

Debunking Myths: Children in the Civil Courts

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Ontario Law Reform Commission
Report on Child Witnesses
The Commission, 1991
97 pp.; *Executive Summary*

WITH THE RECENT SURGE in reported cases of child sexual and physical assault, child witnesses are no longer a novelty in the criminal courts.¹ Inadequate legal and evidentiary rules and procedures born of ignorance, misogyny, and myth hindered prosecution and increased victim trauma.² The 1988 proclamation of Bill C-15³ was an impor-

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¹ Children now comprise at least half of all victims of sexual offences in criminal courts, according to data from six Canadian cities. [*Sexual Assault Legislation in Canada: An Evaluation*. (Report No. 5) (Ottawa: Communications & Public Affairs, Dept. of Justice, Canada, 1990)] at 43. The figure given for Winnipeg is 67%. A Statistics Canada study based on interviews held between 1988 and 1991 with 4300 victims disclosed that children aged 11 or younger are the victims of over 40% of reported sexual assaults; sexual assaults comprise 13% of all crime. (As reported in *The Globe and Mail* (24 March 1992). The study represented 13 jurisdictions participating in the Uniform Crime Reporting Survey.) In the first year of operation of the Winnipeg Family Violence Court, over 1 in 5 victims of criminal offences committed in intimate circumstances were children. (Courtesy Jane Ursel, Dept. of Sociology, University of Manitoba.)

² Wigmore justified such rules and practices on grounds that the "psychic complexes" of "errant" women and girls "are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men." (J.H. Wigmore, *Evidence in Trials at Common Law*, rev'd ed. by J.H. Chadbourn, vol. 3A (Boston: Little, Brown, 1970) s. 924a at 736.) (Originally published in 1904.) In order to bolster his conclusions, Wigmore omitted those parts of his case histories "which might undermine or contradict his hypothesis that young girls who report sexual assault or abuse are lying about the charge," according to L.B. Bienen. Bienen argues the doctrine has survived "because it appealed to society's traditional distrust and general hostility toward women, which was embodied in the law ... When Wigmore passionately expressed his view about the threatening nature of complaints of sexual assault made by female children, he articulated and memorialized an attitude which was apparently widely shared." ("A Question of Credibility: John Henry Wigmore's Use of Scientific Authority" (1983) 19 Cal. W.L. Rev. 235 at 253.)

³ *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24.

tant milestone in the recognition of the juridical equality of children, with broad ramifications for their social and cultural status.⁴ Did the adjectival reforms of Bill C-15 go far enough? Are children, and their evidence, adequately protected?

Despite innovative reforms to the *Criminal Code*⁵ and the *Canada Evidence Act*,⁶ Canada remains in certain important respects deficient in its accommodation of child witnesses. Historical accidents restricting the admission of evidence, unsupported assumptions about children's ethical and cognitive capacities and an inappropriate gloss on the meaning of "adversarial system" continue to make Canadian children very much less than equal participants in the judicial process. Bill C-15, proclaimed in force January 1988, applies only to victim-witnesses in criminal proceedings. Most of its provisions apply only to victims of sexual offences. Other child witnesses, and children involved in civil proceedings including welfare and custody determinations, are not touched by the reforms. Further, the Bill left logical inconsistencies in the areas of credibility and oath-taking. Although supporters of the Bill hoped it would become a model for provincial reform, only Saskatchewan and British Columbia have to date amended their legislation to reflect its evidentiary and procedural provisions.

In reviewing provincial rules affecting child witnesses, the Ontario Law Reform Commission has its priorities straight. Its aims are twofold. They are, first:

... to ensure that the legal rules which apply to young witnesses are based on modern empirical studies respecting the testimonial capabilities of children and not on antiquated and erroneous notions about the frailty of children's evidence ...

and second:

... to address the issue of the psychological impact on a child who comes into contact with the justice system.⁷

⁴ For an overview of Bill C-15 and later developments, see A. McGillivray, "Abused Children in the Courts: Adjusting the Scales After Bill C-15" in A. Esau, ed., *Manitoba Law Annual 1989-90* (Winnipeg: Legal Research Institute, 1990) at 226.

⁵ R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

⁶ R.S.C. 1985, c. C-5.

⁷ Ontario Law Reform Commission, *Report on Child Witnesses* (Toronto: The Commission, 1991) at 1 [hereinafter *Report*].

Given the political climate surrounding the introduction of Bill C-15,⁸ it is understandable that provisions for child witnesses would be the result of compromise, more conservative than those recommended by the Badgley Committee⁹ or already in place in some jurisdictions.¹⁰ Fears of constitutional challenge have been confirmed, with varying results.¹¹ But four years have elapsed since the provisions came into effect and other developments suggest that the reforms are not as constitutionally fragile as the legislative committee feared. They may in fact be more restrictive than warranted by the constitutional protection afforded accused persons.¹²

⁸ Social panics generated by the 1960s "battered baby syndrome," by consequent agency expansion and interventionism and by the 1970s "sexual abuse crisis" inspired backlash in a variety of forms, including the formation of advocacy groups for the "falsely accused." Sexual abuse in particular was alleged to have been manufactured by the women's movement in order to weaken male power within the family. Moves toward equalizing the child witness experience were said to detract from the rights of (male) accused, authenticate the lying child and empower children to point a finger and "vapourize" an innocent man. For a general discussion of the antifeminist backlash in the U.S., see S. Faludi, *Backlash: The Undeclared War Against American Women* (New York: Crown, 1991); for examples pertinent to Bill C-15, see A. McGillivray, *The Criminalization of Child Abuse* (LL.M. Thesis, University of Toronto, 1988). For a critique of the Badgley-Bill C-15 politics surrounding the legislation of adolescent sexuality, see T. Sullivan, *Sexual Abuse and the Rights of Children* (Toronto: University of Toronto Press, 1992).

⁹ Canada, *Report of The Committee on Sexual Offences Against Children and Youths* (Ottawa: Supply and Services, 1984) (Chair: Robin F. Badgley). For Badgley's view of the making, release and use of the report, see McGillivray, *ibid.*

¹⁰ See the *Report*, *supra*, note 7 and A. McGillivray, "R. v. Laramée: Forgetting Children, Forgetting Truth" (1991) 6 C.R. (4th) 325.

¹¹ Provincial courts of appeal have ruled on two Bill C-15 provisions: videotaped interviews (*Criminal Code* s. 715.1) and use of screens or closed-circuit television (*Criminal Code* s. 486(2.1)). The Manitoba Court of Appeal ruled that videotaped interviews contravene ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, (Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]), by placing in evidence prior consistent statements not susceptible to contemporaneous cross-examination. The section is not saved by s. 1 as the child must still appear in court for cross-examination. The case is on appeal to the Supreme Court. See *R. v. Laramée* (1991), 6 C.R. (4th) 277 [hereinafter *Laramée*]. The Ontario Court of Appeal ruled that screening provisions do not violate either s. 7 or s. 11(d) of the *Charter*. See *R. v. Levogiannis* (1990), 1 O.R. (3d) 351, 62 C.C.C. (3d) 59 [hereinafter *Levogiannis*] and *R. v. Paul M.* (1990), 1 O.R. (3d) 341, 42 O.A.C. 135. For a criticism of *Laramée*, see McGillivray, *ibid.*

¹² Dickson, C.J. wrote in *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 94 N.R. 167 at 248: "In sum, the evidence sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal

Similar reforms have been taken by jurisdictions outside Canada, many of which have gone much further. An impressive number of well-constructed empirical studies of the veracity, recall, accuracy, suggestibility and communicative abilities of children have recently been completed.¹³ Legal academics in common as well as civil law jurisdictions have spoken out strongly in favour of child-centred evidentiary reform.¹⁴ Shifts in thinking about children, recognition of the importance of children's testimony as eyewitnesses as well as affected persons and greater experience with problems faced by child witnesses in criminal and civil courts make Bill C-15 look tame.

The Ontario Law Reform Commission presents a thorough and convincing case for child-centred evidentiary and procedural reform. Its recommendations are sensible and workable. They are as respectful of rights as they are of the respective fields of competence of the courts and of child witnesses. Bill C-15 remains the basis of comparison but the Commission has expanded its ambit in almost every respect. Yet the recommendations are radical only in the strict sense of the word: they go to the root of the matter. They are set into traditional evidentiary contexts and supported by empirical information. The goal remains the presentation of reliable and complete evidence in the interests of justice. The interest of the *Report* lies as much in its discussion of what the federal reforms did not accomplish

impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. *This court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.*" [Emphasis added.]

¹³ See, for example, J.R. Spencer & R. Flin, *The Evidence of Children[.] The Law and the Psychology* (London: Blackstone, 1990); S.J. Ceci, M.P. Toggia & D.F. Ross, eds, *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987); R. Fivush & L.J.A. Hudson, *Knowing and Remembering in Young Children* (New York: Cambridge University Press, 1990) and S.J. Ceci, D.F. Ross & M.P. Toggia, eds, *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989); see the *Report* and McGillivray, *supra*, note 10 for further references. As with all empirical studies, the results depend on the framing of definition, testing and objectives.

¹⁴ See, among others, G. Williams, "Videotaping Children's Evidence" (1987) 137 *New L.J.* 108; Spencer & Flin, *ibid.*; N. Bala, "Prosecuting Child Sexual Abuse Cases in Canada: A Measure of Progress" (McGill University, 27 June 1991); C. Stewart & N. Bala, *Understanding Criminal Prosecutions for Child Sexual Abuse: Bill C-15 and the Criminal Code* (Toronto: Institute for the Prevention of Child Abuse, 1988).

as it does in the recommendations themselves. The Commission has established a model other jurisdictions would do well to follow.

The *Report* begins with a review of empirical studies of children's testimonial capabilities, focusing on memory, distinction of fact and fantasy, trustworthiness, suggestibility and developmental issues affecting chronology, communication and abstraction.¹⁵ The references are sound and representative of a variety of empirical approaches and jurisdictions. The chapter provides a solid foundation for the ensuing examination of rules governing children's testimony.

Overall findings indicate that, by the age of three to four, children can give as accurate an account of an event as adults, particularly of those events which engage the child or have personal significance. Children by this age are well able to distinguish fact and fantasy. In several key respects, children are actually more reliable witnesses than adults: they are less prone to making false allegations, less able to fabricate believable stories and more truthful as witnesses. Age-related differences affecting the testimony of the very young — accurate location of an event in time, verbalization and abstraction — can be dealt with by linkage to familiar occurrences and re-enactment through drawing or body language. All witnesses are "suggestible" but children may be more susceptible to an authoritative adult; hence the importance of "sensitive questioning techniques in a supportive environment by a skilled interviewer."¹⁶ One might wish the same for certain vulnerable adults.

These observations take on greater significance with increasing recognition of the frailty of adult testimony. As the authors of an authoritative text on child witnesses note, "Recent forensic research has also highlighted the ubiquitous imperfections of adult testimony, showing the mature witnesses' memories can be fragile and susceptible to the distorting influences of suggestion and misinformation."¹⁷

Although the competency rules enacted in Bill C-15 are clearly an improvement on the common law, in that they permit children inca-

¹⁵ *Report, supra*, note 7 c. 1, "Psychological Studies on the Reliability of Children's Testimony."

¹⁶ *Report, supra*, note 7 at 16. Videotaping protocols developed in Manitoba and other jurisdictions, for example, emphasize non-leading questions by trained interviewers and comfortable and non-threatening environments.

¹⁷ Spencer & Flin, *supra*, note 13 at 238. Several notorious Canadian cases reexamined in the past few years — the convictions of Donald Marshall and David Milgaard, the deaths of J.J. Harper and Betty Ann Osborne — provide excellent examples of the phenomenon.

pable of being sworn to testify under promise to tell the truth, distinguishing the two has become an exercise in hairsplitting. In the Commission's view, the changes to the *Canada Evidence Act* enacted by Bill C-15 do not reflect the realities of children's reliability.¹⁸ Children themselves do not believe there is any difference between swearing and promising to tell the truth: in the view of children, both require truthful speaking. The oath test cannot be met by children lacking certain kinds of religious training and the requirement is in any case unsuitable to a pluralistic and secular society. The requirement has been a block to the reception of crucial evidence. The Commission rejects the view¹⁹ that there is a meaningful distinction between the tests for sworn and unsworn evidence and recommends its abolition. Children (and adults) should be permitted to testify on promising to tell the truth.

The Commission also recommends the abolition of age-based presumptions of incompetence, competency testing and corroboration requirements, proposing instead that the court simply hear the child as it would any witness. Situations may be suspect; classes of persons are not. Questions of intellect and maturity should go to weight rather than admissibility and the court can dismiss an uncommunicative witness in any case. The *Kendall*²⁰ warning against accepting a child's uncorroborated evidence continues to perpetuate dangerous myths and stereotypes. The Commission recommends its abolition.²¹ These recommendations are consistent with developments in other jurisdictions and with broader developments in the Canadian law of evidence.

Exceptions to the rule against hearsay have become ridiculously complex and have been stretched to the limit in the attempt to accommodate children's statements. Reform is needed. As the Commission points out, hearsay may be the best and most reliable evidence or even the sole evidence available, particularly in view of the possibility that trauma and intimidation engendered by the courtroom setting may damage oral testimony when offered.²² While the Supreme Court in *Khan* has opened the door to hearsay from

¹⁸ *Report, supra*, note 7 c. 2, "Competency Rules for Child Witnesses."

¹⁹ Endorsed by McLaughlin J. in *R. v. Khan*, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1 [hereinafter *Khan*].

²⁰ *R. v. Kendall*, [1962] S.C.R. 469, 132 C.C.C. 216.

²¹ *Report, supra*, note 7 c. 3, "The Kendall Rule."

²² *Report, supra*, note 7 c. 4, "The Applicability of the Hearsay Rule to the Statements of Children."

children too traumatized to testify, its imposition of necessity as well as reliability may close the door to hearsay outside traditional categories if the child testifies.²³ As the Commission observes, there is no sound reason for excluding any reliable out-of-court statement when the child is present in court and available for cross-examination.²⁴ The Commission recommends reception of children's out-of-court statements provided the judge is satisfied they are reliable, regardless of whether the child testifies.

Certain features of the adversarial system which make adult testimony stressful are even more damaging to children.²⁵ Cross-examination techniques which suggest the child is lying, face-to-face confrontation by an assailant (frequently a family member or acquaintance), an alien environment and separation from a trusted adult pose particular problems for the child witness. The trauma associated with the experience can obstruct the child's ability to fully and accurately recount the evidence. While this may be helpful to accused persons, it does not serve the administration of justice. In *Levogiannis*²⁶, the Ontario Court of Appeal defined the purpose of screening as the enhancement of the reliability of the testimony and the promotion of the administration of justice. However, *Criminal Code* provisions for screening and testifying via closed-circuit television are restricted to child victims of sexual offences who can meet high threshold requirements. The vast majority of children who testify in criminal cases (and all civil cases) are not screened, severely limiting the utility of the provisions.

The use of previously videotaped testimony has been criticized on several grounds. On one hand, concerns about overbreadth, necessity and lack of contemporaneous opportunity cross-examination have been raised (grounding a successful constitutional challenge in *Laramee*);²⁷ on the other hand, the requirement of cross-examination and the restriction to sexual abuse victims have been criticized as overly narrow and not in the best interests of the witness. The Commission characterizes the use of videotaped testimony as "tantamount to a

²³ I have argued elsewhere, in the context of the constitutionality of videotaped statements, that "necessity" can be grounded, *inter alia*, in the relative freshness of the hearsay statement. See McGillivray, *supra*, note 10.

²⁴ *Ibid.*

²⁵ *Report, supra*, note 7 c. 5, "Accommodation of Child Witnesses."

²⁶ *Supra*, note 11.

²⁷ *Ibid.* and text accompanying note 23.

hearsay exception;”²⁸ therefore, videotaped evidence should be admissible for any child witness, subject only to the reliability test set out by the Commission for children’s hearsay. Bill C-15 did not provide for videotaped depositions, a concept which has gained wide support in other common and civil law jurisdictions.²⁹ Depositions preserve contemporaneous cross-examination but the surroundings in which they are taken can be made relatively protected and congenial. The Commission recommends adoption of provisions for both videotaped interviews and videotaped deposition evidence.

The role of the judge in controlling the trial process is vital to the proper administration of justice. Maintaining a nonhostile courtroom environment and guarding against misuse of the adversarial system is of particular importance when the witness is a child. Judges can achieve this by attention to the attitude of counsel, the level of language used and the physical environment, including seating, provision of a silent support person to sit with the child and regular breaks. The Commission calls for judicial education in child psychology, communication skills and children’s testimonial capabilities.³⁰

Empirical information, however persuasive, will never satisfy every critic of child-centred reform. There will always be a gap between what is, however closely grasped, and what ought to be done about it. Beginning at one end of the argument, it is evident that children’s availability for and success in testifying is vital to the proper administration of justice in both fact and perception. Children are frequent victims of sexual assaults and (barring the screening effect of the *Criminal Code* disciplinary excuse) of physical assaults as well. Children are central but usually silenced parties to custody disputes and protection hearings which will affect the rest of their lives. They are often witnesses to assaults on other children and on parents. Blocks to their participation in the legal process must be removed in the interests of justice.

Beginning at the other end of the argument, it has begun to seem very wrong to judge anyone on the basis of preconceived notions of class characteristics; and right to take steps to equalize generic situations — education, employment, physical access, access to food and shelter, the justice system — to accommodate unequal people. The

²⁸ Report, *supra*, note 7 at 90.

²⁹ *Supra*, note 10 at 329.

³⁰ The Western Judicial Education Centre has pioneered programs in the area for provincial court judges.

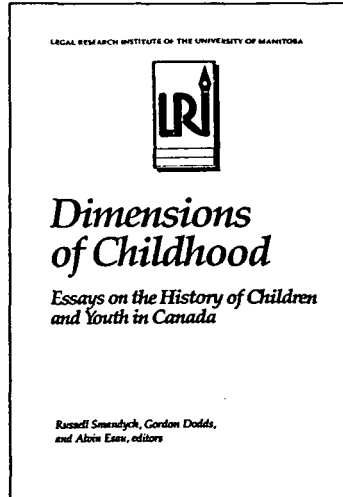
strengths of children's cognitive and ethical abilities and the frailties of children's psyches have at last begun to receive legislative and judicial attention. It is hoped that the commendable stand taken by the Ontario Law Reform Commission will be reflected in legislative change on both provincial and federal levels.

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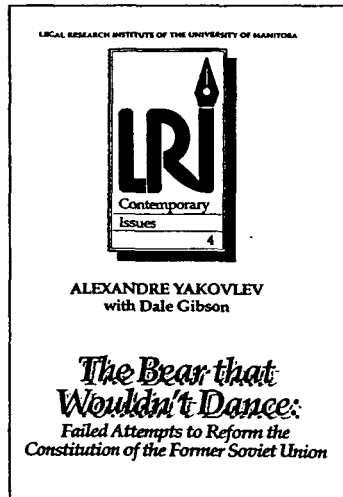
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