence⁵.

In civil proceedings a claim must be proven by the much lower balance of probabilities or the preponderance of the evidence standard, which is commonly accepted to be over fifty percent. In Canada, “there is only one standard of proof in a civil case and that is proof on a balance of probabilities.”⁶ The balance of probabilities is not an exacting standard but it can be understood simply as “whether it is more likely than not that the event occurred.”⁷ When employing the standard in civil cases it is easy to make mistakes, such as taking into account the inherent improbability or the seriousness of the event in question. In the Canadian context these factors are considered irrelevant to the burden of proof. The application of this standard is not without nuance, and juries are given explicit instructions by experts in the law so that they can properly apply it. Analogously in the United States advisors and investigators of Title IX complaints are required to undergo training on the adjudication of complaints in order to meet the federal standard.

Across forms of dispute resolution the use of an explicit burden of proof is common practice for good reason. Canadian Universities need to choose one standard so that victims know to what extent they must prove that misconduct has taken place. The problem that many Canadian Universities have, including Memorial University, is that they do not clearly state *which standard* is being applied. Victims should not be left wondering to what degree they must prove that their claims are true. Further, without uniformity the process is open to discrimination and malpractice. Judges, those responsible for deciding the results of an investigation or hearing, are able to hold sexual harassment to a higher standard of evidence than other types of complaints. This is likely to occur given that they are not trained in the application of standards and even if they apply the civil standard adjudicators are likely to incorporate inherent improbability as well as seriousness into their analysis. It should be no harder for a woman to prove that she is being sexually harassed than for a man to prove that he is being bullied. Given how common misconceptions about sexual assault and harassment are in the judicial system, steps should be taken to make sure that this form of dispute resolution does not have the same issues. In not explicitly setting a standard on this

⁵ *R v Lifchus*. [1997] 3 S.C.R 320

⁶ *F.H v McDougall*, 2008 SCC 53

⁷ *Supra* 6 at para 44

matter adjudicators set a *double standard* for victims of sexual harassment, one based in myth and misconception.

Title IX establishes that complaints are decided on the balance of probabilities explicitly. This has increased impact as American law uses three standards, BARD, balance of probabilities, and clear and convincing. The standard of clear and convincing lies between the civil and criminal standard, requiring the evidence show a contention be in excess of “more likely than not” but not quite reach the surety required of BARD. Legal minds have had a tendency to gravitate towards a higher burden for criminal conduct within the civil system. However, the Americans and the Canadians agree that the civil standard applies in the context of sexual assault and harassment. Simply, raised standards apply to situations where an accused’s constitutional rights hang in the balance as in criminal cases. The civil system employs the lower standard because society as a whole does not have an interest in the outcome, that interest being the life, and liberty of its individuals. The standard of BARD come sfrom the positive obligation of the state not to imprison innocent people whereas in civil law, or university alternative dispute resolution (hereafter ADR), there is no such obligation. The application in the context of sexual harassment in university ADR is justified by leveling the playing field across complaints. It should be no easier for a man to prove that he is being bullied than it should be for a women to prove she is being sexually harassed.

Interim Measures

Interim Measures are not uncommon across alternative dispute resolution mechanisms especially within international arbitration. They generally allow for the preservation of individual or state rights while cases are pending. This is beneficial especially in the context of international arbitration where proceedings can take years. In the university context it is important to decrease the likelihood of detrimental conduct occurring as time goes on in combination with creating appropriate support mechanisms moving forward. Given the high pressure environment of university learning, steps should be taken to decrease the impact of a proceeding on the participants throughout the investigation and moving forward.

Within Memorial’s student code there are two interim measures which are available to a victim of university misconduct before the final outcome of their complaint has been determined. They are *suspension without notice* and *removal from residence*. Both of these interim measures are directed at removing the accused from the situation, which may be detrimental to the resolution process. Many victims do not wish for the accused to know of their allegations for fear of retaliation. These interim measures do not help this class of victim. Further they skirt the due process which should be afforded to the accused, allowing the university to punish someone as if they were guilty before they are proven guilty. Procedural fairness is a cornerstone of dispute resolution and bypassing due process regardless of the nature of the evidence undermines the accused’s right to defend themselves. Across forms of dispute resolution it is standard practice to allow an accused to bring a defence prior to a penalty being imposed and removing the right to do so undermines the objective of the system; to provide a true and equitable verdict for the parties involved.

Memorial’s university-wide Procedures for Sexual Harassment Concerns and complaints paints a somewhat different picture. It sets out that interim measures may be taken “to protect the health, safety, and security of other members of the University community.”⁸ The procedures make

⁸ University-wide Procedures for Sexual Harassment Concerns and Complaints. at s.f

little attempt to show what this entails in concrete terms, and due to lack of transparency little is known about the effectiveness of this policy.

In the United States, interim measures include: academic accommodations, medical and mental health services, change in campus housing and/or dining locations, assistance in finding alternative housing, assistance in arranging for alternative college employment arrangements and/or changing work schedules, a “no contact” directive pending the outcome of an investigation, escort services, transportation accommodations, and assistance identifying an advocate to help secure additional resources. Notice that the vast majority of these measures involve insuring the wellbeing of the victim without alerting the accused. Victims of sexual harassment have widely varying needs which must be accommodated to help them cope and move forward with their university lives. By giving them options the university dispute resolution process becomes exponentially more effective. Because the list is explicit and federally mandated students are more likely to avail of its benefits, and universities are more likely to comply with the standard.

Transparency

Transparency allows society to hold systems of power accountable. The police are required to release statistics on crime and investigations so that society can see areas where individuals are being treated unfairly. Similarly the judicial system is open to the public, bar extenuating circumstances, so that judges and lawyers can be held accountable for their actions, and statistics may be linked to overarching problems. The public is entitled to know the crime statistics within given area, and these statistics directly influence decision making. People might examine the stats when determining where to buy a home, or where to send their children to school. With the neo-liberalization of the university structure in both Canada and the United States, it is easy to see why many universities are reluctant to release statistics on sexual harassment, assault, and other crimes. There is an economic disincentive in doing so, as it tarnishes the reputation of the university and is perceived to hurt enrollment.

Transparency is especially important with regard to sexual assault and harassment, where myth and misconception have caused problems in the criminal justice system. Reports of sexual assault are classified as unfounded by police at disproportionately high rates; the rate sits at 16% while being only 7% for other violent crime. This information is available through statistics Canada, and shows that systemic discrimination still occurs within the police force.⁹ Misconceptions on the nature of consent, and reasonable conduct after trauma are still common in Canada as illustrated by the conduct of Robin Camp, a federal court justice who in 2015 asked a complainant in a sexual assault case why “couldn’t you just keep your knees together?”¹⁰ Because misconceptions such as these are common in the handling of sexual assault cases, and sexual

⁹ DuBois, Teresa. “Police Investigation of Sexual Assault Complaints: How far Have We Come Since *Janes Doe*?”. *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*. (2013) pg. 191-211. At pg. 196. As well as Sex Information and Education Council of Canada. “Sexual Health Issue Brief: Sexual Assault in Canada: Legal Definitions, Statistics, and Frontline Responses” at pg. 3-4. And Roberts, et al. “Trends in crimes of sexual aggression in Canada: An analysis of police reported and victimization statistics. *International Journal of Comparative Criminology*. 18, 187-200. (2013)

¹⁰ <http://www.cbc.ca/news/politics/canada-judge-judicial-review-robin-camp-1.3311574>

assault falls under the umbrella of sexual harassment, transparency procedures are an integral part of any sexual harassment policy.

Under the Memorial University procedures a penalty may be placed upon the complainant if the complaint is determined to be “frivolous or vexatious”. As no description is given to show what exactly makes a complaint “frivolous or vexatious”, it is easy to see how this can be abused. With no explicit burden of proof, or definition, there is nothing preventing any and all complaints from being considered vexatious or frivolous. The university should document and release statistics on the number of complaints so that the quality of the dispute resolution mechanism may be accurately measured, and complainants are not unduly punished.

The problems with Title IX

In 2012 President Barack Obama wrote an op-ed reflecting on the history of Title IX.¹¹ The op-ed speaks fancifully of the document effectively “addressing inequality in math and science education to preventing sexual assault on campus to fairly funding athletic programs”. The reality, however, is far from the optimistic musings of Mr. Obama. Title IX has been dogged by inefficiency in its attempts to dispel discrimination. Its egalitarian dreams are haunted by bureaucratic nightmares.

This is not to say that there has been no progress made with Title IX. Like many other legal entities the progression is slow. Such is the nature of the relationship between civil rights and the law. It was decades after the *Brown v Board of Education* before the decision made concrete changes in the public schools of America. Title IX is a long game strategy, and tempered by context its volatile history can be understood.

Title IX flexed its muscles first in the case of *Alexander v Yale*¹² showing the American public that the bill was meant for more than appeasing civil rights activists. A number of plaintiffs filed lawsuits against the university after being sexually harassed by their professors; one demanding sex in exchange for an “A” grade, and threatening a “C” if refused. A decision of the D.C Circuit Court affirmed the power of Title IX deciding that the “school’s failure to adequately remedy sexual harassment could constitute sex discrimination prohibited by Title IX.” The courts have recognized the role of Title IX in creating a safe learning environment for students. The problem is that the duty of the courts to enforce the legislation has been contorted.

In the cases of *Gebser v Lago Vista Independent School District*¹³ and *Davis v Monroe County Board of Education*¹⁴ the Supreme Court of the United States raised the standard for university liability under Title IX so high that a large degree of troubling conduct is able to slip through the cracks. Victims of sexual harassment must not only show that they were harassed and that the school failed to take action, but they must also prove that the school had “actual knowledge” of conduct which is “severe and pervasive”. The result is that schools are rarely held accountable for failing to meet the standards of Title IX.¹⁵

¹¹ Obama, Barack. “Op-ed by President Obama: President Obama Reflects on the Impact of Title IX”. The White House, Office of the Press Secretary, June, 23rd, 2012

¹² *Alexander v Yale University*. 559, Docket 79-7547. 631 F.2d 178 (1980)

¹³ *Gebser et al. v Lago Vista Independent School District*. USSC No. 96-1866. [1998]

¹⁴ *Davis v Monroe County Board of Education*. USSC No. 97-843. [1999]

¹⁵ Bodsky, Alexandra et al. “The promise of Title IX: Sexual Violence and the Law” Dissent, (2015), Vol.62 (4), pg. 135-144

Despite the failures of the judicial system to adequately enforce the legislation, the few victories have served as a normative framework which fuels progression. There is a space between social movements and legal text. Within this gap is where Title IX works, it plays in the grey between the world of the public and the world of policy. As the bill was tabled, opposition members attempted to have it repealed, or strike at its integrity in other ways; such as trying to exempt sports organizations which generate revenues. These attempts met with failure due to the political will behind the civil rights movement beginning with Title VII¹⁶, and evolving into Title IX. The existence of this type of legislation emboldens social advocates; the law may not be on their side all the time but the fact that it exists brings legitimacy and efficacy to social movements by expanding their normative constraints. Legal education can also be used to shape the future of the bill through the use of educational campaigns. Title IX was not perfect feminist legislation, but it had a number of elements which appealed to the feminist community. Through educational campaigns focusing on these elements social movements are able given fuel to move forward.¹⁷ Title IX is hailed by many feminist organizations as a success, such as the Women's Law Center¹⁸, the Feminist Majority Foundation¹⁹, NOW²⁰, and the American Association of University Women.²¹

Conclusion

Title IX brings with it a number of benefits to university sexual harassment ADR. It mandates the use of the preponderance of evidence standard explicitly, enumerates a number of interim measures, and outlines the obligation of universities to publish campus crime statistics. The Memorial University student code would benefit from these policy changes, and it would create more equitable outcomes for victims. The civil standard allows for victims to know explicitly how much evidence they need in order to prove that sexual harassment has occurred, and helps to stop the misapplication of the standard. Making a broad range of interim measures available to victims allows them to move forward with the complaint process while being able to comfortably maintain their already stressful university lifestyle. Mandating the release of campus crime statistics prompts students to take extra care when there are crimes occurring on campus, and allows for the public to ensure the effectiveness of policy. Though Title IX has had a number of judicial failures, this is not due to the policy implications of the bill, and the bill has been a useful tool in the arsenal of student civil rights advocates for years. Given the prevalence of Sexual

¹⁶ Title VII of the Civil Rights Act of 1964. Pub. L. 88-352. Lays out protections against employment discrimination based on race, color, religion, sex, and national origin.

¹⁷ Katuna, Barret et al. "Unobtrusively Stretching Law: Legal Education, Activism, and Reclaiming Title IX" *Social Movement Studies*, (2015). 15:1, 80-96.

¹⁸ National Women's Law Center's 40th anniversary of Title IX. 21st of June, 2012. <http://www.nwlc.org/our-blog/happy-40th-birthday-title-ix-read-all-posts-nwlc's-title-ix-blogcarnival>

¹⁹ For the Feminist Majority Foundation's definition of Title IX, visit: <http://www.feminist.org/education/titleix.asp>

²⁰ For the National Organization for Women's 'Education & Title IX,' visit: http://www.now.org/issues/title_ix/

²¹ AAUW. "3 Things that Paved the way for Women Astronauts" <http://www.aauw.org/2013/06/24/3-things-that-paved-the-way-for-women-astronauts/>

harassment on university campuses both in Canada and the United States it is time for universities to start looking to improve their dispute resolution processes, and the best first step would be adopting Title IX guidelines.

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