CHILDREN IN COURT

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Not infrequently counsel is faced with the problem (indeed, the many difficult and delicate problems) involved where it becomes necessary or advisable for children to give testimony in court. It goes without saying that if the situation is not handled properly, damage may be done, not only to the case at hand, but, more important, to the child himself. It is not unusual that it becomes necessary to call as witnesses "children of tender years".[1] This is especially so in accident cases, matrimonial causes, delinquency cases, and in many forms of criminal cases. Counsel can do much to avoid, or at least reduce, many of the difficulties involved if he is thoroughly familiar with the relevant cases and statutes.

It is proposed in this article to make some observations upon the law relating to the problems inherent in the preparation of child-witnesses before trial, the *voire dire*, the examination of children as witnesses, and the question of the effect or weight to be given to their evidence.

The first considerations are those of professional ethics. The *Canons of Legal Ethics* of the Canadian Bar Association make reference specifically to the duties owed by a lawyer to the state, the court, the client, his fellow lawyer and himself. There is no separate Canon relating specifically to witnesses. However, by Canon 2(1) the lawyer's "conduct should at all times be characterized by candour and fairness." Also, "he should not offer evidence which he knows the court should not admit": Canon 2(3). And, finally, "he should treat adverse witnesses . . . with fairness, refraining from all offensive personalities": Canon 3(4).

Preparation for Trial

As with adult witnesses, so with child witnesses, a lawyer is entitled, indeed obliged if he is to present the case properly, to consult with the witnesses prior to trial. In short, he must prepare the witnesses for trial. The word "prepare" is used because of inability to think of a better one; it certainly is not used with the idea of suggesting unethical "coaching".

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1. ". . . there is *no specific age* below which capacity will always be deemed wanting": *Wigmore on Evidence*, 3rd edition, Vol. 6, para. 1821 at p. 301. The essence of an oath, in English law, is that the person taking it should call upon his Deity as witness to his truthfulness. See: *Shajoo Ram* v. *R.* (1915) 51 S.C.R. 392, at p. 397.

But, in the case of children, even preparation which falls short of actual coaching must, because of their susceptibility to suggestion, be very carefully done.

Greenleaf On Evidence quotes the following from Dr. Reid's *Inquiry into the Human Mind:*

> It (the principle of credulity) is unlimited in children, until they meet with instances of deceit and falsehood . . . if it (credulity) is the gift of nature, it will be strongest in childhood.[2]

It is no part of the purpose of this article to enter into the realm of child psychology. Rather, it is assumed here that judicial notice may be taken of the credulity of most children of tender years, and of their world of "make-believe" such as is described in Robert Louis Stevenson's *Virginibus Puerisque.*

The dangers inherent in the preparation of child witnesses are well illustrated by the case of *Hollaris* v. *Jankowski,*[3] where the Appellate Court of Illinois made the following observations in the course of its decision:

> In the instant case the testimony of the minor[4] does not show that he is a very intelligent boy. Moreover, his testimony shows that he had little, if any, memory of what actually occurred at the time of the accident. He testified that "the lawyers have talked about it to me, I don't know how many lawyers."
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> We are not obliged to hold, however, that the minor was an incompetent witness solely because of his age. Undoubtedly there are some very smart, precocious children, who, at eight years of age, can remember the details of an accident that happened to them when they were between four and five years of age, but the record shows that the minor in this case was not a very smart, precocious child. Moreover, it affirmatively appears that he had been talked to so much about the accident by members of his family and lawyers that the child had little, if any, independent recollection as to the facts and circumstances surrounding the accident. In any future trial he should not be allowed to testify.[5]

It would be most unfortunate if an otherwise competent child witness should be rendered incompetent by a lawyer's over-zealous preparation for trial. It would be even more so if that child were a party to the litigation, with the result that he was rendered incompetent to testify in his own case.

At common law the general rule is that testimony must be given under oath. Although, as will be explained below, children may be allowed to give unsworn testimony, it is common for them to testify under oath or affirmation. The question arises whether, as a part of preparation for trial, a child may be instructed as to the nature of an oath.

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2. 12th edition, Vol. 1, at pp. 13 and 14.
3. 42 N.E. 2d 859, 315 Ill. App. 154 (1942).
4. The plaintiff, who was eight years of age at the time of the trial. The action concerned personal injuries sustained when he was between four and five years of age.
5. And see: *State* v. *Ranger* 149 Me. 52, 98 A. 2d 652 (1953), and *Cross* v. *Commonwealth* 195 Va. 62, 77 S.E. 2d 447 (1953), where the evidence of children was rejected because of "coaching". In *Maynard* v. *Keough*, 145 Minn. 26, 175 N.W. 891 (1920), the testimony of an eight-year-old girl was admitted with reference to an occurrence when she was five years old. The court indicated in the *Hollaris* case that the real reason for wanting to place the child on the stand was to give the jury an opportunity to see his injuries. As to the exhibition in court of children's injuries, see *Yachuk* v. *Oliver Blais Co. Ltd.* (1944) 3 D.L.R. 615, and *Gray* v. *La Fleche* (1950) 1 D.L.R. 337.

It has been held, rightly, it is submitted, that there is no objection to a child's being instructed as to the nature of an oath with a view to testifying;[6] but there are some decisions to the contrary.[7] On principle, it should be quite permissible to so instruct a child, otherwise competent, as part of preparation for trial. Moreover, where those having the care of the child object to the taking of an oath, being of the class of persons who will affirm, on principle, again, it should be quite permissible to instruct the child as to the nature of an affirmation which, today, has the same legal effect as an oath.[8]

Indeed, the very idea of oaths and affirmations in legal proceedings has been questioned,[9] but a consideration of that subject is not within the scope of this article. The point of the matter is, that while the law continues to require an oath or affirmation, no unnecessary and merely technical obstacles should be placed in the way of the reception and weighing of the testimony of children who are otherwise competent.

The Voire Dire

Upon a child of tender years being called to give evidence in a civil or criminal proceeding, whether he be a party thereto or not, both the Canada Evidence Act[10] and The Manitoba Evidence Act[11] require the Judge to take three principal steps: (1) form his opinion as to whether the child understands the nature of an *oath*, and, if not, (2) form his opinion as to whether the child is possessed of sufficient *intelligence* to justify the reception of his unsworn evidence, and, in addition, (3) form his opinion as to whether the child understands the duty of speaking the *truth*.

For these purposes the Judge might, in addition to conversing with the child, hear other evidence. The *voire dire* must be conducted in open court, and not in the Judge's private chambers.[12] This is important where the trial is by jury, so that the jury, if the testimony of the child is admitted, may have the opportunity of taking into consideration, when they come to weigh the child's evidence, the information disclosed on the *voire dire*.

Each case must necessarily depend upon its own circumstances. The discretion of the Judge, provided it be exercised judicially in accordance with the requirements of the relevant statutory provisions, must by the nature of things be regarded as final. There would be nothing to be gained, therefore, by reciting here many or all of the reported decisions. However, particular attention should be given to the following decision of the Supreme Court of Canada.

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6. *Phipson on Evidence*, 9th ed. (1952) at p. 472. *Wigmore, op. cit.*, vol. 6, para. 1821, at p. 306, states that the Judge may instruct the child.
7. *Phipson, op. cit.*, at p. 472.
8. Sections 16 and 17 of The Manitoba Evidence Act, R.S.M. 1954, c. 75, and section 14 of the Canada Evidence Act, R.S.C. 1952, c. 307.
9. Williams, *The Proof of Guilt*, (1955), at p. 67.
10. R.S.C. 1952, c. 307, s. 16.
11. R.S.M. 1954, c. 75, s. 24.
12. *R.* v. *Dunne*, (1929) 21 Crim. App. R. 176. But see: (1930) 46 L.Q.Rev. 137.

The decision in the case of *Sankey* v. *The King*[13] contains the following excerpt from the trial transcript, and the following unanimous observation of the Court with reference to it:

> When the child, Sandahl, was called as a witness the record shows what occurred as follows:
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> "Haldis Sandahl, a witness called on behalf of the Crown, testified as follows:
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> Mr. Johnson: I think that if you put her in a chair in the box; we haven't a high chair. This child, my lord, is of tender years, nine years old, and I tender her evidence under the provisions of section 16 of the Canada Evidence Act.
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> Mr. Patmore: I understand that this is because this child does not understand the nature of an oath.
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> Mr. Johnson: That is for the judge to satisfy himself.
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> The Court:
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> Q. Where do you live, Haldis? A. Port Essington.
> Q. See how loudly you can speak. How old are you? A. Eight-ten.
> Q. And what is your daddy's name? A. Mr. Sandahl.
> Q. What does he do, does he live up there? A. Yes.
> Q. And your mother, does she live with you too? A. Yes.
> Q. You go to school? A. Yes.
> Q. Can you read a little bit? A. Yes.
> Q. And write your own name? A. Yes.
> Q. Do you know that it is very bad for little girls to tell lies? A. Yes.
> Q. Did they tell you that little girls must never tell stories? Do you understand that? A. Yes.
> Q. You must always tell the truth? A. Yes.
> Q. We want you to answer the questions these men ask you and be sure to tell the truth."
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> The witness then proceeded to give unsworn testimony, which covered ground as to identification most vital to the interest of the defendant . . .
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> The only light thrown by the record on the view taken by the learned trial judge as to the scope of his function in regard to determining whether the girl, Sandahl, understood the nature of an oath is found in his charge to the jury when he said: "The little girl Haldis Sandahl, she was ten years old last February, and as you noticed when the question came up, the law provides that if a child is called as a witness in any case, if the judge thinks the child is not old enough to understand the nature of an oath she can give evidence. Then, when it is given, that evidence has exactly the same weight as any other evidence, subject to this, and then provides that on that evidence alone you must have other evidence with it."

The learned judge made no inquiry as to the capacity or education of the girl in regard to her comprehension of the meaning, effect and sanction of an oath, presumably because, from her appearance he thought her "not old enough to understand the nature of an oath." She was tendered by the Crown as a witness whose evidence could be received under s. 16 of the *Canada Evidence Act;* and, apparently because no objection was taken by counsel for the prisoner, she was allowed to give her evidence unsworn, the learned trial judge having first satisfied himself by apt questions that "she (was) possessed of sufficient intelligence to justify the reception of her evidence and (understood) the duty of speaking the truth."

Now it is quite as much 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

13. (1927) S.C.R. 436. See also, to the same effect, *Paige* v. *The King* (1948) S.C.R. 349, at p. 353.

> 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. Criminal Code, sections 17-18. A very brief inquiry may suffice to satisfy the judge on this point. But some inquiry would seem to be indispensable. 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 the 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.
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> The unsworn testimony of Haldis Sandahl was, we think, improperly received. Its importance is not questioned. It may well have been the deciding factor which led the jury to the conclusion that identification of the defendant as the person guilty of the murder in question was sufficiently established. . . . The conviction must, therefore, be quashed and a new trial ordered.[14]

It is desirable, if not perhaps strictly necessary, that the examination of the child should be done by the Judge rather than by counsel. However, on the *voire dire* it should be kept in mind that counsel calling the child will, or should, be more familiar with the child than will the Judge. Accordingly, it should be open to counsel to bring to the attention of the Judge any particular matters which he considers might be of assistance to him in forming his opinion. This might be done by permitting counsel to direct the Judge's attention to the particular circumstances, or by permitting counsel to put questions to the child after the Judge has completed his examination. Mr. Justice Humphries in *R.* v. *Surgenor*[15] stated that, "it is the duty of the presiding judge to make investigation for himself." But, read in its context, this statement does not of necessity preclude assistance, as above indicated, from counsel.

The Examination of Children as Witnesses

Whether the child gives his evidence under oath or affirmation, on the one hand, or gives unsworn testimony, on the other; once he is qualified on the *voire dire* the task of examining him as a witness passes into the hands of counsel, subject to considerations such as those dealt with in *Jones* v. *National Coal Board.*[16]

As a general principle, counsel and the child are and should be subject to the same rules as would apply with regard to any other witness. There would appear to be no special "privileges" as, for example, in the case of spouses.

However, a few observations or suggestions may be made as to leading questions. The rule applying with regard to children is the same as that with regard to any other witness. Should the Judge exercise a discretion to allow more or less leading than is usually permitted? It is submitted that if he should lean either way, it should be towards less leading.

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14. (1927) S.C.R. 438-9. 15. (1940) 2 All E.R. 249, at p. 251.
16. (1957) 2 All E.R. 155. It will be recalled that in this case the English Court of Appeal ordered a new trial, owing to undue interference by the trial judge in the examination of witnesses.

Once started along the downhill road of leading questions, it is practically inevitable that it will be only with the greatest difficulty that the trip can be stopped. And, if it is, all further testimony from the child will probably be stopped, too. Patience with non-leading questions from the very beginning of the examination in chief is best calculated to elicit the child's testimony. This is not to say, of course, that the child's attention should not be clearly directed to the various subject-matters in issue. But that is a far cry from counsel, in effect, giving the evidence, and the child simply expressing his approval or disapproval of counsel's statements.

The same considerations apply, of course, to re-examination and to examination by Judge and jury, although technically they are not bound by the leading-question rule.

As to cross-examination, cross-examining counsel should bear in mind that if he leads in the fashion that he otherwise might with an adult, little or no effect can be given to what he elicits. Also, any resort to the "Old Bailey technique" will probably result in a complete cessation of the child's testimony, leaving the evidence given in chief standing on the record exactly as it stood before cross-examination was commenced. Perhaps, as a matter of common sense, cross-examining counsel should proceed in the same manner as would be the case if he were conducting examination in chief. Certainly if this course be followed, little harm can be done to the child or to the case.

WEIGHT OF EVIDENCE

Speaking generally, the sworn testimony of children is subject to the same general principles with reference to the weight of evidence as those governing the testimony of any other witness. However, particular consideration is required in the case of unsworn testimony. The Manitoba Evidence Act,[17] the Canada Evidence Act[18] and the Criminal Code[19] provide that no case shall be decided upon the unsworn testimony of a child standing alone, and that corroboration by some other material evidence is necessary. And, of course, the unsworn testimony of one child cannot corroborate the unsworn testimony of another.

In the case of *R.* v. *Campbell*[20] the Court of Appeal in England made the following observation with reference to corroboration:

> To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on him or her self or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not as a matter of law be corroborated but a jury should be warned not that they must find corroboration but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and

17. R.S.M. 1954, c. 75, s. 24.
18. R.S.C. 1952, c. 307, s. 16.
19. S.C. 1953-54, c. 51, s. 566.
20. (1956) 2 All E.R. 272, 2 Q.B. 432.

this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given. As proper warnings were given by the learned deputy chairman in this case there is no ground on which we can interfere with the conviction.

As we are endeavouring in this judgment to deal comprehensively with the evidence of children we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case *R.* v. *Sims*, ((1946) 1 All E.R. 697), subsequently approved on this point by the House of Lords in *Harris* v. *Public Prosecutions Director* ((1952) 1 All E.R. 1044), shows that such evidence can be given to rebut the defence.

Conclusion

The following remarks of Hon. E. J. Sherman of the Superior Court of Massachusetts illustrate the skill and understanding required where a child-witness is involved:

> A case was being tried before me against the Boston Elevated Railroad, and a little boy, perhaps seven years old, was called as a witness. The counsel for the defence objected to his being used as a witness, as he was too young to understand and appreciate an oath, and asked the court to examine him and ascertain that fact. The boy looked frightened and as if he was about to cry. He took the witness stand close beside the bench. His name was John ——. I said to him in a low voice, as if talking confidentially, "John, do you play baseball?" He replied, "Yes, Judge." He was a little short fellow, and I said "I guess you play short stop." "You are right, Judge," replied Johnnie. By this time all disposition to be frightened or cry had disappeared. I then asked him about his school, etc., and he showed unusual brightness. I remarked, "This boy will do, he is all right."
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> He made one of the best witnesses called in the case. If I had said to him in a stern voice, "Do you understand the nature of an oath? What will happen to you if you tell a lie?" as is sometimes asked in like cases, the boy would have broken down in a crying spell.[21]

And *Wigmore* cites the following as an example of "How coarse and irreverent the spectacle of examination into infantile theology often becomes":

> Emma Gaukof, eight years old, of West Hoboken, answered readily in court at Jersey City today a question that has puzzled the profoundest theologians. Questioning her understanding of the value of an oath, lawyer Max Salinger asked what became of little girls who did not tell the truth. "Why, sir, they go to hell," replied Emma. "And where is hell?" questioned the lawyer. "I don't think the counsellor could answer that question himself," remarked Judge John A. Blair. "I know where it is, sir," said the girl. "It's up somewhere near Schuetzen Park, Union Hill. I know it's there, 'cause I heard a man say once that he was going there to raise it!"[22]

21. *Recollections of a Long Life* (1908) at p. 160, quoted in *Wigmore op. cit.*, Vol. 6, para. 1821, at p. 305.
22. *Ibid.*