CHILD WITNESSES IN CRIMINAL CASES

Child witnesses are special. This is true whenever they are called on to give evidence in any proceedings, but when they become part of a criminal prosecution, the uncertainty that our judicial system has with respect to the evidence of children is heightened. The purpose of this paper is to consider how we deal with these uncertainties in our pursuit for the truth and proof beyond a reasonable doubt.

The treatment of child witnesses in a criminal case falls into two major divisions: the technical and the tactical. There is obviously overlap between these two divisions, but they provide a convenient basis for studying the child witness. The technical rules, such as when a child will be permitted to give sworn evidence or when the evidence of the child will require support from other evidence, show us how we treat the child witness and what role we permit the child to play in a criminal case. The tactical side of the inquiry should demonstrate why we have the technical rules which have been developed, and permit us to assess whether those technical rules assist or inhibit the prime function of the criminal trial which is to determine the guilt or innocence of an accused person. It is the contention of this paper that while current practices may lead in some circumstances to objectively unfortunate results, the law cannot afford to sacrifice the rights of accused persons, who are in jeopardy of severe punishments by the State, to the comfort of those whose evidence may lead to the imposition of such severe punishments.

PART I

THE TECHNICAL RULES

Who is a "Child Witness"? - Considerations of Age and Mental Capacity

The Young Offenders Act, S.C. 1980-81-82, c. 110, s. 2(1) provides that:

> In this Act,
>
> ...
>
> "child" means a person who is or, in the absence of evidence to the contrary, appears to be under the age of twelve years; ...

The Act deals specifically with the admissibiity of evidence given by a "child" in proceedings under that Act. Such a definition of who is a child is a tentative departure from the former law, which still applies in the regular criminal courts, that only discussed the status of a person as a child witness by describing what was to be done "where a child of tender years is offered as a witness": Canada Evidence Act, R.S.C. 1970, c. E-10, s. 16(1). This left the question of who was a child witness a matter for the courts to determine on a case by case basis. Compare: Criminal Code, R.S.C. 1970, c.C-34, s. 12, as am. by S.C. 1980-81-82, c. 110, s. 72.

Some guidance can be gained on this issue from the cases which consider when the inquiry contemplated by s. 16(1) of the Canada Evidence Act must be conducted. In Nova Scotia there is the authority of R. v. McKevitt (1936), 66 C.C.C. 70 (N.S.S.C. in banco) which dealt with a witness of 12 who was permitted to

testify without first being examined as to her knowledge of the nature of an oath. Nothing was brought to the attention of the Judge regarding the age of the child when produced as a witness. In his report the trial Judge stated:

> I did not think judging by her age and from her appearance that it was necessary to examine her as to her knowledge of the nature of an oath nor was such course suggested by either counsel.

The Court refused to give effect to the appeal on the basis that the trial Judge had erred in swearing the witness without first examining her as to her knowledge of the nature of an oath.

The fact of capacity to give sworn testimony is presumed where a child is 14 years of age or more: R. v. Antrobus (1946), 87 C.C.C. 118, at p. 122 (B.C.C.A.); R. v. Nicholson, (1950), 98 C.C.C. 291, (B.C.S.C.); R. v. Armstrong (1959), 125 C.C.C. 56 (B.C.C.A.); R. v. Dyer (1971), 5 C.C.C. (2nd) 376, at p. 384 (B.C.C.A.).

At common law if a person could not take an oath their evidence could not be received. The effect of s. 16(1) of the Canada Evidence Act was that unsworn testimony could be received in some circumstances. However, there remain some minimum qualifications required before a person will be competent to give even unsworn testimony. The seminal case on this point still appears to be Sankey v. The King (1927), 48 C.C.C. 97 (S.C.C.). Anglin, C.J.C., stated at pp. 99-100 that:

> Now it is quite as much as the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On

> both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term "child of tender years" is not defined. Of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that he does not understand the nature of an oath. Such a child may be convicted of crime; Cr. Code, ss. 17-18. A very brief inquiry may suffice to satisfy the Judge on this point. But some inquiry would seem to be indispensible. The opinion of the Judge, so formed, that the child does not understand the nature of an oath is made by the statute a pre-requisite to reception in evidence of his unsworn testimony. With the utmost respect, in our opinion, there was, in this instance, no material before the Judge on which he could properly base such an opinion. He apparently misconceived the duty in this regard imposed upon him by the Statute.

See also: R. v. Dumont (1950) 98 C.C.C. 336 (N.B.S.C., A.D.).

The concept of "sufficient intelligence" is difficult to describe. It may also be difficult to determine until the witness has embarked upon giving evidence. In R. v. Harbuz (1978), 45 C.C.C. (2nd) 65 (Sask. Q.B.) a mistrial was declared after it had become apparent during a half hour that the testimony being given by the witness concerned was "confused and repetitious and incoherent", supported by the witness' appearance and actions which were "as strained as his evidence." The trial Judge appears to have thought that the confusion stemmed from some mental deficiency, although there was no evidence of that fact other than the objective perception of the witness. See also R. v. Switzer (1925), 45 C.C.C. 377 (Ont. S.C., A.D.) It appears that this is all that a Judge may rely upon in coming to the conclusion that a young person is capable of being a witness in a criminal proceeding. If the Judge is concerned, a more extensive inquiry will of course be required. It may be that the only "intelligence" required of a witness in the first instance is that she or he know the difference between truth and lying: R.

v. Singh (1979), 48 C.C.C. (2nd) 434, at p. 439 (Man. C.A.).

For a statement of the common law position see Roscoe's Criminal Evidence, 16th ed., Stevens & Sons (London: 1952), p. 125-126. English law has made accommodations for the reception of unsworn testimony of children in particular circumstances as discussed in Archbold Criminal Pleading Evidence & Practice, 36th ed., Sweet & Maxwell (London: 1966), pp. 465, 477-478, 1028-1029; and Phipson on Evidence, 13th ed., Sweet & Maxwell (London: 1982), pp. 694-697.

The Problems of the Oath: The Second Branch of Competency

As we have seen, the statutory exception to the common law in s. 16 of the Canada Evidence Act requires a two-pronged inquiry by a trial Judge to determine whether the witness is able to give sworn testimony or is competent at all. Failure to make such an inquiry will vitiate any conviction founded upon such evidence even though it is given unsworn: R. v. Pawlyna (1948), 91 C.C.C. 50 (Ont. C.A.); R. v. Molnar (1948), 90 C.C.C. 194 (Alta. S.C., A.D.); R. v. Jones, [1964] 2 C.C.C. 123 (N.S.S.C.); R. v. Fitzpatrick (1929), 51 C.C.C. 146 (B.C.C.A.); R. v. Mandy and Petrosky (1950), 98 C.C.C. 240 (B.C.S.C.).

Similarly, there can be no committal for trial after a preliminary inquiry based solely on the deposition of a child received without any investigation of the competency of that child: R. v. Court (1947), 88 C.C.C. 27 (P.E.I.S.C.); Stillo v. The Queen (1981), 22 C.R. (3rd) 224 (Ont. C.A.).

There is authority for the proposition that counsel may elicit the evidence from the potential witness in order to qualify them to give evidence: R. v. Jing Foo (1939), 73 C.C.C.

102 (B.C.Co.Ct.). The better view appears to be that the Judge conduct the inquiry because it is the Judge who must make the decisions pursuant to the duty set forth for him in s. 16 of the Canada Evidence Act.

If there is some question as to the competency of the witness being proferred, it is incumbent upon counsel to raise an objection going to competence at the time the witness is presented to be sworn: R. v. Deol Gill and Randev (1981), 58 C.C.C. (2nd) 524, at p. 529 (Alta. C.A.); R. v. McKevitt, supra. However, this is not an incontrovertible rule; R. v. Pawlyna, supra.

The Canada Evidence Act provides:

> s. 16(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

Much ink has been spilt with respect to the import of this provision. The Canada Evidence Act provision should now be considered in light of the parallel provisions in the Young Offenders Act which provide:

> S. 60(1) In any proceedings under this Act, where the evidence of a child or a young person is taken, it shall be taken only after the youth court judge or the justice, as the case may be, has:
>
> (a) in all cases, if the witness is a child, and

> (b) where he deems it necessary, if the witness is a young person
>
> instruct the child or young person as to the duty of the witness to speak the truth and the consequences or failing to do so.
>
> (2) The evidence of a child or a young person shall be taken under solemn affirmation as follows:
>
> I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.
>
> (3) Evidence of a child or a young person taken under solemn affirmation shall have the same effect as if taken under oath.
>
> s. 61(1) The evidence of a child may not a received in any proceedings under this Act unless, in the opinion of the youth court judge or the justice, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

As noted above, a "child" is a person who is or appears to be under the age of 12 years, while a "young person" means a person who is or appears to be over 12 years of age but under 18, 16 or 17 years of age depending on the provincial proclamation: Young Offenders Act, supra, s. 2(1).

In making the inquiry with respect to swearing a child under s. 16(1) of the Canada Evidence Act the trial Judge must refer to the taking of an oath. This has been described as a condition precedent to receiving any testimony from the proposed witness: R. v. McKay (1975), 23 C.C.C. (2nd) 4, at p. 11 (B.C.C.A.). After all, a child witness does not have the right to affirm except in proceedings under the new Young Offenders Act: R. v. Budin (1981), 58 C.C.C. (2nd) 352, at p. 355 (Ont. C.A.); R. v. Fletcher (1982), 1 C.C.C. (3rd) 370, at p. 373 (Ont. C.A.).

As pointed out above in the citation from the Sankey case, the inquiry mandated by s. 16(1) of the Canada Evidence Act may be brief, but it must cover certain specific territory. It seems to be the law now that there does not have to be any reference by the trial Judge to a belief in God or of another almighty: R. v. Fletcher, supra. This overrides may authorities to the contrary. For example, the Fletcher case specifically overruled R. v. Budin, supra, on this point. In Budin it was stated at p. 356:

> No precise form of questions can be devised to test a child's understanding of the nature of an oath. The essential things are that the trial Judge's questioning should establish whether or not the child believes in God or another almighty and whether he appreciates that, in giving the oath (which can be read to the witness) he is telling such Almighty that what he will say will be the truth. A moral obligation to tell the truth is implicit in such belief and appreciation.

See also R. v. Dawson (1968) 4 C.R.N.S. 263, at p. 267 (B.C.C.A.). On such reasoning, it was quite proper for a trial Judge to examine a prospective witness as to his religious knowledge and, if it were found deficient, to not permit him to be sworn. This, incidentally, was and may still be the rule in some jurisdictions as to whether an adult is permitted to make an oath. Similarly, it had been held, though this is probably now overruled, that where the trial Judge's questions did not refer to God and negative responses were received with respect to the proposed witness' attendance at church or Sunday school that there were insufficient grounds on which to swear that witness: R. v. Kowalski (1962) 132 C.C.C. 324 (Man. C.A.). Other cases which have seemed to require religious belief or some conception of a Supreme Being are: R. v. Larochelle (1951), 102 C.C.C. 194

(N.S.S.C. in banco); R. v. Antrobus, supra. Silence in the face of such questions is of course construed against the witness: R. v. Carson (1954), 110 C.C.C. 61 (B.C.S.C.)

The obligation undertaken in making an oath is now seen as a moral obligation rather than a religious one and so now it has become unnecessary to examine a prospective witness with respect to their religious beliefs or knowledge: R. v. Taylor (1970), 1 C.C.C. (2nd) 321 (Man. C.A.); R. v. Dinsmore (1974), 27 C.C.C. (2nd) 533 (Alta. S.C., T.D.). Certainly, however, questions as to religious belief may still remain relevant as an indication of a child's appreciation of the nature and consequences of an oath.

The concept of the oath as the undertaking of a moral obligation comes from a trilogy of Supreme Court of Canada cases beginning with Bannerman v. The Queen, [1966] S.C.R. v, aff'g (1966) 48 C.R. 110 (Man. C.A.). There Dickson, J., as he then was, stated at p. 135:

> The belief as to the consequences of an oath, supposing this to mean the spiritual consequences of telling a lie on oath, will necessarily differ according to the theological belief of the witness. An oriental child, who, breaking a saucer against the witness box, responds to the oath: "You shall tell the truth and the whole truth; the saucer is cracked and if you don't tell the truth your soul will be cracked like the saucer"; or one who takes the "chicken oath", in which there is cut off the head of the fowl; or one who takes the "paper oath" in which the witness, having written his name on a piece of paper, burns it, may give different answer to the question; "What happens if you tell a lie?" and they all answer differently to the child raised in the Christian tradition.
>
> What are the spiritual consequences of telling a lie under oath? No human being can say.

Dickson, J., continued at pp. 137-138:

> In my opinion all that is required when one speaks of an understanding of the "consequences" of an oath is that the child appreciates it is assuming a moral obligation; see Best, Odgers, Archbold and Halsbury, supra. The object of the law in requiring an oath is to get at the truth relative to the matters in dispute by getting a hold on the conscience of the witness.

Reference should also be had to the decision of the majority of the Supreme Court of Canada in Reference re R. v. Truscott, [1967] 2 C.C.C. 285 where it was held sufficient that a child witness understood the "moral obligation of telling the truth". The test so defined was quoted with approval by Spence, J., in Horsburgh v. The Queen [1968] 2 C.C.C. 288, at p. 320 (S.C.C.):

> I have considered the examination of each of the witnesses by the learned trial Judge and I have come to the conclusion, to use the words of the majority of this court in Reference re R. v. Truscott ... that "the learned trial Judge properly exercised the discretion entrusted to him and that there were reasonable grounds for his concluding that [the child witnesses] understood the moral obligation of telling the truth." I am of the opinion that the test so set out must be considered to be that upon which the competency of a child of tender years to be sworn must now be determined.

Essentially, the trial Judge must look for some "sense of responsibility" in the witness: R. v. Harris (1919), 34 C.C.C. 129 (Sask. K.B.), which shows an ability to appreciate the difference between right and wrong and the obligation to giving evidence only of what is right.

While it would be futile to attempt to suggest some formula of questions by which competency to give sworn evidence

could be determined, there are a number of authorities on the conduct of the inquiry which provide guidelines to follow. For example, the following series of questions and answers was held to be entirely inadequate to determine the competency of a child witness to be sworn:

Q. How old are you?

A. Twelve.

Q. Do you go to school?

A. Yes, sir.

Q. Do you go do Sunday School?

A. Sometimes.

Q. Do you know what the Bible is?

A. Yes, sir.

Q. Do you know what it is to tell the truth?

A. Yes, sir.

Q. Do you know what happens if you tell a lie?

A. Yes, sir.

Q. What happens?

A. You are punished.

R. v. Stone (1960), 127 C.C.C. 359 (Ont. C.A.). See also: Jones v. The Queen (1958), 121 C.C.C. 199 (N.B.S.C., A.D.). Some useful examples and discussion of the proper approach for questioning in this area are given in Bigelow, S. Tupper, "Witness of Tender Years" (1966-67), 9 Crim. L.Q. 298.

Leading questions are permissible during this inquiry by the trial Judge, and the Judge may even instruct the child on

the nature of an oath so that the child can adopt it and understand it: R. v. Bannerman, supra, at p. 137. See also R. v. Larochelle, supra, at p. 202. It is also proper for a parent or counsel to instruct a child on the nature of an oath prior to any court hearing: R v. Brown, (1951), 99 C.C.C. 305 (N.B.S.C., A.D.).

Cross-examination of the child witness on the question of competency may be permitted by the trial Judge: R. v. Armstrong, (1907) 12 C.C.C. 544 (Ont. C.A.) but this authority seems to have been supreceded, at least in Ontario, by the decision in R. v. Salmon (1972), 10 C.C.C. (2nd) 184 (Ont. C.A.), and R. v. Budin, supra, at p. 356.

The inquiry made of a child witness is done in the manner of a voir dire in the presence of the jury if there is one. However, it is essential that the questions and answers made during the inquiry be recorded because:

> The failure of either the transcript or the Learned Trial Judge's report to reveal the nature and scope of the learned Judge's inquiry before admitting the unsworn evidence of Barbarba Berrard leaves me in the position where I am compelled to say, on the record, that this evidence, too, was improperly received.

The absence of a record means that no assessment can be made of the child's understanding of the nature and consequences of an oath or her ability to testify at all: R. v. Duguay [1966] 3 C.C.C. 266, at p. 269 (Sask. C.A.); R. v. Jones, supra, at p. 125.

It is still probably necessary for a trial Judge to keep the two inquiries of which we have been speaking distinct, that is the inquiry as to the understanding of the nature and consequences of an oath, and the second more fundamental inquiry

which may be necessitated in determining whether the witness has sufficient intelligence to testify at all. See R. v. Kowalski, supra; R. v. Lebrun (1951), 100 C.C.C. 16 (Ont. C.A.); R. v. Hampton, [1966] 4 C.C.C. 1 (B.C.C.A.). However, some believe that the two-pronged inquiry has been telescoped to one: Schiff, S.A., Evidence in the Litigation Process, 2nd ed., Carswell (Toronto: 1984), p. 158.

Finally, it must be remembered that if a child's evidence is improperly taken as sworn evidence, it can not later be treated as unsworn evidence. It is the kind of error that requires the ordering of a new trial: R. v. Hampton, supra, at p. 7; although if the evidence is of a "peripheral character" it can perhaps be disregarded: R. v. Bannerman, supra, at p. 139.

A useful, though somewhat dated article on this subject generally is Cartwright, Ian: "The Prospective Child Witness", (1963-64) 6 Crim. L.Q. 196-204. See also: McWilliams, P. K.: Canadian Criminal Evidence, 2nd ed., Canada Law Book (Aurora: 1984), pp. 886-892; Roscoe's Criminal Evidence, supra, loc. cit.; Popple, A. E., Canadian Criminal Evidence, 2nd ed., Carswell (Toronto: 1954), pp. 360-362, 425-427.

The Child's Evidence

Having found the child witness competent to testify by sworn or unsworn testimony, the treatment of a child's evidence as special does not change. There are cautions required in acting on a child's evidence, various requirements for corroboration, and special considerations with respect to "recent complaints" by children. All of these display a wariness with respect to the truthfulness and hence reliability of the child's evidence. These are particularly important given that the courts

have not been disposed to the reception of expert evidence with respect to the mental abilities of a particular child witness. R. v. Kyselka et al (1962), 133 C.C.C. 103 (Ont. C.A.).

The Young Offenders Act provides in s. 61(2) that:

> No case shall be decided on the evidence of a child alone, but must be corroborated by some other material evidence.

This applies whether the "child" - a person apparently or in fact under the age of 12 - has been sworn or not. This appears to be inconsistent with s. 60(3) of that same Act which provides that:

> Evidence of a child or young person taken under solemn affirmation shall have the same effect as if taken under oath.

The statutory rule in s. 61(2) of the Young Offenders Act is consistent with the current law with respect to a child's testimony given as unsworn evidence under s. 16(1) of the Canada Evidence Act and the Criminal Code, supra, s. 586 which provides that:

> No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

The evidence of children, even when sworn, is not seen as inherently as good as that of a competent adult. Spence, J., stated in Horsburgh v. The Queen, [1968] 2 C.C.C. 288, at p. 320 (S.C.C.):

> The view expressed by the learned trial Judge is not only that the evidence of children, once sworn, must be received, but it must be treated as that of a competent adult witness. In my opinion, this is a serious misdirection, as the witnesses, despite the fact that it was determined, in my opinion properly, that they were capable of being sworn, were nevertheless child witnesses and their testimony bore all the frailties of testimony of children, such frailties as Judson, J., in this court referred to in R. v. Kendall, 132 C.C.C. 216 at p. 220... The evidence of such children was, as Judson, J., pointed out, subject to the difficulties related to (1) capacity of observation, (2) capacity to recollect, (3) capacity to understand questions put and frame intelligent answers, and (4) the moral responsibility of the witness.

The Court's concern on this last point was with witnesses who, despite having been qualified to be sworn, might be unlikely from their past history to speak the truth. Compare, for example, R. v. F., [1969] 2 C.C.C. 4 (Ont. H.C.J.); R. v. B. (1969) 12 Crim. L.Q. 337 (Ont. Co.Ct.). This caution with respect to the evidence of young persons is particularly appropriate where the incriminating evidence emanates from a child: R. v. Budin, supra, at p. 357; R. v. Burdick (1975), 27 C.C.C. (2nd) 497, at pp. 507-510, (Ont. C.A.); R. v. Tennant and Naccarato (1975), 23 C.C.C. (2nd) 80, at pp. 87-88 (Ont. C.A.).

It is, however, insufficient to merely direct the jury to consider such evidence of children carefully. Brooke, J.A., commented in R. v. Quesnel and Quesnel (1979), 51 C.C.C. (2nd) 270, at pp. 278-279 (Ont. C.A.):

> The defence contends and I agree that the trial Judge erred in not instructing the jury adequately as to the frailty to be attached to the testimony of children who were the complainants and failing to direct them with respect to such testimony as was suggested by Dubin, J.A., in R. v. Camp (1977), 36 C.C.C. (2nd) 511 at p. 521... What happened here was that the trial Judge

> cautioned the jury with respect to the evidence of children but left the matter on the basis that the evidence may be as dependable as that of an adult. For example, he said of the evidence of a child, "consider it carefully. Remember the age of the witness. Remember from your own personal knowledge the way 13-year olds act and that they may not give as credible evidence as adults or they may give as credible evidence." In his re-charge he said:
>
> > Secondly, I was asked again to refer to the evidence of young children, of people thirteen and fourteen and so forth and I think I told you before that you will have to use your own judgment on this matter, you own knowledge of such things. 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 decision but you should bear these things in mind.
>
> Perhaps the recharge may have gone some distance correcting the original error but the evidence was of such doubtful quality that with the caution reference should have been made to the particular weaknesses in the child's evidence so that the real significance of the frailty of her evidence was clear.

The law reports are themselves compelling evidence that courts are hesitant to act on the evidence of children alone and look for corroboration of some kind before entering a conviction. However, there can be no doubt that the sworn testimony of a child can be so compelling even without corroboration that a verdict of guilt based on such evidence alone can stand: R. v. Patrick (1981), 63 C.C.C. (2nd) 1, at p. 5 (B.C.C.A.), aff'd 66 C.C.C. (2nd) 575 (S.C.C.). See also McWilliams, op. cit., at pp. 735-737; Popple, op. cit., at p. 332.

Corroboration of Sworn Testimony

The Criminal Code, supra, s. 246.4, as am. by S.C. 1980-81-82, c. 125, s. 19, provides that:

> Where an accused is charged with an offence under Section 150 (incest), 157 (gross indecency), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 246.3 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Simply because corroboration is not required for these offences, it is likely that the general attitude shown towards the evidence of children may as a practical matter continue to call for corroboration of the evidence of children in sexual assault cases. As was recently stated in the Alberta Court of Appeal (admittedly dealing with unsworn testimony in that case):

> ...evidence by young children of sexual assault is bound to evoke sympathy from a trier of fact. The trier should be warned not to let emotion cloud judgment and to give serious consideration to the questions how reliable is the unsworn testimony and how persuasive to remove doubt is the evidence offered in support of that unsworn testimony.

R. v. Chayko (1984) 12 C.C.C. (3rd) 157, at p. 173.

The fact that no corroboration is now required for incest is not new: Bergeron v. The King (1930), 56 C.C.C. 62 (Que. K.B.), but see R. v. Beddoes (1952) 103 C.C.C. 131 (Sask. C.A.). Nor was it necessary for the old offence of buggery; R. v. Patrick, supra; R. v. Cook (1979), 47 C.C.C. (2nd) 186 (Ont.

C.A.). However, as was pointed out in Regina ex rel. Taggart v. Forage (1968), 3 C.R.N.S. 117 at p. 120 (Ont. S.C.):

> It is not my intention to deal in any protracted way with the statement of the learned Juvenile Court Judge to the effect that the alleged assault being homosexual in nature no question arises as to the applicability of the general law relating to corroboration. Even apart from specific statutory requirements, corroboration is to be sought for the evidence of children, particularly in relation to allegations of sexual misconduct and its presence or absence judiciously evaluated. ...In the light of the evidence adduced, including the association existing among the four youths, it is for their collective evidence that corroboration should be sought.

Corroboration was required where the charge was indecent assault, whether the victim was male or female: R. v. Larochelle, supra. It was the nature of the accusation made against the accused in a case of sexual misconduct which demanded close scrutiny of any evidence of guilt so that any conviction might be safely made: R. v. McBean (1953), 107 C.C.C. 28 (B.C.S.C.); R. v. Cairns (1960) 128 C.C.C. 188 (B.C.C.A.). While a jury need not now be instructed that it is unsafe to act on the uncorroborated evidence of a complainant, it is not a circumstance that a Judge alone should ignore in considering whether evidence has sufficient cogency to justify a verdict of guilty: R. v. McMillan, [1967] 2 C.C.C. 12 (Alta. S.C.).

Corroboration of Unsworn Testimony

The Criminal Code, s. 586, Canada Evidence Act, s. 16(2), and the Young Offenders Act, s. 61(2) all require corroboration of unsworn testimony for it to be used as a basis for conviction. See McWilliams, op. cit., p 737; Roscoe's

Criminal Evidence, supra, p. 126.

The original purpose of s. 16(2) of the Canada Evidence Act as seen by the Supreme Court of Canada in the case of Paige v. The King (1948), 92 C.C.C. 32, at p. 38 was that corroboration was "independent evidence":

> Such independent evidence must possess probative value which is the very quality s. 16 denies to the unsworn and uncorroborative evidence of a child of tender years. Such is the effect of the specific provision that "such evidence must be corroborated." It follows that if it is not corroborated it does not possess probative value and should be ignored.

This is a rather harsh rule. The recent decision in R. v. Chayko, supra, at p. 171 adopted the view of the Supreme Court of Canada in Vetrovec v. The Queen (1982), 67 C.C.C. (2nd) 1 that corroboration is merely evidence which enhances the credibility of a material particular of the story which implicates the accused, helps the judicial mind appreciably to believe one or more of the material statements or facts deposed to by the witness. The Alberta Court of Appeal came to this conclusion notwithstanding that the Vetrovec decision stated that it was restricted to circumstances requiring corroboration apart from statute. This appears to make more sense than the reasoning in Paige because if the evidence of an uncorroborated witness is not "probative" of anything by itself, surely it should not be admitted at all.

Corroboration of Children Generally

The requirement of corroboration is clearly in place in the Criminal Code, the Canada Evidence Act and the Young Offenders Act. The first major rule that results from these

statutory provisions is that "the unsworn evidence of a child of tender years will not constitute corroboration of the evidence of another child of tender years whose evidence is also given without oath": Paige v. The King, supra, at p. 37; R. v. Whistnant (1912), 20 C.C.C. 322 (B.C.C.A.); R. v. McInulty (1914), 22 C.C.C. 347 (B.C.C.A.); R. v. Lamond, (1925), 45 C.C.C. 200 (Ont. S.C., A.D.); R. v. Mandy and Petrosky (supra); and R. v. Hamlin (1929), 52 C.C.C. 149 (Alta. S.C., A.D.) being overruled; but see R. v. Pepin (1974), 20 C.C.C. (2nd) 531 (Que. S.C.).

Similarly, unsworn evidence requiring corroboration cannot be corroborated by nor corroborate the evidence of an accomplice because the evidence of an accomplice needs to be corroborated: R. v. Perensky and Smith (1950), 96 C.C.C. 397 (Alta. S.C.). However, a definitive statement cannot be made on this point given the change in the law effected by the Vetrovec decision, supra. However far the ripples of the Vetrovec decision run, it seems evident that a trial Judge must be alive to the possibility of concocted or embellished evidence where the Crown offers witnesses from these traditionally suspect categories: children and accomplices. R. v. Cassibo (1982), 70 C.C.C. (2nd) 498 (Ont. C.A.). On the corroboration of unsworn evidence by an accomplice generally, see R. v. Bruce (1971) 3 C.C.C. (2nd) 416 (B.C.C.A.); cf., R. v. White (1974), 16 C.C.C. (2d) 162 (Ont. C.A.)

Unsworn evidence can be corroborated in many ways without the necessity of the Crown adducing evidence from another witness in its case in chief with respect to the circumstances of the offence. For example, statutory corroboration can come from the evidence led by the defence admitting a circumstance of an implicating character: R. v. Fontaine (1914) 23 C.C.C. 159 (Ont. S.C., A.D.); from an inculpatory statement given by the accused:

R. v. Richmond (1945), 84 C.C.C. 289 (B.C.C.A.); R. v. Cowpersmith (1946) 1 C.R.314 (B.C.C.A.); false testimony by an accused: White v. The Queen (1956), 115 C.C.C. 97 (S.C.C.); or the inherent probability of testimony offered by the defence at trial: R. v. Cairns, supra. Silence by an accused in the face of an accusation cannot be used as corroboration: Fargnoli v. The Queen (1957), 117 C.C.C. 359 (S.C.C.). Where it is sought to base corroboration in false testimony or a false statement by an accused person, the court must be astute to find that the false statement has been proved beyond a reasonable doubt: R. v. Burdick (1975), 27 C.C.C. (2nd) 497, at pp. 506-516 (Ont. C.A.).

Similar fact evidence raises particularly difficult questions with respect to corroboration. In Guay v. The Queen (1978), 42 C.C.C. (2nd), 536 (S.C.C.) the Court was dealing with charges of gross indecency and whether or not similar fact evidence with respect to occurrences could be admitted as corroborating the testimony of the young boys involved. Pigeon, J., stated at p. 547:

> On the admissibility of similar fact evidence, I think it should be said that it is essentially in the discretion of the trial Judge. In exercising this discretion he must have regard to the general principles established by the cases. There is no closed list of the sort of cases where such evidence is admissible. It is, however, well established that it may be admitted to rebut a defence of legitimate association for honest purposes, as well as to rebut evidence of good character. Where the evidence is admissable on the first mentioned basis, it may be admitted as part of the case for the prosecution.
>
> Secondly, where similar fact evidence is thus admissible, the evidence on each similar count may also be used to corroborate the evidence for the prosecution on each of the other counts. Seeing that similar fact evidence may be used to rebut the kind of defence above mentioned, the evidence on each count becomes admissable to rebut the defence on each of the other

> counts. It cannot obviously be necessary to have it repeated for this purpose; it is enough to say that it may be taken into account.

See also: R. v. Pottle (1978) 49 C.C.C. (2nd) 113 (Nfld. C.A.); R. v. Williams (1973) 12 C.C.C. (2nd) 453 (Ont. C.A.); R. v. Deslauriers (1972) 10 C.C.C. (2nd) 309 (Ont. C.A.); R. v. Fisher (1968) 11 Crim. L.Q. 204 (B.C. Mag. Ct.); R. v. Kazody (1957), 117 C.C.C. 315 (Ont. C.A.); R. v. Thompson (1954), 110 C.C.C. 95 (B.C.C.A.); R. v. Iman Din (1910), 18 C.C.C. 82 (B.C.C.A.).

Circumstantial evidence may serve as corroboration in some circumstances. R. v. Parish (1968) 3 C.R.N.S. 383 (S.C.C.); R. v. White Debeau and McCollough (1974), 16 C.C.C. (2nd) 162 (Ont. C.A.); R. v. Wilson (1973), 14 C.C.C. (2nd) 258, at p. 277 (N.S.S.C., A.D.); R. v. Johns (1956), 116 C.C.C. 200 (B.C.Co. Ct.). However, it is important to keep in mind when relying on circumstantial evidence for purposes of corroboration the decision of the Supreme Court of Canada in Thomas v. The Queen (1952), 103, C.C.C. 193, at p. 201 where Cartwright, J., as he then was, stated:

> It is the duty of the Judge in a case of this sort, when there is any evidence on which a jury could find corroboration, to direct the jury as to what is necessary to constitute corroboration and it is then for the jury to say whether corroborative inferences should be drawn. In the case at bar to enable the jury to deal with this question it was essential that it be made plain to them ...that facts though independently established, could not amount to corroboration if, in the view of the jury, they were equally consistent with the truth as with the falsity of her story on this point.

The final point to be deal with with respect to corroboration is the now perhaps unimportant question of accomplices. This is a particular problem in relation to sexual

offences. Martland, J., held in Horsburgh v. The Queen, supra, at pp. 298-299, that particeps criminis means one who shares or co-operates in a criminal offence. The passage cited below from that case shows that the term includes an accessory after the fact, who certainly could not be convicted of the main offence. What is necessary to become an accomplice is participation in the crime involved, and not necessarily the actual commission of it. Whether or not there has been such participation will depend upon the facts of the particular case:

> The substance of the case made against the appellant was that he aided and abetted at the commission of delinquencies. The delinquencies consisted of various acts of sexual intercourse. ...
>
> In any event, the situation in this case is that all the material evidence tended to establish that the appellant aided and abetted at the commission of delinquencies was given by persons who had knowingly and willfully committed those very deliquencies, or, as in the case of Best, had been guilty of aiding and abetting. In the circumstances of this case, in my opinion they were particeps criminis and were accomplices. In saying this I do not contend that every child that becomes a juvenile delinquent is necessarily an accomplice of a person who contributes to such a delinquency. I say only that such a child may, depending on the circumstances of the case, be an accomplice.

This, unfortunately, does not provide much guidance. Dickson, J.A., had an opportunity to consider this decision in R. v. Taylor, supra, and concluded at p. 329:

> I do not read Horsburgh as authority for the proposition that child A witness to an act of intercourse by an accused man with child B is rendered incapable of corroborating the evidence of child B for the reason that child A at another time and place had intercourse with the accused. ...a person merely witnessing an act does not thereby become an

accomplice.

R. v. Pegilo (1934), 62 C.C.C. 78 (B.C.C.A.) is a little more helpful on the issue. There the charge was one of incest and corroborative evidence would have been required if the daughter involved had been found to be an accomplice. The Court found at p. 79:

> If she consented to the act she would be equally guilty under the Code. But "to constitute the offence of incest on the part of the woman there must be something in the nature of permission and not merely submission to the act of the accused."...
>
> She testified: "I didn't want to do it and he made me." She tried to prevent him without however making any outcry that would bring others in the house to her rescue. She gave as a reason "because my father threatened me if I called out or did anything - if I told anyone - he would kill me and then kill himself too." This of course was not permission to do the act. Corroboration therefore was not necessary.

See also Bergeron v. The King, supra, where it was held that a person under the age of consent could not be an accomplice to a crime and that therefore their evidence to support a conviction for incest need not be corroborated.

Since Vetrovec it may have become academic whether or not a child is an accomplice in sexual offences. Each case turns on its facts and no invariable warning is required; R. v. Vetrovec, supra, at p. 17:

> ...as a matter of common sense something in the nature of confirmatory evidence should be found before the finder of facts relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect...
>
> Generally on the subject of corroboration of child

Generally on the subject of corroboration of child witnesses, see: Salhany and Carter, Studies in Canadian Criminal Evidence, Butterworths (Toronto: 1972), pp. 173-179; McWilliams, op. cit., 738; Roscoe's Criminal Evidence, supra, 452; Archbold, op. cit., p. 478, 517, 1030-1033, 1041, 1127.

Recent Complaint

The Criminal Code now provides in s. 246.5 that:

> The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated.

This provision may have little effect with respect to the introduction of complaint evidence when young children are involved. The purpose of such evidence was described in R. v. McLay (1979), 48 C.C.C. (2nd) 468 (Ont. Dist. Ct.) in relation to a charge of forcible confinement at pp. 469-470:

> It has long since been well established that in sex-related offences involving females as well as males evidence of a recent complaint said to have been made by the victim together with the particulars of such complaint may be adduced in evidence, not in corroboration with the sworn testimony of the complainant but as conduct consistent with such sworn testimony.
>
> ...
>
> There is some suggestion in the texts based on very early English cases that evidence of a recent complaint is admissible in all criminal cases involving personal violence, whether sexual or not. ...
>
> I...rule that the complaint first of Luke and shortly thereafter of James to their mother having been made at the first reasonable opportunity after the acts

> complained of and without inducement on the part of the mother to make them, may be adduced in evidence together with the particulars of the complaints not to show the truth of the matters complained of but only to show consistency with the unsworn testimony of the two children.

The rule in rape cases used to be that the absence of such complaints was taken into consideration in assessing the evidence. Statute has now abrogated that consideration. However, the positive presence of complaints of this type should be looked for in the evidence of children for the purpose of assisting with the assessment of their credibility. This was the basis on which such recent complaints were admitted in R. v. Frame (1976), 31 C.C.C. (2nd) 332 (B.C.Co.Ct.); R. v. Adam (1972) 8 C.C.C. (2nd) 201 (Ont. C.A.). Nothing in the new statutory provision has changed the fact that a statement made as soon as reasonably possible after the alleged event is likely to be true when told so soon after to the person to whom you would expect the story to be told if it is told at all. R. v. Everitt (1925) 45 C.C.C. 133 (N.S.S.C. in banco). At the same time, it is unlikely that an evidentiary basis now needs to be laid to explain the fact that no complaint was made because of a witness' real fear of vengeance which might result: R. v. Chenier (1981), 63 C.C.C. (2nd) 36 (Que. C.A.).

Statements by Accused Children

The authorities in this area are generally in agreement that statements made by children who are or may be accused of an offence must be given the strictest scrutiny in determining admissibility. The leading decision is, of course, Horvath v. The Queen (1979), 44 C.C.C. (2nd) 385 (S.C.C.). The facts appear sufficiently in the conclusion of Spence, J., at p. 412:

> Here, the appellant was 17 years of age. He was of a most unstable character, diagnosed by the Crown Psychiatrist as being a sociopathic personality who had boasted that he owned three fine automobiles, that he had been the manager of one department of a large company, who had said to a youth who was his friend that he was so anxious to obtain a fine car that he would take the money from his mother and even kill her, and then this boy is hammered in cross-examination by two most impressive police officers and then taken by a skilled and proved interrogations specialist and, with what the psychiatrist described as the most suggestive of questions, taken through a three-phase examination so that the learned trial Judge characterized his condition at that time as one of "complete emotional disintegration." It is my strong view that no statement made by that accused under those circumstances can be imagined to be voluntary, and I do not find anything in the authorities which I have analysed which would show me that the law is otherwise.

Estey, J., concurred with Spence. The other half of the majority of four rested on the narrower basis that lack of consent to the "hypnosis" which began at some point during the interrogation rendered the statement involuntary and thus inadmissible. The other three members of the court would have excluded the statement made under the "light hypnotic state", but allowed subsequent statements which were made when the "light hypnotic state" had ceased. The whole court was clearly concerned with the effect of the interrogation tactics used on the accused. This focus is also central to the other decided cases in this area. The Courts are concerned with the objective circumstances of the making of any statement more than with the subjective qualities of the children making the statements.

The starting point for any consideration of whether a statement made by a child should be admitted into evidence must be R. v. Jacques (1958), 29 C.R. 249 (Que. S.W.Ct.). There a child of 14 1/2 was apprehended by the police, driven for some

135 miles in silence, he was deprived of his personal belongings, imprisoned behind double, locked doors with a barred window in a cell normally used for those detained on suspicion of murder, he was under the constant watch of a permanent guard who could see him always, during his detention of two days he did not receive one full meal, he had to use a toilet in the sight of his guard, no opportunity was given to him to see a relative, and when finally he was led into the room where he was questioned, in tears and nervous, no one said a word until the child's tears stopped and then the first words spoken were the caution. The court held at p. 267:

> Indeed, if the jurisprudence concerning the taking of a statement shows clearly at what point the rights of the individual should be protected, these rights should be observed even more carefully in the case of a child by reason of the fact that a child is a child and that as such, he has not the resistence, maturity or understanding of an adult to cope with the situation of this nature.

As a result of these rather horrific facts, the Court suggested that the authorities should, at p. 268:

> (1) require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to the place of interrogation;
>
> (2) give the child, at the place or room of the interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not;
>
> (3) carry out the questioning as soon as the child and his relative arrive at headquarters;
>
> (4) ask the child, as soon as the caution is given, whether he understands it and if not, give him an explanation;

> (5) detain the child, if there is a possibility of proceeding according to (3) above, in a place designated by the competent authorities as a place for the detention of children.

These, as indicated above, are essentially objective criteria by which courts would be able to assess the voluntariness of a statement given by a child. Doubts have been expressed with the utility of these guidelines: Fox, Williams, "Confessions by Juveniles" (1962-63), 5 Crim. L.Q. 459, but in R. v. Yensen (1961), 130 C.C.C. 353 (Ont. H.C.) the guidelines were cited, and commended with respect to having a parent present. McRuer, C.J.H.C., stated at p. 361:

> I would go one stage further than Judge Schreiber went in this case with reference to the caution. I do not think it is sufficient to ask a child if he understands the caution. I think the officer must be in a position, when he comes into court, to support the statement, to demonstrate to the Court that the child did understand caution as a result of careful explanation and pointing out to the child the consequences that may flow from making the statement.

The presence of parents at the taking of a statement from a child has remained an important consideration in determining the voluntariness of a statement: R. v. R. (No. 1) (1972) 9 C.C.C. (2nd) 274 (Ont. Prov. Ct.). However, the presence of a parent or similar person is only one factor and the absence of such a person will not vitiate a statement: R. v. Blais (1974), 19 C.C.C. (2nd) 262 (Man. Q.B.); R. v. M. (1975) 22 C.C.C. (2nd) 344 (Ont. H.C.J.); R. v. A. (1975) 23 C.C.C. (2nd) 537 (Alta. S.C., T.D.). The current law is perhaps best summarized by Abella, Prov. Ct. J., in R. v. D.M. and J.P. (1980), 58 C.C.C.(2nd) 373, at p. 377 (Ont. Prov. Ct.) where it was stated that:

> Where as in this case, the child's guardian indicates the willingness to attend, no statement should be taken until the guardian has arrived. Although D.M. seemed to be prepared to be interviewed alone, the police should have given him the opportunity of talking to his guardian first. The child is, of course, free to make an informed decision about giving a statement in the absence of a parent or friend, but the prudent course is at least to let the child consult with a protective adult.
>
> J.P.'s mother was virtually excluded from the evening's activities. It was not enough to notify her of her son's arrest. The arrest and her right to come to the station should have been explained in Portuguese. Even if she had understood what was going on, it is difficult to see how she could have found her way to the other end of the city that night. But in any event, any questioning of J.P. should have awaited her arrival. J.P. should have been advised that he could call his parents. Had his mother wished to be present for the interview and had J.P. wanted her there, an interpreter should have been available in order to ensure that her presence was meaningful.

While the absence of a caution will not vitiate a statement either, it is clear from the Yensen decision and from R. v. R. (No. 1), supra, that the absence of a caution is a particularly important matter in a case involving statements by a young person. Other courts have merely treated statements made by a young person in the same way as they would statements by an adult. Re R. D. (1961), 35 C.R. 98 (B.C.S.C.). Perhaps because of this attitude, very little encouragement has been given to the notion that a person who is mentally, but not physically, a child should be given the same protections as are deemed appropriate for children: R. v. Helpard (1979), 49 C.C.C. (2nd) 35 (N.S.S.C., A.D.).

The Young Offenders Act has basically codified the common law as it deals with the statements taken from young children. Section 56 of the Act states as follows:

56(1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.

(2) No oral or written statement given by a young person to a peace officer or other person who is, in law, a person in authority, is admissible against the young offender unless

(a) the statement was voluntary;

(b) the person to whom the statement was given has before the statement was made, clearly explained to the young person, in language appropriate to his age and understanding, that

(i) a young person is under no obligation to give a statement,

(ii) any statement given by him may be used as evidence in proceedings against him,

(iii) the young person has the right to consult another person in accordance with paragraph (c), and

(iv) any statement made by the young person is required to be made in the presence of the person consulted, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent and adult relative, any other appropriate adult chosen by the young person; and

(d) where the young person consults any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

(3) The requirements set out in paragraph 2(b), (c) and (d) do not apply with respect to oral statements where there are made spontaneously by the young

> person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.
>
> (4) A young person may waive his rights under paragraph 2(c) or (d) but any such waiver shall be made in writing and shall contain a statement signed by the young person that he has been apprised of the right that he is waiving.
>
> (5) A youth court judge may rule inadmissible in any proceedings under this Act a statement given by the young offender in respect of whom the proceedings are taken if the young person satisfied the judge that the statement was given under duress imposed by any person who is not, in law, a person in authority.

Statements by "children" are a non-issue because they cannot be convicted of committing offences.

While paragraph 2(b) would appear to lay down certain rigorous standards for admission of statements of young people, the Courts have always given special consideration to confessions by juveniles. It may be that the extensive case law which was considered is still relevant in view of subsection (1) and paragraph (2)(a) above.

However, on aspect of the caution which is not included in paragraph (2)(b) is the requirement of warning the young person, if over age fourteen, of the possibility of a transfer to adult Court. Formerly, this was considered an important aspect on the question of voluntariness of the statement where it was tendered in adult Court following a transfer order: R. v. Yensen, supra. More recently this has also been held to be an important consideration even where the statement was only adduced in juvenile Court: R. v. A., supra, R. v. D.M. and J.P., supra.

The whole area of statements by children is canvassed in Kaufman, F: The Admissibility of Confessions, 3rd ed., Carswell (Toronto: 1979), pp. 128, 254-256; and the second

supplement to that book (1985), pp. 117-121.

PART II

TACTICAL CONSIDERATIONS

Interviewing the Child Witness

In their book, Fundamentals of Criminal Advocacy, L.C.P. - Bancroft - Whitney Co. (New York: 1974), F. Lee Bailey and Henry B. Rothblatt explained some of the difficulties that may be encountered in interviewing a child witness for a criminal proceeding. They state at para. 125:

> Interviews with child witnesses require special techniques and skills. You may have to spend a significant amount of your time gaining the child's confidence and friendship. Many children are reluctant to discuss matters openly with strangers.
>
> You may be able to separate truth from imagination in a child's story. While some children are exceptionally accurate in their ability to narrate facts, others tend to fantasize as a matter of course. When a child is unable to distinguish fact from fantasy in his own mind, even if you ask him if he knows the difference between right and wrong and truth and falsehood, his affirmative answer does not constitute a guarantee that his story is factual.
>
> A number of preliminary questions should be put to the child to determine the truthfulness of his statements. These questions should cover a wide range in order to disclose those areas in which his flights of fancy are likely to occur.
>
> This line of questioning reveals that the child is truthful about his own academic abilities but he tends to exaggerate his physical abilities. In other areas, he seems to be factual but somewhat evasive. Armed with this knowledge you should be able to interview the

> child, exercising extreme care in those areas in which he is most likely to fantasize.

The circumspection with which the Courts have regarded some of the methods used to extract confessions from young persons for use in court have, until recently, been inconsistent with what the courts regard as acceptable in interviewing a child witness and eliciting a complaint from them. R. v. Pailleur (1909), 15 C.C.C. 339 (Ont. C.A.) involved a charge on incest. After the act, the child met another person and answered questions put to her by him which resulted in the laying of the charges. Moss, C.J.O., commented at p. 343:

> The questions he deposed to having put to her were such as might properly be addressed to her by him, having regard to the fact that the girl's mother had in a measure placed her in his charge during her absence. The questions were natural questions, likely to be put under the circumstances by a person in charge, and there is no valid reason for supposing that the answers were not made freely and voluntarily.

Similarly, Maclaren, J.A., stated at p. 347:

> The questions asked in this case were perfectly natural and not of a leading or inducing or even of a suggestive character, and were not objectionable or alone sufficient to exclude the statement.

See also R. v. Larochelle, supra, at pp. 360-362.

Evidence elicited from children by a parent or person in the position of a parent will not be admissible if brought on by the parent saying that the child "would get a licking if she did not tell the truth and that she, Mrs. Garner, would use a wooden spoon on her": R. v. Mullen, [1968] 1 C.C.C. 320 at p. 334

(B.C.C.A.). Reasonable judges may differ and a certain latitude is given in this area because it may be considered that a young child will not necessarily appreciate the full nature of an offence committed upon them, or perhaps fear punishment coming on themselves. Thus, some judges appear to be happy with people in the position of parents strongly challenging the young person for an explanation of certain suspicious circumstances while others are disturbed by such a suggestive approach. It is appropriate to keep in mind the caution of Martin, J.A., in R. v. McGivney (1914) 22 C.C.C. 222, at pp. 227-228 (B.C.C.A.):

> I have no doubt whatever that in such circumstances this complaint cannot be regarded as voluntary and is inadmissible. And I am also of the opinion that it cannot be said to have been made at "the first opportunity after the offence which reasonably offered itself."
>
> That opportunity here was manifestly, at the latest, when her grandmother first challenged her attention by asking her who had hurt her, and her answer in effect was that no one had done so. Whatever could be said to excuse her silence before that time, nothing could excuse it thereafter. To admit evidence of that nature in such circumstances would, in my opinion, be more than dangerous. While one may be justified in making due allowance for the actions or conduct of young children, yet at the same time it must be remembered that their minds, often highly imaginative, are singularly open to suggestion and the limit should be placed on that allowance and indulgence when prejudice to the accused is likely to result from a further extension thereof. When a reasonable just opportunity is established in the case of the child, there is no more justification for departing therefrom than in the case of an adult.

Until recently then, it might have been thought that the courts were somewhat inconsistent in tending to exact a full standard of voluntariness with respect to statements of complaint while often being happy to treat children giving confessions as

equally capable with adults with respect to voluntariness.

If this is so, there was a startling reversal of attitude in R. v. Singh, supra. There a 15 year old girl gave testimony for the Crown against her father on a charge of arson. After giving her evidence, she was taken to an interview room in the Public Safety Building and questioned by a police officer who pointed to some incriminating letters which her father had written and who told her that it was known that she had lied on the stand. The girl eventually went back on the stand and recanted her former false testimony. The Manitoba Court of Appeal decided that such questioning did not disqualify the girl as a witness - though it would certainly affect the weight of her evidence. The Court also stated at p. 438:

> There was some suggestion that the course of action was proper having regard to the fact that the witness was being persuaded to tell the truth, rather than to give false evidence. In my opinion, improper interference with a witness is wrong whether the motive or result of that interference is to produce true testimony or false testimony. ...where no improper means are used, it is material to consider whether it is sought to have a witness speak the truth or falsehood, but where improper means are used, it is immaterial what the motive is. The law must be assiduous in protecting witnesses from improper interference, especially during the course of the trial. Had counsel recalled Paramajit to ask for a ruling that she was adverse, the learned trial Judge could then have considered whether to have her further questioned. Such questioning would have taken place in the court-room before the judge, not in the Public Safety Building in the presence of two police officers.

Judges are quite suspicious enough of the credibility of children that the risk of influencing adversely that credibility by suggestive questioning outside the court-room is something few involved in the criminal justice system could find beneficial.

Cross-Examination

The right to cross-examine the evidence upon which the Crown is attempting to secure a conviction is a fundamental right of natural justice that the courts should not lightly interfere with: R. v. Tillitson (1947), 89 C.C.C. 389 (B.C.S.C.); R. v. McLeish (1961), 34 C.R. 305 (Ont. S.C.). This includes the right to cross-examine a complainant in a case under the Young Offenders Act with respect to his juvenile record despite s. 38 of the Young Offenders Act: R. v. Scott (1984), 16 C.C.C. (3rd) 17 (Ont. G.S.P.)

A fruitful ground for cross-examination in a case involving a child witness may be with respect to the meaning and understanding of words that are central to the decision in the case. For example, in R. v. Earhart, [1969] 2 C.C.C. 175 (B.C.S.C.) a conviction for contributing to a delinquency "by engaging in sexual intercourse" was quashed when it was made apparent that the strict proof required in a criminal case had not been satisfied. It was stated at p. 176:

> The only evidence that the appellant had sexual intercourse with the complainant was that given by the complainant herself. In order to understand the passages from the evidence which I now cite, it is necessary to know that the appellant was known by the nickname "Animal". The only evidence in the complainant's direct examination that the appellant had sexual intercourse with her is in the following passage:
>
> Q. Now, Katherine, you tell us what happened in the house?
>
> A. I had sexual intercourse with him against my will.
>
> The Court. You had sexual intercourse that's all I heard.

A. Against my will, very much against my will.

Q. With whom?

A. Animal.

The only portion of the cross-examination material to whether or not there had been sexual intercourse is as follows:

Q. What is sexual intercourse?

A. Love between a woman...a girl and a boy.

Q. Could you repeat that, please, Katherine?

A. Love between a boy and a girl.

The evidence of the complainant after cross-examination was held to be equivocal on the essential averment which the Crown had to prove. The evidence was insufficient to support the finding that the appellant had sexual intercourse with the complainant.

Joseph Sedgwick Q.C. described the difficulty of cross-examining children in his lecture "Recurring Trial Problems" in L.S.U.C. Special Lectures (1969): Defending a Criminal Case at pp. 160-161. He stated:

> In cross-examining children, remember they are highly imaginative, and very receptive to suggestions. A careful probing of their story will often show that it came in large part from something they had heard, or read, or that had been planted in their minds by parents or someone in authority over them. I think it was Kipling who said, "A lie is a defencework that nature throws up for the defenceless child". Every experienced counsel has had the case where a little girl comes home from school late and with her clothes in disarray, and, to avoid punishment, says that she has been waylaid and assaulted. Go over the child's story, slowly and gently, particularly as to when the first complaint was made, and to whom, and exactly what was then said or done. ...and certainly, while the child gives his evidence, you should try to exclude the

other Crown witnesses, particularly those who are to be called to give evidence of an alleged complaint. Anyway, it is best to take the evidence of a child in the absence of the parents so as to avoid the child looking to them for help, or confirmation. It is difficult for you to get the undivided attention of the child if its parents are in the front row of the court-room glaring or smiling or nodding as they are prone to do.

Bailey and Rothblatt, op. cit., at para. 387 suggest that:

> Juries instinctively sympathize with the child witness. Therefore, your cross-examination must be gentle, never harsh or domineering. The jury will resent such "unfair" tactics even if you succeed in discrediting the child's testimony.
>
> ...
>
> Child witnesses will almost invariably have been coaxed by their parents or the prosecution to state that they are aware of the difference between the truth and a lie. It is, however, often useful to ask the child if he knows the difference between a lie and a fib or between a lie and a white lie. The answer may well indicate the child's belief that it is not wrong to speak untruthfully in cerain circumstances.
>
> Testimony is usually implanted in the minds of children by interested persons. Their parents, the complainant or the prosecutor will constantly rehearse them. The child, especially the intelligent one, will carefully memorize his story. The story will come out perfectly on direct examination. You can expose this memorization by having the child meticulously and rapidly repeat his testimony. As he speaks rapidly, the memorized portions of his testimony will stand out from those that were not memorized. He may be using words that are not natural for his age and speaking vocabulary.

> Another technique is to start your cross-examination with unimportant matters, allowing the child to gain confidence. Ask him about his school, his teachers, his friends, then, slowly begin to probe him on matters that he does not expect. Continue by going over his testimony given on direct. Again, the rehearsed portion should stand out from the answers he gave on the unexpected questions.
>
> Children are extremely imaginative. Their stories can be pure fiction or part fact and part fiction. If the child has let his imagination run away with him, encourage him to exaggerate. Gently lead him further and further until his story reaches the point of ridiculousness.

Most authors in the field are generally agreed on the unreliabilty of child witnesses and in some circumstances, do everything in their power to avoid being put in the situation where the evidence of the child will be crucial. As Lee K. Ferrier, Q.C., stated in Advocacy: 1982, C.B.A.O. - DeBoo (Toronto: 1982), at p. 651:

> ...Child witnesses, quite often in my experience, will make significant changes in their evidence when they're in the box from what they said to you in the office. They have a tendency, in my experience, to really quite dramatically change what they say on a certain subject and I think that's natural because when they're in the witness box and they're under the pressure of the court room scene, they tend to soften their evidence to the point where it's really not of much use to anybody. Now that wasn't the case today but, in my opinion, Robert was a skillful witness and I thought he did very well. If there's any other way of getting the evidence through other witnesses, that you hope to get through the child, well then do it that way and avoid the necessity of putting the child in the box.

Glanville Williams in The Proof of Guilt, 3rd ed., Stevens & Sons (London: 1963), has the same attitute: See pp.

168-169. Williams relates the following story:

> I have known several different and entirely inconsistent stories told to a policewoman who endeavoured to take a note of the evidence to be given by a small girl. What the child said in court was unlike anything she had said before. This particular child had the face of an angel, and a shy hesitating manner of speech which would have convinced an Aberdonian. She was in fact, according to ordinary standards, a very depraved young person.

Because of the generalized attitudes of the unreliability of the testimony of children the law has developed the technical rules which have taken up much of the discussion in this paper. The rules are not simply important because of the perceived unreliability of a child's testimony, but also because their apparent defencelessness or innocence cuts through the usual circumspection which we apply to any testimony which is received in a court. Arthur Maloney, Q.C., explained in his article on "Corroboration" in L.S.U.C. Special Lectures, 1955 - Evidence, at p. 265:

> It often occurs that in cases where young children are testifying an impression is given to judges and juries that the young children are very truthful. This impression seems to be based on the belief that the young child must be telling the truth because it is unlikely that because of his innocence and youthfulness the young child could have knowledge of such facts as those he is relating unless he has had the experience of which he now complains.
>
> I make a practice of examining young children who will be witnesses at a trial during the preliminary hearing to ascertain what their previous knowledge of such activity might be. If the examination discloses that they have some considerable knowledge of that sort of thing, it may be brought out at the trial and can do much to disabuse the jury's or judge's minds of the impression of youthful innocence.

Direct Examination

A final word should be given with respect to leading direct evidence from a child. It is well to remember that children tend to think in much more concrete terms than adults do and as a result, to give very short answers. That is very hard to probe in cross-examination because there is nothing to lead on to something else: Advocacy, supra, at p. 653. John Watson in his book The Child and the Magistrate, Jonathan Cape (London: 1965) at p. 74 gives some suggestions in this area:

> Anyone can talk to children. Too many people not excluding some magistrates, talk at them. An older boy or girl will usually respond to the invitation, "Tell us all about it" but with a young child it is more difficult, especially if he is nervous. A method of coaxing him to speak, which is sometimes effective, may be likened to a military manoeuvre. An attacking general seldom commences operations by a headlong assault on the enemy's centre. He is more likely to begin by cautious reconnaissance and a delicate probing of the enemy's flanks. The same applies with young children: an enveloping movement is more likely to succeed than the direct assault. "Why did you steal your father's watch?" is bad stragety. The enemy closes his ranks and you are rebuffed.
>
> How much wiser to begin on the flanks with a few simple questions about his home and surroundings. Has he any brothers and sisters? How old are they and what are their names? Where do they live? How does he usually spend his evenings and week-ends? None of these things may be very material; but the questions are factual, uncontroversial and reassuringly removed from the delicate question of his father's watch. The child answers them glibly, gets used to the sound of his own voice and gains a measure of self-confidence. Further questions, more material to the issue, may concern the amount of his weekly pocket money; how he spends it; what happens if it runs out; who his friends are; whether his dad approves of them; whether his friends have watches...As like as not the reason why he stole father's watch will become so plain that the direct question need not be asked.

These remarks are of course as applicable to direct as to cross-examination.

CONCLUSION

In the case of Souliere v. The Queen (1952), 104 C.C.C. 339, at p. 345 (Que. Q.B.A.S.), Mr. Justice Bissonnette stated that:

> It is with great circumspection that the testimony of a child should be admitted. It has been said and written that it is error, not truth, that comes naturally from the mouth of the child. To this may be added the statement by a great Canadian psychiatrist, the lamented Dr. Antonio Barbeau, that a child before the Court is, by psychological definition, a witness to be regarded with suspicion and that he can do only a disservice to the true end of justice.

Current psychological research is testing the accuracy of such assumptions as are exposed in the above passage. One significant collection of research appears in the Journal of Social Issues, vol. 40, no. 2, (1984). However, here as elsewhere the studies with respect to the reliability of a child's memory, the suggestability of memory, face-recognition memory, the effect of traumatic anxiety from witnessing a violent offence on memory, remain inconclusive. The real problem in the treatment of the testimony of children remains our experience of it - however much that experience may be coloured by prejudices which may not in the long term, and with the progress of education, be justified. However, until the academic learning shows that such prejudices against the evidence of children are not justified, and until that experience is borne out by experience in the court-room, it is crucial that the legal system not jettison the circumspection

with which child evidence is now treated. It is essential that in the growing rush to protect children that we do not act to the prejudice of the criminally accused who is in jeopardy of suffering the real and tangible consequences of punishment that are, and must remain, the prime focus of a criminal trial.

RESPECTFULLY SUBMITTED

Joel E. Pink

I acknowledge the assistance of my clerk, Donald C. Murray, in the preparation of this paper.