

**OTTAWA UNIVERSITY FACULTY OF LAW
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SPEAKING NOTES

Introduction

We don't have to look far for examples of how the legal system fails women who have experienced violence.

September's triple homicide in Renfrew County is an illustration of the failure of post-court legal responses to women who have experienced intimate partner abuse.

A recent Alberta Court of Appeal decision gives us another look at a failed response – this one from a judge in a sexual assault case.

And a current case in Ottawa opens the door on police response to sexual assault. An 18-year-old student, who has since dropped out of school because of the trauma she is experiencing, reported a sexual assault to the police in late September, after visiting the SADV unit at the hospital for treatment for her injuries, only to be told 6 weeks later that the police were closing the file because it was their opinion that what had happened was a misunderstanding about consensual sex. According to one officer: "He said he thought it was consensual, so I have to believe him." Fortunately, because this young woman had the courage to go public with what happened to her, the police have decided to re-open the case.

One of the reasons for these failures is an ongoing lack of knowledge, awareness and understanding of the complex dynamics of violence against women on the part of those who operate within the legal systems to which many women – not all – who experience abuse turn.

Let's move from the three specific situations I have just mentioned to the systemic level. Although violence against women should not be siloed into "domestic violence" and "sexual violence," the legal system by and large does just that, so I will do the same just to make a couple of points.

In sexual assault cases, reporting rates are shockingly low, prosecution rates even lower and conviction rates lower still. In research done by Holly Johnson and published by YWCA Canada – 1000, 33, 12, 6, 3. Women are routinely not believed. Inappropriate cross-examination persists.

In domestic violence cases, mandatory charging has taken all autonomy away from women who are abused by their partners and has led to counter charging. Family law is a pit of trouble for women leaving abusive relationships, especially those with children, who must battle a system that continues to believe joint custody is what is best for all children and fair for both parents.

One woman is killed in this country approximately every 6 days, which is proof enough that systemic responses – including legal systems – do not know enough about violence against women.

Before I go any farther, I want to explain the language I am using. I use the term violence against women intentionally.

I fully acknowledge that men can be the victims of abuse perpetrated by their female partners and that there is abuse in same sex relationships. However, when we look at the most pervasive and coercive forms of intimate partner violence, the numbers are unequivocal – most victims are women and most perpetrators are men. Almost all victims of domestic homicide are women and an almost equal number of perpetrators are men.

The same can be said for sexual violence – while men can be victims, most victims are women and most perpetrators are men.

For this reason, I use the language of violence against women – because I think we have to correctly name the issue if we are going to successfully address it.

In Ontario in recent years, largely as the result of recommendations made by inquest juries and the Domestic Violence Death Review Committee (DVDRC), some steps have been taken to address the topic of domestic violence in continuing legal education programs for practising lawyers, but to date there has been little attention paid to raising this issue in a formal way in law school curriculum.

Since as early as 1999, recommendations have been made to address the topic of domestic violence in faculties of law in Ontario. The Joint Committee on Domestic Violence wrote as follows:

The Canadian Association of Law Deans and the Canadian Association of Law Teachers should work towards ensuring the adequacy of education for law students on domestic violence. We recommend that such education become part of the core curriculum.

Recommendations have come from a number of other sources in the years since. The various reports of the DVDRC include recommendations generally about the importance of education about the dynamics of domestic violence and the need to take appropriate action for professionals, including lawyers and judges, who come into contact with victims and perpetrators of domestic violence (2007, 2009, 2010) and more specifically to use some of the DVDRC case files as teaching aids in law schools (2010).

In its 2008 research report, Luke's Place Support and Resource Centre for Women and Children recommended that the government work with faculties of law to develop either consistent components within family law courses or a stand-alone course on violence against women.

The final report of the Domestic Violence Advisory Council contained a number of recommendations for reforms to the legal response to violence against women, including the following directed at the education of lawyers:

Build on the work being done through the Government of Ontario and professional schools to ensure that all law students study the issue of violence against women either in stand-alone courses or as part of other courses such as family, criminal and evidence law.

While there has not been a coordinated approach to integrating violence against women into the law school curriculum, there have been both faculties and individual professors who have exposed students to the topic. This happens in particular in criminal and family law courses, but violence against women has also surfaced in contracts, torts and other courses, as well as in more specialized upper year courses.

Students also have the opportunity to learn about violence against women in student legal clinics, externships in specialized community clinics such as Toronto's Barbra Schlifer Commemorative Clinic and through independent study programs.

Building on the recommendations I have noted above, in 2011, the Law Commission of Ontario, with funding from the Ontario Women's Directorate, undertook an initiative to develop model course components for Ontario law schools on issues related to violence against women, with particular emphasis in domestic or intimate partner violence.

The LCO appointed me to lead this initiative, which allowed me the opportunity to undertake research on what was happening in various jurisdictions in Canada and elsewhere. I was also able to talk to law teachers who are addressing these issues, law students to hear what they wanted to learn about and VAW advocates and survivors to hear what they would like lawyers to know about.

What I talk about today has been shaped by the work I did with the LCO, but also by the conversations I have had with judges from across Canada in my work with the National Judicial Institute and, more recently, by what lawyers working for Legal Aid Ontario have talked about and told me in the course of my ongoing work providing domestic violence training for LAO staff, clinics and per diem lawyers. I have also had the opportunity to listen to law students and community activists who have much to contribute to this discussion.

The relationship between understanding violence against women and the legal profession

The American Bar Association Commission on Domestic Violence has written:

“Domestic violence has a tremendous impact on the legal profession. Whether or not lawyers realize it, domestic violence permeates the practice of law in almost every field. Corporate lawyers, bankruptcy lawyers, tort lawyers, real property lawyers, criminal defense lawyers and family lawyers, regularly represent victims or perpetrators of domestic violence. Criminal and civil judges preside over a range of cases involving domestic violence as an underlying or hotly contested issue. Failure to understand domestic violence legal issues threatens the competency of individual lawyers and judges, as well as the legal profession as a whole.”

And yet, women routinely encounter lawyers who do not understand the issue and/or who do not understand its relationship with the law.

As one woman said:

My lawyer said that the abuse didn't need to be mentioned and that the court didn't like to hear about these kinds of things.

Linda Nielson, in her exhaustive 2001 study, points out that one of the dangers of lawyers without the necessary knowledge handling these cases is that they do not understand the importance of the abuse in custody and access cases and so do not gather the evidence needed to raise the issue. In fact, in some cases, lawyers actually discourage their clients from raising allegations of abuse in their pleadings: “(S)urvivors of abuse, primarily women, spoke of pressures to abandon allegations of abuse and claims for denial and/or restrictions on access.”

Her research found what she calls a “siphoning effect”:

[I]nformation about abuse and irresponsible parenting is excluded or omitted at each stage in the legal process: during lawyer-client interviews,

during legal interpretations of those interviews, during preparation of court documents, during negotiations between lawyers, and during the presentation of evidence to judges. Thus, by the time cases reach judges, for decisions or confirmation of 'consent' orders, much of the evidence of abuse and irresponsible parenting has been screened from the legal process.

Of course, it is not just in the obvious areas – family, criminal, immigration and refugee law – where issues of abuse can arise. They can come up in collateral areas like child protection, Office of the Children's Lawyer, etc.

Or they could surface in real estate files, wills and estates, even corporate law.

Lawyers who work for the government, in human rights law or in poverty law (housing, OW) can be confronted with violence against women issues even if they are not the presenting reason the client has come for help. (Eg a housing issue – a lease breaking – because she needs to leave because her abuser knows how to find her)

And, lawyers who represent clients who are alleged to have engaged in abusive behaviour need to understand the dynamics of abuse in order to provide their client with effective and ethical advocacy.

So, lawyers need to know about violence against women if they are going to do their jobs – jobs that could sit almost anywhere on a very long spectrum -- properly.

Lawyers also need to know about violence against women to ensure they are in compliance with the Rules of Professional Conduct. Some rules have a particular overlap with this topic:

2.1 Integrity

3.1 Competence

3.2 Quality of service

3.3 Confidentiality

3.4 Conflicts

5.1 Lawyer as advocate

5.6 Lawyer and the administration of justice

5.7 Lawyers as mediators

My remarks a bit later will, I hope, make the connections between these Rules and knowing about VAW obvious.

Why law school is the best place for gaining this understanding

CPD is not enough. It can serve as a stop-gap for lawyers who have not had the opportunity to learn about violence against women in law school, and it will always be an important way for lawyers to keep their knowledge up to date and their skills honed, but I don't think anyone would disagree with me that learning about a topic as important as this is better done before law school grads start their lives as lawyers and begin developing habits and practice routines that can be hard to break.

All those who graduate – no matter what they plan to use their law degree for – need to know about violence against women, and so the topic of VAW needs to be integrated throughout the curriculum.

Again quoting from the ABA Commission on Domestic Violence:

“The legal profession has a unique role to play in developing and implementing coordinated community responses to domestic violence. To realise this goal, however, law school programs must ensure that law students – who may become prosecutors, defense attorneys, family law attorneys, general practitioners, business leaders, legislators, lobbyists, policy analysts, or judges – attain an adequate understanding of domestic violence issues.

Teaching law students about domestic violence issues should be an inherent part of legal education, rather than a specialized track taught only by professors who are experts in domestic violence law. Raising domestic violence issues provides students with an opportunity to engage in profound debate about the law's role in shaping social policy. The diversity of approaches to the criminal, civil, and federal aspects of domestic violence law allows students to consider a range of perspectives across the political spectrum.”

How law schools can teach about violence against women

If we are going to teach about violence against women in law schools, what is the most effective way to do it?

The Carnegie Foundation for the Advancement of Teaching publication Educating Lawyers: Preparation for the Profession of Law sets out some interesting suggestions for how to educate law students to be effective professionals. While not specific to teaching students about violence against women/domestic violence, they are certainly relevant:

1. Develop in students the fundamental knowledge and skill, especially an academic knowledge base and research
2. Provide students with the capacity to engage in complex practice

3. Enable students to learn to make judgments under conditions of uncertainty
4. Teach students how to learn from experience
5. Introduce students to the disciplines of creating and participating in a responsible and effective professional community
6. Form students able and willing to join an enterprise of public service

The current focus in Canada on ethics and professionalism fits very well with the concept of teaching about violence against women. Indeed, certain core competencies in this area could become part of the ethics and professionalism competency requirement.

I think there are some key core competencies that all graduating law students should have:

i. Knowledge

- Intersectionality of domestic and sexual violence – no more siloing
- Dynamics and types of abuse and violence – typologies – it is not all the same and so cookie cutter responses won't work
- Post-separation abuse
- Relationship between violence and various areas of law and legal issues
- Impact of violence on client's ability to interact with legal system(s)

ii. Best practices

- Establishing safe environments for all clients to allow disclosure of abuse where appropriate
- Creating a professional relationship of trust with clients once abuse has been disclosed
- Safety protocols

iii. Skills

- Screening for violence against women/domestic violence – women don't always tell
- Threat assessment/risk management (for client, lawyer, others in office)
- Responding to a disclosure
- Making referrals – importance of knowing your community
- Appropriate interview techniques
- Appropriate file management strategies

iv. Professional role(s)

- As officer of the court
- Within professional community, associations, etc.

Students could acquire these core competencies by courses that address the following topics:

i. What is violence against women?

- Domestic violence
- Sexual violence
- Tactics of abuse
- Post-separation violence
- Legal strategies of abusers

ii. Family law

- Overview of family law and legal issues
- Impact of VAW on family court proceedings
- Child welfare
- Family Law Rules
- Integrated courts
- Role for ADR in VAW cases

iii. Criminal law

- Overview of criminal law and violence against women
- Key issues in domestic violence (eg. mandatory charging, bail) and sexual violence (eg. production of third party records, consent)
- Role of the victim
- Evidentiary issues
- Sentencing

iv. Tort Law

- Use of tort law in cases of sexual violence, including institutional cases
- A costs/benefits analysis of tort law in domestic violence cases
- Challenges and barriers to use of tort law in domestic violence cases

v. International Law

- International instruments that could be used to address violence against women (eg. CEDAW, Inter-American Commission on Human Rights, International Court of Justice, etc.)
- Use of these instruments to address violence against women in Canada, particularly violence against Aboriginal women
- Challenges and barriers to the use of these instruments

vi. Quasi-legal remedies

- Human rights codes and commissions
- Workplace safety legislation
- Criminal Injuries Compensation Board
- Professional colleges

vii. Policy work

- Working with government to effect violence against women policy reform
- Non-legal issues that require policy attention (eg. housing, income security)
- Supporting women who do not want to engage with the law
- The role of the community in preventing and responding to violence against women (eg initiatives such as “Neighbours, Friends and Families”)

viii. Other areas of law and violence against women

- Real estate, contracts, wills and estates, administrative law
- When violence against women can arise
- How to handle it

ix. Practice considerations

- The importance of being ready for the possibility of VAW/DV with any client
- How to screen for VAW/DV without “looking” for it
- Practice tips for working with an abuser as well as a survivor
- Special conflict of interest/confidentiality considerations
- File management
- Safety planning for the lawyer and her/his staff

I think the most interesting thing to consider in all of this is how we should teach about violence against women, and here I have questions rather than answers:

1. Is a VAW and the law survey course a way to go? This could be a semester-long intro course for students in any year. Should it be mandatory?
2. Could it be part of existing intensives?
3. Could VAW be used as the centre of the ethics curriculum?
4. Should there be advanced seminar courses?
5. What about a clinic component?

One interesting model to consider is that of the domestic violence courses offered to judges by the National Judicial Institute. These courses are taught from a skills development/trial management perspective. They are intensive 3 to 4 day courses, with a relatively small group of judges (30 to 40) working together throughout the course. The judges work with a single case study and engage with the family at various stages throughout the court (family or criminal) process. Videotapes with actors playing the

parts of the man and woman and lawyers and judges playing the parts of lawyers and judges show specific proceedings and are interspersed with live lectures, comments from a panel of experts, and small group work.

General response to this teaching method has been very positive. It could be considered in the law school context; however, it is likely to be most effective in a time-limited intensive setting.

Conclusion

Let me return once again to the ABA, which has done so much work in this area. As it says:

Ultimately, it is the responsibility of law schools to incorporate domestic violence legal issues into the curricula, including funding these programs. The substantive and lawyering skills taught in domestic violence programs enhance legal education by preparing students to practice law competently. . . .

“Institutional support for law school programs addressing domestic violence . . . sends a message to the community that law schools have a commitment to creating, through their educational programs, resources which can help eradicate the suffering created by abuse in the home. By incorporating much needed information about domestic violence law and practice into their curricula, law schools can truly be said to be educating to end domestic violence.