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Child Witnesses

Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes

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INTRODUCTION

Over the past two decades, there has been a dramatic increase in awareness of child abuse and a corresponding increase in the reporting and prosecution of child abuse cases. As more children began to appear in the criminal courts, there was a growing recognition that the traditional legal rules often interfered with the search for truth when they are applied to child witnesses, and participation in the court process was often traumatic for children. In 1988 legislation came into force in Canada to reform some of the substantive offences and procedural rules that apply to child abuse cases. Included in these reforms were provisions to permit the use of testimonial aids - videotaped statements, screens, and closed-circuit television - in order to facilitate the giving of evidence by children and reduce the trauma of the legal process for children in sexual offence cases.¹

In 1993, the Supreme Court of Canada upheld the constitutional validity of these provisions, emphasizing that they facilitate the truth-seeking function of the criminal justice process, without compromising the rights of the accused to a fair trial.²

However, these testimonial aids are still used relatively rarely in Canada, even in cases with young children.³ The limited use of these provisions is in part due to resource issues and

¹S.C. 1987, c. 24. See N. Bala, "Double Victims: Child Sexual Abuse and the Criminal Justice System in Canada" (1990), 15 *Queen's L.J.* 15; A. Harvison Young, "Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues" (1992), 11 *Can.J.Fam.L.* at 11.

²*R. v. L.(D.O.)*, [1993] 4 S.C.R. 419 [hereinafter *D.O.L.*]; *R. v. Levogiannis* [1993] 4 S.C.R. 475 [hereinafter *Levogiannis*]. See also *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183 [hereinafter *C.C.F.*].

³See e.g L. Sas, *I'm Trying to Do My Job in Court. Are You? Questions for the Criminal Justice System* (London Family Court Clinic, 1999), p. 56 - 59. In a study of 913 Ontario cases involving child victims (352 were under 11 years of age), in only 6 cases was a screen used at the preliminary inquiry and in 10 cases was a screen used at trial. Three used closed-circuit television at their preliminary inquiry and only one child used closed-circuit television at trial; videotapes were used in only 7 cases at the preliminary inquiry and 5 at trial.

the lack of access to appropriate facilities. But there also seems to be a continued reluctance by justice system professionals to use the facilities that are available.

This paper explores the Canadian experience with testimonial aids for child witnesses, attempting to discover why they are used so rarely. We review some of the Canadian jurisprudence,⁴ present the findings of a recent survey of Ontario justice system professionals about experiences with testimonial aids, and summarize some court simulation research carried out by one of the authors and others about the effects of using testimonial aids on the perceptions of mock jurors.⁵ We conclude by proposing some institutional and legislative changes to make better use of these technological aids that are intended to improve the administration of justice.

CLOSED CIRCUIT TELEVISION & SCREENS: SECTION 486(2.1)

One of the greatest fears that some child victims have about testifying in court is of seeing the perpetrator of their abuse again. For some children, especially younger ones, there may be a fear that he may physically harm them, for others there is psychological distress at seeing him again. In some cases a perpetrator may attempt to intimidate a witness with a facial expression or hand signal. In some cases, the child may become completely silent on seeing the perpetrator again, or may start to cry or even become physically ill. For some children, it is not just the presence of the accused that is distressing; they may be intimidated into silence by the court room itself, for the child a very large and foreign room filled with strangers.⁶

⁴ For a fuller review of some of the Canadian case law, see Bala, "Child Witnesses in the Canadian Criminal Courts: Recognizing Their Needs and Capacities" (1999), 5 *Psychology, Public Policy and Law* 323.

⁵ The Child Witness Project at Queen's University conducted a survey of justice professionals who work with child witnesses in the criminal courts in Ontario in the summer of 1999. The respondents were 21 victim-witness workers, 44 Crown prosecutors, 194 defense counsel, and 91 provincially appointed judges of the Ontario Court of Justice. The survey dealt with a number of issues related to child witnesses, but here we focus on the respondents' experiences with the application of s.715.1 and s.486(2.1) of the *Canadian Criminal Code*. The full survey results are at: <http://qsilver.queensu.ca/law/witness/witness.htm>

⁶L. Sas et al, *Three Years After the Verdict: A Longitudinal Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project*, Child

To deal with these types concerns, Parliament enacted s.486(2.1) of the *Criminal Code* which permits children (those under 18 years of age at the time of the hearing) to testify from behind a screen or from another room via closed circuit television during the criminal prosecution on a sexual offence, provided that the court is satisfied that this is “necessary to obtain a full and candid account of the acts complained of.” The child may be permitted to testify from behind a sequestration screen placed so the witness does not have to see the accused, or from another room entirely, with the child’s testimony displayed in the court on monitors via closed circuit television.

Witness Project, London Family Court Clinic Inc., September 1993 at xvi. [hereinafter *After the Verdict*].

There is an onus on the Crown to introduce evidence to demonstrate that it is “necessary” to use an aid in order for the child to give a complete account of the alleged offences. It is not sufficient to show that a child is “uncomfortable” in the courtroom setting.¹ The Crown may adduce evidence from a social worker, psychologist, police officer, parent, or other person who is familiar with the child. In making a s. 486(2.1) application, the judge may take account of the child’s age and demeanour in court, though it is not necessary for the child to attempt to testify in open court before a judge decides to permit the child to use a screen or closed circuit television.² In *Levogiannis*, L’Heureux-Dubé J. stated for the Supreme Court that the judge need not find “exceptional and inordinate stress on the child” in order to merit the use of the special measures.³ When the screen is used, trial judges routinely provide instructions to the jury that no adverse inference about the guilt of the accused may be drawn from its use, though it has never been held that this is mandatory.

Of the judges who responded to our survey, 53% had heard applications under s.486(2.1) between one and five times; a further 21% had heard 6 to 10 applications, while 7% had heard 11 or more. Of those judges who heard these applications, 75% said the applications were successful 100% of the time.

The vast majority of judges (96%) agreed that s.486(2.1) is a “useful” provision, while 94% agreed that it is “beneficial” to the child. The judges demonstrated an understanding of how this provision can help diminish the particular difficulties children face in the formal and sometimes frightening atmosphere of the courtroom:

In rare instances, it may provide the only effective means of ‘freeing’ the child from the intimidating inhibition of confronting Accused in the courtroom, or the intimidating presence of others in the courtroom (relatives, etc.)

Reduces the stress for the child witness and thereby tend to assist with the receipt

¹*R. v. M.(P.)*, (1991) 1. O.R. (3d) 341 (O.C.A.).

²See also *D.O.L.*, *supra* note 2.

³*Levogiannis*, *supra* note 2 at 492.

of clear and useful evidence.

Comfortability is a component of truth telling - making *any* witness comfortable does not impair trial process. ... A comfortable witness testifies best - both in direct and cross. We have to create the best atmosphere for all witnesses to testify.

Children, especially young children, are at a distinct disadvantage when challenging or attacking an adult particularly one who may be in a position of authority over them.

One judge said: "The presence of the accused is often overwhelmingly frightening to the child." The screen can be especially useful when the accused is a family member or a relative, and the child will feel "bad" for telling the truth about them, said one judge.

Of the Crown respondents, 51% had made applications under s.486(2.1) between one and five times; 14% had made such applications six to ten times, and 14% had done so 11 times or more. Sixty-nine percent of those who applied stated they were successful 100% of the time. Again, the vast majority of Crown respondents (92%) felt this provision is "useful":

In the cases I was involved in where I requested the screen the children would not have been able to testify if they had to physically see the accused.

Very useful - I have used the screen many times - although the child knows that the perpetrator is in the courtroom, the screen is nevertheless a physical barrier that gives the child something to hide behind and in my experience they feel more comfortable testifying.

It is essential to have children and young people testify versus offending parents.

If these testimonial aids give the witness some better sense of security and comfort than the trier of fact gets to make a decision based on full evidence.

Allows vulnerable witnesses who may not otherwise be able to testify to have an accommodation so that they can give their evidence - many witnesses and victims are very fearful of the accused and are intimidated at being stared at by accused; others are intimidated/fearful of the whole process and these accommodations ease their anxiety and allow them to testify.

A large majority of Crown counsel (86%) believe testifying behind a screen or via closed circuit television is “beneficial” to the child witness. They recognize that the use of these testimonial aids can insulate the child witness from the potential harshness of the courtroom and, in some cases may be the only way for the child to be able to testify. Some Crown counsel remarked, however, that sometimes judges respond to such applications as though the witness is being inappropriately “coddled” by the Crown, or the witness is “enjoying the status and attention accorded to a victim.”

One concern that has been expressed by prosecutors about the use of screens or closed circuit television is that the child may seem less credible and it may be more difficult to secure a conviction. As stated by L’Heureux-Dubé J. in *Levogiannis*:¹

It has been remarked that Crown prosecutors are reluctant to request the use of screens because they are concerned that the young complainant may not come across as credible or the child’s testimony may have less of an impact ... The use of the screen could very well be held against the child complainant, who might be judged to be an unreliable witness, because she or he is unable to look the accused in the eye, rather than against the accused.

Seventeen percent of the Crown respondents agreed with the statement that use of a screen or closed circuit television made it harder to obtain a conviction, but 49% thought it had no impact and 33% disagreed with the statement that their use made it more difficult to obtain a conviction. Among judges, only 4% thought that use of closed circuit television or a screen made it harder to obtain a conviction, 46% thought it had no direct impact, and 51% disagreed with the statement that their use made it more difficult to obtain a conviction.

If a screen is being used, s. 486(2.1) only requires that it should be placed in such a way that the child cannot see the accused. Often use is made of a “one way” screen that obstructs the child’s view of the accused, but permits the accused to see the child. Nothing in s. 486(2.1)

¹*Supra*, note 2 at 494.

suggests that the child should not see the judge or jury if a screen is being used, but Crown counsel report that the screen is sometimes placed so the judge and jury cannot see the child: “There seems to be a residual reluctance in judges and juries who cannot physically see the child to convict.”

Fifty percent of the victim-witness workers who responded to the survey had been involved in one to five trials with child witnesses where applications for the use of a screen were made under s.486(2.1). Twenty-five percent had seen six to ten applications, another 25% had seen 11 or more. Of those victim witness workers who had seen these applications, 40% reported that they were successful 100% of the time.

In determining whether the use of a screen or closed circuit television is appropriate, the court may hear witnesses about the likely effect on the child of testifying in open court in the presence of the accused. Fifteen percent of victim witness workers reported that they were sometimes called to give their opinion, five percent were often called, and a further 15% stated they were always called. Although 89% of victim witness workers felt s.486(2.1) is a useful provision, 11% did not. Some of their comments included:

Threats often accompany abuse and children are very fearful of retaliation. Having to face the accused interfered with their ability to focus and deliver a candid account. Where the child expresses fear of facing the accused and where they do see him they often start to cry - run away - say ‘I don’t know’ to any questions about what happened.

It’s useful because it produces an artificial barrier between victim and accused. However, child has done nothing wrong, so screen should be designed to go in front of the accused so that he can see out but child cannot see in.

It should be a given that any child would be better able to testify without seeing the accused. I would like to see the use of a screen to be standard for child witnesses.

[These provisions are] useful when certain looks from the accused will silence a child. However, sometimes what you can’t see is more fearsome - in some cases there’s a feeling of ‘the big bad wolf hiding behind the screen’ and the child hears the accused coughing, etc.

The victim-witness workers said the presence of the accused is sometimes so intimidating and distracting to the child it is extremely difficult to get a complete and candid account of their experience. Several of these respondents went so far as to say that just placing a child in the same room as the accused is a further victimization of the child. To avoid this trauma, all children should be able to testify in another place via closed circuit television.

Forty percent of the victim witness workers had been involved in one to five trials where s.486(2.1) was used to permit a child to testify via closed circuit television. Ten percent had been involved in six to ten trials and five percent of the victim witness workers had been involved in 11 or more such trials with applications. Forty percent of those who experienced the applications found they were successful 100% of the time. When these applications are made, 30 % of victim witness workers always testified as to their opinion of whether the closed circuit television was necessary to obtain a full and complete account.

Eighty-nine percent of victim witness workers stated they believe the closed circuit television provision is useful, primarily because it keeps the child away from the accused and out of the court room entirely. The child's trauma is minimized and the accused is not able to exercise any kind of covert control over the child witness. As one victim witness worker put it:

[Closed circuit television] is the best option for kids who require testimonial aids. Much easier on the child - does not feel like a courtroom - no distractions, more comfortable to talk with two lawyers than all the court, staff. I've been very impressed with this option. My sense is that kids will give truthful and candid evidence when relaxed and comfortable. I have sat with kids on the stand and when you look up at all the people it's very intimidating. I felt like I was back in grade 2 and called upon to answer a question that I didn't know. I clearly remember thinking 'I'll just not answer for long enough and they'll leave me alone.' I think that's often how kids feel in a courtroom.

Ninety-four percent of the victim witness workers said testifying via closed circuit television is beneficial to the child witness. This provision "addresses the child's biggest fear - talking about the offence in front of the perpetrator."

The perception of victim witness workers is that Crown prosecutors are often reluctant to make s.486(2.1) applications because they believe it is better not to use testimonial aids as they may have a negative impact on the judge, or because they believe it will make it more difficult to get a conviction. This survey of justice workers revealed that s.486(2.1) is being used, but also finds support for the criticism offered by Sas et al that the Crown does not make applications for its use often enough.¹ It is noteworthy that as a large majority of applications are successful; the low use of s. 486(2.1) appears to be more due to Crown reluctance to make applications than to judicial reluctance to permit their use.

While there is a clear perception that s. 486(2.1) is beneficial to children, many defense counsel had concerns with the use of the screen and closed circuit television.

Forty-seven percent of defence counsel responding to the survey had been involved in one to five trials where applications to use the screen were made under s.486(2.1). Ten percent had been involved in six to ten trials and seven percent had been involved in eleven or more.

Defence counsel were divided on whether s. 486(2.1) is a “useful provision,” with 54% stating that it is, and 46% answering that it is not “useful.” Understandably, their negative comments regarding the usefulness of this provision focused on the possible prejudice to the accused, a concern that the use of the provision might create an aura of guilt. In the words of one defence counsel, “spare the complainant, spoil the trial.” Another defence counsel commented:

It makes lying easier and easier. The liar no longer has to look upon or face the victim of the lies. This thought process only has credibility if the accused is really guilty ...

Efforts to coddle or protect child witnesses have no place in a court system where the government seeks to send a person to jail. Truth is hard to find.

I have no experience with this provision, but it makes me nervous as it removes some of the solemnity and gravity from the act of testifying. There are a lot of false allegations by children, in my experience, and we should not make it easier

¹*After the Verdict*, *supra* note 6 at 111.

to lie.

This provision works against the time honoured common law tradition that an accused has a right to confront his accuser. There are those rare cases when the complainant is so distraught that appropriate evidence cannot be obtained or where the complainant is so young that he or she is intimidated by the court surroundings. There should be limited use as long as it does not prevent an accused from having a fair trial.

While 58% of the defence counsel said s.486(2.1) was “beneficial” to child witnesses, many pointed out that their primary duty is not to the witness but to the accused. The use of the screen or the closed circuit television may make it easier for the child to testify without having to face the alleged perpetrator, but many defence respondents said this benefit to the child does not necessarily contribute to justice or to truth-seeking.

Actual confrontation between the defendant and the accuser is a necessary part of our system of justice. In an attempt (misguided!) to prevent further harm to abused children, the notion of ‘protecting’ the witness has further pushed the child into a ‘system’ and prevented him/her from taking back some of their dignity and some power.

If the child has been victimized, it is important for the child to know he or she can be strong enough to make the allegations directly.

Where a witness has a genuine fear of the accused, it can be an excellent tool to allay fears and get the witness to open up. However, there should be a more stringent evidentiary test to establish the need for it.

Defence counsel fear the use of the screen or closed circuit television may provide a subtle form of corroboration of the child’s testimony: the accused must have abused the child, otherwise the child would not require this type of protection. Many defence counsel express a concern that the use of a screen or closed circuit television may be beneficial to the prosecution, but that it is inherently prejudicial to their clients.

Some defence counsel concede that where a child has genuinely been abused, the child may have an understandable fear of the accused, and that there may be cases in which it is appropriate to attempt to reduce the risk of trauma to the child, as long as there is no sacrifice of

any important defence rights. However, a number of defence counsel suggested that it should be mandatory for the trial judge to provide a warning to the jury about the impropriety of drawing any adverse inference from the use such a device.

Sixty-seven percent of the defence counsel disagreed that the use of these provisions made it more difficult for the Crown to secure a conviction.

Usually, it is the Crown who calls a child to be a witness. However, 51% of defence counsel reported that they had also called a child under 18 as a witness. They experienced some problems in eliciting the evidence needed from these children. Cognitive development issues presented the most difficulties with children being “unable to recall exact times and dates of the incident and related events.” One defence lawyer said, “[it] makes me feel like I am abusing the child by dragging him into the proceedings.”

Many of the defence counsel indicated they recognized the difficulty of balancing the competing interests of the accused, the child witness and the quest for a just decision based on the truth. They appreciated that cases which pit children against family members may harm the child even where there is a well-deserved conviction. The family often suffers a lasting schism no matter what the outcome in the court.

Although many defence counsel agreed that the provisions did have some place in the justice system, a common concern was articulated by one lawyer who commented: “In our desire to ‘spare’ the child we are in danger of losing sight of the principles of law which provide protection for the citizen.”

VIDEOTAPES: SECTION 715.1

As awareness and reports of child abuse increased in the 1980's, it became increasingly common for police and social workers to videotape investigative interviews with children. Such videotapes could be shared with different investigators, reducing the need for repeated intrusive interviews. Such videotapes provide a record of events made relatively soon after the events in question, when the child's memory is likely to have the most detailed recollection of the events.

Furthermore, they are made in a relatively supportive setting, permitting a child to fully discuss often embarrassing and sensitive matters. It must, however, be recognized that some children will only disclose incrementally, and so the initial videotape may not be a complete description of all of the abuse that the child has suffered.

Recognizing the value of investigative videotapes, Parliament enacted s. 715.1 to render admissible in sexual offences proceedings the videotape of an interview with a child (under 18 at the time of the alleged offence), provided that it is made within a “reasonable time of after the alleged offence” and that the child “adopts the contents of the videotape” while testifying in court. By making the videotape admissible, the court may receive the fullest account from the child. There is also a possibility that if the tapes are shown to the accused before trial, in some cases this may prompt a guilty plea, sparing the child of the burden of a trial.¹

Before a videotape can be admitted in evidence under s. 715.1, the judge must hold a *voir dire* to determine whether it was made “within a reasonable time” and to ensure that the child adopts the contents. The judge may decide to exclude or edit the videotaped statement if it contains inadmissible statements, for example about other abusive acts that are not the subject of the charges, or where its prejudicial effect outweighs its probative value, or where its admission will operate unfairly to the accused.²

¹N. Walker Perry and B.D. McAuliff, “The Use of Videotaped Child Testimony: Public Policy Implications” (1993), 7 Notre Dame J.L. Ethics & Pub. Pol’y 387.

²In *R. v D.O.L. L’Heureux-Dubé J.* offered the following factors for trial judges to consider in determining whether to admit or exclude a videotaped statement under s.715.1 ([1993] 4 S.C.R. 419, at 463):

1. the form of questions used by any other person appearing in the videotaped statement.
2. any interest of any person participating in the making of the statement.
3. the quality of video and audio reproduction.
4. the presence or absence of inadmissible evidence in the statement
5. the ability to eliminate inappropriate material by editing the tape
6. whether other out-of-court statements by the complainant have been entered
7. whether any visual information in the statement might tend to prejudice

In *R v C.C.F.*, the Supreme Court held that a child on the witness stand has “adopted” a videotaped statement if she recalled “giving the statement and testified that she was then attempting to be honest and truthful...[even if she no longer has] a present recollection of the events described.” Justice Cory went on:

... s.715.1 has built-in guarantees of trustworthiness and reliability which eliminate the need for such a stringent requirement for adoption. Further, a lack of present memory or an inability to provide testimony at trial regarding the events referred to in the videotape as a result of the youthfulness and the emotional state of the complainant increases the need to consider the videotaped statement.³

The primary purpose of s.715.1 is to permit the court to hear what is probably the best recollection of events the child can offer.⁴ The existence of the videotape can also reduce the extent of trauma to the child as a result of testifying⁵ by lessening the amount of time the child

-
- the accused (for example, unrelated injuries visible on the victim)
8. whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant.
 9. whether the trial is by judge alone or by a jury; and
 10. the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.

³*C.C.F.*, *supra*, note 2 at 1201.

⁴*Ibid.* at 1194.

⁵*Ibid.* at 1193.

witness actually spends providing *viva voce* evidence and protecting the witnesses from seeing their alleged abuser as they testify against him or her.

In our survey of justice workers in Ontario, 54% of Crown attorneys had made between one and five applications under s.715.1 and 2% had made eleven or more. Forty-four percent had never made such an application. Of those who had made such applications 65% said they were successful 100% of the time. Ninety-five percent of the Crown attorneys surveyed believe that s. 715.1 is “useful,” allowing the court to receive as full an account of the alleged’s acts as possible. One Crown respondent commented:

In chief and cross about the abuse, if the video has done ‘the talking’ for them first [it’s useful]; better recall at the time the statement is taken, therefore, better record of the child’s evidence; consequently, the ‘I don’t remember’ and the ‘I don’t know’s’ can be answered by the video evidence; observe the child’s demeanour on video, usually recorded in a less hostile environment.

However, several Crown counsel commented that the benefit of the provision to the child is limited because the child is subject to full cross-examination. Use of a videotape may leave a child “cold” and not fully prepared to answer questions in cross-examination. Sometimes children do not pay much attention while the videotape is being shown and the child may not be ready for the detailed questioning on cross-examination.

Fifty-five percent of judges in our survey had heard between one and five applications to admit videotaped interviews of a child witness. Seven percent had heard from six to ten, and 2% had heard 11 or more. Of those who had heard applications, 64% of judges said 100% were successful. Ninety-two percent of judges who responded believe s.715.1 is a useful provision.

Some of the comments from judges include:

Often children are too intimidated by the courtroom setting to testify about personal issues and allowing them to adopt a statement [made in] more relaxed circumstances ensures that the issue can be tried.

Given the delay between the original statement of the child and court appearance, more useful tool than *viva voce* evidence at times!

It assists by graphically illustrating the child’s demeanour in a more friendly environment and also provides insight into the manner in which the statement was

elicited.

It increases the likelihood that the allegations will come before the court. There are many acquittals in child sexual assault cases, but I think it is preferable that the accused be put to their defence rather than the Crown be non-suited because the child can't remember or won't talk.

There are several useful aspects of this provision identified by the judges. A videotaped statement made within a reasonable time of the alleged offense will likely capture the earliest, freshest, and most detailed recollection of events.¹ When it can take a long time to proceed to trial on such a matter, the video provides the trier of fact with an image of the child as he or she was near the time of the alleged offense. There can, for example, be a considerable difference in development, both intellectual and physical, between a child at three or four when a videotape is made, and the same child six months to a year or more later when a trial may be completed.

Judges observed that Crown prosecutors do not always use videotaped statements that they have. The Crown prosecutor may, for example, call the child to testify and only seek to introduce the video only if the child omits significant details or is too overwhelmed to answer questions in chief. Said one judge: "If there is a video that *prima facie* meets the 715.1 criteria, I think Crowns should rely on the video more than they do, as primary evidence."

Some judges observe that the existence of videotapes may in some cases give defence counsel greater opportunities for challenging the Crown's case than it would have had without them. The defence will have access to videotapes as part of Crown disclosure, regardless of whether or not the prosecution uses the videotape. The tape provides a record of the process of interviewing by police and child protection workers. The defence may be able to demonstrate inappropriate questions or suggestive interviewing techniques. Also the defence may be able to argue that the child's allegations are a product of suggestive interviewing creating false

¹*Ibid.*

“memories.”

Judges consider that videotapes can be very useful for assessing witness credibility:

Very useful in assessing credibility to actually see and her tone of voice etc. and to compare testimony.

It provides the court with a complete view of the child in a less formal setting than the courtroom but it most of all provides the court with a very precise view of the interviewer and the tone of the whole scene.

The video contains far more visual evidence than mere words.

Defence counsel had both praise and criticism for s. 715.1. Forty percent of the defence counsel had been involved in between one and five trials where an application had been made by the Crown under s.715.1. Seven percent had been involved in six to ten such trials, and one percent had worked on eleven or more. As a group they were less enthusiastic about the usefulness of s.715.1 than the other professional groups: 62% of defence counsel said it was “useful” while 38% said it was not.

Many defence counsel made statements to the effect that the video recording of the child’s statement was the “best way to preserve the early statements of a child witness.” The video provides a record of the techniques used by investigators to elicit the statements of the child. Leading questions, promises or inducements made to the child, or other inappropriate techniques may be captured on the video. Some defence counsel commented:

It can work to the benefit of the defence especially if it shows ‘coaching’ of the child - not all professionals who question the child do so appropriately.

Very useful for the Crown, a good interviewer can get a kid to say anything. With anatomically correct dolls and some imagination you can work wonders. This is an area that has to be closely scrutinized.

If the videotaped interview is leading (they often are) it can be prejudicial; a balanced neutral interview meets less opposition.

The main problem encountered by the defence in trials where videotaped

statements are used is in attempting to cross-examine a child who has “adopted” the contents of the videotape, but who has little or no memory of the events. The child is subject to cross-examination, but if they cannot speak to the content of the tape, the defence is limited to asking questions to attack their credibility or trying to establish a motive for fabrication. The statement is entered for the truth of its contents and goes to the trier of fact as an untested allegation. One defence lawyer said:

In cases where it is understandable due to elapse of time, that the complainant’s memory has faded, or they have changed their mind about giving evidence due to family pressures ... the 715.1 is useful to the Crown. However, often other evidence ... highly prejudicial and otherwise inadmissible creeps in to the proceedings despite the trier’s editing. It is my feeling that a trier cannot simply sweep some of this evidence from his/her mind and it is my feeling this is prejudicial to the accused. Of course this is no different than any other type of inadmissible evidence, but the videotape tends to lend an air of reality to evidence which by nature of its inadmissibility, cannot be tested with cross-examination.

Another defence counsel commented: “It is dangerous. The police and CAS [child protection agency worker] can prepare an extremely strong narrative which is not subject to cross.”

Some defence counsel also express concern that Crown may use this provision as “oath helping” or to bolster the testimony of a weak witness. There may be less concern for the prosecution about inconsistencies developing between the earlier videotaped statement and the trial, because the video statement comprises their entire evidence-in-chief. The child hears and sees the entire tape, which refreshes his or her memory just in time for cross-examination.

Some defence counsel think that s. 715.1 is too broad, and if the child is capable of testifying, and can recall the events, there is really no need to use s.715.1.

When a child is unable or unwilling to testify or at least give detail, it is very unsatisfactory to have the s.715.1 procedure from a defence point of view. Cross examination is greatly reduced and generally ineffective. You get the impression it’s file the video and plead guilty. You sometimes ‘suspect’ the child is ‘encouraged’ to resort to adopting the video to circumvent cross-examination in court. Client always feels very unfairly treated when Crown gives [evidence] by s.715.1. Further it seems you can never successfully oppose the s.715.1 video or the use of the screen

COURT SIMULATION RESEARCH

The Ontario survey data suggests that the limited use of testimonial aids may be due more to the reluctance of Crown prosecutors to request their use than due to a judicial unwillingness to permit their use. At least in part this reluctance may reflect a concern of prosecutors that it may be more difficult to obtain a conviction if use is made of testimonial aids. Conversely some defence counsel expressed a concern that the use of a testimonial aid may create the impression that the accused is guilty, suggesting to the jury that the child is in need of protection from an abuser.

A few psychologists have conducted studies with mock jurors to try to determine whether either of these conflicting concerns of lawyers are accurate. From the perspective of an experimental psychologist, there are two possible alternative hypotheses. The credibility inflation hypothesis posits that the use a testimonial aid, such as a screen, could enhance the child's credibility because jurors would perceive the child's testimony as protected from the negative effects of the possible trauma and fear associated with having to testify before the alleged abuser. Additionally, the use of such devices may create a perception that the accused is someone that the child fears, and hence is more likely to be guilty. The credibility deflation hypothesis posits that the use of the protective device undermines the child's credibility because it suggests the child is too fragile to testify, that the emotional and fearful responses suggest that the child is a potentially unreliable witness. Additionally there may be perceptual factors that may, for example, make testimony conveyed on a television monitor (whether a videotape or closed circuit television) less compelling and credible than live testimony.

In a series of experiments by Lindsay and colleagues, three different modalities were used in simulated child sexual abuse trials: open court, videotape and screen.¹ In their first

¹D.F. Ross, S. Hopkins, E. Hanson, R.C.L. Lindsay, K. Hazen and T. Eslinger, "The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse" (1994), 18 *Law and Human Behavior* 553.

experiment, subjects watched a professionally produced videotape of a trial involving allegations of abuse against the father of a 10 year old girl. The trial was based on a real transcript, and was taped in an actual courtroom by a professional production company. Three versions of the trial were created that were identical in every respect except the modality in which the child testified. Each of the versions included a judicial caution warning of the impropriety of drawing any adverse inference against the accused from the presence of the testimonial aid. After watching the trials, the subjects indicated whether they thought the defendant was guilty or not, and they rated the credibility of the child and the accused.

The modality of the child's testimony did not have a statistically significant impact on convictions rates. About half the subjects (49%) in each situation "convicted" the accused, though it is interesting that the conviction rate was significantly higher for females (59%) than for males (39%). In this experiment, the modality in which the child testifies did not have a statistically significantly influence on perceptions of mock jurors of the credibility of either the accused or the child.

In the second experiment by Lindsay and his colleagues, the videotape was stopped immediately *after* the child witness testified, without hearing the accused testify. The researchers also manipulated the presence and absence of the judicial caution about not inferring guilt from the use of testimonial aids. Subjects rated the guilt of the accused, and the credibility of the child and the accused, even though at this point they had not seen the accused testify. The presence or absence of the judicial caution about not inferring guilt from the use of testimonial aids had no impact on conviction rates. However, in sharp contrast to the first experiment, the modality of the child's testimony had a significant impact on conviction rates with the subjects in the open court condition being much more likely to convict than those in the video and shield conditions.² The conviction rate in the open court condition was 77% as compared to 61% for video condition and 65% for the screen. In this experiment the gender of the mock jurors did not

²*Ibid.* at 563.

have a statistically significant impact upon perceptions. Again, the modality in which the child testified had no influence on perceived credibility of the accused or the child witness.

Swim, Borgida and McCoy³ conducted an experiment in which mock jurors watched a videotaped a recreation of a sexual abuse trial dealing with four charges. They either saw the child testify in open court or via a video monitor. For three of the four charges, the conviction rate did not vary between the two conditions, but for one of the charges (criminal sexual assault in the first degree), participants who saw the child testify were significantly less likely to consider the accused guilty than those who saw the child testify in open court.

In another study by Goodman et al. an adult male videotaped school aged children playing a game in which they placed stickers on exposed parts of their bodies or on their clothes.⁴ At a later time the children testified in a mock trial about whether the adult had videotaped them while placing a sticker on an exposed part of their body. The mock trial was conducted in two conditions, with the child testifying in open court in the presence of the “accused” and testifying via a closed circuit television. In this experiment the mock jurors actually deliberated in groups, but they were then polled for individual views. The conviction rates did not vary between the two conditions, but the mock jurors who saw the children testify via closed circuit television rated the children more negatively on a variety of dimensions such as accuracy, honesty, and believability.

While there are ethical and methodological limitations to this type of research, the results clearly suggest that the use of testimonial aids does not put the accused at greater risk of conviction. However, in some situations the use of testimonial aids may make it somewhat more difficult for the Crown to obtain a conviction than if the child testifies in open court. This

³J. Swim, E. Borgida and K. McCoy, “Videotaped versus in-court testimony: Assessing Mock Jurors’ Perceptions of Child Witnesses” (1993), 14 J. Applied Social Psych. 5

⁴G.S. Goodman et al, “Face-to-Face Confrontations: Effects of Closed Circuit Technology on Children’s Eyewitness testimony and Jurors’ Decisions” (1998), 22 Law and Human Behaviour 165.

research suggests that seeing children testify in open court is more persuasive for some jurors; at least some jurors may find a child who testifies on a television monitor or from behind a screen less persuasive than hearing from the child in person.

One should be cautious about generalizing from this limited laboratory research to the court room. While no respondents to our survey mentioned this type of research, it may be used to justify the apparent reluctance of some Crown prosecutors to use testimonial aids. However, it must be recognized that in many cases, without the testimonial aids the child will be unable to testify at all, and in other cases the child will give a much fuller account if a testimonial aid is used. Further, to the extent that the use of such aids may significantly reduce the trauma to children, in our view the welfare of the child should be an overriding concern in child abuse cases, even if this makes it more difficult for the Crown to obtain a conviction

CONCLUSION: THE NEED FOR FURTHER REFORM

The federal government has issued a consultation paper on *Child Victims and the Criminal Justice System*⁵ and we hope that law reform issues related to child witnesses will be on the legislative agenda as a new government seeks to establish its priorities. It is, however, apparent that statutory reform will only play a limited role in increasing the use of testimonial aids. Professional training and attitudes and access to resources also play a vitally important role.

Videotaped Statements: The use of the videotaped statement of an interview with a child allows the court to have an accurate record of the child's statements, made when the child's memory is relatively fresh and in a relatively non-threatening environment. The use of videotaped statements can be an important device in the search for the truth of the allegations.

If the child has been subject to inappropriate, suggestive questions by investigators this also may be revealed on a videotape, which can help ensure a fair trial for the accused.

⁵ Canada, Department of Justice, *Child Victims and the Criminal Justice System* (Ottawa, November 1999)

There is a need for more and better equipment, more training, and protocols to encourage more videotaping of child witness statements by police and social work investigators.

In Canada, there also is a need for legislative reform. A number of American states have legislation allowing for the admission of such videotaped pretrial depositions.⁶ The deposition occurs in the presence of prosecution and defence counsel and the child is subject to cross-examination at that time. This allows the child to give evidence while the incident is relatively fresh in his or her mind, providing the best evidence to the court. Most significantly the child can testify at a relatively early stage in the process, and then get on with his or her life without being involved in court proceedings that often drag on for months or even years. The child may then have therapy without any argument that this “contaminated” the child's evidence. The accused’s right of cross-examination is preserved in the deposition format. Legislation should be enacted in Canada to allow a court to receive a videotape of a pre-trial examination and cross-examination instead of having the child testify in criminal court.

Screens and Closed Circuit Television: Children often find the experience of seeing the accused in court profoundly distressing, affecting both the child's emotional well being and the quality of the child's testimony. Legislation enacted in most North American jurisdictions allows a judge to permit a child to testify from behind a screen or from another room via closed circuit television.

However, these provisions are used too infrequently. Even if a child cannot see the accused because a screen is used, children find it very difficult to communicate in (what for them) is a very large, strange and intimidating setting. Greater use needs to be made of closed circuit television, which removes the child from the court room while testifying.

While the limited use of closed circuit television in part reflects lack of resources,

⁶See e.g “Legislative Responses to Child Sexual Abuse: The Hearsay Exception and the Videotape Deposition” (1985), 34 Catholic University Law review 1021; Wisconsin W.S.A. 967.04(7); the constitutionality of this provision was upheld in *State v Thomas*, 442 N.W. (2d) 10 (Wis. 1989)

sensitivity, and training, the words of s. 486(2.1) may be too narrow. Legislation should specify that the minimization of stress for the child is, in itself, a sufficient justification for the use of a screen or closed circuit television for a child witness. A statutory provision that would create a presumption that all children under the age of 14 should testify via closed circuit television, with a discretion in the court to allow older children to testify behind a screen or via closed circuit television. This would protect all young children and help them to give the best evidence possible. It also would reduce concerns about the perceptions about individual accused persons if there were a blanket rule, as jurors could be informed that this practice is used with all children.

Indeed there is an argument that all children under the age of 18 should presumptively testify by closed circuit television in sexual abuse cases. Judges are inclined to believe adolescents are mature and developmentally able to testify in open court, and this may be true for some situations but not for sexual abuse cases. When children and adolescents are under the stress of having to recall the abuse in the intimidating court environment, their emotions and behaviour regress, especially if the case involves intrafamilial abuse or abuse by an adult with a close relationship with the victim. Adolescents can be just as upset as young children when testifying because they have a better understanding of sexual matters and feel more shame, embarrassment and humiliation. Adolescents can be extremely self-conscious, and shy away from being the “center of attention,” especially around strangers and very worried about how others will view them.

While most judges already caution jurors about not drawing an adverse inference against the accused from the fact that a child testifies behind a screen or via closed circuit television,⁷ it might be appropriate for legislation to mandate this. The enactment of a statutory presumption in favour of children testifying by closed circuit television would make clear that its use does not reflect on the individual who is accused. Mock juror research has shown that such a warning

⁷*Levogiannis*, supra, note 2, at 495.

increases the perception that the procedures are fair both to the witness and the accused even when they do not influence the verdict.⁸

Victim Support and Child Friendly Courts: While changes in statutes that govern child abuse and the trial process have been very important, from the perspective of children in the justice system, the changes in attitudes, knowledge and resources have probably been more significant. Police, prosecutors, and social workers now have much better training and a more victim-oriented approach. Increasingly there are victim witness workers who are assigned to support children through the unfamiliar and often hostile justice system, and to help prepare them for testifying. The availability and attitudes of these professionals can reduce the stress of the experience of children in the justice system, and can make them more effective witnesses. If a child has a supportive experience during the investigation and prosecution of an abuse case, this can contribute to the child's recovery from the trauma of abuse. Conversely a child who has been a victim of abuse may be re-victimized by the justice system if the child is not appropriately supported.

Increasingly "child friendly courts" are being established. These courts are designed to address the unique physical needs of child witnesses, with special waiting rooms for children, and good facilities for the use of videotape and closed circuit television. At one "child friendly court" in Toronto, there is a specialized team of prosecutors and victim-witness workers working with police in a coordinated fashion; efforts are made to reduce delay. This designated child-abuse courtroom provides appropriate liaisons with therapeutic services for children, and with the child protection system for cases of intrafamilial abuse.

Too often, however, the justice system remains "unfriendly" to children. There may be a lack of continuity, with different police officers and prosecutors involved at different stages,

⁸ R.C.L. Lindsay, D.F. Ross, J.A. Lea, & C. Carr, "What's fair when a child testifies?" (1995), 25 *Journal of Applied Social Psychology* 870-888.

causing confusion and mistrust for the child. The child may have to spend hours outside the court room in a public area, perhaps expected to wait in sight of the accused. Too often cases are repeatedly adjourned, and children are dragged through the court system for months and even years. In many places there still is a lack of resources and personnel for the support of children involved in the justice system, and it is apparent that some police and prosecutors have not been adequately trained to work with children

The criminal justice system is not only concerned about ascertaining the truth, but also about fairness and protection of the constitutional rights of the accused. In Canada there is a burden on the state to prove the guilt of an accused beyond a reasonable doubt, and one must accept that there will be some true allegations of child abuse that cannot be proven in court. Further while most disclosures of child abuse are true, there are also a relatively small number of unfounded allegations. A child may be mistaken about what occurred or may have identified the wrong perpetrator, or a child may have been induced by inappropriate questioning into making a false allegation, and rarely, a child may fabricate allegations.

The role of the justice system, starting with the police investigation and ending in court is to balance the rights of the accused with the desire to ascertain the truth. Historically the justice system was premised on erroneous beliefs about the inherent unreliability of children, and contributed to the widespread abuse and exploitation of children. The justice system is slowly changing, and now has a better understanding of children as witnesses. Legal changes have both reflected and contributed to a better understanding of child abuse. Society now has a better understanding of the nature and effects of child abuse, and deals more effectively with this devastating problem. We must, however, continue to reform the justice system to find a better balance between the rights of accused and the interests of children and society. Too often, child victims are still denied justice, and society is denied protection from perpetrators of abuse.

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<http://qsilver.queensu.ca/law/witness/witness.htm>