Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System

Nicholas BALA*

* Professor, Faculty of Law, Queen's University, Kingston, Ontario.

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I. INTRODUCTION

The traditional response of the Canadian criminal justice system to child sexual abuse has contributed to the "double victimization" of children. Because of their social, psychological, economic and intellectual positions, children are the most frequent victims of unwanted sexual acts.[1] Our legal and social systems failed our children, initially by allowing them to become victims. And when cases of sexual abuse have been dealt with by the legal system, children have too often been the victims of "secondary trauma," produced by their mistreatment in that system.[2] Children have been victims of a discriminatory justice system which developed rules premised on the notion that children are inherently unreliable witnesses whose testimony must be specially scrutinized. The legal system also discriminated against children by failing to recognize their unique characteristics and their need for distinctive treatment.[3]

Until quite recently, there was a strong tendency to deny the existence of child sexual abuse; few cases were reported to the authorities and even fewer prosecuted in the courts. The attitude of denial was reflected in laws which were premised on the belief that allegations of abuse were inherently unreliable, which in turn made it difficult or impossible

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1. The Badgley Committee's Report, *Sexual Offences Against Children* (Ottawa: Minister of Supply and Services Canada, 1984), Vol. I at 175 discusses the results of its National Population Survey:

   The main findings of the survey are that ... about one in two females and one in three males have been the victims of unwanted sexual acts. About four in five of these incidents first happened to these persons when they were children or youths.

   While the most common unwanted sexual contact was indecent exposure, a significant percentage of children are victims of fondling or penetration. Historically, most victims of sexual abuse have not reported these incidents to the authorities, though the rate of reporting to police and child protection authorities has increased dramatically since the release of the Badgley Report in 1984.

2. The emotional traumatization of children in the Canadian criminal justice system is documented in London Family Court, *Reducing the System — Induced Trauma for Child Sexual Abuse Victims Through Court Preparation, Assessment and Follow-Up* (1991). While the report indicates that there is a need for more detailed research, it concludes (115):

   In our observations of the criminal justice system we saw first-hand the negative side; how sometimes laying charges and going to court resulted in the child being thrown into a system which was extremely slow moving, required frequent recall of abuse, led to stigmatization through public exposure and exacerbated feelings of self-blame, guilt and fear during cross-examination.

3. The concept of discrimination, as articulated by McIntyre J. in *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.) has two aspects.

   One is a "distinction ... based on grounds relating to personal characteristics ... which has the effect of imposing burdens, obligations or disadvantages ... not imposed on others ... ." (at 18).

   Justice McIntyre also recognized that "identical treatment may ... produce serious inequity ... in the well-known words of Frankfurter J. in *Dennis* v. *U.S.* (1950): 'It was a wise man who said that there is no greater inequality than the equal treatment of unequals'" (at 10).

   The central theme of this paper is that child sexual abuse victims have been subjected to unequal or discriminatory treatment in both senses of the term.

to secure convictions and reinforced the perception that child sexual abuse was not widespread.

In the last decade there has been a dramatic change in attitudes and awareness concerning child sexual abuse. Encouraged by growing professional sensitivity and by the feminist movement, adult survivors of childhood sexual abuse have come forward to document the social patterns of denial. Growing public awareness of the problem produced demands for legal reform, most notably resulting in the enactment of Bill C-15,[4] which came into force in Canada on 1 January 1988 and significantly altered the laws governing criminal prosecutions for child sexual abuse. The changes in the law have resulted in more successful prosecutions, which have in turn weakened the social attitudes of denial of the existence of the problem.

Fortunately, as in other areas where our legal system has been guilty of discrimination, in recent years there has been a growing recognition of the need to provide more equitable treatment for victims of child sexual abuse. There have been a number of important legislative and judicial changes intended to facilitate the giving of evidence by children and to reduce the trauma of testifying, and in the past few years there have been a number of Supreme Court of Canada decisions which have demonstrated considerable sensitivity to the problem of child sexual abuse.

The main focus of this paper is a review of some of the developments in the procedural and evidentiary laws governing child sexual abuse prosecutions, as established by the Parliament of Canada and developed by judges in the reported case law. It must, however, be appreciated that the appellate court judges, whose decisions are the most frequently reported, seem to have displayed considerably more sensitivity to issues related to child sexual abuse than have some of our trial judges, whose decisions are less frequently reported and less readily subject to public scrutiny. It would seem that it will take considerable time for changes in the law to be fully implemented at the trial level, which of course is where all cases are dealt with, at least initially. The process of changing attitudes and increasing understanding of the dynamics of child sexual abuse among all members of the judiciary will take time.

It must be appreciated that in the context of the criminal justice system, addressing the needs and rights of alleged victims cannot serve to sacrifice the fundamental rights of accused persons, which in our country are recognized in the *Canadian Charter of Rights and Freedoms*. Parliament and the courts face a delicate balancing task when changing the criminal justice system, but it is submitted that for too long this system has been too heavily skewed against children.

4. S.C. 1987, c. 24.

II. CHILDREN AS WITNESSES: THE PSYCHOLOGICAL LITERATURE

Before considering some of the specific legal rules that govern child sexual abuse prosecutions, it is useful to briefly summarize some of the existing literature on the reliability of children as witnesses.

Until relatively recently, it was a common view of mental health professionals and lawyers that children were highly unreliable and prone to fantasize about sexual abuse allegations. This type of thinking profoundly influenced the laws that developed to regulate these types of proceedings. More recently some advocates for children took a diametrically opposed view, arguing that "children never lie", at least about abuse. It is important for professionals involved in these cases to develop a more sophisticated understanding of the reliability of children, and to appreciate that children can be as reliable witnesses as adults, though like adults they can also make mistakes, forget or be misled and on occasion even lie.

There is a large and growing body of research, largely conducted by psychologists, about the reliability of children as witnesses. There is, of course, some difficulty in applying research that is conducted in an experiment to an actual case involving allegations of abuse. There are understandably ethical and other constraints that limit the "ecological validity" of this research for "real life" court settings. Further, there is disagreement among psychologists about certain questions. However, there is substantial agreement among professionals about certain aspects of children's memories and abilities to recall events:[5]

> *Children's memories are less well developed than those of adults, in particular in "free recall" [i.e. not in response to direct questioning] they may recall fewer details of an event, but what they do recall is generally as accurate as what an adult will recall. Further although the amount of recall that children has fades more quickly than for adults, this may not affect the accuracy of what is recalled.*
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> *In recalling events, children may focus on some details which adults would not, and, especially for younger children, will have great difficulty in giving an accurate sequence of events. Younger children will be unable to answer questions involving units of time or measurement, or that require the drawing of an abstract inference.*
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> *Children sometimes initially disclose only part of their story of abuse, with a fuller picture emerging over time. Partial disclosure may be a product of fear or guilt, or may be the result of suppression of memories of abuse.*

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5. There are a number of quite readable summaries of psychological literature on the reliability of children. See e.g. Ontario Law Reform Commission, *Report on Child Witnesses* (1991), c. 1; R. Besner, "The Competency of the Child Witness: A Critical Analysis of Bill C-15" (1989) 31 Crim. L.Q. 481; S. Penrod, M. Bull & S. Lengnick, "Children as Observers and Witnesses: The Empirical Data" (1989) 23 Fam. L.Q. 411; Mian *et al*, "The Child as Witness" (1991) 4 C.R. (4th) 359; Lilles, "Children As Witnesses: Some Legal and Psychological Viewpoints" (1986) 5 Can. J.F.L.L. 237; and S. Ceci & M. Bruck, "The Suggestibility of the Child Witness: An Historical Review and Synthesis" (1991) (forthcoming).

Children, at least at the pre-adolescent stage, are very unlikely to "fantasize" about abuse, and are as capable as adults of distinguishing fact from fantasy.

Children may lie (i.e., knowingly tell a falsehood) when their motivational structure is tilted towards lying, but in this regard there is no evidence that children are more prone to lying than adults. There is some evidence that due to their verbal and non-verbal behaviours the lies of children may be more easy to detect than those of adults. Young children generally lack the knowledge to fabricate allegations of sexual abuse, unless they have been abused or exposed to information about the subject.

Children may, in some situations, be disproportionately more "suggestible" (subject to erroneous post-event suggestion) than adults. However, there is significant support for the view that children are most resistant to suggestion in regard to "core aspects" of events that directly involved them, as opposed to providing information about events they merely observed or information about peripheral details related to events that happened to them.

Children are less suggestible if they are interviewed in a supportive environment and not subject to leading or repeated questioning.[6] *They are also less suggestible if interviewed by individuals who do not have a single, pre-determined hypothesis they are seeking to validate.*[7]

Children without sexual experience lack the mental capacity to fabricate or fantasize about sexual abuse on their own, though they can be "coached" or

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6. The view that children are more "suggestible" than adults has led some critics to argue that many, or even most, allegations of abuse are the product of vindictive ex-spouses or inadequately trained investigators. See the controversial book by R. Underwager & H. Wakefield, *The Real World of Child Interrogations* (Springfield, Ill.: Charles Thomas Publisher, (1990), though replete with exaggeration and distortion, this book offers insight into the problem of suggestibility and false and unsubstantiated allegations.

   One response to the problem of suggestibility is to videotape all interviews by investigators, providing an accurate record of this questioning.

   Arguably the situation most likely to lead to inappropriate "suggestion" is cross-examination, where an unknown examiner puts leading questions to a child in a hostile environment long after the events in question. Psychological literature indicates that these are all factors likely to increase the possibility of erroneous post-event suggestion.

   It should be appreciated that adults are also subject to post-event erroneous suggestion, though at least in some experimental situations adults appear, on average, less suggestible than children.

7. As Ceci & Bruck, *supra* note 5 at 28-29 point out, when children are asked the same question more than once, they often change their answers because they interpret the repeated question as "I must not have given the correct response the first time, therefore to comply and be a good conversational partner, I must try to provide new information." These same authors, however, note that repeated asking of open-ended questions, especially at different sessions, may enhance recall by serving as "a form of rehearsal...or serve to reactivate faded trace attributes".

> *pressured by adults into making false allegations.*[8] *There are relatively few documented cases of coached false allegations, and much more common than false allegations are false denials of abuse by abusers. Indeed studies of abused children have found that false recantations and false denials by children, intended to protect abusers, are more common than false allegations by children.*

As the discussion which follows demonstrates, until quite recently the legal system clearly did not appreciate the needs and capacities of children. Gradually, however, knowledge and understanding of children has begun to affect how the courts receive their evidence.

III. DISCOUNTING THE EVIDENCE OF CHILDREN: STATUTORY REFORMS

There are many examples of discrimination against children who have been the victims of sexual abuse and who have come before the courts to testify against their alleged abusers, but perhaps the most obvious relate to their presumed incompetence as witnesses.

Legal rules developed which made it difficult, or impossible, for children even to be permitted to testify. If they were permitted to testify, their evidence was discounted as inherently unreliable. Victims of child sexual abuse were particularly prone to having their evidence discounted. Evidence of victims in all sexual offence cases was considered suspect because of the nature of the allegations. Evidence of children and adolescents was further regarded as inherently unreliable because of their age.

While there have been notable changes in the law in this area, there is a continuing concern that some judges may discount the evidence of children in sexual offence cases.

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8. There is a growing body of social science literature on "false allegations," both in terms of its prevalence, and the situations in which it is likely to occur. In considering this literature, it is important to distinguish incidents which are false from those which are not proven and to accept that in some situations there will be genuine uncertainty about what occurred even after careful investigation.

   The literature indicates that the rate of false allegations is well under 10 per cent, and that many of the cases of false allegations are a result of assertions by an adult, most notably a parent after separation or divorce.

   There are some situations in which false allegations appear to be more common, such as where parents have separated. In this atmosphere of mistrust and hostility, innocent gestures may be misinterpreted. There is also the potential for deliberate, strategic fabrication in these situations, but it must also be appreciated that even in situations of separation and divorce there appear to be more false denials than false allegations.

   See Yuille, King & MacDougall, *Child Victims and Witnesses: The Social Science and Legal Literatures* (Ottawa: Department of Justice, 1988) c.1; Jones & McGraw, "Reliable and Fictitious Accounts of Sexual Abuse to Children" (1987) 2 J. Interper. Violence 27; Wehrspann, Steinhauer & Klajner-Diamond, "Criteria and Methodology for Assessing Credibility of Sexual Abuse Allegations" (1987) 32 Can. J. Psy. 615; and Green, "True and False Allegations of Sexual Abuse in Child Custody Disputes" (1986) 25 J. Am. Acad. Child Psych. 499.

1. Qualifying the child as a witness

The courts and legislatures established rules which made it difficult, or impossible, for children even to be heard by the courts. At common law, children could testify only if they "understood the nature and consequences of an oath."[9]

Before they were permitted to testify in court about what was alleged to have happened to them, children were asked a series of rather complex questions about the "nature and consequences" of an oath. There was considerable judicial disagreement about what were the "correct" answers to these questions, and views about this changed over the years. At one time children were expected to state that if they told a lie under oath they would "go to hell-fire."[10] Of course, no one really knows the spiritual consequences of telling a falsehood under oath. There is no evidence that an understanding of the nature of an oath actually affects whether a witness is telling the truth.[11]

Since 1890 it was legally possible for a child to give unsworn evidence, but it was necessary for a judge to be satisfied that the child was "possessed of sufficient intelligence to justify the reception of the evidence" and "understood the duty of speaking the truth,"[12] a requirement which in practice may not have differed much from requiring evidence under oath. Further, if a child gave unsworn testimony, it was necessary to have corroboration, which made it even more difficult to secure a conviction. The practical effect of requiring an understanding of an oath was that it was difficult, or impossible, for children, particularly young children, to testify in court about what happened to them.

Gradually, Canadian courts started to develop a more flexible approach to permitting children to testify, particularly in the context of giving unsworn evidence.[13] This trend has been significantly reinforced by the enactment of Bill C-15 in 1987,[14] though it was apparent

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9. *R.* v. *Brazier* (1779), 168 E.R. 202 (C.C.R.).

10. See *R.* v. *Antrobus* (1946), 87 C.C.C. 118 (B.C.C.A.). Later cases, like *R.* vs. *Bannerman* (1966), 55 W.W.R. 257 (Man. C.A.), aff'd. without reasons (1966), 57 W.W.R. 736 (S.C.C.), took a different approach.

11. M. Ruck, "Children's Understanding of Telling the Truth in Court" (M.A. Thesis, University of Toronto, 1989) reports on an empirical study of 96 children aged seven to 13, and suggests that there is no real difference in children's understanding of testifying under oath and testifying after promising to tell the truth.

12. See *Canada Evidence Act*, R.S.C. 1970, c. E-10, s.16(1).

13. See, for example, *Bannerman* (1966), 55 W.W.R. 257 (Man. C.A.), aff'd. 57 W.W.R. 736 (S.C.C.); and *R.* v. *Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), aff'd. (1990), 79 C.R. (3d) 1.

14. S.C. 1987, c.24, in force 1 January 1988. A detailed consideration of all of the provisions of this important piece of legislation is beyond the scope of this paper. For a fuller consideration, see Stewart & Bala, *Understanding Criminal Prosecutions for Child Sexual Abuse: Bill C-15 and the Criminal Code* (1989); and Bala, *Bill C-15: New Protections for Children, New Challenges for Professionals* (1988). Both are available from Institute for the Prevention of Child Abuse, 25 Spadina Road, Toronto, Ontario M5R 2S9. See also Robb & Kordban, "The Child Witness: Reconciling the Irreconcilable" (1989) 27 Alta. L. Rev. 32.

even before then. There is still some uncertainty about what exactly is meant by "understand the nature of an oath", though with the amendments to the *Canada Evidence Act* found in Bill C-15 the significance of this controversy has diminished and as a child can now give unsworn evidence with relative ease.

The 1981 decision of Ontario Court of Appeal in *R. v. Budin* still displayed a quite restrictive attitude to children giving sworn evidence, with Justice Jessup stating:[15]

> *The essential things are that the child believes in God or another Almighty and whether he appreciates that, in giving the oath he is telling such Almighty that he will tell the truth. A moral obligation to tell the truth is implicit in such belief and appreciation.*

However, a year later, in *R. v. Fletcher*[16] the Ontario Court of Appeal recognized that "as society has changed over the year the oath has lost its spiritual and religious significance". The Court rejected the majority approach in *Budin*, stating that there is no need for a child to demonstrate a belief in God or another Almighty to testify under oath. In *Flether* the Court adopted the view that a child can testify under oath if the child "has sufficient appreciation of the solemnity of the occasion, and of the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct". The approach adopted by the Court of Appeal in its later decision in *Fletcher* seems to more fully accord with present understandings and is preferable.

As a result of Bill C-15, children who do not understand the nature of oath may now testify if they have the "ability to communicate," upon "promising to tell the truth," without the statutory requirement for corroboration.[17]

In 1988 in *R. v. Khan*, Justice Robbins of the Ontario Court of Appeal explained the distinction between situations in which a child could give sworn or unsworn evidence:[18]

> *To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to do so. ... Any frailties that may be inherent in the child's testimony go to the weight to be given the testimony rather than its admissibility.*

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15. (1981), 58 C.C.C. (2d) 352 at 356 (Ont. C.A.).

16. (1982), 7 C.C.C. (3d) 370 at 380 (Ont. C.A.), leave to appeal to S.C.C. refused, 48 N.R. 319.

17. *Canada Evidence Act*, R.S.C. 1985, c.C-5, as amended S.C. 1987, c.24, s.16.

18. (1988), 42 C.C.C. (3d) 197, at 206. Emphasis added. The Court was in fact interpreting the standard for unsworn evidence under the old legislation, but specifically stated that this test was applicable to the provisions dealing with unsworn evidence found in Bill C-15. It is interesting to observe that this was the most liberal interpretation given to the old legislation, and it was given only after Parliament enacted a new legislative approach.

> *... The test is whether the child's intellectual attainments are such that he or she is capable of understanding the simple form of questions, that it can be anticipated will be asked, and is able to communicate the answer in an understandable manner.*

The *Khan* decision was affirmed by the Supreme Court of Canada in September 1990, with Justice McLachlin quoting with approval from the preceding passage of Justice Robins. Justice McLachlin added that in refusing to permit the four and a half year old girl to give unsworn testimony, the trial judge erred by placing[19]

> *too much weight on the fact that the child was very young, in effect drawing a distinction between children of tender years and older children.*

It is to be hoped that this new legislation will be interpreted and applied in a sensitive fashion. It is intended to allow children, who have the ability to participate meaningfully in a trial, to come to court and have their evidence received by the trier of fact. Under the new law children should be able to testify about events which happened to them when they were as young as three or four years of age.[20]

It seems that the usual practice in Canada is for judges to take the lead in asking a child questions during the competency inquiry. However, it is the author's view that the presiding judge's responsibility under s.16(1) to "conduct an inquiry to determine" the child's understanding of the oath or affirmation and into the child's ability to communicate, may be satisfied by allowing the Crown prosecutor to take the lead in asking the child questions to establish the child's competence.[21] The prosecutor will invariably have met with the child

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19. (1989), 79 C.R. (3d) 1 at 7.

20. See *State* v. *Hussey*, 521 A. 2d 278 (Me 1987) where the court upheld a conviction of a man for sexually abusing his daughter. The Maine Supreme Court accepted a ruling that his daughter was competent to testify at the age of three. See similarly *State* v. *R.W.*, 514A. 2d 1287 (N.J. 1986) and *People v. Draper*, 389 N.W. 2d 89 (Mich. App. 1986).

21. In *R.* v. *Budin* (1981), 58 C.C.C. (2d) 352, at 356 (Ont. C.A.) it is stated in that the trial judge, not counsel, is to pose questions to the child in the competency assessment. See also *R.* v. *Leggett* (1986), 75 N.S.R. (2d) 373 (S.C., App. Div.). However, in *R.* v. *Jing Foo* (1939), 73 C.C.C. 103, at 105 (B.C. Co. Ct.) it was held that it was permissible for the judge to allow counsel to ask questions to determine whether the child is a competent witness. Counsel at trial adopted this role in *R.* v. *Bannerman* (1966), 48 C.R. 10 (Man. C.A.), aff'd. 50 C.R. 76 (S.C.C.). In the Manitoba Court of Appeal, Schultz, J.A. stated that only the trial judge should ask questions, but Dickson J.A. did not comment on this issue.

    All of these cases were decided under the previous legislation which arguably was more flexible, since it simply stated that the presiding judge was to be "of the opinion" that the child was competent to testify, and the present legislation specifically refers to the judge "conduct[ing] an inquiry".

    Although the statute now refers to the judge "conduct[ing] an inquiry", s.535 of the *Criminal Code*, governing preliminary inquiries, states that a justice "shall...inquire" into whether a charge is "founded on the facts". No justice presiding over such a preliminary inquiry would take a lead in asking questions. It is similarly the author's view that an inquiry into the competence of a child witness may be conducted by permitting counsel to take the lead in asking the child questions, with the role of the judge being to decide the issue.

before court and should have explained to the child the process of initial qualification[22] as a witness, in appropriate language to the child. The Crown will usually have established a rapport with the child, and may be better able to help the child demonstrate his or her capacity to communicate during the initial tension filled minutes in court. Naturally, if the prosecutor takes a lead in such questioning, the judge and defence will have the right to later ask questions as well.

There is no set pattern of questions for an inquiry into a child's competence to testify, and there is substantial variation in the types of questions asked, depending both on the child's age and the judge's preferences.[23] There is caselaw that has held that it is mandatory that the child be asked questions at trial about whether he or she understands the nature of an oath, even if the child gave unsworn evidence at the preliminary inquiry.[24]

If a child under 14 does not understand the nature of the oath, the focus of inquiry[25] must be upon the child's "ability to communicate". The "ability to communicate" referred to in s.16 of the *Canada Evidence Act* requires an assessment of the child's ability to communicate in the context of court proceedings. Thus, while children as young as one year of age may have the ability to communicate, to communicate in court requires a degree of verbal comprehension and vocabulary, sufficient memory skills to recall and describe past

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22. In *R.* v. *Bannerman* (1966), 48 C.R. 10 (Man. C.A.), aff'd. 50 C.R. 76 (S.C.C.) Dickson J.A. (as he then was) stated that counsel "calling a child have a duty to inform and instruct a child" prior to the child testifying, though if counsel fails in the performance of that duty "the Court should do it".

23. See London Family Court Clinic (1991), *supra* note 2 at 104-106, for description of the variation in the questions asked. For some suggestions for possible questions to ask a child at an inquiry into competence to testify, see Mian et al, "The Child As Witness" (1991) 4 C.R. (4th) 359.

24. In *R.R.D.* v. *The Queen* (1989), 69 C.R. (3d) 267 (Sask. C.A.) a father appealed his conviction of sexually assaulting his six-year-old daughter. As the girl gave unsworn testimony at the preliminary inquiry, the trial judge satisfied himself of the child's capacity to given unsworn evidence, including questions on the importance of telling the truth, without formally asking whether she understood the nature of an oath. The Saskatchewan Court of Appeal granted the accused a new trial because of the process by which the girl was qualified to testify. One ground for ordering the new trial was the failure of the trial judge to conduct a formal inquiry into the girl's understanding of an oath prior to considering her "ability to communicate" and permitting her to give unsworn evidence.

    Although the decision is consistent with cases under the old law dating back to the 1920's, it is submitted that *R.R.D.* offers a very rigid interpretation of the new legislation. Parliament has abolished the distinction between sworn and unsworn evidence of children. It is impossible to see how the accused was prejudiced by the failure to inquire about the girl's knowledge of an oath, since she could testify without understanding the oath. It is, however, easy to appreciate the emotional trauma that this young child will again experience through having another trial (and preliminary inquiry) just to ask her whether or not she understands the nature of an oath. For a critical commentary see Bala, "*R.R.D.*: Interpreting The New Procedure for Qualification of Child Witnesses Too Strictly" (1989) 69 C.R. (3d) 269.

25. If a child under the age of 14 gives sworn evidence, it appears that there must be some sort of inquiry into the child's understanding of the oath or affirmation; see *R. v. Leonard* (1990), 54 C.C.C. (3d) 225 (Ont. C.A.).

    See, however, *R.* v. *Ross* (1989), 90 N.S.R. (2d) 439 (N.S.C.A.), where the appellate Court emphasized the importance of the finding of the trial judge about a child's competence, and upheld a conviction based on the testimony of a 10-year-old girl who gave sworn evidence after a very brief inquiry as to her understanding of the oath.

events and the capacity to carry on a simple form of conversation. It is clear that the child need only have the capacity to respond to a "simple form of questions",[26] and need not be able to respond to the double negative questions and complex vocabulary that lawyers are prone to employ.

A child who does not understand the nature of an oath or affirmation but has the ability to communicate may testify "on promising to tell the truth". No particular form of promise is required. While the child must give the promise, either in response to a question or by making a statement, there is no statutory requirement that the child establish a precise understanding of the abstract concepts of "promising" and precise "truth"[27] in order to give unsworn testimony. Though it may add weight to a child's testimony if the child can articulate an understanding of these concepts, it is submitted that the admissibility of the testimony does not depend on a verbal articulation of the understanding of abstract notions like "promise" and "truth". In particular, if a child lacks understanding of the oath or affirmation, an inquiry into the child's religious
knowledge or background is inappropriate.[28] In some circumstances, it may be necessary for the judge or counsel to offer the child a simple explanation of the significance of the promise to tell the truth.

Although not explicitly stated in the legislation, it is the author's view that sworn testimony and unsworn testimony of children are now legally equivalent. Either type of evidence, at least in theory, is sufficient to obtain conviction, without corroboration or support. In *R. v. Field*[29] it was held that the trial judge "erred in bolstering the weight of the evidence of [child] complainants by reason of their having taken an oath." This would appear to support the view that there is now no legal distinction between sworn and unsworn evidence of children.

2. Corroboration and the common law "warning"

Perhaps the most discriminatory rules were those which required corroboration of the evidence of an alleged victim of child sexual abuse, even one giving sworn testimony.

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26. *R.* v. *Khan* (1990), 79 C.R. (3d) 1 (S.C.C.).

27. In *People* v. *District Court*, 791 P. 2d 682 (Colo. 1990), it was held that a four year old girl was competent to testify in a child sexual abuse even though she could not "understand" (or more accurately, could not state) the difference between telling truth or telling a lie.

28. The London Family Court Clinic (1991) *supra* n.2, (p.108) reported that children were particularly embarrassed by questions about religious observation or instruction if they did not attend church regularly. In light of the possibility of affirming or giving unsworn evidence, as well as *R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.), leave to appeal to S.C.C. refused 48 N.R. 319, one must question the legal relevance of this type of questioning.

    In *R.* v. *Meddoui* [1990] A.J. 455, 73 Alta. L.R. (2d) 416 (C.A.) the Alberta Court of Appeal took a flexible approach to the qualification of child witnesses. The Court of Appeal upheld a conviction where two children gave unsworn testimony, indicating that questioning of a child did not have to deal explicitly with whether a child understands the meaning of the "promise to tell the truth".

29. (1990), 9 W.C.B. (2d) 736 (Ont. C.A.).

These rules made it difficult to obtain a conviction since typically there were no witnesses to the abuse other than the victim. Like many discriminatory laws, the old rules about child witnesses in abuse cases were based on the purported "scientific" findings of a by-gone age. These findings were in reality more reflective of social prejudices than of objective scientific inquiry. The rules were premised on the erroneous belief that allegations of sexual abuse were inherently likely to be fabricated. Perpetrators of these acts, invariably men, were considered less likely to lie than those who made the allegations, usually women and children.[30]

In 1940 John Wigmore, the highly influential American authority on evidence, expressed views which are typical of those which shaped the law in this area:

> *Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.*[31]

It was Wigmore's view that adolescent females are particularly subject to mental unsoundness and, therefore, likely to be guilty of pathological perjury in connection with accusations of sexual abuse practiced upon them.[32] These views were shared by many judges and lawyers (who were invariably male),[33] and were purportedly based on both "modern"

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30. The *Badgley Report*, *supra* note 1 at c.7, found that more than 95 per cent of abusers are male, and almost all victims of unwanted sexual contact are females or under the age of 18. A significant portion of victims of child sexual abuse, roughly one-third, are male.

    See also Canadian Centre for Justice Statistics, *Juristat*, vol. 11, no. 8, May 1991, reporting that on a survey in which 98% of those charged with child sexual abuse were male, with 44% of the victims boys and 56% girls.

31. Wigmore, *3 Evidence*, 3rd ed., (1940) at s.924a.

32. *State* v. *Looney*, 240 S.E. 612 (N.C. 1978) summarizing the views of Wigmore. Although the Court in *Looney* rejected Wigmore's recommendation that the female complainant in a sexual assault case should always be subject to a medical examination as to her "social history and mental make up," it did accept his authority for the proposition that (at 618):

    Obviously, there are types of sex offences, notably incest, in which by the very nature of the charge, there is a grave danger of completely false accusations by young girls of innocent appearance, but unsound minds, susceptible to sexual fantasies and possessed of malicious, vengeful spirits.

33. Attention has recently focussed on the question of whether having female judges affects how the courts deal with issues such as child sexual abuse; see, for example, Madam Justice Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

    It would seem that a disproportionate number of recent judgments that have taken a more sensitive, realistic approach to child sexual abuse cases have been written by women. See, for example, *R.* v. *C.R.B.* (1990), 76 C.R. (3d) 1 (S.C.C.), McLachlin J.; *R.* v. *L.E.D.*, [1989] 2 S.C.R. 111, L'Heureux Dubé (in dissent); *R.* v. *G.B.* (1990), 56 C.C.C. (3d) 200 (S.C.C.), Wilson J.; *R.* v. *Edward D.* (1990), 73 O.R. (2d) 758 (C.A.), per Arbour J.; and McLachlin J. in *R.* v. *Khan* (1990), 79 C.R. (3d) 1.

    However, it would be wrong to conclude that *all* female judges are more sensitive to these issues than *all* male judges. For example in *R.* v. *W.L.K.* (1991), 64 C.C.C. (3d) 321 Mr. Justice Stevenson displayed

psychiatry and the experience of "any" judge of a criminal court and "any" prosecuting attorney.[34]

In fact, Wigmore's assertions are erroneous. In a careful analysis of his work in this area, Leigh Bienen concluded that the "scientific" sources cited by Wigmore were most dubious, even in 1940. More recent empirical research clearly establishes that Wigmore was wrong.[35]

> *Wigmore's unequivocal assertion that young girls who complain of sexual assault are likely to be lying is not supported by recent clinical experience or by survey research data. ... In reality, false denials of incest are vastly more common than false complaints.*

While the type of view expressed by Wigmore about the unreliability of victims of alleged incidents of child sexual abuse is wrong, it has nevertheless been highly influential.

Until quite recently, Canadian law set strict requirements for the corroboration of the testimony of victims of sexual offenses. The Crown was required to adduce independent evidence of some material particular confirming that the crime was committed and that it was the accused who had committed it.[36] In the absence of evidence satisfying the strict legal requirements for "corroboration", an acquittal was required, even if the trier of fact was satisfied beyond a reasonable doubt of the accused's guilt. A similar rule required that the evidence of a child who gave unsworn testimony, because of an inability to understand the "nature of an oath," also needed to be corroborated.

The rules regarding corroboration are indicative of the discriminatory attitudes towards children and victims of sexual offences. In recent years these rules have been

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considerable sensitivity to dynamics of abuse in understanding delayed disclosure. This may be contrasted with the comments of Madam Justice McLachlin in *R.* v. *M.H.C.* (1991), 4 C.R. (4th) 1 where she appeared insensitive to the factors which would lead a child not to disclose abuse, despite direct questioning by a teacher.

34. Wigmore, *supra* note 31.

35. Bienen, "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise in Evidence" (1983) 19 Calif. W.L. Rev. 235 at 265. See discussion above on "Children As Witnesses: The Psychological Literature".

36. For an example of the injustice created by the corroboration rule, see *R.* v. *Scott* (1973), 15 C.C.C. (2d) 234 (N.S.C.A.), where the appellate court overturned the conviction of a man on an incest charge involving his 16-year-old daughter. The appellate court held that the fact that she was not a virgin did not corroborate the charge, since it did not specifically implicate the accused. The girl's complaints to her mother and sister about her father were not corroborative since they were not "independent".

    It is ironic, though perhaps not surprising, that in 1990, two years after the statutory repeal of the corroboration rule, the Supreme Court of Canada dealt with what will almost certainly be its last corroboration case, at least for child witnesses, and displayed a much more flexible approach. In *R.* v. *G.B.* (1990), 56 C.C.C. (3d) 181 (S.C.C.) Madam Justice Wilson held that it was only necessary for a child complainant's evidence to be corroborated "in a material particular."

abrogated by statute, as regards complainants in sexual offences[37] in 1983 and for children giving unsworn evidence in 1988.[38]

37. As regards sexual offences, s.246.4 of the *Criminal Code*, R.S.C. 1970, c.C-34, as enacted by S.C. 1980-81-82, c.125 (in force 4 January 1983); child witnesses, ss.246.4 and 586 of the *Criminal Code*, R.S.C. 1970, c.C-34, and s.16 *Canada Evidence Act*, R.S.C. 1970, c.E-10, as amended by S.C. 1987, c.24 (in force 1 January 1988).

    The earlier repeal of the law requiring corroboration for sexual offences probably reflects the greater influence and sophistication of feminist lobbyists as opposed to those who were advocates for children. See I. Vallance "Interest Groups and the Process of Legislative Reform: Bill C-15 — A Case Study" (1988), 13 Queen's L.J. 159 at 162.

38. See *R.* v. *Bickford* (1989), 51 C.C.C. (3d) 181 (Ont. C.A.), where the Court upheld the constitutionality of the repeal of the statutory requirement that the evidence of children must be corroborated. The Court also held that the abolition of the corroboration requirement applied to all trials occurring after 1 January 1988, when Bill C-15 came into effect, regardless of when the alleged offence occurred. See also L. Lane, "The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases" (1987) 36 Catholic U.L. Rev. 793.

Beyond the statutory rules regarding corroboration, a common law rule of practice developed which required that the judge warn the jury of the "frailties" of the evidence of a child, even one giving testimony under oath. The rationale for that rule was articulated by the Supreme Court of Canada in 1962 in *R. v. Kendall*:[39]

> *The basis for the rule of practice which requires the Judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility. (*Wigmore on Evidence*, 3rd ed., para. 506.)*

While this rule applied to any criminal case, it was most frequently applied in cases where children were the victims of alleged sexual abuse, and often where their testimony could not be supported by other evidence. It is interesting that in *Kendall* the authority cited for this rule is Wigmore.[40] As discussed earlier, his views about the inherent lack of reliability of girls and women who have been victims of alleged abuse have been thoroughly discredited.

It is true that evidence of a child *may* suffer from frailties of observation, memory, capacity to communicate, and moral responsibility. But the evidence of *any* witness may suffer from these frailties. Arguably, on a statistical basis, the evidence of accused persons is much less reliable than that of children, yet the law does not require judges to give special warnings about the lack of reliability of the testimony of accused persons in general. Surely the very purpose of a trial is to assess the evidence of the witnesses in this particular case; general warnings about the lack of reliability of a category of witness are not appropriate.

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39. (1962), 132 C.C.C. 216, at 220 (S.C.C.), Judson J. For an example of the rigours of this "rule of practice," see *R.* v. *Quesnel and Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.), where two adult brothers were convicted by a jury of having sexual relations with four girls, aged 13 to 15 at the time of the alleged incidents. The trial judge charged the jury:

    I think you can accept the fact that children of thirteen or fourteen may not be as reliable witnesses as adults but they may be. Children of that age may fantasize and make up things, may bear grudges or something of that nature. But you have to, in essence, assess these witnesses from the witness box and make your own decision but you should bear these things in mind.

    The accused was convicted. The Ontario Court of Appeal held this was an *inadequate caution* as it failed to warn the jury of "the particular weaknesses in the child's evidence so that the real significance of the frailty of her evidence was clear" (at 279), and ordered a new trial.

40. Although Wigmore had particular concerns about the reliability of complainants in child sexual abuse cases, he favoured individualized assessments of competence and credibility of children. (Wigmore, *2 Evidence*, 3rd ed., (1970) at para. 509):

    Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth.

While some judges are continuing to apply the "*Kendall* caution",[41] it is submitted that the better view is that put forward in *R. v. Kubelka*,[42] a 1991 decision of the British Columbia Court of Appeal. The Court reviewed some of the history of the development of this "rule of practice" and concluded that the "assumption" implicit in this rule "is no longer valid and the statutory amendments...reflect its rejection by a society moving to rid itself of such agenda stereotypical thinking". The Court of Appeal concluded that there is no longer any rule requiring special caution before convicting an accused on the basis of the unsupported evidence of a child, though noting that in individual cases the judge in a criminal case may comment to the jury about the credibility of a particular witness. The Court further recognized "the importance of supportive evidence, when it exists, [and] ... the significance that may be attached to its absence in those cases where one would expect it to be there".

As a matter of policy and empirical fact, a general rule about the need to warn of the unreliability of child witnesses is inappropriate.

In its recent *Report on Child Witnesses*, the Ontario Law Reform Commission conducted a thorough review of the literature on the reliability of children and concluded that the statements enunciated in *Kendall* (assuming that they continue to represent the law) should be statutorily abolished.[43]

> *Triers of fact should not be instructed about the frailties of children's testimony or cautioned about the dangers of basing their decision on the uncorroborated testimony of a child, since there is no empirical support for these prepositions.*
>
> *The statements enunciated in* Kendall *have been responsible for transmitting negative views about the reliability of children's evidence....the quality of a child's evidence ought to be judged on an individual basis, as is the situation with adult witnesses.*

The Commission's position seems sound, though as the British Columbia Court of Appeal indicated in *Kubelka*, judges may now feel that they have the authority and responsibility to modify rules of "judge-made" law that no longer reflect social reality, and appear to be without a sound empirical foundation.

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41. Peter K. McWilliams, *Canadian Criminal Evidence*, 3rd ed. (Aurora, Ont.: Canada Law Book, 1988) at para. 26:50100, argues that "some instructions as to the need for caution should still be required," at least for children giving evidence on the basis of a "promise to tell the truth" under the amended s.16 of the *Evidence Act*.

42. 4 C.R. (4th) 338, [1991] B.C.J. 758 (B.C.C.A.). See also *R.* v. *G.B.*, (1990), 56 C.C.C. (3d) 200 (S.C.C.) where Wilson J. noted that the trial judge first acknowledged that he was governed by the admonition of this Court in *Kendall* and acquitted the accused. The Supreme Court of Canada dealt primarily with the issue of corroboration and unfortunately never directly addressed the issue of whether the approach of *Kendall* should continue to be followed. The Supreme Court affirmed the decision of the Saskatchewan Court of Appeal ordering a new trial, with Wilson J. remarking "the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standards on them as it does on adults."

43. Ontario Law Reform Commission, *Report on Child Witnesses* (1991) at 48.

IV. RECOGNIZING THE DIFFERENCES: DISTINCTIVE TREATMENT FOR CHILDREN

Historically children have been expected to conform to unrealistic, adult expectations in the strange and often hostile atmosphere of the courtroom. More recently, there has been a growing understanding of the need to recognize that children are different from adults, and that the criminal trial process can be modified to accommodate these differences. Such accommodations can reduce the trauma to children from the court process and enhance the ability of the courts to ascertain the truth[44] without violating fundamental rights of accused persons.

1. Closed circuit television and screens

Parliament has recognized that victims of child sexual abuse may be traumatized by the process of testifying in court. Children are invariably more than simply nervous about being in court; they often are afraid of facing their assailant again. There have, for example, been cases involving children so frightened of the accused while testifying that they were physically ill on the witness stand and the prosecution had to be stopped, or so frightened that they were unable to answer questions.[45]

In Bill C-15 Parliament adopted procedures developed in the United States to permit a child in a sexual offence case to testify from behind a screen or from another room via closed circuit television. In order to use this provision, s.486(2.1), the Crown must establish an "evidential base", and must satisfy the court that this "is necessary to obtain a full and candid account of the acts complained of." This will usually be done by calling evidence, in the absence of a jury, from parents, social workers, the child, or others about the child's apprehension of court or the accused.

The Ontario Court of Appeal held in *R. v. Paul M.*[46] that a trial judge has "substantial latitude" in deciding whether to order that a screen or closed circuit television be

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44. For an example of the difficulties children face in court and the effects that this has on the truth seeking function of the court process, see, "Mistrial declared in sex assault case: Witness in hospital for stress" *The [Toronto] Globe and Mail* (23 June 1990) A4, involving a 16-year-old girl testifying against her stepfather, who was accused of sexually abusing two stepdaughters and a son.

    There is a need for more empirical research into the effects of the trial process on children. See, for example, Schwartz-Kenney, Wilson and Goodman, "An Examination of Child Witness Accuracy and the Emotional Effects of Testifying in Court" in K. Oates, ed., *Understanding the Meaning of Child Sexual Abuse* (Sydney: Harcourt, Brace, Ianovich, 1990).

45. See e.g. London Family Court *supra* note 2 at 114.

46. *R.* v. *Paul M.* (1990), 1 O.R. (3d) 341.

employed, and that the evidence need not "take any particular form". It thus seems clear that it is not necessary for the judge to hear evidence from the child before making a ruling.[47]

Children have given evidence from behind screens or from another room by closed circuit television in a number of cases in Canada. However, at least one judge has taken a very narrow view of this section, requiring the Crown to prove that a child has a specific fear of testifying in the presence of the accused, as opposed to a general apprehension of testifying in court. In that case, shortly after the ruling that the child could not testify via closed circuit television, the six-year-old complainant was actually confronted by the presence of the accused in the hallway outside of the court and as a result was so distraught that she was unable to testify.[48] It is submitted that this interpretation is unduly restrictive, since the words of the statute do not specifically require proof of fear of the accused, though this will usually be an important aspect of the Crown's request.

In *R. v. Paul M.* the Ontario Court of Appeal emphasized that there must an "evidential base" for making an order under s.486(2.1) that must satisfy the court that the concerns about the child's testifying in the presence of the accused will affect the child's ability to give a "full and candid account". The Court of Appeal observed that the evidence did not have to take any particular form, nor did it need to "be a litany containing the words of the statute, but, at least it must have some reasonable relevance to the necessity requirement of the statute".

The Court of Appeal has thus emphasized that the purpose of this provision, and the focus of inquiry concerning its use, is not prevention of trauma to the child, but rather on promoting a full inquiry into the facts alleged. Of course, there is a strong linkage between the issues. A child who is emotionally traumatized by the experience of testifying will inevitably be unable to give a "full and candid" of the acts complained of. However, as illustrated in *Paul M.*, it is not sufficient for an order to be made under s.486(2.1) for the child to simply state on the witness stand: "I don't like him. I don't want to know that he's there". The Crown must adduce evidence linking the child's emotional state to the ability to give a full account of the events in question. "Mere discomfort" on the part of the child will not be sufficient.

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47. In the American decision of *Craig* v. *Maryland*, 588 A. 2d 328 (Md. 1991) the court ruled that before permitting a child to testify via closed circuit television, the judge should personally observe and interview the child, if possible in the accused's presence. The court ruled that this was required by the American Constitution's Confrontation Clause, which has no direct Canadian equivalent.

    It is the author's view that such judicial interviewing is not required by the Canadian statute or by the *Charter of Rights*. Since there is no provision for removing the accused while the judge or counsel examines a child, it would seem that any questioning of the child would have to be in the presence of the accused, which would defeat the purpose of having an order made (see s.650 of the Code). This reinforces the view that it is not a requirement of Canadian law that a child be examined.

48. *R.* v. *Brian Dick* (18 August 1988) (Prince Rupert Registry 10344) (B.C.S.C), Rowles, J. The description of subsequent events provided by Crown Attorney in the case, W. Harvey at a presentation given at the National Consultation on Child Sexual Abuse on 30 May 1989 in Ottawa. A broader interpretation of s.486(2.1) was taken in *Ross*, *supra* note 24, where a seven-year-old child was permitted to testify by closed circuit television, with the Court emphasizing the child's young age, shyness, and relationship to the accused, without considering whether she had a specific fear of the accused.

In *R. v. Paul M.* the Ontario Court of Appeal also held that because the use of a screen or closed circuit television is intended to be a "neutralizing factor to meet one or more of the inhibitions to which non-adult witnesses may be prone....[it] would defeat these general purposes" if a judge were required to suggest to a jury that this factor weighs against the credibility of the child. The Court did, however, suggest that a trier of fact "will naturally take this into account with a host of other factors in assessing the credibility of the witness".[49]

If a screen is used, a common practice is to place a one way screen beside the child so that the child cannot see the accused, but the accused can see the child. Alternatively, a one way screen is sometimes placed in front of the accused, to block the child's view of the accused. It is also possible to use a totally opaque screen to block the child's view of the accused.

Closed circuit television has been used on occasion in Canada and has the advantage of totally removing the child from the court room and the presence of the accused. However, Crown prosecutors appear to be reluctant to request its use, partially due to expense and also because of a fear that it might disrupt the normal "flow" of a trial. Section 486(2.2) is premised on the expectation that the child and counsel will be in one room, with a video and audio link to the court. Both counsel must be able to communicate with the judge, for example to rule on objections, and "the accused must be able to privately communicate with his counsel while watching the testimony.

In *R. v. Levogiannis*[50] the Ontario Court of Appeal ruled that s.486(2.1) did not violate the *Charter of Rights* guarantees to be treated in accordance with the "principles of fundamental justice" (s.7) and to have a "fair trial" (s.11(d)). The Court also observed that even if these rights were infringed, the use of a screen or closed circuit television in accordance with this provision was acceptable under s.1 of the *Charter of Rights*, as a "demonstrably justified" limit on the rights of accused persons. *Levogiannis* involved a 12 year old boy, who alleged that he was sexually fondled by an adult who was a volunteer in an organization that provided support for children who were having troubles. The trial judge permitted the boy to testify from behind a one way screen that blocked the boy's view of the accused.

Justice Morden accepted the "general truth" of the proposition that it is "more difficult not to tell the truth about a person when looking at that person eye to eye", but recognized that it is important not to "dogmatize about this — and in some cases...eye to eye contact may frustrate the obtaining of as true an account from the witness as is possible". The judge noted that "the prevention of trauma is not the expressed object of our legislation

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49. *R.* v. *Paul M.* (1990), 1 O.R. (3d) 341 (C.A.).

50. (1990), 1 O.R. (3d) 351 (C.A.). See also *R.* v. *Ross* (1989), 90 N.S.R. (2d) 439 (N.S.C.A.) rejecting a challenge to use of the closed circuit television provision as violating the accused's "common law" and statutory rights to be present at his own trial. The Court did not deal with a *Charter* challenge.

In *Maryland* v. *Craig*, 58 U.S.L.W. 5044 (U.S.S.C. 1990), the United States Supreme Court upheld the constitutionality of legislation allowing a child in a sexual abuse case to testify via closed circuit television provided the judge is satisfied that testifying "in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."

although...the trauma of the witness may, in many cases, be the most important factor to be considered in deciding whether the statutory requirement has been met". Justice Morden quoted with approval from an article by an Ontario Crown Attorney:[51]

> *Common sense, common experience of practitioners of criminal law and studies show that children are particularly mentally distressed by being in a court-room. Their most common fear related to criminal proceedings is facing the accused. They are also afraid of cross-examination, not being believed, breaking up their family, putting a parent into jail and being accused of consenting, lying or fantasizing. Child victims tend to blame themselves for the offences and, therefore, also feel guilty and ashamed. Unfortunately, such feelings lead to anxiety which can lead to less accurate testimony and greater susceptibility to inaccurate suggestion.*

The Ontario Court of Appeal also stated in *Levogiannis* that the accused had a right to call his own evidence prior to a decision being made as to whether use of a screen or closed circuit television was necessary. The Court appeared to indicate that the accused should be notified prior to court that an order would be sought, or could be granted an adjournment to allow time to prepare evidence for such a hearing.

The Court of Appeal accepted that the Crown adduced sufficient expert evidence in this case to have an order made under s.486(2.1), even though the boy had testified at the preliminary inquiry without a screen. The Court relied on statements of Dr. Louise Jas, of the London Child Witness Project, that there were "differences in time" and the boy was "increasingly...having trouble dealing with this event". The Court ruled that it was not necessary for the trial judge to attempt to see if the boy could give evidence without a screen before making the order, noting that in some cases this would be "wrong and self-defeating".

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51. 1 O.R. (3d) 351 at 376. Quoting from C.F. Graham, "Sequestration Screens for Young Complainants in Criminal Prosecutions: Early Developments in Canada" (1990) 32 Crim. L.Q. 229-252.

2. Exclusion of the Public

The *Criminal Code* s.486(1) allows for the exclusion of some or all members of the public from some or all of a trial if their presence in the court room is not consistent with the "proper administration of justice".

The courts have stated the fact that a case involves a sexual offence or evidence that may be "embarrassing" to a witness is not sufficient reason to exclude the public.[52] There is an onus upon the Crown to satisfy the court that it will be "more difficult" for a witness to testify in the presence of members of the public, or that the presence of too many persons may cause the witness to be unable to testify.[53]

On account of their vulnerability, one would expect that it would be easier to satisfy the criteria for obtaining an order under s.486(1) in cases involving a child or adolescent than ones involving adult complainants. In one British Columbia decision a judge made an order to exclude the public from a trial involving a teenaged complainant, even though the public was not excluded from the preliminary inquiry. The judge wrote:[54]

> *Bill C-15 illustrates the legislative intent to broaden the right of children with respect to judicial procedures. Accordingly the proper 'administration of justice' should be interpreted broadly to meet that legislative intent. I think that on the basis of what I have heard from ... [the complainant's] mother and her therapist, her anxiety and stress will be heightened in the presence of the public in the courtroom, and will, by virtue of that fact impair her ability to testify as a result.*

It should be noted that s.486(1) gives a judge a discretion to exclude "all or any members of the public". In order to facilitate the child's testimony if may only be necessary to exclude members of the family of the accused. In some cases it may be necessary to exclude all members of the "public", in order to facilitate the child giving evidence, but in making such an order the court should exempt a social worker or other person who is acting as a support person to the child; exclusion of such a person is not necessary to achieve the order's purpose, and indeed might undermine its effectiveness.

3. Publication Ban

Under s.486(3) of the *Criminal Code* in any case involving a sexual offence, a court may make an order directing that "the identity of the complainant or of a witness and any information that could disclose the identity...[of that person] shall not be published...or broadcast in any way". Children under the age of 18 must be informed of their right to seek a publication ban, and if an application is made on or on behalf of a child, the court must

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52. *R.* v. *Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.); *R.* v. *Warawuk* (1978), 42 C.C.C. (2d) 121 (Alta. C.A.).

53. *R. v. Lefebvre* (1984), 17 C.C.C. (3d) 277 (Que. C.A.).

54. *R.* v. *Allan* (3 October 1989) (Vancouver Registry No. CC882079) (B.C. Co. Ct.), Allen J.

make the order [s.486(4)(b)]. An accused has no right to seek a publication ban, though if the court is satisfied that publication of his identity would reveal the child's identity, the order may cover him as well,[55] this could most obviously occur if a man is charged with incest, publishing his name would effectively reveal his daughter's identity.

Although a publication ban restricts the constitutionally protected freedom of the press, the constitutionality of this provision, at least as it regards complainants, has been upheld as it is intended to protect victims from the trauma of widespread publicity and thereby facilitate disclosure and prosecution for what have historically been offences that frequently are not prosecuted.[56]

4. Videotapes

Section 715.1 of the *Criminal Code*, also enacted as part of Bill C-15, permits a court dealing with an offence involving child sexual abuse to admit "a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of...if the complainant adopts the contents of the videotape while testifying." This provision does not eliminate the need for the child to testify, as the videotape is received *in addition to* the child giving evidence.

Initially the practice of videotaping investigative interviews with children in sexual abuse cases was undertaken for the purpose of eliminating the need to subject the child to repeated interviews, by allowing the tape to be shared with investigators from different agencies, as well as with therapists. Repeated interviewing is potentially traumatic. In some cases repeated interviewing may even have the potential to give the child the impression that the allegations are not being believed by the investigators, or might cause the child to begin to embellish on details of the abuse, or be affected by repeated suggestions from different interviewers.

In addition, even if they are not admissible in criminal court, videotapes may be useful in securing guilty pleas if shown to the accused prior to trial. The videotape may demonstrate that the child is likely to be a convincing witness. Further, there is a psychological tendency for those who are guilty of abuse to deny to themselves what they have done. Particularly in cases of intra-familial abuse, viewing the videotape of a child's statement may cause an abuser to take responsibility for his acts and plead guilty.[57]

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55. *R.* v. *London Free Press* (1990), 75 O.R. (2d) 161 (Ont. H.C.), per Granger J. See also *R.* v. *Dalzell* (1991), 2 O.R. (3d) 498 (C.A.) holding that an accused person has no right to seek an order prohibiting the publication of identifying information.

56. *R.* v. *Canadian Newspapers Co.* (1988), 65 C.R. (3d) 50 (S.C.C.).

57. J.R. Spencer & R.H. Flin, *The Evidence of Children: The Law and the Psychology* (London: Blackstone Press, 1990), 162-163 cite English, American and Canadian reports on the increase in guilty pleas when videotapes of children's interviews are available. The authors comment that: "as far as inducing guilty pleas is concerned, the videotape is surely much more likely to have this effect if it is admissible in evidence, and the defendant and his lawyers know this."

Videotapes may also be admissible in child protection or other civil proceedings which may affect the child's future well-being, and in these proceedings may sometimes be shown *instead of* having the child testify, thereby reducing the trauma of these civil proceedings to the child.[58]

In enacting s.715.1 Parliament intended to facilitate prosecutions for child sexual abuse cases. The videotape of an interview made within a reasonable time after the alleged offence in a relatively relaxed setting should serve to give the trier of fact a fuller account of the incident than testimony given months or even years later in the more intimidating environment of a court room. The English scholars Spencer and Flin observe:[59]

> *The first and most obvious advantage of a videotape of an early interview is that it enables the court to hear an unquestionably accurate account of what the child was saying about the incident at the time it first came to light, before time wiped certain details from his or her mind, and prompting or questioning by adults implanted others. This is important, in order to secure the acquittal of innocent defendants as much as to secure the conviction of those who are guilty. It has become all the more important as the delay between a complaint being made and the eventual trial has grown in recent years....*
>
> *As well as telling us exactly what the child said, an early tape would tell us how he said it. In the course of being questioned, little children often pick up the adult words for sexual acts. They then use these when giving evidence in court, which often leads to the suggestion that they have been coached.*

Further, in some situations, use of a videotape may reduce the amount of time that a child will spend giving testimony. This might serve to reduce the secondary trauma which children experience as a result of their involvement in the court system.

Even if not shown in court, the videotape may be useful to show to a child prior to testifying to remind the child of details of the incident.

In enacting this provision Parliament believed that the accused's rights were adequately protected. The videotape is not admissible unless the child adopts the contents while testifying, and is available for cross-examination.

In some circumstances the existence of the videotape may be an advantage to the accused, for example, if there are suggestions that the interviewer improperly coached or pressured a child into making a statement. Defence counsel may also exploit discrepancies between statements made on the tape and those given on the witness stand. Some investigators

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58. See *Minister of Health and Community Services* v. *R.B.* (1991), 31 R.F.L. (3d) 456 (N.B.Q.B.), but *contra Re B.* (1991), 31 R.F.L. (3d) 219 (Ont. Prov. Ct.).

59. Spencer & Flin, *supra* note 57 at 161.

of child abuse cases recognize that a videotape is "a double-edged sword" and may be reluctant to make them because of their potential utility for the defence.[60]

Videotapes have been admitted under s.715.1 at preliminary inquiries and trials in several provinces, but there is continuing controversy about the appropriate interpretation of this provision, as well as in regard to its constitutionality.

In a 1989 Alberta Queen's Bench decision, *R. v. Thompson*,[61] MacKenzie J. ruled that s.715.1 violates ss.7 and 11(d) of the *Charter of Rights*. With no real discussion, the judge concluded that this provision "goes very, very far in departing from the general rule that an accused person will not be convicted except in accordance with the principles of fundamental justice and ... only have ... guilt proven ... by a fair and public hearing." The judge then engaged in a s.1 analysis, concluding that s.715.1 imposed "arbitrary" and "disproportionate" limits, since it applied to any complainant under the age of 18 in a sexual offence case. Unlike the videotape and screen provision, s.486(2.1), there is no need for an individualized determination of the need for a videotape to minimize trauma to the child or assist the trier of fact in obtaining the best evidence.[62]

Despite the conclusory tone of *Thompson*, it is not obvious that the use of videotapes violates the precepts of procedural fairness embodied in ss.7 and 11(d) of the *Charter*. Under s.715.1 the videotape is only admissible in evidence if the child adopts the contents while testifying, and is available for full cross-examination about the circumstances in which the videotape was made, the contents of the tape, and in regard to any other matters related to the alleged offence.

In his judgment MacKenzie J. argued that allowing cross-examination may not be adequate:

> *the complainant might simply freeze, as sometimes happens in these cases, where they just will not talk. The won't answer questions no matter how nicely you ask, or they become very vague.*

If a child is unwilling or unable to answer questions during cross-examination, this will reduce the weight to be given the evidence given in examination-in-chief, including the

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60. One of the most extensive videotape projects for child witnesses has been in Manitoba. Over 600 videotapes were made, though very few were used at trial. By June 1989, tapes were admitted at 5 preliminary inquiries and two trials; in one of the two trials it was defence counsel who tendered the videotape for the purposes of attacking the child's credibility. See A. McGillivray, "Abused Children in the Courts: Adjusting the Scales After Bill C-15" (1990) 19 Man. L. Rev. 549 at 567-569.

61. (1989), 68 C.R. (3d) 328 (Alta. Q.B.)[hereinafter *Thompson*]. The Crown was unable to appeal the ruling in *Thompson* since the accused was convicted despite the refusal to admit the videotape. See accompanying critical annotation in Criminal Reports by N. Bala at 335-40. *Thompson* was followed in *R.* v. *Christensen* (1989), 8 W.C.B. (2d) 8 (Ont. Dist. Ct.), McMahon Dist. Ct. J.

62. Significantly, MacKenzie J. accepted that "if it was directed simply at very young children [s.715.1] would be very compelling". This indicates that even if *Thompson* is upheld, Parliament may enact more narrowly drafted legislation to pe~~t use of videotapes in criminal prosecutions of child sexual abuse.~~

videotape. It is, however, submitted that it is wrong to find that s.715.1 is unconstitutional because some children *might* not answer questions during cross-examination.

In *R. v. Kilabuk*,[63] de Weerdt J. rejected the approach of *Thompson*, and held that s.715.1 did not violate the *Charter*, since the accused still has the right and opportunity to cross-examine the child. The judge commented that

> *The special problems faced with very young witnesses, particularly where giving an account of traumatic events in their lives, made use of a videotape necessary if their evidence is to be heard at all in many cases.*

In *R. v. Kilabuk*, the judge ruled that he had the discretion to exclude a videotape in situations where "undue prejudice to the accused" can be shown, indicating that if a videotape is "replete with otherwise objectionable hearsay, grossly misleading questions or suggestions [by the interviewer] concerning material issues of fact", it may be excluded. The court also indicated that it could consider the circumstances in which a videotape was made to ensure that there was no "coaching of the witness through off camera cues and so forth". It is clear that investigators should use care in conducting videotaped interviews.

In its 1990 decision in *R. v. Meddoui*[64] the Alberta Court of Appeal made several important rulings in regard to s.715.1. While the Court was apparently not asked to rule on its constitutionality, the Court clearly recognized the value of s.715.1 and generally gave the provision a liberal interpretation. The Court ruled that it could be used whether the child gives sworn or unsworn testimony, and that the term "acts complained of" in s.715.1 was to be interpreted to allow the child to also provide a description of the assailant.

The Court of Appeal recognized that

> *a very early account may be of more probative force than present testimony....Where the child might remain almost mute in the traditional method of inquiry, question and answer, he might divulge much in casual spontaneous activity, even play activity, at the tape interrogation ...the child might even report a fact unselfconsciously.*

The Alberta Court of Appeal also held that the videotape is itself admissible as proof of its contents, though its weight as evidence will depend on all of the factors relevant to its making, including whether the child is perceived as having had a "motive to lie or been under pressure" to not tell the full truth. The Court also suggested that a situation where the child is prepared to "adopt" its contents on the witness stand but "cannot recall and affirm what is on the tape...is probably a case for the judge to give the jury a special warning". The Court also observed that if the child can give a full account of the alleged abuse on the witness stand, it may not be useful to submit a videotape, though this would be the Crown to decide.

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63. (1990), 11 W.C.B. (2d) 70, 2 C.R. (4th) 350 (N.W.T.S.C.). Section 715.1 was also held not to violate ss.7 or 11(d) of the Charter in *R.* v. *K.B. and R.B.*, unreported, June 28, 1990, Alta. Q.B. per Power J.; and in *R.* v. *Toten*, Jan. 24, 1991, Ont. Dist. Ct.; under appeal to Ont. C.A.

64. (1990), 61 C.C.C. (3d) 345 (Alta. C.A.).

In its 1991 decision in *R. v. Laramee*[65] the Manitoba Court of Appeal adopted a very different approach from the Alberta Court of Appeal to s.715.1. The Manitoba Court of Appeal ruled that s.715.1 of the *Criminal Code* violates s.7 and 11(d) of the *Charter of Rights* and cannot be saved under s.1 as "demonstrably justified in a free and democratic society", though Justices Twaddle and Helper took different approaches to the issue of the provision's constitutionality.

Justice Twaddle began by reviewing jurisprudence dating from the seventeenth century establishing the principle that "only the best evidence available may be admitted in a criminal case", and concluded that "the right of cross-examination ensures that the evidence given by a witness is the very best available from that witness". Justice Twaddle concluded that the "reliability of a recollection recounted long before the trial" cannot be adequately tested at trial "when the memory has faded".

Madam Justice Helper emphasized that s.715.1 violates the historic common law rule prohibiting admission of "previous consistent statements". She expressed concern that children could be misled by interviewers, remarking that "young people have difficulty separating suggestion from reality". She concluded that s.715.1 is "inconvenient, ineffective and grossly unfair to the accused". She was especially concerned that the fact that an accused cannot challenge the statements of the child at the time that these are made:

> *Cross-examination by the accused at a time unrelated to the giving of direct testimony hampers the opportunity of the accused to challenge that evidence and to test it effectively.*

The Manitoba Court of Appeal decision in *Laramee* is disappointing for its extensive reliance on archaic notions of evidence law, developed in the nineteenth century and earlier. The videotape provision is clearly intended to be an innovation to the Canadian system of justice,[66] by improving the quality of evidence received. As stated by a representative of the federal government when Bill C-15 was introduced:[67]

> *The videotape...is a means of getting the child's earlier statement before the court in the belief that that early statement will be an accurate and, hopefully, more complete account as to what took place.*

Section 715.1 should be seen as enhancing the truth seeking function of the judicial process, while preserving the accused's right to challenge the accuracy of the child's statement, both by permitting cross-examination of the child and by permitting inquiry into

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65. [1991] M.J. 339 (C.A.).

66. As of 1988, 33 American states had some form of videotape provisions for cases involving children, and similar proposals are under consideration for Britain and Australia. The American statutes vary, though most utilize a pretrial deposition before a judge that permits cross-examination. See Campbell "LB 96 and the Confrontation Clause: The Use of Videotaped and In Camera Testimony in Criminal Trials to Accommodate Child Witnesses" (1989), 68 Neb. L. Rev. 372.

67. R.G. Mosley, General Senior Counsel, Department of Justice Proceedings of Standing Senate Committee on Legal and Constitutional Affairs, Nov. 20, 1986, at 11:23. For a full critique of *Laramee*, see A. McGillivrary, "Laramee: Forgetting Children, Forgetting Truth" (1991), (forthcoming) C.R. (4th).

the circumstances in which the videotape was made. Further, as is quite common, the defence rests on the premise that the child was improperly coached or interviewed, the existence of a videotape may be a potentially important piece of evidence for the accused. Without s.715.1, such tapes are less likely to be made.

Even if s.715.1 is unconstitutional, videotaping may have considerable utility for reducing repeated interviewing of child abuse victims by different professionals and may be admissible in civil cases.[68] It should also be appreciated that regardless of the constitutionality of s.715.1, the accused is likely to have the right to view the videotapes to prepare for his trial, and will be permitted to use them in court to attempt to impeach the child's credibility if there is inconsistency between the child's testimony and the videotape.

5. Recognizing the capacities of children

In *R. v. G.B. et al.*, Justice Wakeling of the Saskatchewan Court of Appeal acknowledged the need for greater judicial sensitivity in the assessment of the reliability of child witnesses, and the significance of their silence or vagueness during cross-examination:[69]

> *... I am of the opinion the trial judge erred in utilizing and applying strictly an adult standard for the assessment of credibility of the youths that appeared before him. Although the cross-examination was conducted quite reasonably in these trials (but sometimes by as many as three counsel), I find it unremarkable that the youthful witness would eventually find shelter in silence or simply agreement with counsel's suggestions. Nor do I find it difficult to understand that the trauma resulting from the incidents of assault would prevent a witness from having an accurate and detailed recall of the event, even if it were being recalled on the day it occurred. In the same way that adult standards would not be suitable to gauge the conduct of youths in physical, mental, social, or other aspects of human activity, it is equally unacceptable that such a standard be applied without modification when measuring the credibility of their testimony.*

This decision was appealed to the Supreme Court of Canada, and affirmed there, with Madam Justice Wilson quoting this passage from Justice Wakeling and commenting:[70]

> *... this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children. ... Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his*

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68. As discussed below, in *R.* v. *J.T.*, [1991] O.J. 831 (Ont. Prov. Ct.), it was held that a videotape of the interview of a 4 1/2 year old child was admitted as hearsay evidence *instead* of the child testifying, the child being unable to testify in court and hence being ruled "unavailable".

69. (1988), 65 Sask. R. 134 at 150 (C.A.).

70. (1990), 56 C.C.C. (3d) 200, at 219-220 (S.C.C.).

> *concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed, but the standard of the 'reasonable adult' is not necessarily appropriate in assessing the credibility of young children.*

It must be appreciated that the silence or vagueness of children during cross-examination is often a reflection of the form and nature of the questioning. Prolonged questioning without a break may be insensitive to a child's needs and abilities, and can result in a child's failing to adequately respond to questions.[71] An intimidating or unduly complex question may also result in silence. The best way to ensure that child witnesses do not freeze is for judges to ensure that questioning occurs in a fashion which is appropriate to their age.

Judges obviously have a key role in ensuring that the court is not a hostile environment for children. Judges should ensure that there are recesses in the proceedings consistent with the child's attention span and needs. Young children should, for example, be aware of their "right" to have the proceedings recessed to allow them to go to the bathroom. Young children should be permitted to take a favourite toy with them to the witness stand. In appropriate cases, children might be accompanied to the stand by a neutral adult, and should be permitted to sit in a chair appropriate to their size.[72]

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71. Crown prosecutors, police, social workers, and other professionals also have an important role in ensuring that children are adequately prepared for court. Increasingly child victim witness support workers are being employed to assist in this role. For a description of the positive effect of a victim witness program on children and its potential to increase the conviction rate by providing support to children during the court process, see London Family Court Clinic *supra* note 2.

    While non-lawyers can have a critically important role in helping children understand and deal with the court process, they must be careful to avoid suggestions that they have improperly coached a child. The Crown prosecutor should take the lead in directly preparing the child for testifying.

72. For a discussion of some steps that can be taken to reduce the trauma that a child may experience when testifying, see Jean-Gilles Lebel, *Reducing the Trauma of Testifying: Bill C-15 and the Child Victims* (1989), Institute for the Prevention of Child Abuse, 25 Spadina Road, Toronto, Ontario M5R 2S9.

    A judge must, however, also maintain the appearance of impartiality. This was emphasized in *R.* v. *Wallick*, [1990] M.J. 650 where the Manitoba Court of Appeal ordered a new trial after a conviction in sexual assault case involving an adult complainant on the grounds that the trial judge was "overly zealous in her apparent desire to protect the complainant from having to relive unnecessarily the events which gave rise to the charge". The appeal court expressed concerns about the trial judge "interjecting answers on behalf of the complainant in response to critical questions posed in cross-examination", though another interpretation was that the trial judge simply indicated the answers that the complainant had already given to repeated questions. The appeal court also expressed concerns about the trial judge "compartmentalizing" the cross-examination by asking defence counsel to complete questioning about the actual alleged assault prior to a lunch recess.

V. COMMON LAW EVIDENCE RULES — PRIOR STATEMENTS, EXPERTS, AND SIMILAR FACTS

In order to convict a person, a court must be satisfied beyond a reasonable doubt that the alleged offence was committed by the accused. In a child sexual abuse case, the central issue is often one of credibility. Is the child making the allegation to be believed? There are particular difficulties of proof in these cases, as there is often no other witness who has observed the offence. It is a crime typically carried out in secret. Further, children who are victims of abuse often are threatened or feel guilty about their victimization, and frequently do not disclose until long after the offence occurred. This may make it impossible to obtain physical evidence to support the allegation. In any event, in cases involving fondling or exposure, there is often no physical evidence of abuse, though there may be significant psychological damage.

In the past, difficulties of proof made the police very reluctant to lay charges in child sexual abuse cases. Legislative changes, for example concerning the admissibility of videotapes, have made it easier to prove abuse. Canadian judges have also begun to display a more realistic attitude through the development of common law rules governing the admission of prior out-of-court statements of children, expert evidence and evidence of prior incidents of abuse by the accused. This type of supportive evidence may be highly relevant, and can assist a trier of fact in discovering the truth of the allegations.

1. Child's Prior Statements and Hearsay

There is a general rule of evidence that previous statements made by a witness consistent with the testimony offered in court are not admissible. Such statements are considered irrelevant and self-serving, and contests over their accuracy might needlessly prolong trials.[73] Further, if the child is not called as a witness, any statements made by the child to others are normally regarded as hearsay and inadmissible for that reason.

The general rules about the exclusion previous consistent statements and hearsay are basically sound. However, they should not be applied so strictly that the trier of fact is deprived of highly relevant and probative information. Not infrequently in child sexual abuse cases, the initial disclosure of abuse by the child to a parent or another trusted person is graphic and directly supportive of the allegations which form the basis of the charge. Recent appellate decisions demonstrate a willingness to admit this type of evidence in a variety of situations.

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73. The "recent complaint rule" was an important but unfortunate exception to the rule barring previous consistent statements. The courts were prepared to allow evidence of a statement made by a victim of a sexual attack, provided the statement was a "recent complaint", that is one made "at the first reasonable opportunity" after the attack. However, if no complaint was made at the first reasonable opportunity, the court would draw an adverse inference against the credibility of a victim. This rule was based on the erroneous and biased belief that "genuine" victims of sexual assaults would complain at the first opportunity, whereas, in reality, a sense of shame or guilt, and fear or threats often precludes early disclosure. The recent complaint rule was abrogated by s.275 of the *Criminal Code* in 1983.

In *R. v. Owens*, the Ontario Court of Appeal ruled that in a case where children testified that their parents could also testify about statements made to them by their sons about an alleged sexual assault by their teacher. Lacourciere J.A. wrote:[74]

> *One special circumstance to be considered in the exercise of judicial discretion in this area is the tender age of the principal witness. The voluntary and spontaneous account of an improper act, given by a child to his father or mother, may reasonably be thought to be free from suspicion. Such statements should be admitted when it is contended that the child's sworn evidence is the result of parental suggestions and influence. ...*
>
> *It is not necessary to show that an allegation of recent fabrication has been expressly made before the prior consistent statement becomes admissible. ... The allegation may be implicit from the conduct of the case.*

The Court in *Owens* limited the purpose for admitting the statements to establishing consistency and thereby restoring the children's impugned credibility. However, the decision illustrates sensitivity to the dynamics of the disclosure of child sexual abuse.

In *R. v. Beliveau*[75] the British Columbia Court of Appeal held admissible statements made by a five-year-old girl to her mother, for the purpose of showing the response of the accused when confronted by them. This permitted the trier of fact to know precisely what the allegations were and so properly assess the accused's response to the mother's accusation. The Court also held that a pediatrician could testify about statements made to him by the child, as the basis for his expert opinion that the child had been abused. The child in *Beliveau* gave unsworn testimony.

In *R. v. Khan* the Ontario Court of Appeal ruled that a mother could testify about statements made by her three-and-a-half-year-old daughter about 15 minutes after an alleged sexual assault by a doctor, even if the child did not testify and these statements were technically hearsay. Robins J.A. ruled that this was admissible under the "spontaneous declaration" (*res gestae*) exception to the hearsay rule:[76]

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74. (1986), 33 C.C.C. (3d) 275, at 280-81 (Ont. C.A.). In *Leonard*, (1990), 54 C.C.C. (3d) 225 (Ont. C.A.), the Court appeared to restrict *Owens* to situations where the defence is alleging "recent fabrication or want[s] the evidence ... to attempt to prove an inconsistency in the children's testimony at trial." See, however, *R.* v. *G.W.M.*, [1990] O.J. 1495 (C.A.) where the Court admitted reply evidence from the Crown of a child's prior statements about abuse to rebut defence allegation of fabrication.

75. (1986), 30 C.C.C. (3d) 193 (B.C.C.A.)[hereinafter *Beliveau*].

76. (1988), 42 C.C.C. (3d) 197, at 211 (Ont. C.A.). It seems clear from the case that the Court would have admitted this evidence even if the child did not testify, though on the facts the Court also ruled that she was competent to give unsworn evidence.

    See also *R.* v. *Malette* (1988), 6 W.C.B. (2d) 341 (Ont. Dist. Ct.), where a statement made by a three-year-old child to her mother nine hours after the alleged sexual assault was admitted on the basis of the principle articulated in *Khan*.

    For an American case admitting a child's out-of-court statement under the "excited utterance exception" to the hearsay rule, see *Lancaster* v. *People*, 615 P.2d 720 (Colo. 1980). See also *People* v. *White*, 555

The fact that the child made her statement in response to this general question does not warrant the statement being characterized as narrative. The mother's total lack of suspicion or animosity towards the respondent together with the ingenuousness and guilelessness of the child in her recounting of the alleged happening can only lead to the conclusion that her statement was not likely infected with device or afterthought. While the nature and import of the alleged act were not fully understood by the child, and she did not appreciate that what she said the doctor had done was wrong, the act was so out of the ordinary as to be clearly capable of producing an ongoing effect on her and prompting a spontaneous statement at a time following the event....Given the child's age and the very brief time that elapsed between the alleged sexual act and the statement, the danger of fabrication appears remote.

The Supreme Court of Canada affirmed the decision of the Court of Appeal in *Khan*, though taking a different, and arguably broader, approach to the admissibility of this type of statement. Madam Justice McLachlin observed that there is a "need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse," but indicated that it was unnecessary to stretch the spontaneous declaration rule to deal with this situation.

Rather than apply the spontaneous declaration rule, McLachlin J. utilized the more lexible test of "necessity and reliability":[77]

> *The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court* might be traumatic *for the child or harm the child might also serve....*
>
> *The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable.*
>
> On the facts of the case, McLachlin J. ruled the statement admissible.[78]
>
> *I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's viva voce evidence having been rejected. It was also reliable. The 8child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not*

N.E. 2d 1241 (Ill. App. 1990), cert. granted 59 U.S.L.W. 3741 admitting statements made by a 4 year old child to her mother and a police officer as "spontaneous declarations".

77. 79 C.R. (3d) 1 at 13-14 (S.C.C.). [Emphasis added]

78. 79 C.R. (3d) 1, at 15 (S.C.C.).

be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence. Having said this, I note that it may not be necessary to enter the statement on a new trial, if the child's viva voce evidence can be received....

The courts have begun to apply *Khan* while there is still some controversy over its interpretation, most judges seem to be taking a flexible approach.

For example, in *R. v. K.O.S.*[79] Judge Wetmore of the British Columbia Supreme Court applied *Khan* to admit the statement of a 3 year old child to her grandparents concerning allegations of sexual abuse by her mother's common law husband. The statements were made in the two days following the incidents. The child later refused to discuss the events with investigators, and the judge accepted this as a situation of "necessity" for receiving the hearsay evidence. The judge received expert evidence from a child psychiatrist about this child and ruled that there was sufficient evidence of the reliability of the statements to admit them, though acknowledging that the "ultimate reliability" of the statements must be assessed in light of all of the evidence at trial.

While the greater flexibility of *Khan* to the admission of children's out-of-court statements in situations where the child is unable to testify is welcome, it is the author's view that there may also be situations in which such evidence should be admitted *in addition* to the child's oral testimony,[80] and that *Khan* might be viewed as supportive of a court receiving such testimony.

The circumstances and nature of a child's disclosure to a parent, teacher or other person about an incident of alleged abuse, may be highly graphic and convincing evidence to support the veracity of the allegation, and should not be inadmissible merely because the child is also available to testify about the incident. As long as appropriately controlled by the trial judge, the admission of this type of evidence should not add unduly to the length or complexity of a trial, and may add significantly to the evidence provided the trier of fact. While some of the comments of McLachlin J. in *Khan* might be interpreted as disapproval for the admission such evidence if the child is also testifying, it is submitted that she was not

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79. (1991), 4 C.R. (4th) 37, 63 C.C.C. (3d) 90 (B.C.S.C.). See also *R.* v. *J.T.*, [1991] O.J. 831 (Prov. Ct.) where Main Prov. J. admitted a videotape of a 4 1/2 year old boy's interviews with child protection workers concerning allegations of abuse. The court ruled that the "necessity" requirement was satisfied because the boy would be "emotionally traumatized" by testifying; further, as a result of threats received the boy was no longer willing to discuss the incident. The court accepted that a videotape was a "reliable" record of what the child said, though the weight to be given to this type of hearsay was for the court to decide, and would depend upon how much corroborative evidence was available.

However, in *R.* v. *W.* (1990), 2 C.R. (4th) 204 (Ont. Prov. Ct.) Crawford Prov. J. took a relatively narrow view of "necessity", ruling that the testimony of a pediatrician and a child protection worker had not adequately demonstrated the harm that would result to a 4 year old child from testifying, and therefore the child was available to testify and there was no basis for excluding statements made by the child to her mother and step-sister concerning abuse by her step-father.

80. In the United States in cases where children have testified, courts have also admitted hearsay statements of children for the purposes of supporting credibility and providing a more complete description of the allegations. See *United States* v. *Spotted War Bonnet*, 49 Cr. L. 1229 (CA8, 1991).

directly considering the issue of admitting evidence of statements made by a child disclosing abuse if the child is also testifying. Alternatively, it may be argued that the "necessity" for admitting such evidence can be established if the Crown demonstrates that this evidence is needed to rebut a defence of fabrication or to support a child's credibility.

A number of American states have enacted legislation rendering admissible out-of-court statements of a child in sexual abuse cases. Typically, such statements are only admissible if there are "sufficient indicia of reliability"; in most states, for such statements to be admissible, either the child must testify, or if the child is unable to testify for psychological or other reasons, there must be corroborative evidence.[81] In Canada, the *Khan* decision is moving courts in a similar direction. The courts are developing a more flexible approach to the admission of out-of-court statements which support a child's testimony.[82]

There appears to be a willingness to admit such statements if there is some assurance of their reliability, either because they are given in a relatively spontaneous fashion or because they are given to a qualified expert who uses them as the basis of expert testimony and can in some way vouch for their accuracy.[83] Arguably this exception to the hearsay rule should not be widened to admit statements which one could reasonably expect to be videotaped, since the common law rules should not be used to weaken the protections afforded the accused under s.715.1, and the possibility of having a videotape weakens the necessity of relying on oral testimony about a child's out-of-court statements.

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81. See, for example, Judge R.P. Ringland, "They Must Not Speak A Useless Word: The Case For a Children's Hearsay Exception for Ohio" (1987) 14 Ohio N.U.L. Rev. 213; Wash. Rev. Code S. 9A.44.120 (Supp. 1987); Ind. Code Ann., s.35-37-4-6 (Burns Supp. 1986). See also *State* v. *Boston*, 545 N.E. 2d 1220 (Ohio 1989) (out-of-court statements of three year old child to mother and doctor concerning alleged abuse admitted; the child did not testify).

    See *Idaho* v. *Wright*, 58 U.S.L.W. 5036 (U.S.S.C., 1990) accepting that such legislation is constitutionally valid, but emphasizing that if the child does not testify, the statement of the child must fall within a "firmly rooted hearsay exception," or be supported by "particularized guarantees of trustworthiness."

82. In civil cases, in particular child protection proceedings and custody or access disputes involving allegations of abuse, Canadian courts have demonstrated a willingness to admit children's out-of-court statements, *instead* of having young children testify, provided there are some assurances as to the reliability of the statements. See *D.R.H.* v. Superintendent of Child Welfare (1984), 41 R.F.L. (2d) 337 (B.C.C.A.), leave to appeal to S.C.C. refused (1984), 42 R.F.L. (2d) xxxv; and D.A.R. Thompson, "Children Should Be Heard But Not Seen: Children's Evidence in Protection Proceedings" (1991) 8 Can. F.L.Q. 1.

83. See *People* v. *District Court of El Paso County*, 776 P. 2d 1083 (Colo. 1989) for a decision discussing the types of factors to be used to determine whether there are sufficient indicia of reliability to permit a child's out-of-court statement to be admitted in evidence.

2. Expert evidence

It has long been accepted that a medical doctor, with appropriate education and experience, can give expert evidence about the results of a physical examination of a child who is alleged to have been sexually abused.[84] A doctor may describe the nature and extent of injuries, and may for example testify that the condition of a girl's vagina was consistent with being penetrated by a penis or finger, or that the trauma to the vagina could not have occurred as a result of an accident described by the parent.

More recently courts have begun to deal with the issue of whether they should receive evidence from experts who are prepared to express an opinion on whether the child's mental, psychological, or behaviourial condition is consistent with allegations of abuse. There is an increasing number of experts — pediatricians, psychologists, psychiatrists and social workers — who have extensive experience in interviewing children and assessing the reliability of their allegations. There is also a growing body of literature on this subject.[85] The assessment of the reliability of an allegation rests on such factors as the child's emotional state when describing the incidents, the age-inappropriateness of the child's sexual knowledge, the detail offered in the description, and the pattern and consistency of disclosure. While an assessment of the reliability of a child's statement is not an exact science, trained experts can be of genuine assistance to the courts,[86] particularly if they explain why they think an allegation is true or false.

Experts can explain the significance of delayed or incomplete disclosure of abuse, which in the absence of explanation might be viewed as damaging to a child's credibility. They are also familiar with the "child abuse accommodation syndrome," which often results in children falsely recanting their allegations due to familial pressure or guilt. Again, in the absence of an explanation, a trier of fact might draw incorrect conclusions about a child's credibility as a result of the prior inconsistent statement. Experts can also explain how children who are victims of abuse may subsequently tend to fantasize and evidence of their fantasizing or "telling stories" should not necessarily undermine their credibility.[87]

One of the first appellate judgments in Canada to deal with the admissibility of this type of expert evidence was the 1986 case of *R. v. Kostuck*. At trial, a psychologist testified that children "very, very rarely lie about sexual abuse," and the judge apparently placed

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84. In *C.A.S. Hamilton-Wentworth* v. *S.D.*, [1991] O.J. 1312 (Ont. U.F.C.), Steinberg U.F.C.J. recognized that there is no special discipline or specialty taught in professional schools as "child abuse", and that expertise could be acquired through "individual self-study and experience", as well as by attending conferences and engaging in research. In this case, the judge recognized a general practitioner on the staff on a child abuse clinic as an "expert".

85. See, for example, J.C. Yuille, "The Systematic Assessment of Children's Testimony" (1988) 29 Can. Psychology 247; Klajner-Diamond, Wehrspann & Steinhauer, "Assessing the Credibility of Young Children's Allegations of Sexual Abuse: Clinical Issues" (1987) 32 Can. J. Psy. 610; and Haugaard & Reppucci, *The Sexual Abuse of Children: A Comprehensive Guide* (San Francisco: Jossey-Bass, 1988).

86. In *R.* v. *Field* (1990), 9 W.C.B. (2d) 736 (Ont. C.A.), it was held to be a reversible error for a trial to rely on "judicial notice" of the child sexual abuse syndrome rather than having expert evidence on this subject.

87. See *R.* v. *Taylor* (1986), 57 O.R. (2d) 737 (C.A.) [hereinafter *Taylor*].

significant weight on this evidence in convicting the accused. The Manitoba Court of Appeal reversed the lower court and acquitted the accused, with Hall J.A. stating:[88]

> *It has long been part of the law for which no authority need be cited that a witness, expert or otherwise, may not testify that an accused, including a complainant, is likely telling the truth.*

While *Kostuck* could be interpreted as a general prohibition on expert evidence related to the reliability of a child's allegations (sometimes confusingly referred to as a "prohibition on oath-helping"), the better view is that *Kostuck* only precludes reliance on expert assertions regarding the general incidence of veracity of allegations of child abuse.

In *R. v. G.B. et al.*, Wakeling J.A. of the Saskatchewan Court of Appeal suggested that *Kostuck* was

> *... simply rejecting any evidence which would seem to support a determination of credibility based on statistical probability.*

Justice Wakeling went on:[89]

> *On the other hand, I see no objection to expert testimony which does nothing more ... than show that psychological and physical conditions which occurred were consistent with sexual abuse, a factor which might otherwise be nothing more than conjecture or speculation on the part of the judge or jury. The trial judge's conclusions are always at least twofold in nature, one requiring a determination of whether the offence occurred, and the second whether the accused was the perpetrator of the offence. If expert testimony is available to corroborate either of these conclusions, it should be accepted by the trial judge as a welcome assistance to what is always a difficult task, but is even more difficult when the incident involves reliance upon the evidence of children.*

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88. (1986), 29 C.C.C. (3d) 190 at 192 (Man. C.A.)[hereinafter *Kostuck*]. See also *Taylor* (1986), 57 O.R. (2d) 737 (C.A.); and *Commonwealth* v. *Smith*, 567 A 2d 1080 (Pa. Super. Ct. 1989) (family therapist not to testify about child's character for telling the truth).

89. (1988) 65 Sask. R. 134 at 149. A growing number of American appeal courts have admitted this type of expert evidence; see, for example, *Hawaii* v. *Kim* 645 P. 2d 1330 (1982); *People* v. *Payan*, 220 Cal. Rptr. 126 (Cal. Ct. App. 2d 1985); *Oregon v. Middleton*, 657 P. 2d 1215 (Ore. 1982); *People* v. *District Court of El Paso*, 776 P.2d 1083 (Colo. 1989). See Myers *et al.*, "Expert Testimony in Child Sexual Abuse Litigation" (1989) 68 Nebraska L. Rev. 1.

In *People* v. *Beckley*, 456 N.W. 2d 391 (Mich. 1990), the court explained (at 401-402)

"A victim's reactions to a sexual assault, especially if the assailant is a family member, are unique to the particular crime. The uniqueness puts the evidence beyond the jury's ability to evaluate the facts in issue absent expert testimony. Further there is general agreement among experts that the readiness of a victim of sexual assault vary quite significantly from those of an 'average' crime".

This decision was affirmed by the Supreme Court of Canada, where Wilson J. wrote:[90]

> *I agree with Wakeling J.A.'s conclusion that the expert evidence in this case was well within the bounds of acceptable and admissible testimony and that in cases of sexual assault against children the opinion of an expert often proves invaluable.*

While this type of expert evidence is admissible in child sexual abuse cases, there is a need for some caution in its use, particularly in a jury trial. A 1990 decision of the Ontario Court of Appeal, *R. v. F.E.J.*, recognized both the utility of expert evidence and the need for judicial care in its use. The case involved a man charged with numerous acts of sexual abuse of his daughter over a period of years, including sexual intercourse. Shortly before the preliminary inquiry the daughter, then aged 15, wrote to the social worker to whom she initially reported the abuse stating that she had "lied" about her father having abused her. At trial she testified that she had been abused and that the letter was not true but only written to help her deal with the terrible events in her life. The trial judge permitted a psychologist with extensive experience in dealing with child sexual abuse to testify about the phenomena of false "recantations," even though the expert had not interviewed the girl. The social worker was also permitted to testify that the letter was part of a common scenario with abused children.

The Ontario Court of Appeal upheld the admission of this type of evidence, with Galligan J.A. stating:[91]

> *I think it should now be accepted by this court that properly qualified expert opinion evidence about the general behaviourial and psychological characteristics of child victims of sexual abuse is admissible for certain*

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90. (1990) 77 C.R. (3d) 327, at 369. See also *R.* v. *Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.) taking a flexible approach to the admissibility of expert evidence in a homicide case where the accused woman based her defence on the battered wife syndrome.

    For another child abuse case where this type of evidence was admitted, see *R.* v. *Beliveau* (1986), 30 C.C.C. (3d) 193 at 204 (B.C.C.A.).

    An issue not fully resolved by the current jurisprudence is the extent to which a trier of fact can base a decision of an expert who has relied extensively on unproven hearsay evidence in formulating an opinion; see Sheppard, "The Supreme Court of Canada and Criminal Evidence Reference: Recent Cases on Sexual Abuse of Children and Spousal Murder" (1991) 9 Can. J.F.L. 11 at 25.

91. (1990), 74 C.R. (3d) 269 at 275-276 (Ont. C.A.)[hereinafter *F.E.J.*]. For a different view, see *R.* v. *Banks* (30 March 1990) 944-020 (Ont. Dist. Ct.), *Lawyers Weekly* (30 March 1990) at 32, Kozak J., where the court refused to allow an experienced child abuse counsellor to testify that a child's failure to tell about abuse for three months was behaviour consistent with sexual abuse. This decision is highly doubtful in light of *F.E.J.*

    The approach of *F.E.J.* was utilized by the British Columbia Court of Appeal in *R.* v. *R.A.C.* (1990), 78 C.R. (3d) 390 where the Court permitted a child sexual abuse who had counselled the two complainants to testify that their pattern of disclosure and behaviour was "consistent with having been subject to sexual abuse".

> *purposes. It would violate the rule against oath-helping if a witness were allowed to express an opinion about the credibility of a particular witness. However, in order to assist a judge or jury in deciding whether, in a particular case, a recantation by a child of his or her allegations of sexual abuse should lead to a doubt abut the witness's credibility, expert evidence about the general behaviour patterns of children in similar circumstances could be helpful. ...*
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> *I would think that it is probably not generally known that children who have been sexually abused, and have reported it, commonly recant their allegations. Thus, in order for the trial judge in this case to decide whether this child's testimony should have been disbelieved because of the letter, he was entitled to know that recantations are common.*

The Ontario Court of Appeal in *F.E.J.* clearly recognized the importance of expert evidence in child abuse cases, but also emphasized the need for judicial caution and limitations.

In *F.E.J.*, Galligan J.A. observed:[92]

> *The admission of evidence of that kind, as well as being probative, could have a very serious prejudicial effect. The crucial issues in the criminal law, the credibility of witnesses and the guilt or innocence of accused persons, must not be decided by expert witnesses, no matter how high their qualifications. An impressively qualified expert must not be allowed to appear to put his or her stamp of approval upon the testimony of a witness. Worrisome as I find those concerns to be, I am unable to say that they could prevent the evidence from being admitted. However, they do call for the greatest care on the part of trial judges in the use of such evidence.*
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> *The psychologist in this case, gave evidence not only about the general behaviourial patterns of children involved in sexual abuse cases, but he also said that he had not seen one case where the recantation was truthful. The latter part of his evidence was clearly inadmissible.*

It is submitted that Canadian courts should follow the trend of these decisions, which recognize the value and admissibility of expert evidence for dealing with child sexual abuse allegations but also recognize that it is ultimately for the trier of fact and not for experts to decide a case.

It should be appreciated that while it is usually the prosecution that leads expert evidence, there has been a growing trend, especially in the United States, for the defence to call its own experts. Such an expert may, for example critique a videotaped interview

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92. 74 C.R. (3d) 269, at 276. The Court of Appeal nevertheless affirmed the conviction. See also *R.* v. *Millar* (1989), 49 C.C.C. (3d) 193 (Ont. C.A.), where the Court admitted expert evidence concerning the cause of death in a physical abuse case, but warned of the need for experts to avoid giving "conclusory statements", and of the need for the "unravelling" of "global, all-encompassing" opinions, particularly those which might be based on "facts" which were later proved "wrong or incomplete."

concerning how interviewer bias or suggestion, or inappropriate use of anatomically correct dolls, may have influenced a child.[93]

3. Similar facts

Many of those who sexually abuse children have multiple victims. In incestuous situations it is common for a father to become sexually involved with each daughter, often as she reaches puberty. Some pedophiles have hundreds of young victims. Police and child protection workers who are investigating an allegation of abuse are naturally interested in whether a suspect has a prior history of abuse. Given the difficulties of proving in court that a child has been sexually abused, it is understandable that courts have begun to admit evidence of a prior history of abuse under the "similar fact" rule, though exercising caution to ensure that such evidence is not used unfairly.

The significance of such evidence is illustrated in *R. v. Green*, a 1987 decision of the Supreme Court of Canada on the similar fact rule. In *Green* a leader of a church program for adolescents was charged with sexually assaulting a 12-year-old girl and a 13-year-old boy. At issue was whether the court could admit testimony from four other adolescents in the same program, who stated that they previously had similar experiences with the accused, though these had not resulted in criminal charges. The trial judge was prepared to admit this evidence and convicted the accused of assaulting the girl.

The Manitoba Court of Appeal ruled that the evidence of the other children was not admissible, and acquitted the accused. The decision of the Court of Appeal followed the narrow approach to the similar fact rule developed in some earlier cases.[94] Further, Twaddle J.A. expressed deep concerns about the reliability of the testimony of children in general:[95]

> *If the child's description of the offence is taken partly from her imagination, put there perhaps by the talk of children contemplating their maturity or by lurid literature too easily available to children, is there not a danger that the offence itself is an invention of the maturing mind? It is for this reason that the common*

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93. See e.g. *State* v. *Erickson*, 454 N.W. 2d 624 (Minn, App. 1990) where an expert for the defence was permitted to testify about the effect of interviewer bias and use of anatomically correct dolls, but not about "the suggestibility of unwanted children" or "learned versus actual memory".

    An issue that has arisen in the United States is whether the accused has a right to have a child examined by his own expert. The majority of states require a court considering such an application to balance the defendant's right to discovery against the victim's right to privacy, and require the defendant to demonstrate a "compelling need or reason" for an involuntary psychological examination of a child in a sex abuse case; see *People* v. *Chard*, 808 P. 2d 351 (Colo. 1991).

94. A number of older cases cited by the Manitoba Court of Appeal emphasized the need that the prior offences be "strikingly similar"; see, for example, *R.* v. *Scarott*, [1978] 1 All E.R. 672 (Eng. C.A., Crim. Div.); and *Alward and Mooney* v. *R.*, [1978] 1 S.C.R. 559, 35 C.C.C. (2d) 392.

95. (1987), 40 C.C.C. (3d) 333 at 342 (Man. C.A.). As argued above, the "common law warning" rule may no longer apply to children's evidence.

> *law requires the judge to warn himself that it is unsafe to convict on the uncorroborated, though sworn, testimony of a child witness.*

These comments reveal a judicial antipathy to the testimony of children. This is particularly disturbing in light of the ruling that the testimony of four other victims, which supported the complaint's evidence, lacked a "similarity sufficiently striking to have positive probative value" and was inadmissible. Having excluded logically relevant evidence, supportive of the victims' testimony, Twaddle J.A. then concluded that their evidence standing alone lacked credibility.

The Supreme Court of Canada reversed the decision of the Manitoba Court of Appeal in *Green*, admitted the evidence of the other children and restored the conviction. Justice McIntyre in the Supreme Court wrote:[96]

> *This evidence is admissible to show a system adopted by the respondent [accused], and its probative force was sufficient to outweigh any prejudicial effect.*

A more recent decision of the Supreme Court of Canada, *R. v. C.R.B.*,[97] recognized the special nature of child sexual abuse cases and the potential value of similar fact evidence for this type of case. The accused was charged with acts of sexual misconduct against his daughter during a two-year period after the death of her mother, commencing when she was 11 years old. According to the complainant's testimony, her father abused her during the period from 1981 to 1983, progressing from fondling to oral sex and sexual intercourse; on occasion she and the accused urinated on each other. At issue was whether the Crown could adduce evidence that between 1974 and 1975 the accused had been sexually involved with the then 15-year-old daughter of his then common-law partner, including acts of sexual intercourse, oral sex and masturbation, which did not result in criminal charges. The trial judge admitted the testimony of the older girl as "similar fact" evidence, a decision upheld by the Supreme Court of Canada.

Writing for the majority in the Supreme Court, McLachlin J. articulated the approach that courts must adopt when deciding whether to admit evidence of other "similar" incidents to assist in determining whether the accused person is guilty of the offence with which he is charged.[98]

> *In determining its admissibility, one starts from the proposition that the evidence is inadmissible, given the low degree of probative force and the high degree of prejudice typically associated with it. The question then is whether, because of*

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96. (1987), 40 C.C.C. (3d) 333 at 355 (S.C.C.).

97. 76 C.R. (3d) 1 [hereinafter *C.R.B.*]. The Court split five to two, with McLachlin J. writing for the majority. Lamer J. concurred with the dissenting judgment of Sopinka J. It is significant that Sopinka J. wrote the majority judgment in *L.E.D.* (1989), 71 C.R. (3d) 1 (S.C.C.), decided just five months earlier. *L.E.D.* took a narrower view of the admissibility of similar fact evidence in child sexual abuse cases, and *C.R.B.* appears to signal a more flexible, sensitive approach to this issue.

98. 76 C.R. (3d) 1 at 21.

> *the exceptional probative value of the evidence under consideration in relation to its potential prejudice, it should be admitted notwithstanding the general exclusionary rule.*

The Supreme Court thus articulated a generalized approach, and rejected the view expressed in some earlier cases that similar fact evidence was only admissible for certain specified categories of purposes, such as to help establish the identity of the accused or to prove that conduct which may appear innocent in nature was in fact sexual in nature.[99]

Justice McLachlin acknowledged the need for caution in the use of this type of evidence, especially in a jury trial, since it would be wrong to convict an accused simply because he is a bad or suspicious person. However, she also stated that[100]

> *... evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.*

Further, she specifically addressed the utility of similar fact evidence in child sexual abuse cases.[101]

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99. For example, in *Green* (1987), 40 C.C.C. (3d) 333 (S.C.C.), evidence about prior incidents of touching and rubbing several children was admissible to establish that the accused's touching of the complainant was not "innocent," but rather was sexual in purpose.

100. 76 C.R. (3d) 1.

101. *Ibid.* at 28. In a sensitive dissenting judgment in *L.E.D.* (1989), 71 C.R. (3d) 1 (S.C.C.) L'Heureux-Dubé J. also recognized the unique nature of this type of case, and was prepared to admit evidence about an accused's alleged conduct with the complainant, his daughter, which occurred seven years before the incidents in question. The judge pointed out that the girl explained her earlier refusal to discuss the case with the police "as being the result of fear, unwillingness to hurt her father and guilt at being the cause of her parents' separation." The judgment went on to observe (at 8):

> When, as in this case, the credibility of the victim is attacked by defense counsel, the victim should not be denied recourse to evidence which effectively rebuts the negative aspersions cast upon her testimony, her character or her motives. ...
>
> It cannot be over-emphasized that cases of sexual assault by family members against children provide the courts with a difficult and unique set of problems. The fact that most child sexual assaults occur under circumstances where the problem is hard to detect and even harder to prosecute places an obligation upon the judiciary to ensure that abuses suffered by the victims are not perpetuated by an inability of the legal system to respond to the particular nature of the crime.

> *...the probative value of similar fact evidence must be assessed in the context of other evidence in the case. In cases such as the present, which pit the word of the child alleged to have been sexually assaulted against the word of the accused, similar fact evidence may be useful on the central issue of credibility.*

On the facts of *C.R.B.*, the Supreme Court recognized that there were differences in terms of the age of the two girls and specific nature of some of the sexual acts, but observed:[102]

> *The fact that in each case the accused established a father-daughter relationship with the girl before the sexual violations began might be argued to go to showing, if not a system or design, a pattern of similar behaviour suggesting that the complainant's story is true.*

Justice McLachlin noted that this case might be on the "borderline" of admissibility, but was prepared to defer to the decision of the trial judge. She noted that in considering the similar fact rule, appellate courts should "accord a high degree of respect to the decision of the trial judge, who is charged with the delicate process of balancing the probative value of the evidence against its prejudicial effect."

It must be appreciated that *C.R.B.* only gives general guidance to trial judges. Perhaps inevitably, the test articulated for the admission of similar fact evidence has a conclusory or circular aspect to it. The Supreme Court decision, however, demonstrate a sensitivity to the problems arising in child abuse cases. The Supreme Court showed a willingness to allow courts to admit evidence about prior incidents of alleged abuse, especially if they occurred within a reasonable time of the incidents which form the basis of the charges in question, or involve similar types of relationships between the accused and the other alleged victims.[103] Such evidence is clearly relevant and probative, and if not too remote in time or nature to the incidents forming the basis of the charges, is not unfairly admitted.[104]

VI. CONCLUSION

The criminal justice system has a very significant role to play in combatting child sexual abuse. The criminal law is an important symbol in our society. Effective prosecution

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102. *Ibid. C.R.B.* at 28.

103. It remains to be seen whether the Court will continue to follow this approach. In a later decision, *R.* v. *M.C.H.* (1991), 4 C.R. (4th) 1 McLachlin J. quoted from *C.R.B.* and indicated that the same test should be applied, but some commentators have suggested that *M.C.H.* may signal a more narrow approach to the similar fact rule; see R. Delisle, "Annotation to *R.* v. *M.C.H.*: Principles for Similar Fact Evidence" (1991) 4 C.R. (4th) 17.

104. Professor Delisle, "Annotation to *R.* v. *L.E.D.*" (1989) 71 C.R. (3rd) 22 at 24 points out that in this context unfairness or prejudice "of course does not mean that the evidence might increase the chance of conviction, but rather that the evidence might be improperly used by the trier of fact." Delisle agrees that it would be improper simply to convict the accused because he was a "bad person" who committed prior acts of abuse and hence deserved punishment, but suggests the fact that the accused committed similar prior acts might support an inference that he committed the acts in question.

of offenders can have a significant deterrent effect, as well as serving to vindicate victims. Further, most sexual abusers appear to be highly resistant to treatment without the involvement of the courts, and their rehabilitation is only likely to be possible if they are convicted and judicially directed towards treatment. It must also be recognized that some sexual offenders are not amenable to treatment, and that society will only be protected if they are incarcerated.

Too often in the past children have been failed by our legal system. We need to ensure that our justice system is fair to victims, without jeopardizing the fundamental rights of accused persons. The recent reforms introduced by Parliament and by judges have enhanced the ability of our courts to discover truth and deal effectively with child abuse cases, though clearly further reforms are required.

It is apparent that the laws governing child sexual abuse are being improved, though there is substantial need for further reforms, some of which are identified in this paper. Perhaps more pressing is the need for sufficient resources and training so that professionals, like judges, prosecutors, police, social workers, prosecutors, child victim witness support workers, and correctional professionals, can deal adequately with the cases they now have.

We must also recognize the limits of the law. We should not imagine that criminal prosecutions will always help victims of abuse. We should explore alternatives to traditional sentencing, in particular in intra-familial abuse cases where the child victim may suffer from the imprisonment of the parent offender. We must also appreciate that reducing the incidence of child abuse will require fundamental changes in our society, in our values and in attitudes towards children and sexuality, as well as in our education, social service, health and justice systems.[105]

105. For an analysis and recommendations on a broad range of issues related to child sexual abuse, see Rix Rogers, *The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada: Reaching For Solutions* (Ottawa: Health & Welfare Canada, 1990).