Evidence in Child Sexual Abuse Cases: A Clash Over Credibility

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Five full years have passed since the introduction of reform legislation concerning the prosecution and defence of child sexual abuse cases.[1] The thrust of the reforms was four-fold:

a) altering oath requirements, presumably to make it easier for young children to testify;

b) eliminating corroboration requirements with respect to child witnesses, whether they be sworn or unsworn witnesses, presumably to end the devaluation of a child's testimony;

c) providing for videotaped statements as evidence, presumably to overcome the problems of failing memories; and

d) providing for testimony from behind screens or by way of closed circuit television, presumably to reduce courtroom trauma.

During the same time period we have seen rapid common law developments either specifically directed to child sexual abuse cases or, having the potential of significant impact on such cases. The areas of rapid change in child sexual abuse cases include:

a) judicial statements with respect to assessing credibility of children;

b) burdens of proof - more particularly, the application of the reasonable doubt rule to the issue of credibility;

c) expansion of the use of similar fact evidence;

d) expansion of the scope of expert testimony;

e) expanded usage of hearsay statements; and

f) potential expanded usage of hearsay through an expert witness.

Each of the statutory and common law developments are significant, some more so than others, but significant nonetheless. At the least, they signal that child sexual abuse cases are likely to remain a significant focal point of controversy within the broad field of evidence for a number of years to come. We find ourselves in the midst of significant changes of attitudes with respect to assessing the worth of a child's testimony. Long held views, attitudes, and stereotypes are being challenged, resulting in substantial changes to the law. As perceptions of the worth of a child's testimony change, legal rules rooted in older assumptions are directly altered or, other rules are altered to compensate for the continued existence of such assumptions.

At the practical level it is imperative that the practitioner have some understanding of the developments and trends in each area. While each topic area could be the subject of a separate paper, this paper will attempt to provide a brief overview of the developments and trends in each area.

I. CREDIBILITY OF CHILDREN: GOING FULL CIRCLE

A. Introduction

At common law there was initially a broad circle of potential witnesses whose testimony was excluded as undesirable or lacking in inherent worth. The list included parties to an action, spouses of the parties, persons convicted of certain felonies, and persons unwilling or unable to give their testimony under oath. Following an evolutionary pattern, the courts and legislatures gradually reduced the list of those legally incompetent to testify to those who were unwilling or unable to give their testimony under oath.[2]

However, the requirement of oath (or affirmation, it's statutory equivalent) remained a stringent requirement. The early common law had a strict requirement that every witness must be sworn as a precondition to giving testimony.[3] In its original form, the oath had to be taken on the

Christian gospel. Those excluded from taking the oath were "heathens" and those incapable of appreciating the nature and consequences of the oath due to youth or intellectual disability.

The exclusionary category of "heathens" was substantially modified by the landmark decision in *Omychund* v. *Barker.*[4] In this case, the justices were of the view that oaths were not a Christian invention but were a universal requirement based upon a universal belief in a governor or creator of the world. While there must be a belief in a creator and punishment by the god in this world or the next, provided this requisite belief was present, the form of the oath could be adapted to meet particular religious requirements.

The net result of the case was that those excluded from giving testimony were those who in fact did not believe in a god capable of imposing punishment, those whose religion forbade the taking of an oath, or those incapable due to a lack of intellect of comprehending the concept.

However, the requirement of an oath was not perceived by the early common law as necessarily requiring the exclusion of the testimony of young children. Blackstone summarized the law as follows :

> *Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; and, even if she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion, first, because the nature of the offence being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses; and, secondly, because the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand from those who swear they heard her say so. And indeed* ***it is now settled, that infants of any age are to be heard; and, if they have any idea of an oath, to be also sworn; it being found by experience that infants of very tender years often give the clearest and truest testimony.*** *(emphasis added).*[5]

It is remarkable that at such an early stage there was an understanding that the dynamics of child sexual abuse involved secrecy and a vulnerable target, and that young children in particular could provide inherently reliable testimony. For that reason, the strict oath requirements that existed were to be relaxed. But, given the absence of oath (then viewed as the primary guarantor of truth) there would have to be some corroboration.

B. From Trust to Hardened Suspicion

The early benevolent view of the worth of a child's testimony was not to last. One can discern a distinct change in attitudes changing from trust, to suspicion, to hardened suspicion, and back again (somewhat) to trust. Change has resulted from varying scientific theories with respect to women and children, and more particularly as to children, resulting from changed theories as to the child's capacity to be a witness and the veracity of sexual abuse allegations.

Myers[6] posits that at each stage of history during which the veil of secrecy surrounding child sexual abuse has been lifted it has been just as quickly drawn again under allegations of child (particularly female) fabrication of sexual abuse. According to Myers, evidence of an early "backlash" phenomenon can be found plainly in the reaction to theories enunciated by Tardieu and Freud. In 1857 Tardieu, a French physician, completed a study in which over 11,000 cases of sexual abuse were recited. While this gained some credence, by 1883, Tardieu's theories were under strong attack in the scientific community by those who alleged that respectable men were targets of blackmail by depraved children and that 60 to 80% of all allegations were fabricated. The controversy surrounding the notion of "false allegations" is not new.

In 1896 Freud presented a paper which linked hysteria in women with childhood sexual abuse (the Seduction Theory). Under heavy attack and scorn Freud recanted and presented a new theory (the Oedipus Complex) which explained mental illness in terms of children's sexual fantasies.[7] Freud's recantation and alternative theory had an arguably profound influence upon the law. His influence upon legal scholars such as Wigmore is undoubted:

> *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 environments, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man* [...]
>
> *No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician. It is time that the courts awakened to the sinister possibilities of injustice that lurk in believing such a witness without careful psychiatric scrutiny.*[8]

Wigmore was mistrustful of children characterizing them as particularly prone to fantasy, and females as prone to fantasy and/or vindictiveness, as did other influential writers.[9] While Wigmore conceded that child testimony should be received, it was on the basis that it was worth very little.[10]

The combined Freud-Wigmore view cannot be underestimated. The philosophical basis of our current competency and corroboration rules find their roots in those views, despite critical analysis.[11] By 1911, noted Belgian psychologist, J. Varendonck, posed the rhetorical question: "When are we going to give up, in all civilized nations, listening to children in courts of law".[12] In 1943 the House of Lords stated:

> *It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age* [referring to a fifteen year old] *in charging men with sexual intercourse. No doubt, there is no law against believing them, but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law.*[13]

The effects of strongly held views, bolstered by "scientific opinion" were strongly felt in Canada. The effects on evidence rules included:

a) A strongly held view that young children should not be called as witnesses. Pre-1987, section 16 of the *Canada Evidence Act*[14] used the age of 14 as the presumptive age of competency. The origins of the usage of age 14 stem from Lord Coke who had equated young children below that age with the insane.[15] Case law from England emphatically asserted that children under age 6 should never be called, for "the jury could not attach any value to the evidence of a child of five, it is ridiculous to suppose that they could".[16] Case law from Canada suggested that a child under 7 is presumptively incapable of understanding the oath;[17]

b) By 1954, Canada had adopted statutory corroboration rules which were more stringent than those imposed by early common law; and[18]

c) Corroboration rules applied to children in four different ways. First, if they gave unsworn testimony there was a statutory requirement of corroboration.[19] Second, young children could be viewed as accomplices on the theory that they were *particeps criminis,* thereby triggering a common law requirement of a warning.[20] Third, if the charge was a sexual offence,the child complainant was subject to a common law requirement of a warning, or a statutory mandatory requirement of corroboration, if the offence was rape. Fourth, there was a requirement of corroboration flowing from the fact that the witness was a child. In *R.* v. *Kendall*[21] the Supreme Court held that a child's testimony was not to be measured as being of equal worth to that of an adult, for children lack the capacity of observation, to recollect, to understand questions put and frame intelligent answers, and to understand the moral responsibility of a witness. Therefore, even if sworn, the child witness required a warning as to the dangers of convicting in the absence of corroboration.

Given scientific, societal and judicial attitudes toward children (particularly female children) it is not surprising that current estimates are that approximately 14% of reported child

sexual abuse cases are prosecuted, and those tend to be the strongest cases (usually supported by medical evidence or other corroboration) resulting in a 50% guilty plea.[22]

It is equally not surprising that the focus of law reform in this area has concentrated on the perceived artificiality of legal rules which prevent young children from being heard in court (the oath) and rules which treat children as a class of witness that is inherently untrustworthy (corroboration). Both combine to keep the prosecution level of child sexual abuse offenses at a relatively low level.

The pressure for reform stems from two key developments : (a) a strongly held view that child sexual abuse is a much more prevalent problem than previously thought; and (b) the challenge to underlying assumptions and attitudes resulting from new research with respect to the child witness.

C. Changing Views: Forward to the Past

1. Incidence of Abuse

The concentration of legal reform on child sexual abuse cases stems from increasing concern about the high incidence of sexual abuse. The Report of the Committee on Sexual Offenses (1986), commonly referred as the *Badgley Report*, estimated that about one in two females, and one in three males have been victims of sexual abuse.[23] Estimates of the extent of sexual abuse will vary dependent upon the definition of sexual abuse[24] used in the research study, and the extent to which the study depends upon self-referral or non-representational subjects.

Nevertheless, U.S. studies support the findings of the *Badgley Report,* tending to indicate that up to 54% of women are sexually abused before age 14 (if a broad definition of sexual abuse is used) and up to 35-36% if a narrower definition is used.[25] The literature supports the view that a larger number of males than previously thought are victims, but less likely to disclose and that the vast majority of perpetrators, regardless of victim gender, are male and not a stranger to the child.[26]

This is not a subject free of controversy. As with earlier attempts cited by Myers[27] to lift the veil of secrecy on child sexual abuse, the rapid increase in reports of sexual abuse[28] has raised both consciousness and a backlash. The critical components of the backlash are studies on false allegations and accusations that women and/or feminist therapists brainwash children.[29]

The most common concern with respect to children's testimony has been with respect to false allegations of sexual abuse. Here, the current literature tends to indicate that false allegations in general are between 2 and 10%.[30] One problem that emerges from reading the literature is the extended usage of the term "unfounded" which is a commonly used reporting term (including by Statistics Canada) which may encompass deliberately false allegations, erroneous allegations (misinterpretation of actions or words), cases for which there is insufficient evidence,[31] cases in which there has been recantation,[32] and cases in which the state interview process does not result in a disclosure.[33] Studies which do not (and many do not) make these differentiations are fraught with difficulty.

The more serious problem of false allegations (that is, deliberately false accusations) is thought to arise in disputed divorce/custody cases. The majority of deliberately false allegations are attributed to this category of case. Estimates of false allegations in such cases have ranged from a low 3-7%,[34] to 36%[35] to 55%,[36] and even as high as 65%.[37] Most of these studies have been criticized on grounds of size of sample, bias and methodology, particularly the studies by Green and Besharov.[38]

Despite the controversy in the literature, there is a commonly held perception that allegations emanating from a mother are likely to be false.[39]

The second component of the backlash, which is tied to the first, is the notion that a vindictive/delusional mother sees a way to obtain exclusive custody of the child. This can be exacerbated by a view that a biased (feminist) therapist/interviewer has tainted the process and, indeed, may have used conduct tantamount to "brainwashing" of the child.[40]

The phenomenon of the vindictive mother/biased therapist is hotly disputed. Hornek & Clarke indicate that in the criminal law process the intensive screening process virtually excludes such cases. That is, given the approximate 5% of reported abuse cases that go to trial, it is highly unlikely that such cases survive the screening.[41] Hornek & Clarke state:

> *The American Prosecutor's Research Institute summarized well the issue of false allegations as follows:*
>
> *Unfounded reports are rarely attributable to deliberate deceit or lying by children. There have been no studies demonstrating that children can be influenced to fabricate entire events despite some current accusations about parental or professional brainwashing. The opposite, in fact, is truer. It is clear that rather than exaggerating or fabricating incidents of abuse, children are much more likely to minimize and deny abuse because of pressure or fear. Typically, physically abused children cover up the abuse by offering alternative explanations for the injury and sexual abuse victims recant or refuse to repeat the story to avoid the pain. Moreover, there is no scientific evidence that children are capable of fantasizing abuse experiences, especially young children, since imagined events normally have some base in actual experiences and knowledge.*[42]

Thus, we see a dichotomy of scientific opinion, one side positing a high number of false allegations, particularly in disputed custody cases; another side positing that the number of false allegations (including the disputed custody cases) is small and that the more significant problem is that of "false recantations", and non-disclosure.

2. Veracity of Children

Present trends in psychological research indicate that a child's testimony should be examined on a case by case basis rather than older theories of developmental stages.[43] Broadly speaking, the current literature indicates that children are no more prone to deliberate fabrication than adults; even young children have the ability of recall, albeit with some problems of free recall, suggestibility is not necessarily more of a problem with children than adults; and that adult testimony is not necessarily more accurate than that of children.[44]

Yuille *et. al.*, do state that suggestibility can be a problem, and the younger the child the more this is true. However, the degree of suggestibility depends upon the dynamics of the interview situation, the child's understanding of the interview, and the behaviour of the interviewer; specific questions should be minimized and leading questions avoided.[45] Suggestibility can be more of a problem with mentally handicapped children, although it would appear that the problem does not arise as much when the child is describing an event he or she has directly experienced; in other words, memory is accurate and not susceptible to suggestion.[46]

Ability to give accurate information can be variable depending upon a number of factors: age influences free recall, cognitive complexity directly improves subsequent memory, recall strategies develop with age.[47] A key difference between children and adults is that adults can put order into their accounts; young children give disjointed versions lacking cohesion, but it is not necessarily less accurate.[48] As Yuille *et al*. indicate, while children may generally recall less than adults, when tested on a topic about which they have specialized knowledge, they may actually recall more than an adult.[49]

D. Changing Views and Their Impact

Recently, the British Columbia Court of Appeal accepted expert opinion that there were problems of recantation in general, and that in intra-familial abuse cases that figure might be as high as 8-10%.[50] A recent U.S. study places that figure much higher.

Sorenson and Snow reviewed 630 cases in which sexual abuse had been confirmed by way of confession or guilty (80%), conviction (14%) or supportive medical evidence (6%). Generally they found that in 74% of the cases the disclosure was accidental rather than purposive, that 72% of the victims initially denied sexual abuse when questioned, then moved to a vague or partial description of the event, and then finally to a strong assertion of sexual abuse. Following the strong assertion, recantation then occurred in 22% of the cases with 93% of those children subsequently reaffirming the allegation. Recantation was seen as stemming primarily from lack of a supportive, non-offending parent and perpetrator pressure.[51]

It should be noted that if Sorenson and Snow are correct, that the process of disclosure is just that - a process, and not an immediate moment - then the possibilities of writing off a report as unfounded or false are magnified. Secondly, if they are correct, the process is a rich source of ammunition for cross-examination if not viewed by a court as a process. That is, there are often at least two recantations, one at the beginning and one toward the end of the process. This leads to a source of prior inconsistent statements, particularly as they relate to detail and whether the event occurred at all. Further, the process is dependent upon a series of interviews and a supportive parent leading to allegations of bias and suggestibility.

Thus far, one would have to say that our courts have not seen disclosure as a process. In *R.* v. *Keller,*[52] approved of in *R.* v. *Meddoui* by the Alberta Court of Appeal,[53] it was held that a recantation would render a videotaped statement inadmissible.

What has clearly been accepted by Parliament, and to some extent by the courts, is that old theories with respect to children's veracity are antiquated, and that the extent of sexual abuse requires strong measures. The measures adopted are directed at two major themes: (a) ending the silence of children; and (b) providing a means of supporting the child's version of events.

II. ENDING SILENCE

A. Oaths, Affirmations and Promises

The 1987 amendments to section 16 of the *Canada Evidence Act* now permit three possibilities:

1) A person who understands the nature of an oath or affirmation and is able to communicate evidence may give evidence upon oath or affirmation;

2) A person who does not understand the nature of an oath or affirmation but is able to communicate the evidence may testify on promising to tell the truth;

3) A person who neither understands the oath or affirmation or cannot communicate shall not testify.

While much attention has been paid to these amendments, in a very real sense they are not the most important. The critical developments have resulted from judicial decisions which have a) secularized the oath; and b) removed notions of presumptive ages of incapacity. The first of these had largely occurred pre-amendments.

In its origins the oath required a religious belief in an anthropomorphic deity and divine retribution. With codification in section 16, case law made it clear that a belief in divine retribution was unnecessary.[54] Indeed, in *Bannerman*[55] and *Ref. Re. Truscott*[56] it was held that what was important was understanding the moral obligation to tell the truth. Thus, provided there was a belief in a supreme being, the hurdle of understanding the nature of an oath was made relatively easy.

It became easier. In *R.* v. *Fletcher*[57] it was held that no inquiry needed to be made about belief in a supreme being, because in a secular society it was doubtful that many adults could satisfy the requirement. Therefore, children could be sworn provided they understood the duty to tell the truth. This can be accomplished by a cursory examination of the child. The reasoning was adopted by de Weerdt J. in *R.* v. *Pootoogook*,[58] where it was reiterated that while it may be helpful to inquire into the child's religious background, it is unnecessary if the judge is satisfied that the child understands the moral obligation to tell the truth. Furthermore, the judge may lead the child in questioning, and while counsel do not have a right of cross-examination, they may suggest questions to the judge.

The secular reasoning in *Fletcher* was adopted by the Alberta Court of Appeal in *R.* v. *Connors*.[59] The court held that understanding the moral obligation to tell the truth meant that the child could be affirmed. Finally, in *R.* v. *Khan*[60] secularization was completed. The test for taking an oath is whether the witness understands the solemnity of the occasion, and that there is an added responsibility to tell the truth over and above the duty to tell the truth which is an ordinary duty of normal social conduct.

One problem with the new test is that it is as prone to varying rulings as ever. In *R.* v. *D.(R.R.)*[61] a trial judge permitted a six year old to give sworn testimony after being satisfied that the child understood the difference between a truth and a lie, and that "God would be mad if he lied". The Court of Appeal held that this was an insufficient indication that the child understood the requirement of telling the truth flowing from the special nature of the oath.

In contrast, in *R.* v. *R.(M.E.)*[62] it was held that a child had been properly sworn where she stated that she understood that if she put her hand on the Bible she had to tell the truth, although she later indicated that she did not know what would happen if she told a lie.

The result is that two lines of authority exist. The first would favour questioning of the child designed to determine whether the child understands not only a moral obligation to tell the truth, but also the heightened duty arising from the solemnity of the occasion which binds conscience.[63] The second line pins the test on whether the child understands that there is an obligation to tell the truth.[64] The critical difference revolves around the question as to how extensive and searching the inquiry must be. If the first line of authority is followed, it is doubtful that the "new" test will be any more realistic than the previous, religious-based test.

A second critical development stemming from judicial interpretation is that there is no age of presumptive incompetence. That was made clear in *R.* v. *Khan*,[65] and has been followed by the Alberta Court of Appeal. In *R.* v. *C.K.C.*[66] the trial judge, following a brief inquiry, had determined that a five year old was incompetent to testify, in part because she was only 5. The Court of Appeal was emphatic that the age of the child does not relieve the trial judge of the obligation to inquire and to determine whether the child understands the nature of the oath.

The substantial change wrought by the 1987 amendments is that pre-1987, if a child did not understand the nature of an oath, the child was permitted to give unsworn evidence, provided the child understood the duty to tell the truth (the moral obligation). Second, unsworn evidence would have to be corroborated. Post-1987, a child may testify if able to communicate and promises to tell the truth. Corroboration is no longer a mandatory requirement.

The unresolved question is whether this is simply a test of communication skills, that is, able to understand simple questions and respond, or does it also require an understanding of the moral obligation to tell the truth. According to the Alberta Court of Appeal, when dealing with a child of age 5, it will be a rare event when a child will be found to have insufficient communication skills.[67] Is communication skill sufficient to permit a child to give evidence? The trial judge in *C.K.C.* had assumed that there must be an understanding of the moral obligation to tell the truth, but had not found it necessary to deal with that, given his finding, that the child could be disqualified on the ground of age alone. The Alberta Court of Appeal did not deal with the point. The current case law *seems* to suggest that some inquiry is necessary.[68]

Certainly the Uniform Law Commissioners have assumed that such inquiry is necessary. New amendments to section 16 have been considered which would create a general presumption of competence subject to challenge.[69] If adopted by Parliament the amendments would create three categories of witnesses :

a) those who understand the oath;

b) those who can communicate and give testimony upon a promise to tell the truth;

c) those who can communicate only, which would require the judge to hear the evidence and determine admissibility after hearing the evidence, that is, determine whether the evidence is sufficiently reliable.

B. Expanding Hearsay Exceptions

The developments in this area have been three-fold: 1) Criminal Code provisions which permit the introduction of video-taped statements; 2) common law developments which have expanded the scope of hearsay by liberalizing necessity and reliability tests; and 3) common law developments which may have expanded the scope of hearsay through the mouth of an expert.

1. Videotaped Statements

Section 715.1 of the Criminal Code authorizes the usage of videotaped statements provided the complainant was under 18 at the time of the offence, the video is taken within a reasonable time of the acts complained of, it describes the acts complained of, and the complainant adopts the content of the tape while testifying.

It should be noted that the section is conservatively cast. It does not authorize videotapes for witnesses other than the complainant, and is admissible only if the complainant appears as a witness. The critical issue arising from the section is what the words "adopts the statement" mean.

This was addressed by the Alberta Court of Appeal in *R.* v. *Meddoui*[70] which held that there were four possibilities.

1) The witness might adopt the statement in the strongest sense of recalling both it and the events discussed, and positively confirms the truth of what the statement says about the events.

   This interpretation was rejected on the basis that it would offend the rule against usage of prior consistent statements.

2) The witness might adopt the statement in the sense that, whether or not she recalls the events discussed, she does believe them to be true because she recalls giving the statement and her attempt then to be honest and truthful.

   This was held to be the correct interpretation for it was Parliament's intent to lift the requirement of clear memory loss. The video can be used where there are gaps in memory, or ambiguity in the testimony.

3) The witness might adopt the statement in the weak sense that, while she has no present recall, she does believe them to be true because she at least recalls giving the statement and her attempt then to be honest and truthful.

This interpretation was rejected. In such circumstances, the video would be admissible under the existing common law past recollection recorded hearsay exception.

4) The witness might adopt in the weakest sense of admitting that the statement was made but will not admit that it is truthful (recanting).

This interpretation was rejected for it would mean that a disavowed statement could become positive evidence. The possibility that recantation may be part of the disclosure process and evidence of child sexual abuse accommodation syndrome[71] was not discussed. The Court concluded that absent statutory requirements of guarantees of trustworthiness, it would be too dangerous to permit the statement to be admitted.

The result of the case is a slight expansion of the past recollection recorded hearsay exception limiting the number of cases in which videotapes are used. In that sense the change was unremarkable. While in *R.* v. *Laramee*[72] the Manitoba Court of Appeal held that section 715.1 of the Criminal Code contravened sections 7 and 11(d) of the Charter, which has since been overturned by the Supreme Court.[73]

One other recent Supreme Court decision may affect the interpretation of section 715.1 As noted above, the Alberta Court of Appeal rejected the usage of such statements where there is a recantation by the child. In *R.* v. *K.G.B.*[74] the Supreme Court held that a prior inconsistent statement may be used as positive evidence provided there were sufficient indicia of reliability including the giving of a warning as to the consequences of lying, and the taking of the statement under oath. While section 715.1 does not require an oath, the absence of an oath in *K.G.B.* was held not to automatically disqualify the statement if there were other indicia of reliability.

This approach would require the court to assess the credibility of the videotaped statement against the credibility of the possibly sworn recantation, and decide which is the most believable. If satisfied that the recantation is true, presumably the videotaped statement is inadmissible. If

unsure as to which is true, the same result would occur. But, if satisfied that the videotaped statement is truthful, it might well be inadmissible.

2. Common Law Tests of Necessity and Reliability

The far more dramatic developments with respect to child hearsay have arisen from the common law. In *R.* v. *Khan*[75] the Supreme Court concluded that the trial judge had incorrectly disqualified the young child as a witness. Nevertheless, the court dealt with the consequences of a determination of incompetence which creates a Hobson's Choice for the defence - permit the child to testify and cross-examine; succeed in disqualifying the witness and face a hearsay statement.

In effect the Court concluded that necessity means unavailability of direct evidence or inability of the witness to testify. The categories fitting within the necessity principle are not closed. With respect to reliability, while the three year old child's statement was insufficiently connected in time (15 to 30 minutes) and insufficiently spontaneous (mother's questioning) to fit within the conventional *res gestae* principle, nonetheless the age of the child and relative spontaneity were some evidence of reliability. Therefore, the statement was admissible. This approach was confirmed by the Supreme Court in *R.* v. *Smith.*[76]

In *R.* v. *Collins*[77] the Ontario Court of Appeal held that were the child testified the hearsay was inadmissible to confirm the testimony of the child's absent allegations of recent fabrication or the statement meeting the *res gestae* test. An example of a statement meeting the *res gestae* test may be found in *R.* v. *Reed*[78] where it was held that a statement to a mother was admissible as part of the *res gestae* in circumstances where the victim who was assaulted went immediately to her home and complained to her mother.

In *R.* v. *Aguilar*[79] it was held that the hearsay statement was inadmissible with respect to a ten year old where there was nothing to indicate a problem when the child was testifying or recalling events. The Youth Court of Alberta has recently followed this approach in a case where

the Court concluded that there was no significant problem with memory or hesitancy in testifying.[80]

However, in *College of Physicians and Surgeons* v. *Khan*,[81] it was held that the child's statement to her mother was admissible notwithstanding that the child testified. The Court relied in part on decisions making a statement admissible where a child was too emotionally distraught to testify,[82] and where an adult witness was mentally incapable of recounting the relevant details.[83] The Court concluded that the Supreme Court's decision in *R.* v. *Khan*[84] did not require an all or nothing approach. Rather, necessity may arise in circumstances where the child is unable to testify in the full detail that is revealed in the statement. Indeed, where the child testifies, the reliability of the statement is enhanced.

Therefore, the Court concluded that trial courts should, in assessing necessity, consider the age of the child, the difficulties the child has in testifying, the demeanour of the child, any inability to recall events, expert evidence on the ability of the child to recall, and whether there were any intervening events which might impede the child's ability or willingness to testify. If admissibility appears to be "reasonably necessary" and provided there is nothing which undermines the statement's reliability, the statement may be admitted.

It should be further noted in terms of reliability, that in *R.* v. *Khan,* a young child had given a relatively spontaneous statement in response to a non-leading question shortly after the event. In *R.* v. *Steven A.*[85] it was held by the Ontario Court of Appeal that a statement of a young child approximately two weeks after the event, in response to a non-leading question, was admissible. This does accord with current literature which indicates that very young children may not immediately understand the implications of a sexual act, or may react with shock; in either event it results in delay in reporting, or not reporting at all.[86]

The combined effect of all of these decisions has been to rapidly expand the scope of admissible hearsay in child sexual abuse cases. However, it should be noted that some courts are beginning to address an issue which has largely been dealt with by statute in the U.S., such as the

need for a special warning, or the need for corroboration where the evidence going to the central allegation is supplied by hearsay.[87]

In the *Steven A.* decision it was held that hearsay admitted through the expanded category of hearsay requires a special warning that both the oath and cross-examination are missing and that these are important safeguards. The absence of corroboration raises a particular need for caution before accepting and acting upon the hearsay, and such statements should be considered as less reliable than would be the case had the child been cross-examined.

It should be noted, however, that the notion of cross-examination as an objective, neutral manner of testing or obtaining truth is itself a controversial subject. Spencer and Flin noted that cross-examination itself, flowing from the usage of leading questions, is very likely to distort a child's evidence, particularly if the cross-examination deals with peripheral details. That is, the authors are of the view that suggestibility is less of a problem when the area of questioning is on a matter of central importance to the child. Although controlled studies have indicated that the younger the child the more likely the accuracy of a child's version will be substantially distorted by cross-examination.[88] Others have indicated that this is particularly true when the cross-examination involves questioning a child on peripheral detail.[89]

3. Hearsay Through an Expert

It seems to have been firmly established in Canadian law that hearsay is admissible through an expert, not as proof of the content of the statement, but to establish the basis of the opinion.[90] However, the Supreme Court's decision in *R.* v. *Lavallee*[91] has potentially expanded the scope of hearsay through experts. Ms. Lavallee was charged with the murder of her husband. At trial she mounted the defence of battered wife syndrome which was accepted by the Supreme Court as a part of the general defence of self-defence. The accused did not testify, but a statement to the police was entered as an exhibit. The critical evidence was that of a psychiatrist who interviewed the accused, reviewed a police report and hospital reports, and interviewed the accused's mother. Based on this information, with heavy reliance upon the interviews with the accused, the expert

concluded that the accused was a victim of battered wife syndrome and provided an explanation as to why she did not leave the house.

The central issue was whether the information relied upon could be used testimonially as proof of the truth of the contents. It was held that it could. As long as there is some admissible evidence to establish the foundation, the jury is to be cautioned as to weight, but not told to ignore the testimony in terms of its truthfulness. Admissible evidence included hospital records and evidence of a doctor. It should be noted that the hearsay in question met neither of the traditional criteria of necessity or reliability.

Thus far, *Lavallee* appears to have been given a restrictive interpretation. In *College of Physicians and Surgeons* v. *Khan*,[92] it was held that evidence of statements to a social worker were admissible but only to establish the foundations of the opinion and not the truth. Similarly, in *R.* v. *Johnson*[93] the Alberta Court of Appeal held that such evidence is admissible for the limited purpose of establishing the basis of an opinion.

III. CORROBORATING THE CHILD'S VERSION

A. Similar Fact Evidence

Since 1982 there have been nine major judgments of the Supreme Court on the subject of similar fact evidence. Eight of the judgments involved allegations of sexual assault or child sexual abuse, five of which involved sexual abuse of a child. To some extent, at least, this does indicate that the major focus of similar fact evidence cases has been in this particular area.

The classic premise for excluding evidence of other discreditable conduct of an accused is that evidence of propensity or disposition, while perhaps relevant, is of marginal probative value, but with the added danger that a trier of fact may apply disproportionate weight to the evidence. Therefore, similar fact evidence must be relevant and have significant probative value supplied; it was thought for a time, by meeting a test of striking similarity.

Of the nine judgments of the Supreme Court, some clearly utilized the striking similarity test, notably *R.* v. *Sweitzer* (where the issue was identity) and *R.* v. *Clermont* (where the issue was consent or honest belief in consent). However, in *R.* v. *Robertson*[94] we see a significant shift in reasoning.

In *R.* v. *Robertson* the issue was again consent or honest belief in consent. The evidence in issue was that of a sexual proposition to the complainant's roommate prior to the sexual assault in question. The Court held that striking similarity was not the test but, rather, a factor to be considered in the exercise of judicial discretion. Here, the evidence was stated to be relevant to motive going to intent, and it tended to support the roommate's version of events. We see the first inkling of usage of similar fact evidence to support credibility notwithstanding (and without mention) of the rule prohibiting evidence intended solely to bolster credibility.[95]

Since *Robertson* the reasoning of the Supreme Court has appeared to be variable but, overall, with a distinct trend to enlarging the scope of admissible evidence of discreditable conduct.

In *R.* v. *Green*,[96] the defence to a charge of sexually abusing a female child (fondling) was accidental touching (that is, innocent association). The prior acts tendered were acts of fondling of boys and girls on other occasions. A majority judgment of the Manitoba Court of Appeal had rejected the evidence on the basis of insufficient striking similarity necessary to elevate the evidence from that of the forbidden evidence of propensity or disposition. In a brief judgment, virtually without reasons, the Supreme Court restored the conviction.

In *R.* v. *Morin*[97] the charge was murder in a case involving the abduction, sexual abuse and killing of a young female child. The issue was identity. The Supreme Court held that expert testimony, that the accused was a schizophrenic, and that some schizophrenics were capable of that level of violence was inadmissible evidence of disposition. The evidence was insufficiently detailed to place Morin in the small category of schizophrenics capable of such an act.

The next important case was *R.* v. *D.(L.E.)*[98] in which the issue was whether the act of child sexual abuse (fondling) had occurred as alleged. The Crown tendered evidence of more serious misconduct (incest) with the same daughter, 4 to 7 years previously. Part of the defence's approach to the defence of absolute denial was to assert that the adolescent had a motive for lying. The Court held that the evidence was inadmissible on the basis that it was insufficiently probative, meaning that it was too old and was more serious than the acts alleged giving rise to greater potential for prejudice.

However, in *R.* v. *C.R.B.*[99] the issue was the same as in *R.* v. *D.(L.E.)* - denial that the sexual abuse had occurred. The tendered evidence was that of sexual activity with a daughter of a common law wife several years previously. The Court held that while the evidence was borderline, the admissibility of such evidence was a matter of judicial discretion, and provided the judge a line to the dangers of admissibility and the correct tests, that discretion was not to be lightly interfered with.

Perhaps more importantly, the Court also held that where a case involved the word of an accused against that of a child, such evidence is often vital to support the credibility of the child. It was stated:

> *It is well-established that similar fact evidence may be useful in providing corroboration in cases where identity or mens rea is not in issue. Andrews and Hirst* [...] *write:*
>
> *`A third important use of similar fact evidence is to provide corroboration, particularly in cases involving sexual offenses or offenses against children, where the law either requires corroboration or requires the judge to warn the jury of the dangers of convicting in its absence. In many such cases there may be no possibility of mistaken identification, nor, if the witness is to be believed, any doubt as to the criminality of the acts committed. The only doubt will then be whether the complainant is indeed telling the truth.'*[100]

It is important to note four points arising from the judgment:

1) the rule against bolstering credibility is not discussed;

2) the 1987 reform to the Criminal Code and *Canada Evidence Act* eliminating mandatory requirements of corroboration and warnings as to the desirability of corroboration are not discussed;

3) there is a recognition that in such cases credibility of the complainant is a vital issue on which there may well have to be supporting evidence; and therefore

4) some greater latitude may be given to the admissibility of such evidence where the issue is not identity or *mens rea* (honest belief in consent).

In *R.* v. *F.F.B.*[101] the allegation was that the accused had sexually and physically abused the complainant while she was a minor (during the 1950's and 60's). Evidence of sexual abuse was rejected but evidence of the brother regarding the violence in the home was held to be admissible by the trial judge. The Supreme Court upheld the trial judge for the following reasons:

a) while the testimony supported the complainant's credibility it was not called for that purpose alone;

b) the evidence was not called *solely to prove disposition but rather to rebut the defence of innocent association and demonstrate a system of violent control;*

c) this, in turn, helped explain why the abuse was allowed to occur and why the complainant was too frightened to disclose; and

d) it rebutted the defence suggestion that others were responsible for the injuries.

While some authors are of the view that the above cases are consistent,[102] this writer finds difficulty in rationalizing all of the cases. Nevertheless, what one can say with some confidence, is that in recognition of a practical need for supporting evidence, there is a trend to increasing the scope of similar fact evidence that is admissible.

Part of the source of need for supporting evidence flows from what the courts have also stated with respect to burden of proof and, in particular, the application of the reasonable doubt rule to the issue of credibility. In *R.* v. *W.(D.)*,[103] a case involving allegations of sexual assault of a niece, the Supreme Court confirmed that it is incorrect to charge a jury, that to render a verdict they must decide whether they believe the defence or the Crown's evidence. A third alternative must be provided which is that, if the jury does not believe the accused they may, notwithstanding, still have a reasonable doubt as to the accused's guilt arising from the evidence tendered by the Crown.

Sopinka, J. (for the minority) described both the accused and the complainant as poor witnesses, noting that the complainant was 16, an unemployed dropout, had been thrown out of several friends' homes, did not immediately complain of the incidents despite numerous opportunities to do so, had returned to the accused's home, and may have acted from spite having been eventually ordered from the home.[104] Given these frailties (which others might view as consistent with the dynamics of sexual abuse) the correct direction to the jury was imperative. The majority agreed with the essentials of the above analysis but concluded that, in the context of the charge to the jury as a whole, no miscarriage of justice had occurred.

A striking example of the application of the "third alternative" to cases of intra-familial sexual abuse is found in the Alberta Court of Appeal decision in *R.* v. *Tucker.*[105] The case involved two complainants, ages 5 and 11. Their evidence was the only evidence of sexual assault. The trial judge wholly believed the complainants despite some vagueness of detail, particularly with respect to dates, and some indication that the complaint may have originated from one of the mothers as a result of a "family feud". He completely disbelieved the accused and, accordingly, convicted. The Court of Appeal quashed the conviction and entered an acquittal. The trial judge's approach to rejecting a simple denial may have inhibited him from objectively assessing whether there was a reasonable doubt.[106]

The case is illustrative of the dangers of the prosecution advancing a case dependent solely upon the credibility of the complainants, particularly where the defence is able to call into question the motive for the complaint (such as the "vindictive" mother as the source) or can attack the

character of the complainant (often the case where the complainant is an adolescent survivor of sexual abuse with consequent behaviour problems).

It is also evident that trial judges will have to take care in the expression of reasons for accepting or rejecting a particular version. Simply stating a belief in the complainant and a disbelief of the accused may not suffice. In *R.* v. *C.(R.)*[107] the Supreme Court restored a conviction with brief reasons essentially confirming the minority judgment of Rothman, J.A. from the court below.[108] Rothman, J.A. had held that, while it would have been preferable for the trial judge to have given reasons for rejecting the accused's testimony, it was not essential in light of:

a) the detailed explanation for believing the complainant;

b) the fact that it was made plain that the accused's denials did not raise a reasonable doubt;

c) the fact that the frailties of a child's testimony was appropriately considered.

Therefore, giving detailed reasons for rejecting the accused's version would have added little to an otherwise complete judgment.

The Supreme Court has stated in *R.* v. *R. W.*[109] that late disclosure is often the case in intra-familial sexual abuse cases, and that a child's credibility on matters of detail must be assessed by reference to criteria appropriate to the mental development, understanding and ability to communicate. Therefore, presence of inconsistencies, particularly with reference to peripheral matters of time and location should be viewed in the context of age.[110] That will assist the young witness in terms of assessment of credibility, but the existence of the "third alternative", in the case involving an adolescent complainant, or a case in which the image of tainting of evidence by manipulation of a mother or a biased therapist is invoked, may still invoke a practical requirement of supporting evidence.

If there is a practical requirement of supportive evidence, the sources of such evidence may be few since many cases involve late disclosure and, hence, little medical evidence of the crime.[111] The source may be the corroborative evidence of multiple complainants or it may be similar fact evidence. The greater latitude for similar fact evidence may make this a more common issue in child sexual abuse cases.

A striking example of inadmissibility under conventional rules and admissibility under expanded rules is to be found in the decision of the Ontario Court of Appeal in *R.* v. *Jones.*[112] The accused was charged with sexually assaulting a young girl by attempting to force oral and anal sex upon her while the two were in a car. During the course of the assault he was alleged to have placed his hand over her mouth and told her that he had "done it" with his two sisters. One sister testified that while visiting the accused, he had kissed her, placed his hand over her mouth and attempted to rub his hands over her vagina. The Court held that such evidence was inadmissible as similar fact evidence since it was insufficiently similar to establish a method or system. However, since the accused's defence was alibi (implicit denial) it was admissible to corroborate the complainant's version of events, and particularly, supported her version that he had told her of the prior events. The inference to be drawn was that he had said it to obtain her "cooperation".

It should be noted, however, that the Ontario Court of Appeal has also ruled that usage of similar fact evidence by the Crown may expand the scope of expert testimony admissible to rebut such evidence. In *R.* v. *Mohan*[113] a physician was charged with sexually abusing several young, female patients, some of whom were previous sexual abuse victims at the hands of others. The Crown tendered the evidence of the several complainants as similar fact evidence. The Court held that where the Crown alleges that the probative value of the evidence arises from its similarities, the defence is equally entitled to lead evidence as to features of the acts which demonstrate dissimilarities. The source of such evidence may be expert evidence that the nature of the acts involved may have been committed by separate persons.[114]

B. Expert Evidence

An alternative source of supporting evidence is expert testimony. In *R.* v. *B.(G.)*[115] it was held by the Supreme Court that expert testimony was often desirable in cases involving allegations of child sexual abuse.[116] One hopes that this was not stated in a naive belief that experts are of one mind on questions of incidence and veracity of allegations of sexual abuse for, as noted above, there is a major dichotomy of opinion on these very questions. Indeed, the usage of expert evidence in criminal cases may well bring into the forum the pitched battles between experts that have been evident in disputed custody cases.

What is important to note, however, is that the potential scope of such evidence has been expanded. The Supreme Court's decision in *R.* v. *Graat* signalled that the so called "ultimate issue rule" was unsound historically and in principle.[117] Rather, admissibility of expert opinion is premised on the theory that the evidence is helpful in the sense that it is necessary in order to fully understand the other trial evidence and make proper conclusions or inferences. If, on the other hand, the court is itself equipped to determine the issue without aid, then the evidence is inadmissible as it is simply superfluous.[118]

Based in part on this theory, expert evidence which goes solely to opinion on credibility is inadmissible. However, the line between opinion going to credibility and evidence and opinion which is helpful and necessary can be quite fine. The following opinion evidence has been rejected on the basis that it is simply opinion as to credibility:

* psychiatric evidence that because of mental age a complainant lacked the imagination to concoct a story and therefore was likely to tell the truth;[119]

* expert evidence that children rarely lie about sexual abuse and the complainant was likely telling the truth;[120]

* where the evidence disclosed that a dispute between a police officer and a child care worker over whether to lay a charge had been based on differences of opinion as to believability of the child, evidence that the case had been reviewed by an independent

expert was inadmissible because the inference to be drawn was that the expert had found the child to be believable.[121]

The following evidence has been held to be admissible:

* while questions as to truthfulness of a child are improper, an expert could posit that the child was sexually abused based on consistency of version and that she appeared candid and honest;[122]

*expert opinion that one characteristic of an abused child is a fantasy life was admissible to rebut defence evidence of reputation and specific instances of non-veracity, but only to lessen the impact of the defence evidence and not to bolster credibility;[123]

* expert evidence that child victims are more likely to withdraw allegations of sexual abuse against family members if they are not supported by their mothers;[124]

* evidence to explain why young victims often delay making complaints to rebut any adverse inference that might be drawn from long delay;[125]

* expert opinion about the general behavioural and psychological characteristics of child victims of sexual abuse which helps explain actions and conduct, but not solely to bolster credibility;[126]

* expert opinion that a child had been sexually abused when based on the opinion that facts and symptoms are consistent only with prior sexual abuse - the expert is then entitled to state the inference that arises from that; and[127]

* evidence of an expert that in the formation of an opinion he had not been provided with untruthful information by the complainant.[128]

The bottom line to the above is that there are wide parameters for the admissibility of expert evidence. A bald assertion going solely to credibility is out; dynamics of sexual abuse, processes of disclosure, characteristics of victims are in. Given this reality one can safely predict two responses from the defence.

First, it is likely that the defence will call its own experts to rebut the evidence. The possibility looms large that the war of experts in divorce/custody cases may be repeated in the criminal courts. The tendency of the defence bar would be to seek experts who would use the profiles of sexual abuse supplied, for example, by Green or Besharov.

The second response would be (and to some extent is currently) to fight the battle at the qualification stage. Given the potential importance of the expert opinion that would be a necessary part of the defence strategy.

What is a distinct possibility is that the defence will use experts, not necessarily as witnesses, but to assist in the cross-examination of persons tendered as Crown experts. On the issue of qualifications, stringent questioning on educational background should be expected since therapists in some jurisdictions hold a Master's degree in Social Work or Education Psychology (it will be suggested that they are less qualified than those holding a Ph.D.); there are a few Masters programs which involve a specialization in child sexual abuse; and there is unlikely to be an extensive educational background in assessment as opposed to counselling or therapy.

Stringent questioning can also be expected on issues of bias, particularly the position on the false allegation issue, and knowledge of the literature in that area; and stringent questioning should also be expected on "tainting", that is, the possible dangers of suggestibility as a result of therapeutic models of interviewing as compared to assessment questioning. One can expect demands for full production of notes and records on this latter line of questioning. A defence coupling of issues of bias (the therapeutic model of starting from a position of believing the child) plus suggestibility can be devastating to expert evidence.

Additionally, one can expect the usage of anatomically correct dolls to be a major issue with the defence suggesting that its usage at all, and certainly incorrect usage, may well taint the evidence. Yuille, for example has argued that usage of anatomically correct dolls can never be justified based on the current studies.[129] White would argue that dolls may be used at an initial investigatory stage but only with extreme caution and without firm conclusions to be drawn.[130]

The difficulty that arises is that some therapists and sexual assault centres are now faced with the prospect of refusing to provide therapy for fear that it may taint a case. If disclosure is a process rather than, as with an adult complainant in other crime situations, a moment of immediate complaint, the likelihood of increasing the number of reported incidents to the prosecution level is going to remain low.

FOOTNOTES

1. *An Act to Amend the Criminal Code and Canada Evidence Act,* S.C. 1988, c. 24, proclaimed Jan. 1, 1988.

2. These restrictions have been removed in large part by provisions of provincial legislation and the *Canada Evidence Act. R.S.C. 1985, c. C-5.*

3. *Wright* v. *Tatham*, (1837) 112 E.R. 488.

4. *Omychund* v. *Barker* (1744), 26 E.R. 15.

5. W. Blackstone, *Commentaries on the Law of England*, vol. 4 (Oxford: Clarendon Press, 1966) at 214.

6. Myers, "Protecting Children from Sexual Abuse: What Does the Future Hold?" (1989) 15 J. of Contemp. L. 31.

7. See J. Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (New York: Farrar, Strauss & Giroux, 1984).

8. J. Wigmore, *Evidence in Trials at Common Law* (1970), at 736-737.

9. See for example, A.R. Cross, *Cross On Evidence,* 4th ed., (London: Butterworths, 1974) at 181; G. Williams, "Corroboration - Sexual Cases" [1962] Crim. L.R. 662. Williams, for example, argued that sexual cases are particularly subject to the danger of deliberately false charges stemming from sexual neurosis, fantasy, jealousy and spite.

10. *Supra* note 8, vol. 2 at 509ff.

11. See for example, Bienen, "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in S. 924A of the Treatise on Evidence" (1983) 19 Cal. W.L. Rev. 235, in which it is strongly argued that Wigmore ignored scientific evidence to the contrary at the time he wrote the text.

12. Cited in G. Goodman, "Children's Testimony in Historical Perspective" (1984) 40 J. of Social Issues 9 at 10-11.

13. *Mattouk* v. *Massad,* [1943] A.C. 568 at 591.

14. *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 16.

15. Sir W. Holdsworth, *The History of the English Law*, 3d. ed., (London: Sweet & Maxwell, 1944).

16. *R.* v. *Wallwork* (1958), 42 Cr. App. R. 153 at 160-161.

17. *Sankey* v. *R.,* [1927] S.C.R. 436 at 439.

18. R.J. Delisle, *Evidence Principles and Problems*, 2d ed., (Toronto: Carswell, 1989) at 316.

19. *Supra* note 14.

20. *R.* v. *Horsburgh,* [1967] S.C.R. 746 at 756, Martland J., in which it was held that young children who committed sexual acts amongst themselves under the encouragement of an adult were participants in the crime.

21. *R.* v. *Kendall*, [1962] S.C.R. 469.

22. Hornek & Clarke, "Children Testimony: Legal and Developmental Issues" (prepared for the Western Judicial Education Centre Conference, May 1990) at 31.

23. Report of the Committee on Sexual Offences, *Badgley Report,* vol. 1 (1986) at 193.

24. For example, whether the definition of sexual abuse includes verbal propositions or is restricted to actual or attemped physical sexual contact.

25. See V. De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults* (Denver: American Humane Association, 1979) at 216; Yun, "A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases" (1983) 83 Col. L. Rev. 1745.

26. D. Finkelhor, *Sexually Victimized Children* (New York: Free Press, 1979).

27. *Supra* note 6.

28. In the U.S. there has been a 322% increase in reports since 1980: see Sorensen & Snow, "How Children Tell: The Process of Disclosure in Child Sexual Abuse" (1991) 52 Child Welfare 3 at 3.

29. *Ibid.*

30. J.C. Yuille, M. King & D. MacDougall, *Child Victims and Witnesses: The Social Science and Legal Literatures* (Ottawa: Department of Justice, 1988); Jones & McGraw, "Reliable and Fictitious Accounts of Sexual Abuse to Children" (1987) 2 J. of Interpersonal Violence.

31. See Thoennes & Tjaden, "The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes" (1990) 14 Child Abuse & Neglect 151 at 157, where it is noted that this is particularly common where the child is very young because of the difficulties in extracting information from the child.

32. Sorenson & Snow, *supra* note 28 indicate that this may be as high as 75% at some stage in the disclosure process.

33. Typically one interview is conducted. With young children the likelihood of disclosure is minimal.

34. Toth, "False Prophets and Other Dangers: Current Issues in Child Abuse Intervention" (Address presented to the National Center for Prosecution of Child Abuse) at 8-9; Quinn, "The Credibility of Children's Allegations of Sexual Abuse" (1988) J. Beh. Sciences & The Law 181.

35. Green, "True and False Allegations of Sexual Abuse in Child Custody Disputes" (1986) 25 J. of the Am. Acad. of Child Psych. 449.

36. Benedek & Sheteky, "Allegations of Sexual Abuse in Child Custody and Visitation Disputes" (1985) Emerging Issues in Child Psychiatry and the Law.

37. Besharov, "Solomon's Choice", *Ms. Magazine* (June 1989).

38. See Thoennes & Tjaden, *supra* note 31, in which the authors dispute the notion that there is an epidemic of such allegations or that when such allegations are made that the reports are any more likely to be unfounded than if not reported in the context of a divorce/custody dispute. See also Corwin, "Child Sexual Abuse and Custody Disputes, No Easy Answers" (1987) 2 J. of Interpersonal Violence; Finkelhor, "Is Child Abuse Overreported" (1990) Public Welfare at 23-29.

39. Recently, Social Services in Alberta was reported to have claimed that as many as 50% were false (the term should have been unfounded) but this was quickly withdrawn by the Deputy Minister: see "Sex Complaints Claim Retracted" *Calgary Herald* 1992 (10 October 1992).

40. In *D.* v. *D., (3 Nov. 1989),* (Alta. Q.B.) [unreported] it was stated of a child abuse treatment centre that "their therapy is almost a brainwashing procedure".

41. *Supra* note 22.

42. *Ibid.* at 32.

43. Yuille, King & MacDougall, *supra* note 30 at 18.

44. Sheehy & Chapman, "Assessing the Veracity of Children's Testimony" (1989) 3 Med. L. 311; Nurcombe, "The Child as Witness" (1986) 25 J. of the Am. Acad. of Child Psych. 478-480; Melton, "Children's Competency to Testify" (1981) 5 Law and Human Beh. at 82; Loftus & Davies, "Distortions in the Memory of Children" (1984) 40 J. of Social Issues at 62; Ceci, M.P. Toglia & D.F. Ross, *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987).

45. *Supra* note 30 at 22-23.

46. *Ibid.* at 25.

47. J.C. Yuille, "Assessment of Children's Testimony" (1988) 29 Can. Psych. 247.

48. Sheehy & Chapman, *supra* note 44 at 20-21.

49. Yuille, King & MacDougall, *supra* note 30; Jones & McGraw, "Reliable and Fictitious Accounts of Sexual Abuse to Children" (1987) 2 J. of Interpersonal Violence.

50. *R.* v. *Poitras* (28 July 1992), (B.C.C.A.) [unreported] at 5.

51. *Supra* note 28.

52. *R.* v. *Keller* (4 June 1989), (Alta. Q.B.) [unreported].

53. *R.* v. *Meddoui* (1991), 61 C.C.C. (3d) 345 (Alta. C.A.).

54. *R.* v. *Bannerman* (1966), 55 W.W.R. 257, aff'd 57 W.W.R. 736 (S.C.C.).

55. *Ibid.*

56. *Ref. Re. Truscott*, [1967] S.C.R. 309.

57. *R.* v. *Fletcher* (1983), 1 C.C.C. (3d) 370 (Ont. C.A.).

58. *R.* v. *Pootoogook*, [1984] N.W.T.R. 165.

59. *R.* v. *Connors* (1986), 71 A.R. 78 (Alta. C.A.).

60. *R.* v. *Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.).

61. *R.* v. *D.(R.R.)* (1989), 47 C.C.C. (3d) 97 (Sask. C.A.).

62. *R.* v. *R.(M.E.)* (1989), 71 C.R. (3d) 113 (N.S.C.A.).

63. See also *R.* v. *Demerchant* (1991), 66 C.C.C. (3d) 49 (N.B.C.A.); *R.* v. *Leonard* (1990), 54 C.C.C. (3d) 225 (Ont. C.A.); *R.* v. *Krack* (1990), 56 C.C.C. (3d) 555 (Ont. C.A.).

64. See also *R.* v. *Christian* (1992), 125 A.R. 57 (Alta. C.A.); *R.* v. *Gosselin* (23 May 1986), (Sask C.A.) [unreported].

65. *Supra* note 60.

66. *R.* v. *C.K.C.* (1 June 1992), (Alta. C.A.) [unreported].

67. *Ibid.*

68. See *R.* v. *Steven A.* (19 October 1992), (Ont. C.A.) [unreported]; *R.* v. *Barsoum* (June 1991), (N.W.T.C.A.) [unreported].

69. Minutes of the Uniform Law Conference, August 1992.

70. *Supra* note 53.

71. Sorenson & Snow, *supra* note 28; Summit, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 Child Abuse & Neglect 177.

72. *R.* v. *Laramee* (1991), 6 C.R. (4th) 277 (Man. C.A.).

73. *R.* v. *L.(D.O.),* [1993] 4 S.C.R. 419.

74. *R.* v. *K.G.B.* (25 February 1993), (S.C.C.) [unreported].

75. *Supra* note 60.

76. *R*. v. *Smith* (27 August 1992), (S.C.C.) [unreported].

77. *R*. v. *Collins* (1991), 9 C.R. (4th) 377 (Ont. C.A.).

78. *R*. v. *Reed* (8 March 1992), (Alta. C.A.) [unreported]. See also *R.* v. *P.(J.),* [1993] 1 S.C.R. 469 in affirming the decision of the Que. C.A. that a statement of a child aged 3 years and 9 months as to what occurred at age 2 years and 3 months was admissible as *res gestae.*

79. *R.* v. *Aguilar*, [1992] O.J. No. 1825 (Ont. C.A.).

80. *R.* v. *W.B.* (9 November 1992), (Alta. P.C.Y.D.) [unreported].

81. *College of Physicians and Surgeons* v. *Khan* (September 1991), (Ont. C.A.) [unreported].

82. *R.* v. *F.(G.)* (1992), 10 C.R. (4th) 93 (Ont. Gen. Div.).

83. *R.* v. *Moore* (1991), 63 C.C.C. (3d) 85 (Ont. Gen. Div.).

84. *Supra* note 60.

85. *R.* v. *Steven A*. (29 September 1992), (Ont. C.A.) [unreported].

86. Frissell & Vukelic, "Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of a Child's Out-of-Court Statements" (1990) 66 N. Dak. L. Rev. 599.

87. The U.S. Supreme Court has held that statements in response to leading questions of a therapist were inadmissible. See *Idaho* v. *Wright* 110 S. Ct. 2139 (1990). This case also lists the 23 States which permit child hearsay but require corroboration.

88. J.R. Spencer & R.H. Flin, *The Evidence of Children: The Law and the Psychology* (London: Blackstone, 1990) at 221-225.

89. Goodman & Reed, "Age Differences in Eyewitness Testimony" (1986) 10 Law and Hum. Beh. 317.

90. *R.* v. *Abbey,* [1982] 2 S.C.R. 24, in which it was held that cross-examination is necessary as the primary test of veracity.

91. *R.* v. *Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.).

92. *Supra* note 81.

93. *R.* v. *Johnson* (11 June 1992), (Alta. C.A.) [unreported].

94. *R.* v. *Robertson* (1987), 33 C.C.C. (3d) 481 (S.C.C.).

95. *Beland* v. *R.* (1988), 60 C.R. (3d) 1 (S.C.C.).

96. *R.* v. *Green* (1988), 40 C.C.C. (3d) 333 (S.C.C.).

97. *R.* v. *Morin* (1989), 44 C.C.C. (3d) 193 (S.C.C.).

98. *R.* v. *D.(L.E.)* (1989), 50 C.C.C. (3d) 142 (S.C.C.).

99. *R.* v. *C.R.B* (1991), 109 A.R. 81 (S.C.C.).

100. *Ibid.* at 101.

101. *R.* v. *B.(F.F.),* [1993] 1 S.C.R. 697.

102. See for example the discussion in J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 489-506.

103. *R.* v. *W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.).

104. *Ibid.* at 400.

105. *R.* v. *Tucker* (1992), 120 A.R. 393 (C.A.).

106. *Ibid.* at 395.

107. *R.* v. *C.(R.),* [1993] 2 S.C.R. 226.

108. *R.* v. *R.C.* (1992), 49 Q.A.C. 37.

109. *R.* v. *R. W.* (11 June 1992), (S.C.C.) [unreported].

110. *Ibid.* at 12-13.

111. Jongt & Rose, (1989) 84 Pediatrics 1022.

112. *R.* v. *Jones* (1989), 44 C.C.C. (3d) 248 (Ont. C.A.).

113. *R.* v. *Mohan* (1992), 71 C.C.C. (3d) 321 (Ont. C.A.).

114. *Ibid.* at 326-327.

115. *R.* v. *B.(G.)* (1990), 56 C.C.C. (3d) 200 at 220 (S.C.C.).

116. *Ibid.* at 220.

117. *R.* v. *Graat*, [1982] 2 S.C.R. 819. Subsequent to the completion of this paper the Supreme Court of Canada replaced the condition of "helpfulness" with "necessity"; *R.* v. *Mohan* (5 May 1994), (S.C.C.) [unreported].

118. *R.* v. *Graat, ibid.; R.* v. *Fisher,* [1961] S.C.R. 535.

119. *R.* v. *Kyselka,* [1962] O.W.N. 160 (C.A.).

120. *R.* v. *Kostuck* (1967), 29 C.C.C. (3d) 190 (Man. C.A.).

121. *R.* v. *S.R.* (11 June 1992), (Ont. C.A.) [unreported].

122. *R.* v. *Beliveau* (1987), 30 C.C.C. (3d) 193 (B.C.C.A.).

123. *R.* v. *Taylor* (1987), 31 C.C.C. (3d) 1 (Ont. C.A.).

124. *R.* v. *Poitras* (28 July 1992), (B.C.C.A.) [unreported].

125. *R.* v. (*C.R.A.)* (1990), 57 C.C.C. (3d) 522 (B.C.C.A.).

126. *R.* v. *J.(F.E.)* (1989), 53 C.C.C. (3d) 64 (Ont. C.A.); *R.* v. *Kuz* (9 September 1992), (Ont. C.A.) [unreported].

127. *R.* v. *Burns* (1992), 74 C.C.C. (3d) 125 (B.C.C.A.); *R.* v. *Kuz, ibid.*; *College of Physicians and Surveons* v. *Kanz* (September 1992), (Ont. C.A.) [unreported].

128. *R.* v. *Burns, ibid.*

129. Yuille, "The Systematic Assessment of Children's Testimony" (1988) Can. Psychology 247.

130. White, "Should Investigatory Use of Anatomical Dolls Be Defined by the Courts" (1988) J. of Interpersonal Violence 471; White & Santillie, "A Review of Clinical Practices and Research Data on Anatomical Dolls" (1988) J. of Interpersonal Violence 430.