

Admitting the Out-of-Court Statements of Children

LEE STUESSER*

IT HAS BEEN SAID that our courts are designed for adults and not children. While this is true, in recent years we have seen a movement towards making our courts more accommodating and less traumatic for children. For example, portions of a child's testimony may be given via video tape or the child may testify without having to actually face the accused.¹ We have also seen a change in how the evidence of children is to be assessed. For example, the need for corroboration of child witnesses has been abolished.

A further problem, we are told, lies with what evidence is received. The Ontario Law Reform Commission tells us that when it comes to children it is "imperative that lawyers and judges ... no longer be constrained by archaic rules of evidence."² Specifically targeted is the admissibility and use of out-of-court statements made by children.

Admitting the out-of-court statements of children potentially runs afoul of two rules of evidence: (i) the prohibition against self-serving, self-corroborating evidence, if the statements are tendered for their consistency; and (ii) the rule against hearsay, if tendered for their truth. This paper will examine the question, should the out-of-court statements of children, who testify in criminal trials, be admitted for their truth or their consistency?

* Professor, Faculty of Law, University of Manitoba. This paper was originally prepared for the National Judicial Institute Seminar entitled "Admissibility and Assessment of Evidence in Abuse Cases" 27 & 28 April 1995.

¹ See *Criminal Code of Canada*, R.S.C. 1985, c. C-46, sections 486(2.1) and 715.1.

² Ontario Law Reform Commission, *Report on Child Witnesses* (1991) at 6.

I. THE CASE OF *R. v. B.(D.C.)*³

THE MANITOBA COURT OF APPEAL, in the recent case of *R. v. B.(D.C.)*, was called upon to deal with this very question. The case, in fact, provides a classic illustration of the issues and the problems.

The accused was charged with sexual touching and sexual assault in relation to his stepdaughter and twin daughters. The stepdaughter was 10 years of age at the time of trial and the twins were nine years of age. It was alleged that the accused sexually assaulted the children over a period of approximately five years. The allegations of sexual abuse were first disclosed to a school counsellor.

As a result of an altercation with some boys in the school yard the stepdaughter was interviewed by the school counsellor. The school counsellor testified that in answer to a question whether there was anything else the child would like to tell her, the child gave a clear and concise statement of sexual abuse by her stepfather. The counsellor described the manner in which the complaint came out as follows:

The best way I can put it is this. She was like a faucet that was turned on — and she just went for it, and she, she was very clear and she was very concise. Her emotional outbreaks seemed to subside and she wanted to give me the information.⁴

The child also disclosed that she had witnessed the accused abusing his daughters. The school counsellor then interviewed the two daughters and asked if they wanted to tell her anything. The children disclosed the sexual abuse by the accused.

At trial the children testified as to the abuse and the Crown led the evidence of the school counsellor without any objection by defence counsel. Defence counsel cross-examined the counsellor and the children at length on the details of the complaints of sexual abuse that they had made. The accused took the stand and denied the allegations.

The accused was convicted at trial by Mr. Justice Clearwater, sitting without a jury, of five counts of sexual touching and three counts of sexual assault. The accused appealed. He attacked the credibility findings of the trial judge asserting that the verdict was unreasonable.

Mr. Justice Clearwater in finding the accused guilty was much impressed by the evidence of the school counsellor:

After observing these children and hearing their evidence, together with the other evidence led in this matter, and in particular the evidence of *Gail Fishman* [the school counsellor], I have come to the conclusion that although the children are obviously wrong ... in some portions of their evidence as to

³ *R. v. B.(D.C.)* (1994), 91 C.C.C. (3d) 357 (Man. C.A.).

⁴ *Ibid.* at 362.

the frequency of the assaults at times when it was not possible (or it was unlikely) that the accused had opportunity, there is an underlying ring to the truth of the story told by these three children.⁵

It was only at the appeal hearing that Mr. Justice Twaddle, *ex proprio motu*, raised the issue of the admissibility of the children's statements to the school counsellor. The court unanimously went on to find that the statements were admissible, although Mr. Justice Philp and Mr. Justice Twaddle took different paths to reach this conclusion.

Mr. Justice Kroft described these differences as follows:

There are some differences between the rationale expressed by Justice Twaddle in his reasons and that expressed [by] Justice Philp in his alternate approach. In particular, Justice Twaddle is of the opinion that, once admitted, the evidence in question can be considered for all purposes while Justice Philp is of the view that its use is limited to supporting the truth of the child's in-court evidence.⁶

Mr. Justice Kroft, on the facts of the case, felt that he did not need to comment on these differences. He did, however, go on to state that a "child's spontaneous account of sexual abuse may be very relevant to trial judges' determination of credibility and should be admitted."

The two differing approaches of Justices Philp and Twaddle deserve further attention. Both agreed that under the traditional rules of evidence these out-of-court statements were inadmissible. In the words of Mr. Justice Twaddle:

As proof of the truth of what the children said, it was hearsay; as proof of consistency, it offended the rule against self-corroboration and, as support for the children's credibility, it was an improper attempt to bolster it up.⁷

Nevertheless, they swept aside these concerns to admit the statements.

A. The Self-Serving Aspect

Mr. Justice Philp's discussion on the admissibility of the out-of-court statements is *obiter* in that, as a preliminary matter, he found that the accused was bound by his failure to object at trial and could not now pursue a contradictory position on appeal. Counsel for the accused chose to allow these statements in with a design to cross-examine and expose inconsistencies. That strategy failed and, according to Mr. Justice Philp, it was not now open to counsel to challenge that strategy on

⁵ *Ibid.* at 361.

⁶ *Ibid.* at 383–84.

⁷ *Ibid.* at 375.

appeal. Although, as Mr. Justice Twaddle pointed out, it was not counsel who was raising this ground of appeal but the court.

Mr. Justice Philp then went on to find that in any event the evidence was admissible going to credibility. It was clear that the trial judge used the evidence for the purpose of establishing the consistency of the evidence of the complainants. Mr. Justice Philp swept aside the rule against prior consistent statements:

If it were necessary to do so in the resolution of this appeal, I would take up the challenge and conclude that the out-of-court statements of the children were admissible because the judge-made rule against prior consistent statements should no longer apply to the evidence of a child's complaint of sexual abuse. That evidence should be admissible to show consistency with a child's court-room testimony.⁸

What we have here is a new exception to the prohibition against prior consistent statements — “child's complaint of sexual abuse.” The evidence is admitted for its consistency but not for its truth.

B. The Hearsay Aspect

Mr. Justice Twaddle took a larger broom in hand than that used by Mr. Justice Philp. According to Mr. Justice Twaddle there was a “need for change” because:

Those rules of evidence which exclude a previous consistent statement of a child and evidence of the circumstances in which it was made fail to recognize the difficulty of obtaining a full account from the child of the events complained of. Those rules also ignore the fact that credibility may more readily be judged in the case of a child by considering the circumstances in which a complaint was first made.⁹

The “change proposed” was as follows:

A previous consistent statement by a child is not, in my view, always redundant. Such a statement may amplify the child's testimony at trial and, if made spontaneously as a first complaint, have sufficient indicia of reliability to permit its reception.

Unless the statement falls to be admitted under the rule in *Khan, supra*, the child's previous consistent statement should only be admissible where the child testifies. This avoids violation of the hearsay principle.

In order to qualify for admission under the changed rule, it should be necessary for the person who received the complaint to testify as to the circumstances in which it was made.¹⁰

Having satisfied these conditions the out-of-court statement would be admitted for all purposes.

⁸ *Ibid.* at 372.

⁹ *Ibid.* at 381.

¹⁰ *Ibid.*

II. ADMITTING OUT-OF-COURT STATEMENTS OF CHILDREN FOR THEIR TRUTH

MR. JUSTICE TWADDLE WAS OF THE VIEW that once a child testified the admission of that child's previous out-court-statements would not violate the rule against hearsay. That, of course, depends upon the definition of hearsay.

True, early English authority supported the proposition that prior statements of witnesses were not hearsay. In 1902 Phipson defined hearsay as:

Oral or written statements made by persons *not called* as witnesses ... [are] inadmissible to prove the truth of the matters stated [emphasis added].¹¹

The English courts embraced two complementary rules. There was the rule against hearsay for statements from witnesses who did not testify, and the rule against "narrative," which prevented a witness from testifying as to his prior statements.

In the United States the traditional view has always been that all out-of-court statements are hearsay. McCormick observed:

... the traditional view had been that a prior statement of a witness is hearsay if offered to prove the happening of matters asserted therein.

The logic of the orthodox view is that the previous statement of the witness is hearsay since its value rests on the credit of the declarant, who, when the statement was made, was not (1) under oath, (2) in the presence of the trier, or (3) subject to cross-examination.¹²

Rule 801(d)(1) of the Federal Rules of Evidence reflects this traditional view, albeit with certain built in exceptions.

It can be said that the prevailing view now in the Common Law world, including England, is that out-of-court statements made by witnesses are hearsay. In the 1990 edition of *Phipson on Evidence* it is stated:

Former statements of any person *whether or not he is a witness* in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them.¹³

So too, Cross has come around to this view:

¹¹ As quoted in M.T. MacCrimmon, "Consistent Statements of a Witness" 17 Osgoode Hall L.J. 285 at 290.

¹² E.W. Cleary, ed., *McCormick on Evidence*, 3d ed. (St. Paul: West, 1984) at 744.

¹³ M.N. Howard, P. Crane & D.A. Hochberg, eds., *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990) at para. 21-02.

According to the rule against hearsay as formulated in ch I, an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. This formulation conflates two common law rules, the rule that the previous assertions of the witness who is testifying are inadmissible as evidence of the facts stated (sometimes spoken of as the 'rule against narrative', or the 'rule against self-corroboration'), and the rule that assertions by persons other than the witness who is testifying are inadmissible as evidence of the facts asserted (the rule against hearsay in the strict sense).¹⁴

What is the law in Canada? Mr. Justice Sopinka, in his text on evidence, defined hearsay as:

Written or oral statements, or communicative conduct made by persons *otherwise than in testimony* at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein [emphasis added].¹⁵

Therefore, based on these authorities, any out-of-court statement is hearsay, so long as it is tendered for its truth. The fact that the witness testifies in-court is of no moment. The prior statement is still hearsay and for it to be admitted for its truth a hearsay exception needs to be found.

When one is dealing with prior complaints there are really only two options. First, a prior complaint could be a "spontaneous declaration." It is within this hearsay exception that most complaint evidence is admitted (for its truth) in the United States. American courts have been particularly flexible when it comes to applying this exception to statements made by children of tender years.¹⁶

This was the approach of the Ontario Court of Appeal in *R. v. Khan*, but it was effectively nipped in the bud by Madam Justice McLachlin when the case reached the Supreme Court of Canada. Madam Justice McLachlin noted the "relaxation" of the requirements taking place in the American courts regarding statements of children, however, she was of the view that "to extend the spontaneous declaration rule as far as these cases would extend it, is to deform it beyond recognition and is conceptually undesirable." Madam Justice McLachlin was troubled by the fact that a spontaneous declaration was admissible with no requirement that it be "necessary."¹⁷

Instead Madam Justice McLachlin crafted a principled approach to hearsay, based upon the two requirements of necessity and reliability. This then is the second option.

¹⁴ Sir R. Cross & C. Tapper, *Cross on Evidence*, 7th ed. (London: Butterworths, 1990) at 509.

¹⁵ J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 156.

¹⁶ Cleary, *supra* note 12 at 859.

¹⁷ *R. v. Khan* (1990), 59 C.C.C. (3d) 92 at 102 (S.C.C.).

In the case of *R. v. B. (D.C.)* we have no evidence of necessity. There is no indication that the in-court testimony of the children, other than there being certain inconsistencies, was in any way flawed such that it was necessary to refer to the earlier consistent statements made to the counsellor.

Mr. Justice Twaddle's decision to admit the evidence for all purposes rests simply upon the indicia of reliability. The requirement of necessity has been removed. This is a major and fundamental change in the law.

It is also a reform which has been urged with respect to children's evidence. The Ontario Law Reform Commission in its 1990 *Report on Child Witnesses* called for this very change.¹⁸ Similar statutory reform has already been undertaken in the United States. Professor John Myers summarized the reform as follows:

The statutes authorize admission of any reliable out-of-court statements by children of specified ages. The statutes are first cousins of the catchall exception contained in Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence. Both varieties of exception authorize admission of a broad range of reliable hearsay, and both call for a case-by-case approach to reliability.¹⁹

The Washington state statute has served as the model and it is outlined below:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings ... and criminal proceedings in courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.²⁰

The reform of the law in this regard has already occurred in Manitoba in child protection hearings. The Manitoba Court of Appeal in *Winnipeg Child and Family Services v. L.L.*²¹ dealt directly with the question whether hearsay evidence could be received into evidence in a child protection case without proof of necessity. The

¹⁸ Ontario Law Reform Commission, *supra* note 2 at 68.

¹⁹ J.E.B. Myers, *Child Witness Law and Practice* (New York: Wiley Law Publications, 1987) at 372-73.

²⁰ *Ibid.* at 374.

²¹ *Winnipeg Child and Family Services v. L.L.*, [1994] M.J. # 251 (C.A.).

court ruled that it could. In so doing the court noted that “circumstances of necessity” is “an entirely proper consideration in a criminal case, where a person’s liberty is at stake ... but is counterproductive in a case involving the protection of children.”²²

Should we do away with the requirement of necessity in criminal cases? No. There is value in preserving the requirement. It does serve to keep out unnecessary evidence. To illustrate, consider the case of *Khan v. College of Physicians and Surgeons of Ontario*.²³ Dr. Khan, besides facing the criminal charges that brought him before the Supreme Court of Canada, faced disciplinary proceedings brought by the college. At the disciplinary hearing the complainant, Tanya, now eight years old, was allowed to testify as to what occurred in Dr. Khan’s office when she was three-and-a-half years old. Her mother also testified as to what Tanya told her some 20 minutes after leaving Dr. Khan’s office. And Tanya’s aunt was also called to testify as to what Tanya had told her about the incident later that same day. Dr. Khan was found guilty of professional misconduct. His appeal to the Divisional Court was allowed primarily because of the error in admitting the subsequent “hearsay” statements of the child, which were not necessary since the child had testified. The college appealed to the Court of Appeal.

Mr. Justice Doherty gave the judgment of the court and overturned the Divisional Court’s ruling. Mr. Justice Doherty was of the view that

The fact that the child testifies will clearly impact on the necessity of receiving his or her out-of-court statement. Necessity cannot, however, be equated with unavailability.²⁴

Upon a careful review of the transcript from the hearing Mr. Justice Doherty found that the child’s evidence was not as complete as given in earlier statements to her mother. Therefore, the mother’s evidence was “reasonably necessary” and reliable and admissible. However, the subsequent repetition of the child’s statement to the aunt was not necessary and should not have been admitted.

Mr. Justice Doherty observed that the admissibility of a child’s out-of-court statement is to be determined on a case-by-case basis by the trial judge. He provided a list of factors to consider:

- 1) The age of the child at the time of the alleged event and at the time he or she testifies;
- 2) The manner in which the child gives his or her evidence, including the extent to which it is necessary to resort to leading questions to elicit answers from the child;
- 3) The demeanour of the child when he or she testifies;

²² *Ibid.* at para. 65.

²³ *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.).

²⁴ *Ibid.* at 657.

- 4) The substance of the child's testimony, particularly as it reflects on the coherence and completeness of the child's description of the events in question;
- 5) Any professed inability by the child to recall all or part of the relevant events;
- 6) Any evidence of matters which occurred between the event and the time of the child's testimony which may reflect on the child's ability to provide an independent and accurate account of the events in issue;
- 7) Any expert evidence relevant to the child's ability at the time he or she is required to give evidence to comprehend, recall or narrate the events in issue.

Mr. Justice Doherty's decision shows both the flexibility contained within the notion of "reasonable necessity" and the wisdom of retaining that requirement. There was no need for the aunt's repetition of the statement, yet this is the danger in doing away with the requirement of necessity.

True, it can be said that Mr. Justice Twaddle's exception to the hearsay rule would not allow the aunt to repeat the out-of-court statement. Mr. Justice Twaddle's exception is confined to a *child's spontaneous first complaint*. If we accept this narrow crafting of the exception, is this not a return to pigeon-holing? Moreover, is this not merely a re-working of spontaneous declaration, now called "spontaneous first complaint"? Both these approaches were rejected by the Supreme Court of Canada in *Khan*.

III. ADMITTING OUT-OF-COURT STATEMENTS OF CHILDREN FOR THEIR CONSISTENCY

NEEDLESS REPETITION LIES AT THE HEART of the prohibition against the admission of prior consistent statements. The word "superfluous" often is used to describe this evidence. "Superfluous" is defined as "more than is needed or wanted, useless."²⁵ The common law has long recognized the wisdom of confining a trial to the courtroom testimony. To do otherwise invites protracted inquiries, with little to be gained, in that the witness is present and can testify.²⁶ Consistency alone has never been enough.

Wigmore made this telling comment:

When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it.²⁷

²⁵ J.B. Sykes, ed., *The Concise Oxford Dictionary*, 7th ed. (Avon: Oxford University Press, 1982) at 1070.

²⁶ See the comments in *Cross on Evidence*, *supra* note 14 at 281.

²⁷ J.H. Wigmore, *Wigmore on Evidence*, 3d ed. (Boston: Little, Brown, 1940) at para. 1124.

Not only is the repetition unnecessary; it is also unfair. Professor Irving Younger, in his classic lecture on the *Ten Commandments of Cross-Examination*, admonished the cross-examiner to observe his seventh commandment:

Seventh commandment: never allow the witness to repeat on cross-examination what he said on direct examination. A lawyer must never permit a witness to say something twice. The reason is simple. If the jurors hear something once, they may or may not believe it. If they hear it twice, they will probably believe it. If they hear it three times, they will certainly believe it. If it is in writing, nothing on earth will persuade them that it is not true.

The prejudice arising from repetition was recognized by the Ontario Court of Appeal in the recent case of *R. v. Albert*.²⁸ The accused was charged and convicted of sexual assault. Several witnesses testified as to prior consistent statements made to them by the complainant. The Court of Appeal found that this evidence was prejudicial to the defence and ought not to have been admitted.²⁹

Consistency, standing alone, not being enough the Common Law fashioned exceptions where there was additional relevancy, which made the evidence now worth receiving. The following categories were fashioned:

- 1) Where recent fabrication is alleged;
- 2) Where the previous consistent statement is admitted as part of the *res gestae* or part of the narrative;
- 3) Recent complaints in sexual cases;
- 4) Statements on arrest;
- 5) Statements made on recovery of incriminatory articles;
- 6) Statements made with respect to previous identification of an accused.³⁰

An excellent case to illustrate these exceptions at work in a case similar to that under discussion is the Ontario Court of Appeal's decision in *R. v. F.(J.E.)*.³¹ The charge was one of sexual assault. The complainant was 16 years of age at the time of trial. The allegations of sexual assault went back to when she was nine years old. During the course of the trial the judge allowed the Crown to lead evidence that the complainant had made prior consistent statements relating to the appellant's sexual abuse of her to a number of persons. The Ontario Court of Appeal then canvassed the various exceptions that might apply in this situation.

²⁸ *R. v. Albert* (1993), 80 C.C.C. (3d) 193 (Ont. C.A.).

²⁹ *Ibid.* at 195.

³⁰ As taken from *R. v. Ay* (1994), 93 C.C.C. (3d) 456 at 468 (B.C. C.A.).

³¹ *R. v. F.(J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.).

A. Recent Complaint

Recent complaint has been abrogated by section 275 of the *Criminal Code*. The exception was premised upon the erroneous notion of “hue and cry.” That the victim would complain at the first reasonable opportunity. Failure to complain led to an adverse inference and the judge was to so instruct the jury. In order to rebut this inference the Crown was permitted to lead evidence of a recent complaint.

The Ontario Court of Appeal pointed out that abrogation only precluded the Crown from leading evidence of complaint. This did not preclude the defence from pursuing in cross-examination the failure of the complainant to complain. The door would then be open for the Crown to respond in re-examination or by way of rebuttal evidence to show that a complaint was, in fact, made or give reasons why no complaint was made.³²

B. Recent Fabrication

The Ontario Court of Appeal noted that this was a “favourite justification of the Crown for leading evidence of prior consistent statements.”³³ Therefore, it is important that judges be vigilant and the Ontario Court of Appeal cautioned that “if the Crown is relying upon recent fabrication ... it must wait until the defence has clearly opened this door.”³⁴ For example, the door is not opened simply because the whole story of a witness is challenged.³⁵ The court emphasized that “it is only *consistent* statements made prior to the time when it is alleged that the fabrication began that are admissible.”³⁶ Herein lies the relevancy of the prior consistent statement.³⁷

C. *Res Gestae* or Narrative

We have already looked at the hearsay exception for spontaneous declarations. “Narrative” is not a hearsay exception. The statement is not being introduced for its truth, but for the fact it was made. Nor is the statement going in for its consistency. Rather, the evidence is going in to provide background, a context if you will, which enables the court to better understand what occurred. Mr. Justice Finlayson, writing for the court, described the narrative exception as follows:

³² See D. Dawson, “The Abrogation of Recent Complaint: Where Do We Stand Now?” (1984–85) 27 *Crim. L.Q.* 56 at 71.

³³ *R. v. F. (J.E.)*, *supra* note 31 at 469.

³⁴ *Ibid.* at 470.

³⁵ *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 at 20 (Ont. C.A.).

³⁶ *R. v. F. (J.E.)*, *supra* note 31 at 470.

³⁷ The leading case on the issue is *Nominal Defendant v. Clements* (1960), 104 C.L.R. 476 (H.C.A.).

It must be a part of the narrative in the sense that it advances the story from offence to prosecution or explains why so little was done to terminate the abuse or bring the perpetrator to justice. Specifically, it appears to me to be part of the narrative of a complainant's testimony when she recounts the assaults, how they came to be terminated, and how the matter came to the attention of the police.³⁸

In our case "narrative" might well include the fact that a complaint was made to her counsellor and that the police were called. The child's evidence is now in a context — should that be necessary. What is not necessary is detailed testimony as to what the child said to the counsellor or to the police.

The British Columbia Court of Appeal in *R. v. Ay*, *supra*, reiterated this point. The complainant made a complaint to the police during a 5 and a quarter hour interview. The statement given at the time was of some 160 pages. Throughout the trial Crown counsel made repeated reference to the length both in time and volume of this prior statement. The Court of Appeal ruled that it was open to the Crown to lead evidence to confirm that complaints were made, as part of the narrative, however:

What ought not to have been admitted was any evidence of the specific content of such statements, and any other evidence the sole purpose of which was to invite the jury to conclude that these prior statements were both truthful and consistent with her sworn evidence before them.³⁹

Mr. Justice Philp reviewed these possible exceptions and found that none applied to the case on appeal and that really the entire approach of these courts in attempting to force fit prior statements of children into recognized categories was wanting. He concluded:

Square pegs simply do not fit into round holes. And yet that is what courts attempt to do when they try to force the evidence of child witnesses within rigid evidentiary rules and categories that were never intended to govern the admissibility and use of their testimony. Often the results are inconsistent, illogical and indefensible, and, in the result, inimical to the search for truth.⁴⁰

IV. CONCLUSION

UNFORTUNATELY, THE RESULT REACHED in *R. v. B.(D.C.)* too is "inconsistent, illogical and indefensible." Why a special evidentiary rule for children?

No experts were called on the question. Mr. Justice Philp, in fact, expressed concern "that the policy of the law is often shaped by judges on the basis of selective experts whose opinions have never seen the inside of a court-room, and surface for

³⁸ *R. v. F.(J.E.)*, *supra* note 31 at 472.

³⁹ *R. v. Ay*, *supra* note 30 at 471.

⁴⁰ *R. v. B.(D.C.)*, *supra* note _ at 369.

the first time in their judgments.”⁴¹ Yet, is the Court of Appeal not guilty of doing the same?

Should we regard prior complaints of children as being any more reliable than coming from other witnesses? Modern psychological research indicates “that the courts are wrong in assuming that children’s allegations of sexual abuse are inherently reliable.”⁴²

Studies seem to indicate that children, simply put, are as reliable as adults — no more, no less. Look to the findings of the Ontario Law Reform Commission in its *Report on Child Witnesses*:

- Therefore, modern studies confirm that there is no relationship between age and honesty. The testimony of a child is as trustworthy as the testimony furnished by an adult.
- ... modern scientific data ... demonstrates that all witnesses, regardless of age, are prone to suggestive influences.⁴³

To apply “principle,” why not admit prior complaint statements by all witnesses, or, for that matter, all prior statements made by a witness?⁴⁴ Heresy? Actually, this was proposed in the *Model Code of Evidence* and the *Uniform Rules of Evidence*, although neither were enacted in the United States.⁴⁵

The irony is that the exceptions fashioned in *R. v. B.(D.C.)* arise from a distrust of children’s testimony. The court reasons that since it is inappropriate to apply traditional rules of evidence and court-room procedures to the testimony of a child witness, then it is also inappropriate to apply the traditional rules of admissibility. Such is a false logic.

It amounts to a finding that the testimony of children cannot stand alone and that it needs bolstering. Yet, the abolition of the need for corroboration was designed to remove the unjustifiable assumption that children’s evidence is always less reliable than that of adults. The general principle is that a witness is taken to be credible — until shown to be otherwise. The assumption, the generalization, implicit in *R. v. B.(D.C.)*, is that a child’s testimony is less reliable than an adult’s.

Madam Justice McLachlin has cautioned us that this is exactly what we are not to do. A child’s evidence was to be assessed as follows:

⁴¹ *Ibid.* at 370.

⁴² M. Misener, “Children’s Hearsay Evidence in Child Sexual Abuse Prosecutions: A Proposal for Reform” (1991) 33 *Crim. L.Q.* 364 at 372.

⁴³ Ontario Law Reform Commission, *supra* note 2 at 7–18.

⁴⁴ Mr. Justice Philp noted “that there is significant social science research that puts in doubt, in the case of child witnesses, the assumption that oral court-room testimony is the best evidence” [para. 370]. Yet, can this not be said for every eye-witness or complainant who takes the stand?

⁴⁵ See A. Travers, “Prior Consistent Statements” (1978) 57 *Nebraska L.R.* 974.

... we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, *taking into account the strengths and weaknesses which characterize the evidence offered in the particular case* [emphasis added].⁴⁶

In a given case a child's evidence may be as credible, as worthy of belief, as that of any adult. There should be no special rules of admissibility simply because the complainant is a child. The rules excluding prior self-serving and hearsay statements are important safeguards in *any* criminal trial.

⁴⁶ R. v. W.(R.) (1992), 74 C.C.C. (3d) 134 at 143 (S.C.C.).