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A CHILD'S EVIDENCE

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I have been asked to address the topic of children testifying in court and what effect, from a social worker's point of view, this has on them. I am employed as a supervisor in a child welfare agency, Family and Children's Services of Kings County, Nova Scotia, which has recently been involved with a highly publicized case of child sexual abuse in which thirteen adults, many members of the same family, were charged with a number of sexual offences involving twelve children.

This particular situation, which was handled both in Criminal and Family Court, saw eleven of the twelve children, ranging in age from six to fifteen years at the time charges were laid, being involved with eight judges, two juries and nine lawyers. This particular situation, as well as our agency's experience with other children in both Family and Criminal Court, has recently forced us to focus on the effect the court system has on them.

I will attempt, in this paper, to address the trauma, if any, court appearances have on children; child development issues which must be understood in dealing with children in court room situations; the impact of a child's sense of time on his testimony and decisions regarding his fate; the credibility of the child witness; some specific aspects of child sexual abuse and the ramifications of it regarding the child witness; and, lastly, some suggestions and ideas which would improve the situation for children who must give evidence in court.

Little empirical data exists on whether or not court appearances are actually harmful to children. "We do not know whether a court appearance is harmful for some but beneficial for others, or which circumstances lead to trauma and which to catharsis."<sup>1</sup>

Blair and Rita Justice, well known therapists and authors who work with sexually abused children, cite a study completed by the American Humane

Association conducted of 250 families in which a child has been sexually abused, as finding that almost half the families reported having negative experiences about the court process and said that the court experience was bad for their child. The harm done to child victims of sexual abuse by the court process may include lengthy questioning by many legal and social work personnel, who are often strangers to the child, regarding the highly sensitive topic of sexual activity; the trauma of court appearances which can be lengthy and require a child to repeatedly face traumatic memories; and the lack of guarantee that children will not encounter untrained or insensitive personnel. As well as these very justifiable concerns, should the offender be a family member, the child is likely to feel guilty over the accusations and rejection, and sometimes hostility, from other family members. "Many families come away from the judicial experience feeling the child has been harmed, rather than helped, by the process."<sup>2</sup>

The main issue remains as to whether the child as witness will suffer more than the child as victim. Court appearances can pose psychological hazards for the child but these are not insurmountable. The trauma can be greatly reduced by those adults involved in the criminal justice process.

Little research has been done on the effect on children of witnessing or experiencing a crime. Even less is known about the child's response to the legal process itself. It is accepted by many who work with children, however, that current laws which require repeated court appearances, corroboration of child's testimony, or face to face confrontation with the defendant, are traumatizing for children and lead to their failure to perform optimally as witnesses. These types of legal requirements may inadvertently endanger the child's mental health. Research is needed, however, to determine whether current procedures actually increase trauma and to suggest practices to minimize it.

"One of the few studies based on systematic research, that of Gibbens and Prince (1963), reports that child sexual abuse victims who were involved

in court proceedings experienced greater trauma than those who were not, but the researchers admit that it was probably the more severe cases of abuse that ended up in court."<sup>3</sup> Further systematic studies are certainly needed to determine what leads to the trauma some children suffer, while some children do not seem to experience greater harm from legal involvement, and if there are some for whom the legal process actually seems beneficial. Apparently for some children the experience of testifying in court can have a therapeutic effect. In our experience with the specific children mentioned previously, some of the children actually appeared to become stronger as the cases progressed. One thirteen year old boy came to the police wanting to give evidence of further abuse by his parents. The criminal justice process seemed to enforce for some of these children that social institutions take children seriously, that what adults had done to them was wrong, and a sense that justice was being done. Children may also feel that they have some control in the process.

Those experts who feel that the court process is unharmed, sometimes even therapeutic, for the child victim or witness feel that progress is being made with children who must appear in court room situations. "There was a time when a sexually abused child who complained to police had only one thing to look forward to: another rape in the court room. But for many youngsters, in many courts, that is no longer true. Children are being seen, heard and believed in cases that were previously consigned to the closet."<sup>4</sup>

A concern remains for many, however, that children are being clearly prejudiced by delay of resolution of legal matters. A major problem at present is the extent to which parallel proceedings in Family Court and Criminal Court cause the child to sit in limbo pending the resolution of criminal charges. According to the Special Committee on Child Abuse of Metropolitan Toronto, some Family Court Judges will not make a disposition order until the Criminal Court matter is resolved. However, the best interests of the child require a

rapid resolution of the protection issues. "The delay is a terrible burden on the child. He or she has to cope with the pressure of being 'key witness' in a pending prosecution as well as the dislocation and uncertainty of any interim placement."<sup>5</sup>

Our agency has experienced the reverse of this problem with the Family Court proceedings having been completed, the children coming into the permanent care and custody of the agency, but having to testify in Criminal Court proceedings well over a year later. This effects the agency's ability to make permanent, long-range plans for their children via adoption placement so they are in temporary, interim placements at the very time they need permanence and security.

Media identification in child sexual abuse and assaults may result in further victimization of the child and his family. In our community the family name of one of the accused became the brunt of many jokes. This led to those children bearing that surname being exposed to horrendous joking and cruelty by their peers and adults.

The trauma children may suffer through the legal process is a complex and delicate issue. As with any other, there are no clear cut answers and a black or white approach to seeking them will not be productive. Rather, each particular child's vulnerability to the legal process will depend upon the child's own strengths, stage of development, family or other support systems, as well as the intensity of the offence. "...with consideration for the child's age and vulnerability, and with good professional practice, the necessary legal procedures may be carried out in a way that does not further traumatize the child..."<sup>6</sup>

Legal intervention does not have to be destructive to children. As adults involved in the system, we can ensure that children are treated with consideration and respect and that police and court procedures are modified to appropriately address the child as a witness and participant. One means of ensuring good professional practice is by gaining an increased understanding of child

development issues.

A general knowledge of what children are like at certain stages is necessary for those involved with children in a court room situation. This will enable them to choose appropriate methods of gaining information and to assess the child's responses. It must, however, be remembered that no two children develop at the same rate and children of the same age may vary greatly in social, intellectual, and physical maturity. However, children normally progress to adulthood in fairly predictable stages, mastering skills at one level before moving on to the next.

The pre-school age child develops language as the primary mode of communication between ages two and four. Obviously a child cannot be a witness unless he has acquired verbal skills. In the case of a pre-verbal child, another witness or corroborating evidence would be necessary to pursue prosecution. A child aged four through six may be able to talk well, but they do not understand concepts well, and therefore, their verbal skills may imply a better comprehension than actually exists. The pre-school age child does not understand metaphors, analogies, or irony. Children of that age group can accept connections between events but do not understand causality. A child of this age can vividly recall isolated events but memory is usually spotty and lacking in continuity and organization. Although a child at this age is capable of lying to try to get out of a problem situation, it is unlikely since they believe that adults have complete authority and would perceive any lie. Children of this age can distinguish fact from fantasy. When a child in this age group does lie, it is usually his attempt to make something look better or extricate himself from a problem situation. He is unable to practice real deception. The abilities of the pre-school age child fall short of the traditional requirements which the legal system has for witness performance. A young child who has witnessed or experienced a violent crime may not be ready or capable of discussing the event immediately. However, after a delay, the child may describe the crime to a trusted

adult. Lack of understanding of this can lead to police ignoring the young witness or erode the credibility of the child witness' testimony.

The school age child (age six to 11), although capable of practicing deception with adults as part of establishing his own separateness, seldom lies about major issues, particularly in relation to justice and equality. Children in this age group are very sensitive to unfairness. Their thinking is still largely concrete rather than abstract. School age children are very sensitive to any differential application of justice. "They are often rigid and harsh on each other and become legalistic nitpickers with adults."<sup>7</sup> School age children can be coerced into an accomplice role and forced to tell an agreed upon lie or remain silent by the adult offender.

The adolescent relates best to his peer group and may have a minimal outward rapport with adults. He strives to establish his own identity separate from his family. A young person of this age group is capable of deception and manipulation. They are moving into adult thinking and can think abstractly, understand metaphors, analogies, and irony. In short, this age group can be much more similar to an adult witness.

Children in general have a diminished vocabulary and general knowledge base than adults. Their comprehension of any problem being discussed and the words used vary greatly according to their developmental status. Thus, the use of basic words, short sentences, and simple concepts are necessary when interviewing children. It is also well to remember that children in all developmental stages have varying degrees of dependence upon the adults in their world. Thus, they perceive themselves as having limited control over situations. This may lead to children trying to please adults and trying to do and say what they perceive the adults expects. The child may also be highly susceptible to being led by the interviewer and may perceive the interview as a vulnerable experience against which he must try to defend himself. Recognition must also be given to a child's limited

attention span and need for activity.

Studies conducted by Johnson and Foley dispel the wide spread belief that children have more difficulty than adults in discriminating what they perceive from what they imagine. An adult's memory, however, can be more easily facilitated through verbal prompts while a child is likely to need more concrete clues to revive memory. Thus, "the typical police interview consists of a verbal dialogue which places a young child at a distinct disadvantage. This procedure would benefit tremendously from the inclusion of relevant dolls, props, photographs, items of clothing, etc."<sup>8</sup> "While children's tendency to recall less than adults is well documented, there is surprisingly little evidence for other deficits in children's memory."<sup>9</sup>

Because it is becoming increasingly necessary that children are a part of court proceedings, it is mandatory that responsible legal professionals understand child development and know when and how to listen to children.

Some understanding of the children's sense of time is also necessary for those dealing with children within the court system. This is true both as it applies to a child's testimony as well as to placement decisions concerning children. Young children especially have difficulty relating to the passage of time. As well as their sense of time being quite different from that of adults, children tend to have difficulty knowing dates, specific times, or in remembering exactly the timing of past occurrences. It is important in hearing children's testimony to remember that children do not relate to time the way adults do by referring to dates, hours, etc. Rather, children relate to birthdays, holidays, seasons, day and night, special events, or even the time certain shows are on television. Children respond most accurately when asked such things as when the alleged incident occurred, who else was present, who else may have been nearby. Very specific questions, such as if it was a school day or holiday, or what the weather was like, etc., can lead toward the time of an alleged incident.

Bonding issues and the length of time it takes children to forget



significant others when separated from them should be paramount in the minds of those making decisions regarding a child's status. This holds true whether a child is to be made a child in the care of a child welfare agency, placed for adoption, or placed in the custody of one or another parent. It is startling, but factual, that: A child under 2 years of age loses the memory of his primary caregiver after 1 week; a child 2 - 5 years of age, after two months; a child 5 - 10 years of age, after 6 months; a child 11 - 13 years of age, after 1 year; and after 13 years, a child's memory retention is that of an adult. Thus, the frequency of parental contact, if a child may be returned home, must be measured with the above in mind as must as speedy as possible a resolution in child welfare proceedings.

The child's sense-of-time guideline would require decision makers to act with 'all deliberate speed' to maximize each child's opportunity either to restore stability to an existing relationship or to facilitate the establishment of new relationships to "replace" old ones. Procedural and substantive decisions should never exceed the time that the child to be placed can endure loss and uncertainty.

"The courts, social agencies, and all the adults concerned with child placement must greatly reduce the time they take for decisions."<sup>10</sup> To avoid irreparable psychological injury, placement decisions regarding children must be treated as emergencies. Such things as: courts with overcrowded dockets, extended and often postponed hearings, and decision makers who are inclined to procrastinate before rendering decisions, are extremely detrimental to the well being of children.

Our agency has experienced a glaring example of the above with the case of a six month old child, who, after suffering head injuries, was apprehended from his mother who had had two previous children die in unexplained circumstances. The child was found to be a child in need of protection after one year of Family Court Hearings; this decision was appealed to County Court which upheld the decision ten months later; this is presently under appeal.

Therefore, this young child has now spent two years in foster care without permanent plans being able to be made for him!

To combat the above, decisions regarding a child's placement must be treated by agencies and courts as a matter of urgency which gives consideration to a child's sense of time; these cases must be dealt with rapidly and final decisions reached as soon as possible.

Finally, regarding time and children in the court room situation, legal professionals must realize that children, unlike adults, who have learned to anticipate the future and manage delay, have a sense of time based on the urgency of their instinctual and emotional needs. A child will gradually develop the capacity to delay gratification and anticipate and plan for the future. An example of the implications of this occurred with a nine year old child in the care of our agency who was testifying at a Criminal Court hearing regarding sexual abuse. This child had been waiting to testify since 9 a.m. and finally appeared before the judge at 1 p.m. Social work and police personnel had requested a break for lunch before hearing the child's testimony. This was not done and the child, being hungry and having looked forward to a lunch at MacDonald's, rushed through his testimony, making errors, in his efforts to hurry up the procedure and have his immediate needs, ie. food, met!

The younger the child, the more incapable he is of tolerating delay and waiting. "A child will experience a given time period not according to its actual duration, measured objectively by calendar and clock, but according to his purely subjective feelings of impatience and frustration."<sup>11</sup> During adolescence, an individual's sense of time closely approaches that of most adults.

In such crimes as sexual assault, the child victim is often the only witness. Therefore, a key issue regarding children in court is whether the child is judged to be competent to testify, and whether that testimony is credible. The credibility of children's statements has been a source of controversy for centuries. As discussed previously, age differences in perceptual, memory and verbal capabilities must be taken into consideration in assessing witness' competency. However, with proper preparation, literature and experience suggest that even very young children can give valuable testimony. "In most jurisdictions, young children must be qualified as witnesses by the judge before they are permitted to testify before the jury. To qualify a child as a witness, the attorney must demonstrate to the judge's satisfaction that the child (A) can receive and relate information accurately, (B) can understand the difference between telling the truth and telling a lie and (C) can appreciate the necessity of telling the truth in court."<sup>12</sup> It is possible to establish these criteria quite easily provided the questions are asked in a way that the child can understand and provided the child has been prepared for such questioning. Clear questions such as: "If I said 'You are talking to me outdoors now', would that be a lie or the truth?" This type of questioning, rather than asking a child a definition of a lie or the truth (abstract concepts), is much more useful in determining the child's understanding of the necessity to tell the truth. Obviously, infants and pre-verbal children will simply not be able to meet the legal criteria for witnesses.

Regarding sexual abuse particularly, our prejudices concerning the credibility of children as witnesses come to the fore. Judith Herman, a Harvard Medical School Psychiatrist, has been quoted as saying: "We have a very long intellectual tradition that discredits the testimony of women and children when they complain of sexual assault. ...more commonly, there are false retractions of true complaints after a child gives in to family pressure not to testify against an abusive relative."<sup>13</sup> A simple test for

determining whether a child is telling the truth in cases of sexual assault is to listen for details the child would not know if he or she had not witnessed sexual conduct.

The Canadian Criminal Code specifies that the unsworn evidence of a child must be corroborated. By virtue of Common Law, the sworn testimony of children under 14 must be corroborated. A change in the Criminal Code has been in effect since January, 1983 with regard to specific sexual offences only allowing children to be sworn without the necessity for corroboration or jury instruction. However, the courts have generally been reluctant to give full weight to children's evidence even if sworn. No person can be convicted on the unsworn evidence of a child interpreted to be a child under 14 years of age.

Proposed revisions to the Canada Evidence Act recommend that children be allowed to testify as sworn witnesses on the simple basis of understanding what it means to tell the truth, and courts will be free to convict without the necessity of corroborative evidence. These changes call for doing away with the need for corroboration allowing a child under the age of 14 to testify, provided the judge is satisfied that the child understands the obligation to tell the truth. Some critics fear that the accused may be at a disadvantage by getting rid of the corroboration requirement and allowing children to speak. However, in practice, it is expected that judges will be very careful if there is any doubt at all about the credibility of the child. Judges must address the essential issue of whether children understand the moral obligation of telling the truth.

Therefore, in Canada, without amendments to the Canada Evidence Act, the judge has complete discretion over whether a child under 14 is allowed to testify. The judge must be convinced that a child understands the moral obligation of telling the truth. If there are some doubts about the child's competency, the child may still appear in the court room as an unsworn witness, as long as other witnesses or evidence corroborates the testimony.

With crimes of sexual assault in particular, if there are other witnesses, they are often children, and corroborative evidence is usually scarce or non-existent. Therefore, the younger and more vulnerable the child at the time of the assault, the less likelihood of obtaining a conviction of the offender. "Words relating to competency and corroboration are directed toward the protection of the accused and the prevention of an improper conviction in the criminal justice system. Canadian proposals for reform have not yet addressed the issue of the desirability of protecting the child victim."<sup>14</sup>

Thus, factors to consider when judging a child's competency to offer testimony include: the child's degree of maturity, the child's comprehension of the proceedings, the child's ability to distinguish facts from falsehoods, and the child's ability to recall and articulate facts and events. If the proceedings involve some traumatic experience for the child, such as sexual abuse or severe physical abuse, it should also be remembered that discussion of these offences may cause extreme embarrassment for the child as well as fear of coming face to face with the accused, often the parent. Children, no matter how severely abused, often feel guilt and a desire to appease their parent or caretaker. It must also be remembered that the child is fearful of what his testimony might mean in terms of his own future placement. The children with whom we were involved were fearful that the resolutions of Criminal Court would effect their foster home placements. Thus, they confused Family and Criminal Court decisions and their implications.

What are the contra indications to a child's testifying? Experts seem to agree that the child victim should testify only when that testimony will substantially increase the chance of a conviction and will not do serious harm to the child. A case should not proceed if a child is unable or unwilling to give a coherent statement and there is no other evidence. If there is so little chance of a conviction in a particular case, it may not be worth putting a child through the stress of the proceedings. The child's own background,

for example, adjustment or behaviour problems, could be used to try to impeach him or her in the court room. If it seems likely that a jury would be so influenced by these background facts there is little hope for a conviction, there seems no point to having the child testify. However, in deciding not to use the testimony of a child witness, the probability of winning should not be the only criteria. If this is the case, the opportunity to change the climate of the legal system and to change our prejudices about the credibility of the testimony of children, will be lost.

A recent case heard before the Family Court of the Province of Alberta made its finding of a further order of temporary wardship of two girls alleging that they had been sexually abused by their father. Evidence consisted of the written, unsworn statements made by the girls and, although these statements were not directly corroborated, they were corroborated by circumstantial evidence, which included: the expert opinion of a clinical psychologist; self corroboration by the girls themselves through statements that were consistent, detailed, and which demonstrated a sexual knowledge beyond their years; the father's refusal to take a polygraph test, testify or otherwise cooperate with workers and counsellors; and the non-expert opinion of a counsellor of sexually abused children. The evidence was taken as a whole and it was decided that in the girls' best interests that they be made temporary wards.<sup>15</sup>

Although children's credibility in courts of law is effected by a variety of factors such as developmental issues, maturity, the child's sense of time, etc., three legal procedures have been particularly controversial in regard to their effects on children's perceived credibility: competency examination, requirements for corroboration for children's statements, and jury instructions that warn jurors of children's presumed inabilities and describe children as being suggestible. The legal trend seems to be to omit these last two requirements. However, old prejudices die hard and adults are extremely reluctant to believe a child over an adult. Children often

recognize this and possess an inherent reluctance to challenge adult authority and fear retaliation should they contravene this. Moreover, the crime of sexual abuse by its very nature contains major burden-of-proof problems. Prosecutors remain reluctant to try a case that hinges mainly on the uncorroborated testimony of a child victim. For successful prosecution, the child's competence must first be established and, "the child's statements, elicited under constraints defined by the formal structure of the law, must be believed."<sup>16</sup> Should a jury be involved, each juror brings his or her own biases regarding children's abilities and motivations to a trial. Negative biases may be reinforced by a child, who, under the stress of testifying, uses a barely audible voice, fidgets, and is, in general, less assertive than an adult witness. The judge's instructions to the jury may also effect the child's perceived credibility.

In summary, children as witnesses or victims, often report more limited information than do adults, but what they report can be just as accurate. Children are able to differentiate fantasy from reality. "...children can serve as reliable and credible witnesses if they are adequately prepared for the experience and if judges and attorneys are sensitive to their special needs."<sup>17</sup> This sensitivity is definitely increasing, although concerns still abound regarding children and the legal process. "When a child is a key witness to an event, he or she is often in a position similar to a rape victim. The child's credibility is questioned and attacked. Thus, a child who may already have been traumatized by witnessing or experiencing crime may be further traumatized by the actions of the members of the legal system"<sup>18</sup>

Because of the widespread problem of sexual abuse, which effects the lives of countless children, some aspects of the child victim/witness in these cases deserve special mention. Basic knowledge in this area, which is necessary for judges and legal professionals, includes Dr. Suzanne Sgroi's framework for validating a child's complaint of sexual abuse. These criteria will enhance the credibility of the child's story

and relate particularly to incest victims:

- "1) The presence of multiple incidents occurring over time;
- 2) Progression of sexual activity from less intimate to more intimate types of interaction;
- 3) Elements of secrecy;
- 4) Elements of pressure or coercion;
- 5) The child should be able to give explicit details of the sexual behavior."<sup>19</sup>

Dr. Sgroi believes that law enforcement and the criminal justice system have a significant impact on child sexual abuse cases. If prosecution is unlikely to occur, most offenders fail to follow through with treatment plans. They often undermine the credibility of the child victim and pressure the child to recant his statement. She sees the main hope of helping non-violent offenders as being the intervention of the criminal justice system.

"When criminal court judges have the option of sentencing offenders who are convicted of some type of non-violent child sexual abuse (or who plead guilty to charges) to participate in a treatment program as a condition of a suspended sentence or as part of a work release program, the authority of the criminal justice system can be used humanely rather than punitively."<sup>20</sup>

The onus is, however, on judges to find out just what effective treatment is available in their communities remembering that the offender must acknowledge full responsibility for the abuse if any treatment is to be successful.

Dr. Sgroi cautions on laws which are restrictive with respect to the admission of evidence. "Determining the validity of an allegation of child sexual abuse is first and foremost a matter of belief. You either believe the child's story or you do not. If you require that there be corroboration of the child's story by physical evidence, witnesses, or a confession by the perpetrator, you will turn many cases into 'noncases'..."<sup>21</sup>

Sexual abuse counsellors Berliner and Barbieri, who have had direct



experience with hundreds of cases of child sexual assault, say there is little or no evidence indicating that children's reports are unreliable, and no evidence at all to support the fear that children make false accusations or misunderstand innocent adult behavior. "Our clinical experience indicates that many children who report being assaulted actually underreport the amount and type of abuse; exaggeration is rare."<sup>22</sup>

Unfortunately, ..."children cannot expect that society and its institutions will respond supportively to their disclosure of sexual abuse. Adult reactions to uncovered acts of sexual abuse of children are often disbelief, blaming the victim, or minimizing the seriousness of the problem."<sup>23</sup> Even when adults are found guilty of sexual assault against children, prison sentences are lighter than similar crimes against adults. "Persons convicted of crimes against children go to jail less often and for shorter terms than other criminals..."<sup>24</sup> a recent U.S. Justice Department Study found. "Using data from four states covering 1980 and 1981, the study found that 8 percent of persons arrested for child related felonies are sentenced to more than one year in prison. By contrast, 12 percent of persons arrested for similar crimes against victims of all ages received that minimum sentence."<sup>25</sup> The odds still favor the childmolester or abuser. Most cases go unreported, most complaints never lead to charges, and most charges are reduced in plea bargains.

Despite some concerns about the involvement of the criminal justice system in child sexual assault, and particularly incest cases, most experts agree that the meshing of the legal system with the therapeutic thrust is essential. A sexual offender will rarely seek help voluntarily and is likely to resist treatment even if he has been found out. The law enforcement, court system, and probation services are essential external pressures which motivate the offender to seek change and treatment. The combined legal and therapeutic approach is compatible and ensures increased protection for victims, a clearer message of disapproval for the abuse, and a greater

chance of securing treatment for the offender.

The Report of the Committee on Sexual Offences Against Children and Youth, i.e. the Badgeley Report, was made public last August. One task of the committee was to examine and make recommendations on the adequacy of laws to protect children from sexual offences. The report represents the most complete research on child sexual abuse undertaken by any country. The Badgeley committee, after a comprehensive and careful empirical study, found that sexual abuse of children is not new and is extremely widespread. A good number of the 52 recommendations to deal with sexually abused children involve the creation of new offences and greater use of the criminal justice process. The report calls for a fundamental change in the law to permit children to speak directly for themselves at legal proceedings stating that the assumptions that children are unworthy as witnesses and unable to correctly recall events are largely unfounded.

Several recommendations of the report advise widening and defining more clearly and specifically what constitutes sexual abuse against children. These recommendations are proposed on the basis that current legal provisions do not encompass the full range of sexual abuse perpetrated on children. The Report also recommends, on the basis of its findings, changing rules of evidence regarding children's testimony. It recommends that children's evidence be admissible and that there be no statutory requirement for corroboration of an "unsworn" child's evidence. "Lastly, the committee recommends that previous statements made by a child regarding their sexual abuse be admissible to prove the act occurred, whether or not the child testifies at the proceedings."<sup>26</sup> The implementation of these recommendations would increase the opportunity for children to give evidence in court and allow others, such as child protection workers and therapists, to testify regarding the child's statements.

The Badgeley report contends that the Court experience is not harmful for many children. However, this assumption is not substantiated. Thus,

the report focuses largely on the barriers to meeting legal requirements and recommends legislation that is more child-centered. Joyce Miller, a lawyer with the Law Reform Commission of Canada, cautions: "When reforming our laws it is important that we make sure that the State's rights do not outweigh the child victim's rights to be treated in a fair and just manner - the needs of the child should always be held paramount."<sup>27</sup>

From our agency's experience, and a review of the literature, there are ways, keeping in mind the rights of the defendant, to assist and help the child who must appear in the court room. These include:

I Adequate Preparation - There can be no question that it lessens the trauma suffered by children testifying in criminal court if they are adequately prepared. This includes the child witness meeting the crown prosecutor beforehand and spending as much time as possible with him or her. The child should also have an opportunity to visit the court room when it is empty, to become acquainted with where he and other persons will be placed, and perhaps even have a chance to sit in the judge's chair. Role playing, explaining the parts that the crown prosecutor, defence lawyers, and judge will play, are often very helpful for children. Despite the best of intentions on all sides, in many of the cases with which we have been involved, there has not been sufficient time for the crown prosecutor to fully explain to the children why the defence lawyers will act as they do, the types of questions to expect, etc. It is also essential that the crown prosecutor knows the children's words for body parts and acts. The crown should understand the terminology the child is comfortable with and, as well, the child can be prepared with terminology that is suitable for court.

The attorney who presents the child as a witness should make all possible efforts to give the child emotional support and accurate information about what will ensue. Time must be taken to establish rapport with the child. The child must also be instructed not to answer the questions that he or

she does not understand, but instead to ask for clarification before answering. In short, the child should be instructed to tell the truth.

Crown prosecutors should be aware, and should make children aware, of the implications of the use of certain words. For example, note the implication of the use of the word "practice" in the following script:

Q. Do you remember when John (a social worker), said, "Now it's time to practice for court...?"

A. Yes

Q. And you practiced saying, "I'm telling the truth with John, didn't you?"

A. Yes

Q. And you practiced with John saying that your Mom and Dad touched you in the private parts, didn't you?

A. Yes

Q. And during practice, if you gave the wrong answer, John would correct you wouldn't he?

Children we were involved with were repeatedly asked by defense lawyers, in many ways, if someone told them what to say.

Thus, preparing a child with his statement, can be taken out of context to imply that the person doing the preparation has put words in the child's mouth.

In summary, when it becomes clear that a trial is likely and that a child's testimony will be needed, the attorney involved should try to arrange the opportunity for the child to become familiar with the physical and procedural arrangements which will be involved in the court room. Unfortunately, crown prosecutors, police personnel, and social work personnel, are, because of heavy workloads, not always able to spend the time necessary in preparing child witnesses.

## II Consideration Given When Interviewing a Child Victim or Witness -

The manner, as well as the place, in which a child is interviewed is extremely important in determining how traumatized a child may be by the legal process.

First and foremost, the number of times the young victim must repeat details of the assault should be minimized as much as possible. Thus, joint interviews should be held from the onset with police and social work personnel. Hopefully, this initial interviewing will be done in a neutral setting, and in a room which will make the child feel as comfortable as possible. Assigning the same people to handle a case all the way through proceedings can also help the child to feel the comfort of being with familiar adults. It is essential that, should it be at all possible, professionally trained personnel handle all interviews. "A child has a limited capacity to respond to repeated questioning, so in order to most effectively elicit and maintain her cooperation, these various agencies might develop a coordinated approach. Joint interviewing could be established or preferably one person could be designated to take the victim's statements. The initial interview could be videotaped to afford the prosecuting attorney an opportunity to review her capability as a witness. One comprehensive statement should be adequate to file charges."<sup>28</sup>

During interviewing, except if the parent is the offender, a younger child will need a parent or familiar person present to feel secure enough to talk, whereas an older child may be too embarrassed to talk freely if a parent is present. The interviewer should be relaxed and casual, and preferably not in uniform. The function of the interview, as well as the agency he is representing, should be fully explained to the child so that he can cooperate with the proceedings. The language used by the interviewer should relate to the child's level of comprehension. The attention span of the child must also be kept in mind.

The first interview with a child, especially a child who is the victim of sexual abuse, should be comprehensive and aimed towards gathering all the information required as the child is more likely to talk spontaneously at the time of the crisis than later. Since speaking of the details of sexual abuse will cause anxiety, the necessity of numerous interviews

should be avoided. Finally, children's interviewing rooms, and even in some cases child designed courtrooms, have helped the child witness.

Children's courtrooms would be equipped with one way mirrors behind which the defendant, his counsel, and the prosecution could observe the proceedings and participate in the questioning via a skilled interviewer. The interview would be taped and presented during the actual trial.

### III Consideration and Sensitivity Shown to the Child Witness or Victim -

Honesty and sensitivity with child witnesses and/or victims is essential. Children, no matter how young, should be aware, as far as they can understand, of what is happening within the court process and what their role is. It is also the responsibility of judges and legal professionals to become familiar with child development theory as it relates to children's credibility as witnesses as well as learning the specific physical and behavioural or psychological signs of neglect and abuse. From our experience with children testifying in Criminal Court, they often did not eat before the court hearing nor sleep well the night before. Children were also kept waiting for several hours before they testified and, when a lunch break was requested before their testimony, it was denied. Children, unlike adults, cannot always delay gratification and their needs have to be kept in mind. Such things as allowing a private room for children to wait before testimony, etc. go a long way toward helping the child to adequately cope with the ordeal of appearing in the court room. A child's age must also be kept in mind when assessing the implications of them giving testimony. Certainly from our experience, the older the child, often the more difficulty they have, especially in sexual abuse cases, to give testimony. For teenagers, they often feel some responsibility for the abuse although this is not rightly theirs.

Such things as having to confront accused parents, sometimes for the first time in many months, are certainly traumatic for children. Thoughtfulness and consideration for children's feelings should be remembered

by all adults in the court room. One example of an upsetting incident which happened with one of our children was the showing of a video of the family home in the court room with the child present. The child had not been home for several months and, seeing his pet dog in the video, was extremely upsetting for him. Simple things like this can be avoided if adults remain sensitive to children's needs.

As mentioned above, children, if possible, should not be kept waiting long periods of time because of heavy court dockets. In California, whenever a minor is a witness or victim, in a criminal action, his case is given calendar precedence over all others. Waiting increases children's anxiety level and may well reduce the impact of their testimony. During one criminal court hearing with which we were involved, there was supposedly only one case scheduled for that day. However, several others were heard before this while the anxious children waited from 9:30 a.m. to 3:30 p.m. to testify. Their parents, whom they had not seen for several months and who were accused of sexually abusing them, were trying to look in and gain access to the building where the children were held. The R.C.M.P. in that particular case had requested that the children not testify until the next day, but the judge did not follow this recommendation.

As discussed previously in the paper, delays in decisions within the court system have a tremendous impact on children's present well-being as well as their ability to get on with other aspects of their lives. Some of the children in our care in the highly publicized sexual abuse case testified over a period of well over one year. These children certainly regressed, both in their behavior at home and at school, as well as displayed angry and acting out behavior. Clinical findings support that with the passage of time, children become less willing to re-explore distressing events and endeavor to suppress them.

It was recently the recommendation of a justice department commission in Washington, D.C., that victimized children must be handled with greater

sensitivity by prosecutors and judges. Child witnesses should also be informed of judicial outcomes; this notification is often overlooked.

IV Greater Sensitivity Shown by Defence Lawyers - It has been recognized that cross examination is especially difficult for child witnesses. "The defence attorney's job is to impeach the child's testimony. Usual cross examination tactics, such as bringing up other situations that tend to cast doubt on the witnesses' veracity or competence or using an intimidating manner in the questioning, are less acceptable in the case of child witnesses and should not go unchallenged."<sup>29</sup> Sometimes judges will intervene to shield child witnesses from such practices. Judges are charged with regulating the scope, extent and form of cross examination. When the judge does not intervene, the prosecuting attorney must do so. Despite the above quoted caution on the treatment and consideration children should receive, even from the defence lawyer, our experience with children testifying in criminal court on sexual abuse cases often showed that sensitivity was lacking. The children experienced lawyers laughing at them and ridiculing them while they testified as well as openly accusing the children of lying in the court room situation. Children were also pressured to answer questions which they didn't understand and so sometimes gave the wrong answers. Judges should be aware of this and encourage children to take their time and have questions rephrased if they do not understand. When a jury is present, the defence attorney risks alienation should he come down too hard on child witnesses or victims. However, more subtle tactics such as lengthy cross examinations pointing out the child's inconsistencies or lapses in memory are effective in undermining the testimony of the child as are the use of complex grammatical forms, such as double negatives. Tactics such as questioning children in such a way that implies practice or rehearsal of their testimony, with an adult who has gone over their statement with them, also may leave doubt in the judge or jury's mind as to whether the children are telling the truth. Since we have seen ample



evidence in the literature that children do not lie about such issues as sexual abuse, judges should keep in mind, and remind juries, that of course the statement has been gone over with the child but this does not mean that the child has been told what to say.

Children can most eloquently speak for themselves in terms of unfair treatment in the court room. We recently had a 10-year-old boy, who was a victim of sexual assault as well as a witness to sexual abuse of another child, testifying in criminal court. Although the particular trial was only of one of the two accused parents, defence counsels for both parents were present, and they, along with the accused, consulted constantly during the child's testimony, ridiculed him, and made his giving evidence very uncomfortable for him. When the child came out of the court room he expressed to the social worker: "Three big people against one little kid, that's just not fair!"

V The Presence of Supportive Adults Within the Court Room - Children in court room situations need more advocates, as well as having adults who are meaningful in their lives present for support. "...the problem might be solved by having the child sit on the lap of a familiar adult while testifying. Such a procedure may seem foreign to judges and attorneys, but there is no rule in any jurisdiction that forbids it, provided the child's testimony is not prompted."<sup>30</sup>

Consideration should be given to the presence of parents, a social worker if indicated, or a foster parent, if indicated, being present for the child when he/she testifies. This was not permitted in our agency's experience. Fortunately, in most cases, the policemen involved in the case had established an extremely supportive relationship with the children and could act in the role of a supportive adult in the court room. However, in at least one situation, the defence lawyer had the policeman removed because he claimed he was looking at the child and giving support. Certainly as far as supportive adults in the court room goes, some part in the decision should be given to the

child as to whom, if anyone, he would like to have present. Some therapists recommend that the courts appoint experts on mental health to bolster child witnesses emotionally throughout both the investigative and the court phase of legal action.

In Family Court, consideration should also be given to having a child not have parents present if it is a protection hearing where abuse or neglect may have occurred. "The experience of testifying in open court, particularly in the presence of parents, may, however, have a traumatic effect on the child; further, there is some concern that a child might feel intimidated by parents or others."<sup>31</sup> Family Court judges can certainly exclude all adult participants, except counsel, for the child who is the subject of a protection proceeding. Judges are given the authority to determine whether the child who is the subject of a protection hearing will even be present during the hearings. However, despite this, in some recent cases with which our agency has been involved, defence lawyers have subpoenaed children to Family Court. Section 33 of Ontario's Child Welfare Act explicitly directs that "...children under 10 will not be present unless the judge is satisfied that proceedings will be understandable and attendance not injurious to the child's emotional health; a child of 10 and over may be excluded from all, or part of, a hearing if his attendance would be injurious to his emotional health."<sup>32</sup>

Personnel such as social workers, who may work through the court system, should be available to help the child witness and/or victim and this family to understand the legal process including: each person's role and responsibilities, the reason for delays, and the nature of rules of evidence. By advocacy, personnel such as therapists, social workers, etc. can help ensure that the criminal justice system will operate in the best interest of child victims and their families. Those involved with children in the court system should advocate changes such as joint interviewing, having the same prosecutor throughout the legal process, creating child interview rooms designed to

make the child more comfortable, etc. as being necessary. "In the absence of research findings on the effects of criminal justice system involvement, one view is that the protection of the child should be one of the major concerns of the social worker."<sup>33</sup>

VI Legal Representation for Children - As well as all of us who are involved with children in the court system, some experts believe that independent legal representation for children should be mandatory. At the present time counsel for the child has developed in an ad hoc fashion. "Children who are victims of extrafamilial abuse, or are not subject to protection proceedings, do not generally enjoy the benefits that counsel can provide. The designation of a specific child support person may reduce the need for counsel for the child in the criminal courts. Until that occurs, however, greater use of counsel for the child is appropriate."<sup>34</sup> The Child Welfare Act of Ontario provides that a child may have legal representation at any stage in abuse and neglect proceedings in Family Court. Further, it is the recommendation of the Metropolitan Chairman's Committee on Child Abuse of Ontario that the potential utility of independent counsel for the child warrants consideration in all cases, even those which do not proceed to court hearings. This counsel is seen as insulating the child from potential familial pressure, assisting with the investigation, and ensuring that a child's consent to any voluntary services agreement is informed. Then, should the court action become necessary, this counsel could provide continuity of representation, a liaison between the courts, and advocacy. This recommendation of the committee, however, extends only to representation for children who have the capacity to instruct counsel.

Our experience in the Criminal Court system, when child victims or witnesses were testifying, was that an often overworked crown prosecutor did not always have the time to adequately vouch for the needs of the children involved. Separate representation for these children may have resulted in more support being offered to them.

Representation of children's rights could also be done by such people as youth interrogators. "A number of countries, Denmark, Sweden, Israel and the United States, acknowledge there is a need to give special protection to the child victim in the criminal justice process. In 1955, Israel recognized that a sexually assaulted child should not have to relive and re-experience the event in the criminal justice system. The Israeli parliament enacted laws which vest pre-trial investigative powers in 'youth interrogators' who are not members of the police force, but are psychiatric social workers, clinical psychologists, psychiatrists, and child care workers."<sup>35</sup> Thus, children under 14 are excluded from the trial unless the youth interrogator agrees that the child may testify in court. The interrogator can introduce into the court the information obtained from the child. However, legislation does provide that an accused cannot be convicted on the testimony of the interrogator alone but on additional corroborating evidence.

#### VII Use of Videos, Closed Circuit T.V., etc. for Children Testifying -

Many experts have recommended, especially in cases of incest, that the child not have to testify in front of the accused. Video taped testimony, as well as the use of closed circuit television, has effectively been used in Texas and California, in lieu of face to face testimony. At the very best, experts recommend the positioning of children in the court room so that a screen, the judge, or the crown prosecutor is between the child and the accused, thus, there is an illusion of protection for the child. In our involvement with clinical court cases, the accused made faces at, and used hand signals to intimidate the children testifying against them. Psychological pressures can be put on children who may fear reprisals or not want to hurt parents.

In using modern technological aids in imaginative ways, the minor's giving of testimony can be a less traumatic and threatening experience. Inclusion of the defendant, along with the judge and counsel, in the

videotaping session, although not ideal, at the very least spares the child the ordeal of an open trial and protects the accused's rights to have a public trial and the opportunity to make a full defense.

This procedure of prerecording testimony has other possible advantages. "Because the examination is designed to minimize emotional stress, the child's memory and communication can be improved, enhancing the quality of evidence given...and, the accused, after reviewing the prerecorded evidence, may recognize that the prosecution crown has well-developed, convincing evidence if the case goes to trial."<sup>36</sup>

The lawyer representing the child should be reluctant to permit the child to testify in the presence of an abusing parent if it appears this may be traumatic. However, given the parents' constitutional rights, courts may be unsympathetic to this. An affidavit or testimony from a mental health professional saying that the child victim or witness will suffer harm, may be essential.

VIII Use of Depositions; Admission of Hearsay Evidence - Alternatives to a court appearance by a child include a child's out-of-court deposition in grand jury indictments, where rules of evidence are not so stringent, and the admission of hearsay evidence.

"A deposition is the most useful discovery technique, for it not only impresses on the child, the seriousness of the child's statements, but may supply the attorney with impeachment material...counsel should propose terms and conditions for taking the deposition that are least likely to upset the child as necessary...and that the deposition will take place at a location where the child feels most comfortable."<sup>37</sup>

There are certain exceptions to the hearsay rule that sometimes permit a child's out-of-court statements to be entered as evidence. Some prosecutors have successfully agreed for an expansion of the "excited utterances" (res gestae) exception to cover a longer period of time, especially in cases of child sexual abuse where children rarely tell of the abuse soon after

the event.

Another potential exception to the hearsay rule is for statements made to a medical doctor; a child may show or tell a doctor where sexual contact took place and this be entered as evidence as part of the medical record.

Some courts, for example, Colorado, are experimenting with funnelling lawyer's questions through a friendly therapist, while also in the states of Colorado and Washington, laws permit a counsellor to tell the jury what a young child told him, even though it's hearsay that can't be cross examined.

Rules of evidence must be adapted to fit the nature of the crime. For example, changes in the statutes of limitation for child sexual abuse are necessary since most children do not report immediately, and, often when they do report, they are not believed. Some American states have extended their statutes of limitations for such offences as sexual assault.

Even if statements made to another are not admissible, innovative judges can order that testimony be pre-recorded and elicited from a therapist from prepared questions submitted by the attorney. The child and therapist can be in one room, while the video camera, operator, counsel, parties and court are behind a one-way glass. In one case "...the questions that the lawyers wanted to pose were written down and used by the psychologist at the child's level of understanding, to elicit the child's testimony in a conversational manner which would not be threatening or disturbing to the child.... This order, although radical in that it bypassed traditional court room procedure, appears to be a human and rational response to a sensitive situation."<sup>38</sup>

Perhaps the most encouraging example of admissible hearsay evidence was made recently in a sexual abuse case of 8 and 9 year old sisters apprehended for alleged sexual abuse by their father. Evidence was admitted from an elementary school teacher's aid to whom one of the children had spoken. The British Columbia Court of Appeal held that in a protection

hearing, hearsay evidence might be admissible in lieu of a child's direct evidence even where the child was old enough to testify. The criminal justice system must be able to respond flexibly to the special needs of children as victims and as witnesses.

In our experience, decisions by Family Court judges regarding children's appearance in court are made, and rightly so, on a case by case basis. Children are often seen by the judge alone, or, if it is determined that testifying in front of parents would be harmful, by the judge with lawyers present only.

This becomes more difficult if there are simultaneous Family and Criminal Court hearings, with lawyers representing the accused in both. In our cases of sexual abuse, children were subpoenaed to Family Court; the judge did not request that the children be present nor did he want to question them. This resulted in some upsetting experiences for specific children where it was unclear who was to be present in the court room and children saw parents, whom they had not seen in several months, by mistake before they could be removed from court.

#### IX Avoidance of Publicity Which may be Harmful to Children -

Use should be made of such provisions as are in the Canadian Criminal Code by which the judge may make an order prohibiting the media from publishing identifying information about the victim and his family in cases of sexual assaults. A ban can also be issued on the publication of evidence. Unfortunately, should children be victims of incest, their names are inevitably linked with the accused relative. In our experience, the media coverage of names in sexual abuse cases has resulted in considerable stress and trauma for the children involved.

"In an attempt to mitigate emotional trauma within the constraints of the American legal system, some states have passed laws to protect the child from press coverage, particularly in cases of sexual assault. These laws mandate courts to close their doors to the press when a child testifies

about sensitive matters."30

X Allowing the Use of Interviewing Aids, Anatomically Correct Dolls, etc.:

As discussed previously, children respond to tactile reminders and can better demonstrate what has happened to them with these aids. Anatomically or sexually correct dolls have been used by young children, and by mentally retarded children, to graphically demonstrate a sexual act which has happened to them or which they have witnessed. These dolls also allow the child to externalize and depersonalize the recounting of sexual abuse. However, it must be remembered that dolls supplement, rather than replace, good interviewing skills. The use of other props, such as photographs, items of clothing, etc. more easily facilitate a child's memory than does verbal dialogue.

In summary, special techniques must be adopted within the criminal justice system which not only encourage the cooperation of child victims and witnesses, but acknowledge that there are inherent limitations on a child's performance in the traditional court room setting. The intervention process of the criminal justice system must be modified to accommodate the child witness/victim. This, along with properly trained and prepared personnel, and procedures designed to give support and comfort to a child, will facilitate the use of child witnesses.

"Legal intervention need not inevitably be destructive to children. Where the victim is treated with consideration and respect, where...complaints are taken seriously, and where police and court procedures are appropriately modified for children, the trauma of the legal process can be greatly reduced."40

It is certainly recognized that any criminal justice system requires a careful balancing of the interests of all parties - the child witness/victim, the accused offender, the family, the legal system, and the community. However, all too often the current system does not do full justice to the child victim/witness. "A criminal justice system fails if it does not protect its most vulnerable and innocent members at least as well as the



more powerful." 41

APPENDIX A

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APPENDIX B

FOOTNOTES

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<sup>3</sup>Goodman, p. 167.

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<sup>32</sup>Canadian Children's Law, p. 248.

<sup>33</sup>Conte, p. 605.

<sup>34</sup>\_\_\_\_\_, Child Sexual Abuse Protocol, p. XV.

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<sup>36</sup>Miller, p. 12

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