

*Children in the Canadian Justice System:
Progress & Problems*

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Presentation Outline

- *Historical evolution of the laws dealing with children as witnesses in Canada's criminal justice system*
- *Areas of Progress*
- *Areas of Concern*

An Overall Assessment

- *Substantial improvements in how society understands & deals with children who are victimized by adults.*
- *Better psychological understanding has led to improvements in policing & investigation, laws and courts, prevention and services.*
- *Large increase in cases reported successfully prosecuted*
- *Still too many cases not dealt with adequately*
- *Likely decline in actual incidence of child abuse over past 25 years*

History

- *1800's common law rules developed by male judges (and reinforced by early psychologists & Freud) premised on unreliability of children and female victims of sexual assault*
- *Difficult for children to testify, usually had to demonstrate understanding of oath*
- *Need for corroboration*
- *No accommodation & little support*

Change

- *1970's -Women's movement & beginnings growing clinical awareness of child abuse*
- *“Discovery” of child sexual abuse, with thousands of adult survivors coming forward & revealing institutional & familial abuse*
- *1980's: Goodman and others - research that children can be reliable if questioned appropriately about their own experiences*
- *1988 & 1993 Criminal Code of Canada reforms*
- *Evolution of common law*
- *Better support services, training & court rooms*

Criminal Justice Response

- *Child victims under 18 - % of police reports:
60% sexual offences &
20% of physical assaults*
- *Child victims of sexual assaults:
80% female victims (peak ages
12 - 14 years)
20% male victims (peak ages 3-6 yrs.)*

Children testifying in Criminal Court

- *Child may feel powerless, stigmatized & betrayed by the criminal process, but also potential for empowerment & support (Hamblen & Levine 1997; Sas 1993)*
- *Adolescents express greater anxiety; greatest negative effects of testifying on behaviour seem to be on 6 -11 years*
- *repeated testifying and delay increase stress on child; maternal support decreases stress*
- *No evidence of long term emotional trauma from testifying, but 22% of child victims said that they would not want case prosecuted again in similar situation (Sas, 1993)*

False Allegations

- *Summit (1983): “Children do not lie” about sexual abuse.*
- *There are false allegations, but false allegations by children much less frequent than false denials by abusive adults*
- *Distinguish: - false vs unproven
- malicious reports vs honest mistake*
- *Some contexts have higher rates of false allegations:
 - *Sexual abuse allegations when parental separation -miscommunication & mistrust more than malicious. Also many true allegations)*
 - *Manipulative adolescents may make false allegations, but also frequent genuine victims**
- *Adults (investigators, therapists & parents) often more source of false allegations. Problems of suggestibility of children & undertrained investigators - Martensville*

Investigations:

Policies, training & resources

- *Interagency protocols & better cooperation, including information sharing*
- *Increased training for police, prosecutors & judges, but still much to be done*
- *Victim witness supports*
- *Special court rooms*

Courts & Court Houses

- *A few 'child friendly' courts with CCTV facilities, appropriate seating for children*
- *In all courts, need appropriate waiting areas for children, separate from accused & public*
- *More victim witness support services needed, especially in rural & remote areas*
- *Better access to CCTV*
- *Special needs for aboriginal & ethnic minority child victims*
- *Need for support and referrals for children after proceedings, including if acquittal*

Delay

- *9 months to resolve average case with child witness ; 10 month if withdrawal (N.S. 2000)*
- *Need scheduling priority for child abuse cases, plus continuity of police/prosecution/victim-witness*
- *Earlier decisions on withdrawal, including consultation with victim or parents, but Crown to decide*

Child Competency Inquiry

- *Before being allowed to testify, child (starting at 4) must show that they understand “oath”, or can “promise to tell the truth.” Evidence Act s. 16*
- *Intrusive questions on religious belief (Do you go to Sunday school? Do you know what would happen if you lied to God?)*
- *Children have great difficulty with abstract questions like “What is truth?” “What does it mean to promise?”*
- *Queen’s research*
 - *ability to correctly answer cognitive & moral questions about truth & lie NOT related to whether children will tell the truth*
 - *promise does somewhat increase truth telling with children*
- *Need for Law Reform – Bill C-2 (2004) before Parliament*

Videotapes of child interview: s. 715.1

- *Videotaping of police-protection worker interviews with child can reduce stress on child and perhaps induce more guilty pleas.*
- *Admissible in assault cases if made “within a reasonable time of the acts complained of”. Could include video of session with assessor or therapist*
- *Interview close to time of offence often more complete, and may best reveal trauma*
- *Videotape will be revealed to accused. Fair to accused to have clear record of investigation*
- *Good quality taping requires protocols, equipment & training*
- *Need to expand types of cases where admissible (e.g homicide) – Bill C-2 before Parliament*

Screen & Closed Circuit TV: s. 486(2.1)

- *Often child's greatest fear in testifying is to again see the accused*
- *Screen & CCTV rarely used (under 10% of cases with young children), more due to Crown reluctance & administrative difficulty than judicial refusal to allow*
- *CCTV preferable to child than screen. Screen often clumsy. Need more access to equipment*
- *Preferable to have motion to use before trial, not on day of trial. Police, victim-witness & Crown need to co-ordinate*
- *Role of psychologist to establish that "full and candid account" needs testimonial aid*
- *Need to expand range of cases where available- Bill C-2 before Parliament*

Developmentally Appropriate Questions

- *Children are often asked questions by police, prosecutors, judges and lawyers that are NOT developmentally appropriate eg vocabulary, numeracy, motivation etc.*
- *Questions using inappropriate vocabulary, complex sentence structure. Questions that ask children about time, distance or frequency that a child of that age could not be expected to accurately answer*
- *Need for training for police, Crowns & judges*
- *Judges need to control defence counsel questions*
- *See eg. Anne Walker, Handbook on Questioning Children (1999) & Schuman, Bala, Lee (1999)*

Hearsay

- *Courts have become more flexible in allowing testimony about child's disclosures of abuse*
- *Hearsay rule modified – R v Khan (1990)*
 - *Necessary & reliable*

Expert Evidence

- *Considerable scope for psychologists and others to testify in 'best interests' proceedings (eg child protection & divorce)*
- *Recently in criminal courts, much more restrictive approach to psychologists & other mental health professionals testifying in child abuse cases (R v DD, SCC, 1999).
Concerns about (un)reliability, too influential with jurors, unfairness to accused without resources*
- *Still scope for experts eg. Child too traumatized to testify, allow hearsay or use of CCTV*

Other legal proceedings

- *Abuse allegations in context of parental custody & access cases – special challenges*
- *Child Welfare*
- *Monetary damages – seeking compensation from abusers & institutions*

Suggested Guiding Principles: Child focus

- *In deciding whether & how to prosecute, welfare of child must always be a paramount consideration.*
- *Co-ordination between systems & professionals is essential*
- *Adequate support for child & parents through criminal justice process, and afterwards*
- *Avoid delay & maintain case continuity*
- *Do not delay supportive services until completion of criminal trial*
- *In intrafamilial cases, recognize that the relationship of child & offender will continue*

The Way Ahead

- *Need societal & political support-> resources for staff & training*
- *Training must be interdisciplinary*
- *Children need support throughout and after criminal process*
- *Need legislative reform eg abolish competency inquiry (Bill C-2)*
- *Case-law: similar fact rule (R v B. – SCC argued Oct. 18, 2004)*
- *Increase co-ordination at federal-provincial government level **and** at local level (protocols & programs)*
- *Research into treatment of victims & offenders, investigations & prosecutions.*

Some References

Bala Child Witness Research:

<http://law.queensu.ca/faculty/bala/witness/projectoct2004.htm>

Nicholas Bala, Kang Lee, Rod Lindsay & Victoria Talwar , "A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000), 38 Osgoode Hall Law Journal 409 - 451.

John Schuman, Nicholas Bala & Kang Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999), 25 Queen's Law Journal 251 -304.

Anne Graffam Walker, Handbook on Questioning Children: A Linguistic Perspective, 2nd edit (Washington, ABA Center on Children and the Law, 1999)

*A quick plug:
For professionals testifying in
court*

*Robin Vogl & Nicholas Bala,
Testifying on Behalf of
Children: A Handbook for
Canadian Professionals (2001)*

\$19.95 +taxes + S &H

www.thompsonbooks.com

*Another quick plug:
Child Welfare Law, including chapter
by Wendy Van Tongeren Harvey on
preparing children for court*

*Nicholas Bala et al,
Canadian Child Welfare Law
(2004)*

\$39.95 +taxes + S &H

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